

Lawyers For The Talent

by

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Chapter 1

Life Story Rights

by Richard Dooling Telling “based upon,” nonfiction stories about others often treads on what the industry calls “life story rights,” not a legal term, just a handy grab bag term for the rights involved. The artist (filmmaker, storyteller, photographer, fine artist, even songwriters) wants to tell a person’s “life story” or use their name, image or likeness without getting sued for it.

These so-called life story rights are different in every jurisdiction. Lawyers must watch out for international law, American constitutional law (the First Amendment), and a patchwork quilt of State laws. Some states (notably Alabama, Tennessee, and California) zealously protect the inherited privacy rights of dead celebrities, and allow the heirs of Martin Luther King, Elvis Presley, and the Three Stooges to protect the rights of their famous dead former citizens. Even dead celebrities sometimes have publicity rights, and their heirs can sue to protect those rights in state court. But those celebrity rights many not tread on the First Amendment rights of authors and artists. Authors are free to tell stories about dead people by creating biographical works, history, film, fiction, news and the like. These works are protected speech under the First Amendment and the Copyright clause. But celebrities have a different parallel right to “commercial” exploitation of their names, image, and likeness.

More important than theoretical doctrinal hair-splitting of First Amendment theories and privacy rights is to make sure that authors and filmmakers who want to tell fact-based stories about people living or dead get a “life rights” agreement, a collection of contract provisions dealing with story rights and waivers of liability. Again all of these rights are jurisdiction-specific and depend on careful, specific drafting of contract provisions .

Acquiring Life Story Rights

If possible artist and living subject execute a simple agreement, wherein the subject promises not to sue for defamation, invasion of privacy, use of name,

image, or likeness, and a number of other claims. A nice description can be found in a passage called “[Fact-Based Stories](#)” from the [Independent Producers Survival Guide: A Business and Legal Sourcebook](#) 4th Ed. (2009), by Gunnar Erickson, Mark Halloran & Harris Tulchin. See also, [Purchasing Life Story Rights By: Mark Litwak](#).

Here are some links to sample life story rights agreements and templates:

- [Life Story Rights Agreement, courtesy of the Northern Kentucky University Chase College of Law.]
(<http://chaselaw.nku.edu/content/dam/chaselaw/docs/centersandinstitute/Law—Informatics/LifeStoryRightsAgreement.pdf>)
- [Done Deal: Life Rights Option Agreement](#).
- [Done Deal: Life Rights Agreement](#).

If an agreement can’t be had, storytellers and filmmakers may proceed, but often the script or the nonfiction book will be annotated. All factual statements about living people and historical events, will be annotated with sources.

The next case introduces us to what happens when there’s no “life story rights” agreement. In *Matthews v. Wozencraft*, the Fifth Circuit Court of Appeals, applying Texas law, said that, at least in Texas, there’s no such thing as a property interest in one’s life story. In passing, the Court distinguishes “life story rights” from celebrity/publicity rights. We don’t read about those rights, also known by far too many other names (personality rights, celebrity rights, publicity rights or the right of publicity, appropriation of name or likeness), until next week, but the Court discusses them while struggling with the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one’s identity.

Matthews v. Wozencraft

(5th Cir. 1994)

- [case on Google Scholar](#)
- [how cited Google Scholar](#)
- [case on Westlaw](#)
- [Texas Right of Publicity Law, citing *Matthews*](#).

JERRY E. SMITH, Circuit Judge:

Prior to 1979, Creig Matthews was an undercover narcotics officer with the Plano, Texas, police department, in charge of the criminal investigation division. Kim Wozencraft (Kim Ramsey at the time) was hired as a police officer. Matthews trained and then worked with her as an undercover narcotics officer

making drug purchases. Both of them used drugs, primarily marijuana and cocaine, while on the Plano drug assignment.

In August 1978, Matthews was hired by the Tyler, Texas, police department as an undercover narcotics officer, where he used the aliases “Jim” and “Jim Myers.” Early the next year, Wozencraft joined him in Tyler as an undercover drug officer. Together they conducted a drug investigation that lasted until April 24, 1979. During this time, they became romantically involved and began living together.

Their primary target in Tyler was Ken Bora, for whom Matthews worked undercover as a bartender. After several futile attempts to buy drugs from Bora, Matthews and Wozencraft, on instruction from Tyler police chief Willie Hardy, made a phony “stash” case on Bora.

During the investigation, Matthews and Wozencraft used drugs both to make drug cases and for personal use, eventually becoming addicted. They informed Hardy of Matthews’s drug problem. He gave them several days off but insisted that they continue with the investigation. At the end of the Tyler investigation, Matthews and Wozencraft assembled over 200 drug cases, involving the arrest of 100 defendants.

At the conclusion of the investigation, Matthews and Wozencraft were attacked by a shotgun-wielding assailant at Wozencraft’s mobile home. She returned fire and was not seriously hurt; Matthews was severely wounded in the arm and leg and was hospitalized for over a month. After being released from the hospital, Hardy placed them in a house on the outskirts of Tyler. While there, they were visited by H. Ross Perot, who at the time was serving as chairman of a special crime commission. Perot moved them to a secure safe-house in the Dallas area and arranged for Matthews to receive medical treatment for his wounds.

During this time, Matthews and Wozencraft began testifying at the trials of some of the drug defendants. They falsely denied using drugs during the investigation and falsely testified that they had bought cocaine from Bora.

Evidence arose of their misconduct. Eventually they confessed, pleaded guilty to criminal informations alleging civil rights violations, and were sentenced to terms in federal prison.

The Prison Agreement

While in prison, Wozencraft, Matthews, and fellow inmate John Rubien signed the contract at issue in this case (the “Prison Agreement”). Matthews and Wozencraft were married at the time the contract was formed, and Wozencraft is identified in it as “Kimberly Ramsey Matthews.” The contract specifies that Wozencraft and Rubien were to co-author a book based upon Matthews and Wozencraft’s story about the undercover investigations.

Wozencraft was released from prison in the spring of 1983. She divorced Matthews and moved to New York City to join Rubien. She already had started writing the book. She described events in the book, linking them to specific events that had transpired during the investigations. The co-authored book by Wozencraft and Rubien was not finished during the one-year period provided for by the Prison Agreement.

Wozencraft received a masters degree from Columbia University. Her thesis became the basis for the book entitled RUSH. She sold her manuscript to Random House and sold the movie rights for one million dollars.

Based Upon?

There is substantial evidence that the character “Jim Raynor” in RUSH is based upon Matthews and that the public recognized him as that character. Nonetheless, the book is labeled as a novel and states on its copyright page that it “is a work of fiction. Any resemblance its characters may have to persons living or dead is purely coincidental.”

Matthews concedes that the issue raised in RUSH, i.e., corruption of law enforcement officers, is a matter of public concern. His willingness to discuss the book with the media has made him a public figure. Furthermore, prior to the publication of RUSH, Matthews cooperated with an author named David Ellsworth in publishing SMITH COUNTY JUSTICE, a non-fiction book detailing Matthews’s life and the events surrounding the Tyler operation.

Matthews has received no compensation for the defendants’ use, portrayal, or promotion of his likeness in the book and movie.

Appropriation of Life Story?

The district court granted summary judgment on Matthews’s appropriation claim because Texas law does not recognize a cause of action for appropriation of one’s life story and because if it did, there would be an exception for biographies and “fictionalized biographies.” We affirm the summary judgment.

“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”
 RESTATEMENT (SECOND) OF TORTS (the “RESTATEMENT”) § 652C (1977).

There are three elements to a misappropriation claim under Texas law:

1. that the defendant appropriated the plaintiff’s name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose;

2. that the plaintiff can be identified from the publication; and
3. that there was some advantage or benefit to the defendant.

See *Faloon v. Hustler Magazine* (5th Cir. 1986).

Under this test, Matthews is unable to create any issue of material fact as to liability. There is no question that Matthews can be identified from the publication, at least to the point of creating a genuine issue of fact as to the identity of the Jim Raynor character. He claims that his life story was appropriated for Wozencraft's commercial benefit. The protection of "name or likeness" under Texas law, however, does not include a person's life story. If Texas law did protect such a right, it was not "appropriated." And, even if Matthews could state a claim, Wozencraft would be protected by an exception in the state tort law.

Tortious liability for appropriation of a name or likeness is intended to protect the value of an individual's notoriety or skill. Thus, the RESTATEMENT provides for liability only if:

the defendant ... appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness.

RESTATEMENT § 652C, comment c.

The misappropriation tort does not protect one's name *per se*; rather, it protects the value associated with that name.

Appropriation of a name or likeness generally becomes actionable when used "to advertise the defendant's business or product, or for some similar commercial purpose." RESTATEMENT § 652C, comment b. The value of one's likeness is not "appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity... It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded." RESTATEMENT § 652C, comment d.

There is nothing unique about Matthew's name or likeness that creates value for Wozencraft to appropriate. She is not "cashing-in" on goodwill associated with his name but is simply converting factual events that happen to include Matthews into fiction. The use of his name does not provide value to the book, nor is she using his name to "endorse" the book to the public, because his name has no independent value. In short, Matthew's life story, while interesting to readers and film-goers, is not a "name or likeness" for purposes of applying the misappropriation doctrine.

Protecting one's name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage. Associating one's goodwill with a product transmits valuable information to consumers. Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero.

For instance, if a well-known public figure's picture could be used freely to endorse commercial products, the value of his likeness would disappear. Creating artificial scarcity preserves the value to him, to advertisers who contract for the use of his likeness, and in the end, to consumers, who receive information from the knowledge that he is being paid to endorse the product. See *Kimbrough v. Coca-Cola* (Tex.Civ.App. 1975 (in which former Texas A & M football star stated valid claim for misappropriation where his picture was used, over his objection, as part of an advertisement for Coca-Cola in a football game program)).

As Judge Posner writes,

It might seem that creating a property right in such uses would not lead to any socially worthwhile investment but would simply enrich already wealthy celebrities. However, whatever information value a celebrity's endorsement has to consumers will be lost if every advertiser can use the celebrity's name and picture.... [T]he value of associating the celebrity's name with a particular product will be diminished if others are permitted to use the name in association with their products.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.3, at 43 (4th ed. 1992).

The tort of misappropriation of name or likeness, therefore, creates property rights only where the failure to do so would result in the excessive exploitation of its value.

[Thus, the term "likeness" includes such things as pictures, drawings, and the use of a singer's distinctive voice.]

The term "likeness" does not include general incidents from a person's life, especially when fictionalized.¹ The narrative of an individual's life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects. Unlike the goodwill associated with one's name or likeness, the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use. As Posner observes, "If Brand X beer makes money using Celebrity A's picture in its advertising, competing brands might use the same picture until the picture ceased to have any advertising value at all. In contrast, the multiple use of a celebrity's photograph by competing newspapers is unlikely to reduce the

value of the photograph to the newspaper-reading public.” RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 258 (2d ed. 1983).

1 *See* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 117 at 853 (5th ed. 1984) (“Nor is there any liability for misappropriation when the plaintiff’s character, occupation and the general outline of his career, with many incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.”)

Far from reducing the value of Matthews’s story, RUSH increased the value, as reflected in the publication of articles about Matthews and Wozencraft in *NEW YORK MAGAZINE*, *THE WASHINGTON POST*, and *THE GUARDIAN*, among others. Similarly, *SMITH COUNTY JUSTICE*, although published first, did not reduce the sales of RUSH. As there is no fear that any valuable information provided by the facts of one’s life will be reduced by repeated use, the law does not forbid the “appropriation” of this information.

Further, because most of the material facts are a matter of public record because of the highly-publicized trial, it is especially difficult for Matthews to claim that his likeness was unfairly appropriated, as a name cannot be appropriated by reference to it in connection with the legitimate mention of public activities.

III.

A.

Even if Texas courts recognized a cause of action for misappropriation of events in one’s life, it likely would recognize an exception for biographies. As one commentator has written, “Courts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual’s identity in advertising infringes on the persona.” George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 *LA. L.REV.* 443, 467 (1991) (citing *Rogers v. Grimaldi* (SDNY 1988), *aff’d*, 875 F.2d 994 (2d Cir.1989)).

B.

Matthews also contends that appropriation can occur through the fictionalized account of his life. The cases he cites, however, do not support his argument, as they apply the “false light” doctrine. In each of them, (1) the plaintiff’s real name was used; (2) false or defamatory statements were made regarding the plaintiff; and (3) the plaintiff alleged invasion of privacy by false light, not misappropriation.

By contrast, RUSH does not use Matthews's real name, and Matthews admits that all the material facts are true. Thus, assuming he is trying to state a claim under the false light doctrine, rather than misappropriation, his attempt fails.

C.

Even if Matthews has created a genuine issue of material fact on his misappropriation claim, Wozencraft is entitled to summary judgment as a matter of law because of free speech and public domain defenses.

1.

While there is no binding authority directly on point, we conclude that Wozencraft's novel falls within the protection of the First Amendment. It is immaterial whether RUSH "is viewed as an historical or a fictional work," *Meeropol v. Nizer* (2d Cir.1977), so long as it is not "simply a disguised commercial advertisement for the sale of goods or services." *Rogers v. Grimaldi* (2d Cir. 1989).

The book and its accompanying publicity have converted Matthews into a public figure under *Gertz v. Robert Welch, Inc.* (S.Ct. 1974) "[T]he same standards of constitutional protection apply to an invasion of privacy as to libel actions." *Meeropol*.

Accordingly, absent a showing of malice, i.e., a "reckless disregard for the truth," RUSH is protected by the First Amendment. See *Time, Inc. v. Hill* (S.Ct. 1967). Neither the book nor the movie holds out Matthews in a false light or in an embarrassing way; thus, his claim is meritless.

2.

Liability for misappropriation also will not arise when the information in question is in the public domain, for the public figure no longer has the right to control the dissemination of the information. See *Douglass v. Hustler Magazine* (7th Cir.1985),.

"To whatever degree and whatever connection a man's life ceases to be private before the publication under consideration has been made, to that extent the protection is withdrawn...." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193, 214-15 (1890). As one court has commented,

[A] public figure has no exclusive rights to his or her own life story....
Such life story of the public figure may legitimately extend, to some

reasonable degree, to ... information concerning the individual, and to facts about him, which are not public.... Thus the life history of one accused of [crime], together with such heretofore private facts may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing a crime, are a matter of legitimate public interest.

Corabi v. Curtis Publishing Co. (PA 1971).

In the time since his participation in the Tyler drug investigation and his subsequent conviction and prison time for his illegal activity, Matthews voluntarily submitted to numerous interviews with the national media. He also cooperated in the publication of SMITH COUNTY JUSTICE and testified about his activities in Hardy's criminal trial. All the material facts underlying RUSH were a matter of public knowledge and were in the public domain.

Thus, Matthews became a public figure through his activities. The subject matter of his statements — narcotics officers using drugs, perjuring themselves, and making fraudulent charges — was a matter of public interest. See *Trotter v. Jack Anderson Enters.* (5th Cir. 1987).

Because all of the events were a part of the public domain, defendants were entitled to their fair use, including their narration in fictionalized form. *Douglass*.

[The court's discussion of contract matters and division of marital property omitted.]

VI.

Matthews has created no genuine issue of material fact under Texas law. Thus, we AFFIRM the district court's grant of summary judgment on all claims.