

Conflict of Rights in Audiovisual Works:  
From Freedom of Speech to Image Rights

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Amanda Hyland  
Taylor English  
Atlanta, Georgia, USA

taylor | english

# Nonfiction Works – Let's all stay out of trouble!

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Staying out of Trouble under U.S. laws means thinking about lots of things. Today we will focus on:

- Misappropriation of likeness
- Invasion of Privacy
- Defamation



# Should you worry about US laws?

Each state has statutes that govern jurisdiction. Some states require physical presence in the state. Others do not.

**You should be considering US laws if:**

- Filming occurred in U.S.
- Film concerns U.S. resident or estate of U.S. resident

# Misappropriation of Likeness

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- Also called “right of publicity”
- Prohibits unauthorized use of a person’s name or likeness for financial gain
- 23 states recognize postmortem rights of publicity
- Leads to questions of where the deceased was domiciled at time of death



# Invasion of Privacy

Most states have laws that prohibit public disclosure of private facts.

Must be “highly offensive” to a reasonable person.

The victim must have had a reasonable expectation of privacy.

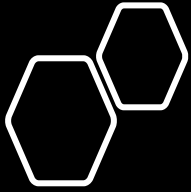
If you secretly record video in the United States, check state’s law on consent. California, Florida, and Illinois forbid secret recordings.



Misappropriation  
of Likeness and  
Invasion of  
Privacy have the  
same defenses.

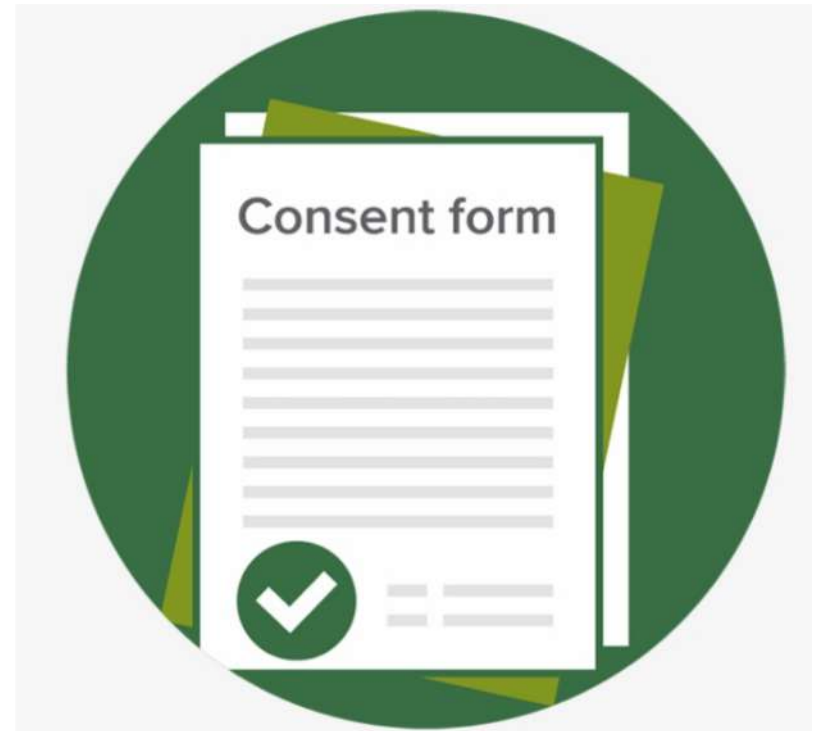
Consent

Legitimate  
Public Interest



# Consent

- May be in the form of a release
- May be in the form of accepting an interview or allowing filming



# Newsworthiness

Most filmmaker's content is "newsworthy."

Courts will balance newsworthiness with necessity of the misappropriation.





## Newsworthiness and individuals

The “public interest” in the person’s life typically creates a defense to using their likeness and discussing their private life.

The more famous the person, the harder it is for them to claim a privacy right.

# Best practices:

Get consent when possible.

Don't misrepresent the project.

If consent is not possible:

- Is the subject matter newsworthy or in the public interest? Or is it sensationalized? If it is newsworthy, it is probably fine.
- Is the information already disclosed publicly? If so, use of the information cannot be actionable.
- Have you only used what is necessary? Have you used more of the person's likeness or disclosed more private facts than necessary to tell the story?

# Defamation and False Light

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- Broad protections that make these claims challenging.
- To win, a plaintiff must show:
  - Reasonable viewers know the statement is actually about the plaintiff.
  - The film must be perceived as non-fiction. If the viewer understands that film to be dramatized, it's highly unlikely a defamation claim will prevail.
  - Public figures must prove actual malice. This means the publisher knows the statement is false or has serious concerns about its truth.





# Reasonable viewers expect fictionalization

“Viewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined” and the fact that a program “is a so-called docudrama or historical fiction . . . might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.”

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# Some Real Examples

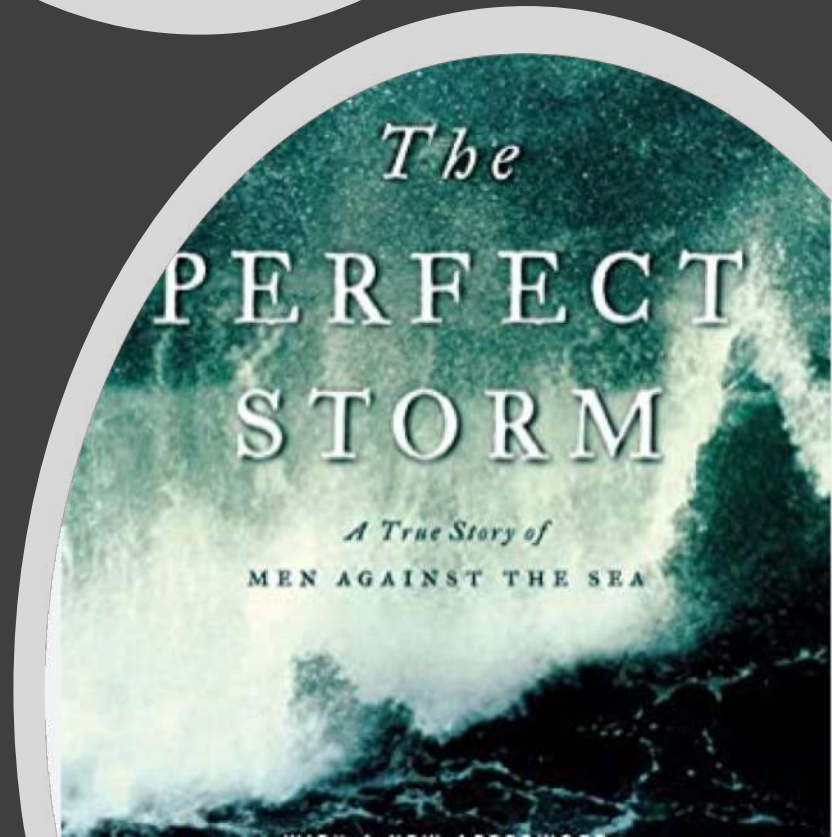
## The Perfect Storm


Book recounted how the crew of the Andrea Gail lost their lives at sea in a 1991 storm

In 2000, Warner Bros. released a movie based on the book and advertised it as “based on a true story.”


The widow sued, claiming the movie was fictionalized.

She said the filmmakers took too many liberties, showing her husband’s character flirting with other women, making poor decisions at sea.





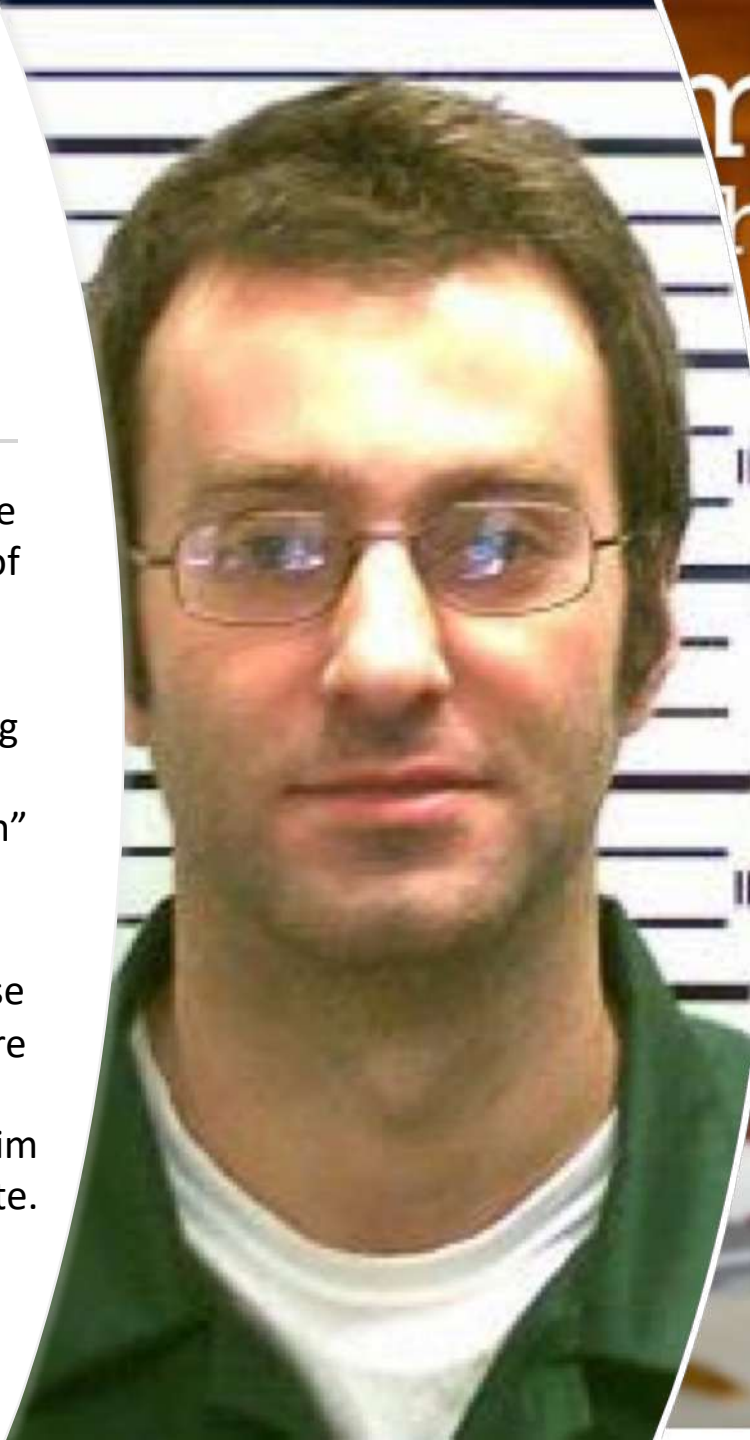
The widow sued  
for  
misappropriation  
of likeness.

- The Court dismissed her claims, finding that the film did not use the decedent's image for a "commercial purpose," as required by the statute.
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# The Romeo Killer

- 2013 Lifetime movie based on the case of ax murderer Christopher Porco
- Porco sued, claiming the movie was “so infected with fiction” that it was not newsworthy.
- Court dismissed case because events were newsworthy and Lifetime did not claim movie to be accurate.



Romeo Killer  
Chris Porco Story

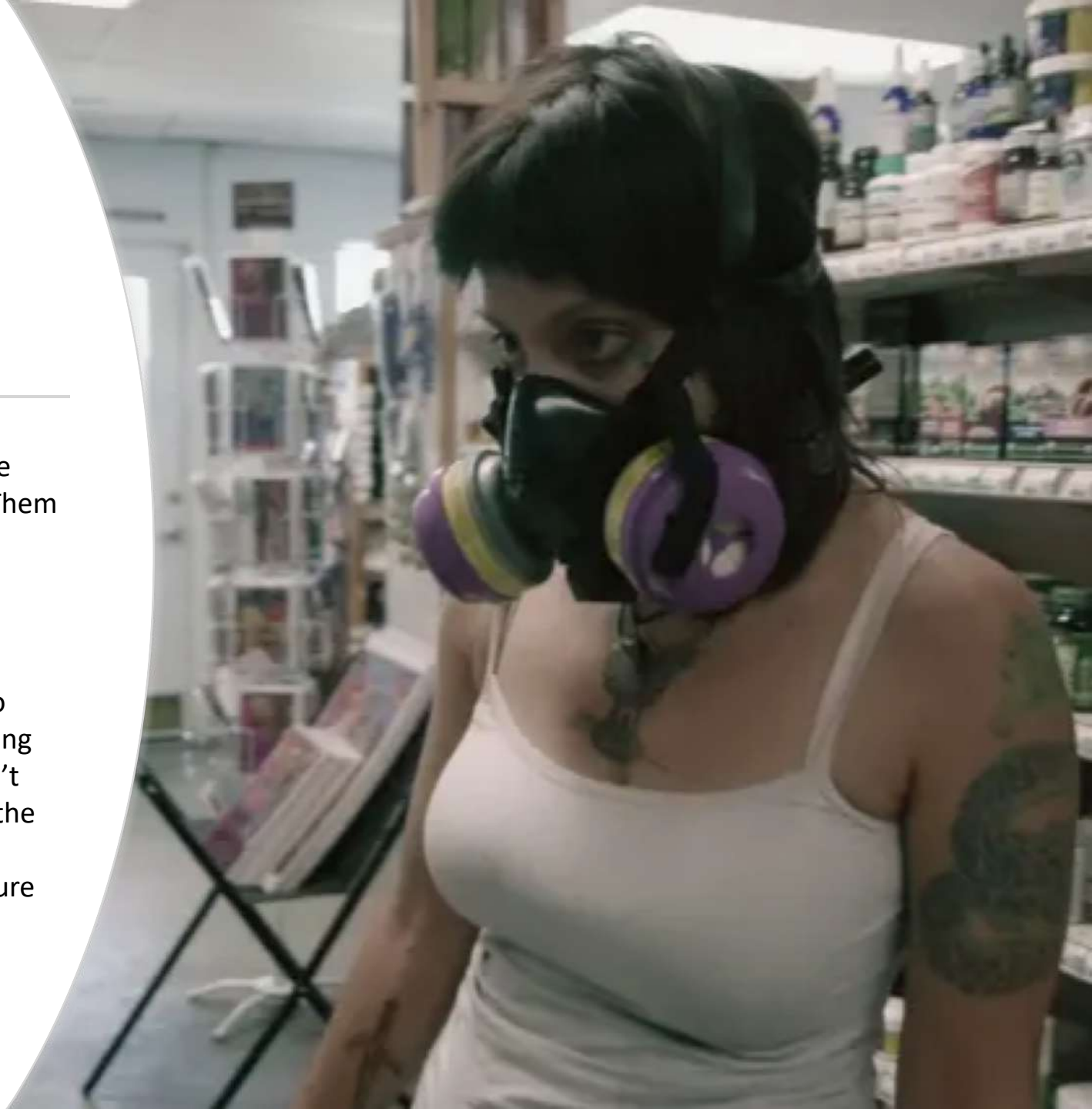




# AFFLICTED

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- 'Afflicted' Subjects Sue Netflix for Depicting Them as "Crazy Hypochondriacs"
- The plaintiffs signed releases.
- A New York refused to dismiss the case, finding that the releases aren't enforceable because the releases falsely characterized the nature of the documentary.




# “Under the Gun”





Case  
dismissed

“In this case, the footage  
does not, on its face, carry  
the defamatory sting  
required . . . ”



# What do the cases teach us?

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- Liability is unlikely, but lawsuits are expensive.
- Get releases where you can.
- Don't misrepresent your project when getting releases.
- If the work is fictionalized, clearly state that content has been dramatized.
- Pay extra attention to how living people are portrayed.
- Ask sources to substantiate their assertions. Keep records.
- Talk to U.S. counsel prior to filming in the U.S. and well in advance of finalizing the film!