Can Too Much Fictionalization in "BioPics" and "DocuDramas" Void "Newsworthiness" in Right of Privacy Cases?

By Pamela Jones, Television and Radio Committee Co-Chair, with the assistance of Lindsay Butler

On February 23, 2017, the New York State Supreme Court's Appellate Division for the Third Department revived convicted murderer Christopher Porco's right of privacy lawsuit against Lifetime Entertainment Services, LLC (Lifetime or Network) in a decision that compels television network and studio lawyers to undertake a careful risk assessment prior to green-lighting projects based on biographical stories.[1] The Appellate Division overturned the lower court's motion to dismiss in favor of Lifetime.

In 2013, Christopher Porco sought a temporary restraining order to enjoin Lifetime from airing a movie it had in production about the crime for which Christopher Porco had been convicted.[2] Although he had never seen the movie,[3] Porco had argued that the "movie is a knowing and substantially fictionalized account, inspired by a true story,"[4] and the unauthorized use of Porco's name, likeness and personality for purposes of profit violated Porco's statutory right of privacy under New York law.[5]

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In its defense, the Network argued that the essential elements of the movie were "true and accurate…as were details of the crimes, criminal investigation and the conviction of Porco."[6] Furthermore, the Network argued that uses of Porco's name and likeness concerned a newsworthy matter of public interest, and were therefore exempt from liability under the state of New York's right of privacy statute.

To the surprise of many, New York State Supreme Court Justice Robert J. Muller ruled in favor Porco, forcing the Network to request an emergency hearing by the New York Supreme Court's Appellate Division for the Third Department.[7] The Appellate Division vacated the temporary restraining order; the movie aired on March 23, 2013, and the Supreme Court eventually granted Lifetime's motion to dismiss the cause of action.[8] These dramatic events captured the attention of the Hollywood press. Numerous media companies filed amicus briefs, noting that many well-known movies based on the lives of real people would never have been made had consents been required.[9]

After the injunction was vacated and the Network won its motion to dismiss,[10] Porco appealed, arguing once again that the movie script had been so fictionalized that it could not qualify as a newsworthy event or matter of public interest, and that once stripped of this privilege, the Network's movie violated Porco's right of publicity under New York Civil Rights Law §50.[11]

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A right of publicity cause of action in New York has three components: (1) the use of a living person's name, portrait or picture; (2) for advertising purposes or for purposes of trade; and (3) without prior written consent.[12] Courts have held that the statute is to be narrowly construed by creating "a broad privilege for the legitimate dissemination to the public of news and information (the newsworthy exception), which includes matters of the public interest not readily recognized as "hard news."[13] The New York courts have not wanted to intrude upon "constitutional values in the area of free speech" and the editorial freedom of the press.[14] Accordingly, they have viewed "newsworthy" articles as outside the parameters of trade or advertising. They have held "time and again" that there can be no liability for the use of a person's picture to illustrate a matter of public interest unless the name or likeness has "no real relationship to the article or the article is an advertisement in disguise."[15] A "real relationship" translates as "newsworthiness," and has been found as a "matter of law" in New York even where the "juxtaposition…could reasonably have been viewed

as falsifying or fictionalizing the plaintiff's relationship to the article."[16]

For the purposes of evaluating Lifetime's motion to dismiss the plaintiff's cause of action, the court reviewed the facts and circumstances in a light most favorable to the plaintiff. The issue, as formulated by the Appellate Division, was whether Porco's complaint had alleged facts sufficient to support his claim that Lifetime had knowingly produced a "materially and substantially fictitious biography."[17] If Porco were found to have met his burden, the possibility arises that the Network would be unable to avoid liability under the newsworthiness exception and Porco's right of privacy under §§ 50 and 51 may have been violated.[18]

In its analysis, the court identified a series of New York Second Circuit Court of Appeals right of privacy cases concerning "invented biographies of the plaintiffs' lives."[19] In these cases, the court found application of the newsworthy exception inapplicable, because gross fictionalization had eviscerated the newsworthiness of the event. Among this "older" line of cases were *Spahn v. Julian Messner, Inc. (Spahn)*[20] and *Binns v. Vitagraph Company of America (Binns).*[21, 22] These were the same cases used by the losing plaintiff in the *Messenger v. Gruner + Jahr* (*Messenger)* where the court upheld the newsworthiness exception using the "real relationship test."[23]

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The Court of Appeals for the Second Circuit in *Messenger* saw so "no inherent tension" between the "*Finger-Arrington-Murray* line and the *Binns-Spahn* line," because neither *Binns* nor *Spahn* concerned the use of a photograph to illustrate a newsworthy article.[24] The court in *Messenger* cited the cases of *Binns* and *Spahn* as involving "substantially fictional biographies," which amounted to "invented biographies of plaintiffs' lives" that were "attempts to trade on the persona" of the plaintiffs.[25] In both of these cases, the court concluded that "a work may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthy exception."[26] In *Spahn*, the court held that while a truthful biography would be protected under the newsworthy exception, the doctrine could not be extended to a "substantially fictitious biography" whose protection was "unnecessary."[27] *Binns* involved a fictionalized story about the "true occurrence" of the "plaintiff's role in rescuing passengers of shipwrecked boat," which was held to be actionable under §§ 50 and 51.[28] The Second Circuit in *Messenger* held that the facts were "controlled by *Finger* and not by *Binns* nor *Spahn*."[29]

In support of his claim that the Lifetime movie was a "knowing and substantially fictionalized account about the plaintiff and the events that led to his incarceration," Porco presented the court with a letter written prior to the film's premiere, by a producer associated with the film, to Porco's mother.[30] The court summarized the letter as stating that it was the hope of the producer that the documentary film intended to accompany the movie would provide the mother's family with the opportunity to state its position in a non-factual program after the movie aired. Evaluating the letter in a light most favorable to the plaintiff, the court determined that the producer's letter served as an objective indication that the Lifetime movie was fictitious and, as a result, that the plaintiff had not failed to allege a sufficient degree of fictionalization or the defendant's knowledge of the fictionalization.[31]

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Rather than apply the more familiar three step analysis used by the Second Circuit to evaluate liability, including whether (i) the subject falls under the "newsworthy exception", as a matter of law, (ii) if there is a "real relationship" between the movie and the actual events, and whether (iii) the movie is an advertisement in disguise, the Appellate Division relied upon a rarely applied line of much older case law as if there were a longstanding exception to newsworthiness for cases dealing with the "fictionalization" of biographical stories. However, by holding that Porco succeeded in stating "a cause of action cognizable under the law," because the Lifetime portrayal was a "material and substantial falsity or fictionalization," suggests that such a development might be possible.

On April 3, 2017, Lifetime submitted a bid for re-argument.[32] Amici curiae were submitted by HBO, NBCUniversal, The New York Times Company, The Reporters Committee for Freedom of the Press, and various news entities.[33] For media organizations, the outcome of this case has the potential of impacting the production of "films and TV show about real-life people" and raises broader First Amendment questions.[34]

Endnotes

1. *Porco v. Lifetime Entm't Servs., LLC*, 147 A.D.3d 1253, 1253 (3rd Dept. 2017).
2. *Id.*
3. Eriq Gardner, *Judge Bans Airing of Lifetime TV's Chris Porco Movie (Exclusive)*, The Hollywood Reporter (Mar. 20, 2013), *available at* http://www.hollywoodreporter.com/thr-esq/lifetimes-chris-porco-movie-banned-429988.
4. *Porco v. Lifetime Entm't Servs., LLC*, 9 N.Y.S.3d 567, 568 (Sup. Ct. Clinton County 2015)
5. New York Civil Right Law sections 50 and 51 are the only one of the four Prosser privacy torts recognized in the state of New York. *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev 383 (1960).
6. Memorandum in Support of Emergency Motion by Defendant-Appellant to Vacate or Stay a Prior Restraint on Speech, *Porco v. Lifetime Entm't Servs*., LLC, 147 A.D.3d 1253 (No. 2013/90).
7. Gardner, *supra* note 3.
8. *Porco*, 9 N.Y.S.3d at 568.
9. Eriq Gardner, *MPAA: Films and TV Shows About Real-Life People Jeopardized by 'Porco' Ruling*, The Hollywood Reporter (Apr. 4, 2017), *available at* http://www.hollywoodreporter.com/thr-esq/mpaa-films-tv-shows-real-life-people-jeopardized-by-porco-ruling-991163.
10. *Porco v. Lifetime Entm't Servs.*, LLC, 116 A.D.3d 1264, 1265 (3rd Dept. 2014).
11. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.
12. *Roberson v. Rochester Folding Box Co*., 171 N.Y. 538, 554-57 (N.Y. 1902).
13. *Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 445-46 (2000).
14. Kathleen Conkey, et al., Counseling Content Providers in the Digital Age: A Handbook for Lawyers 81-83 (2010).
15. *Id.*
16. *Messenger*, 94 N.Y.2d at 436.
17. *Porco*, 116 A.D.3d at 1265.
18. *Id.*
19. *Id.*
20. *Spahn v. Julian Messner, Inc*., 21 N.Y.2d 124, 126-29 (1967).
21. *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58 (1913).
22. *See, e.g. Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324 (1966); Lerman v. Flynt Distrib. Co., 745 F.2d 123, 135 (2d Cir. 1984) (citing *Spahn*, noting that despite the involvement of a newsworthy matter of public interest, a plaintiff might be entitled to sanctions where (1) the use has no real relationship to the article and functions as "an advertisement in disguise" or (2) where defendant's use was "infected with material and substantial fiction or falsity and the work was published with knowledge of such falsification or with a reckless disregard for the truth.").
23. *Messenger*, 94 N.Y.2d at 436; *see also Int'l Finger v. Omni Publications Int'l, Ltd.*, 77 N.Y.2d 138 (1990); *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440 (1982); *Murray v. New York Mag. Co.*, 318 N.Y.S.2d 474.
24. *Messenger*, 94 N.Y.2d at 436.
25. *Id.*
26. *Id.*
27. *Id.* (citing *Spahn*, 21 N.Y.2d at 126-29).
28. *Id.* (citing *Binns*, 210 N.Y. at 58).
29. *Id.*
30. *Porco*, 147 A.D.3d at 1253.
31. *Id.*
32. Motion for Leave to Reargue or, in the Alternative, for Leave to Appeal to the New York State Court of Appeals, *Porco*, 147 A.D.3d at 1254-55 (No. 522707).
33. *Id.*; Notice of Motion for Leave to File Brief as Amici Curiae in Support of Defendant-Respondent's Motion for Leave to Appeal.
34. Eriq Gardner, *MPAA: Films and TV Shows About Real-Life People Jeopardized by 'Porco' Ruling*, The Hollywood Reporter (Apr. 4, 2017), *available at* http://www.hollywoodreporter.com/thr-esq/mpaa-films-tv-shows-real-life-people-jeopardized-by-porco-ruling-991163.

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