



Do filmmakers actually have to acquire life rights?

Ideas for films come from many sources but, asks **Lisa Callif**, is it always necessary to acquire life rights before turning a person's life into a movie?

Writers get inspired to write a script after they've read an article about a real-life hero in *Vanity Fair*. Producers get a great idea for a film after they've read an interesting op-ed piece in *The New York Times*. The first question those people might ask themselves is 'how do I get the rights?' But that's not necessarily the right question. The correction question should be: do I need to get the rights?

Historically, movies based on true stories were not made unless the rights to the individuals involved in the story were acquired. Producing movies has been dominated by a culture of big studios with deep pockets that would always obtain life rights whether they were producing a movie based on the life of Steve Jobs or someone's next-door neighbour. Today, the picture is much different with more and more independent films being produced and financed without studio involvement. Independent producers have smaller pockets and aren't tied to the policies, standards and practices of studios. Some are beginning to realise that the First Amendment extends to making a movie – even a fictional one.

So how does someone decide whether they need to obtain life rights before embarking on making a film about a specific person?

Let's first take a brief look at public domain. Facts and events are in the public domain. No one can 'own' the date of an election or the fact that the grass is green or the fact that two plus two equals four. However, if you write about any of these facts in an original way, your original writing is protected by copyright. If you hear or read an account of a true event, you can use the facts to your heart's content, you just can't use the other person's way of telling about those facts.

Using this logic, it becomes apparent that the facts related to a person's life story are also public domain. Although perhaps more interesting than two plus two equals four, Gwyneth Paltrow's divorce

from Chris Martin is a fact. One can search court records and get information about the divorce proceedings – all facts. The birth of Princess Charlotte to Prince William and Kate Middleton is also a fact. Anyone can write about these facts without obtaining permission to do so. What one cannot do is take the way in which these facts are expressed or written and use them without permission.

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The expression of the facts makes the work original to the author, earning the author a valid copyright interest in the work. Accordingly, if you love the expression of the *Vanity Fair* article and want to use the story as written in the article, you had better get the rights to that article. On the other hand, if you are simply culling facts from that article and it is one of many sources that you are using to craft your own story you don't need to secure permission.

The question to ask yourself is: am I telling a story that has already been told or am I using facts to create my own story?

Even when something is in the public domain it is often a good idea to acquire an underlying property. This is done by directly contracting

with the person whose story you wish to tell or by purchasing the film rights to a book or magazine story about that person.

Acquiring the rights not only makes studios and financiers feel more comfortable, it also eases the burden of obtaining an Errors & Omissions (E&O) insurance policy, which provides you with coverage if anyone portrayed in your film decides to sue you. People possess rights of privacy and publicity that you cannot invade as well as a right not to be placed in a false light. When you purchase someone's life story rights, they waive the right to file a lawsuit based on a violation of those rights.

Another advantage of buying underlying rights is that the writer of such a story may very well have some juicy, hard-to-find information that was not used in the article that he or she may share with you if you purchase the film rights to the story. In fact, the person who lived the story always has such information. The story of Princess Charlotte's birth would likely be much more interesting if you had Kate Middleton's cooperation and participation. Also, it often helps to have a spokesperson for publicity purposes who is familiar with or directly involved with the subject, but is not a direct participant in making the film. Purchasing film rights from a person usually makes them available for such promotional purposes.

An example of the interplay between public domain facts and life story rights can be found in the numerous docudramas portraying the life of Nelson Mandela. Since 2007, the late former South African president and anti-apartheid revolutionary has been depicted in film several times.

In 2007, independent filmmaker Bille August made *The Color of Freedom*, a film from the perspective of prison guard James Gregory, who guarded Mandela when he was imprisoned as a young revolutionary. The film was based on Gregory's autobiography *Goodbye Bafana: Nelson Mandela, My Prisoner, My Friend*, so when August made the film he only acquired the rights to Gregory's book. He did not acquire any life-story rights. All information in the film, beyond that which was taken from Gregory's book, was based on facts.

August's film, starring Joseph Fiennes and Dennis Haysbert, was neither a critical nor a financial success. In part, the film was criticised for contradicting many other accounts of Nelson Mandela's story. The film adopted many of the same flaws found in the book.

In 2011, came *Winnie Mandela*, which was produced by Equinox Films. The film, which starred Jennifer Hudson and Terrence Howard, followed the life of Nelson Mandela's ex-wife Winnie and was based on the biography *Winnie Mandela: A Life* by Anne Marie du Preez Bezrob. And while they got the rights to that book, the filmmakers did not get Winnie Mandela's life-story rights when making the movie. In fact, Winnie Mandela openly criticised the movie for not obtaining her permission and for delving only superficially into her life story. *Winnie Mandela* was a flop.

While, as discussed above, there are many good reasons to obtain underlying rights, attempting to acquire them can often prove to be difficult, if not impossible. Some filmmakers who have tried to acquire life rights have found that the subject would only participate if he or she had certain approval rights with regard to the script and the film, wanted unreasonable amounts of money for such rights or proved to be so difficult the filmmaker wished they had just proceeded without even trying to obtain the rights. Additionally, sometimes by avoiding the costs associated with acquiring those rights you can use the money on things that will hopefully make your film more successful, like attaching a big-name star or facilitating deeper character research and development.

The downside of not getting life-story rights is that the real-life individuals on which the characters are based might be less supportive or helpful, like the situation with Winnie Mandela discussed above. That said, the permission and support of the subject might not necessarily lead to success either.

Something a filmmaker should always keep in mind is the risk of asking for life rights, but not successfully acquiring them. This can become a real problem when seeking to obtain E&O insurance. The application for an E&O policy always has a question that asks whether you have negotiated for, but failed to acquire, a licence for the rights of any person featured in your film. If you have to answer yes to that question the underwriter will likely view that as a 'pre-existing condition' (to analogise it to health insurance) and will not provide coverage for claims filed by that person from whom you failed to obtain rights. That could put a stop to your film. Before asking for rights, be pretty darn sure you'll be able to acquire them.

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Our office often represents filmmakers who want to produce a film without obtaining the rights of the individuals depicted in the film. We review the film at the script stage, before shooting. We read the script and the documentation that supports the facts set forth in the script (eg, articles, books, news stories and court records) to ensure there are no viable personal, privacy or publicity-rights claims. We look not only at the content of the documentation, but also the source of the information, which is quite important in our analysis. We advise that our clients have two independent sources for each fact. If you are basing your film on accounts from tabloids and you are treating those stories as gospel, we very well may have a problem and may not be able to issue a favourable opinion. Having multiple reliable sources is crucial.

If a client fictionalises scenes, which is commonly the case, we review those scenes carefully. We work with the filmmaker to ensure the fictionalisation naturally stems from factual events and such fictionalisation does not defame the person or put them in a false light.

The goal of our review is to obtain E&O insurance at the script stage so that the filmmaker is protected financially from any potential claims. Importantly, obtaining an E&O policy provides comfort to financiers and distributors as they know the project is viable even without the life rights.

The bottom line is that, as a filmmaker, whether or not you acquire life-story rights for a story based on public facts will ultimately be your decision. Remember, facts are in the public domain. So if you feel that you can successfully and accurately tell the story without any help or guidance from the subject, then go right ahead. The law does not require you to acquire the life-story rights to do so.

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