

# **Fictionalized Stories May Violate New York's Civil Rights Law**

**By Mark Litwak**

According to a recent New York Appellate Division decision, stories based on facts that have significant fictionalization may violate New York's Civil Rights Law Section 51, which contradicts precedent in other jurisdictions and has created uncertainty as to when one can produce a fictionalized movie based on true events without obtaining releases from the subjects of the story.

Several years ago, a New York court enjoined Lifetime Television from exhibiting the movie *Romeo Killer: The Christopher Porco Story*, which was based on the true story of Porco's murder of family members. Porco sued Lifetime, but Lifetime was able to vacate the injunction as a prior restraint of its first amendment right to free expression. This ruling was later upheld on appeal, and Porco's complaint dismissed. Now, however, the Appellate Division has reversed that dismissal.

Porco, who is incarcerated, contended that the movie violated New York's Civil Rights Law Section 51, the state's privacy law, which protects individuals from the use of their identity for advertising or trade without the prior written consent of the subject. New York's law, however, has an exception for stories considered newsworthy. Porco alleged that the story is a fictionalized account, and that it appropriates his name without his consent "for purposes of profit." In a surprise decision, the appeals court ruled that the newsworthiness exception could be overcome by fictionalizing the story.

The decision is based in part on an earlier decision concerning a fictionalized biography of Warren Spahn, a well-known baseball player, who sued over the publication of an unauthorized biography alleging that his rights under New York's misappropriation (privacy) statute had been invaded. In the purported biography, the author took great literary license, dramatizing incidents, inventing conversations, manipulating chronologies, attributing thoughts and feelings to Spahn, and fictionalizing events. The invented material depicted the Spahn's childhood, his relationship with his father, the courtship of his wife, important events in their marriage, and his military experience.

The book's author argued that the literary techniques he used were customary for juvenile books. The defendant never interviewed Spahn, any members of his family, or any baseball player who knew him. The author's research was comprised of newspaper and magazine clippings, the veracity of which he rarely confirmed. The court held that the New York privacy statute protects a public person from fictionalized publication only if the work was published with knowledge of the falsification or with reckless disregard for the truth (actual malice). In the Spahn case, the court found that the author knowingly incorporated a lot of fictional and false material.

So, the precedent became that factual reporting of newsworthy persons and events is in the public interest and is protected, but the fictitious is not. But what happens when facts and fiction are combined, which is common? Many films are based on true stories, but take considerable creative liberties in telling their tales, including fictionalizing persons and events to make the story more compelling.

The Reporters Committee for Freedom of the Press, as well as HBO and the Motion Picture Association of America, Inc. (MPAA) have filed petitions to submit amicus briefs in support of Lifetime and have asked for an immediate review by the Court of Appeals. They argue that the decision is inconsistent with other New York and other state decisions involving expressive works, and with protections for freedom of speech. They contend it threatens to chill creative expression and deter the creation of films and television shows based on real people and events.

The full decision can be read here:

[http://nycourts.gov/reporter/3dseries/2017/2017\\_01421.htm](http://nycourts.gov/reporter/3dseries/2017/2017_01421.htm)

Reporters Amicus motion: <https://www.documentcloud.org/documents/3536000-RCFP-Amicus-Porco-v-Lifetime.html>

Lifetime's motion: <https://www.documentcloud.org/documents/3536001-Lifetime-App.html>

HBO and MPAA motion: <https://www.documentcloud.org/documents/3536002-MPAA-Third-Department-Motion-Filing-4-4.html>

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