No. B285629

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 3

FX NETWORKS, LLC and PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,
Defendants-Appellants,

vs.

OLIVIA DE HAVILLAND, DBE
Plaintiff-Respondent

On Appeal From
Los Angeles County Superior Court Case No. BC667011
The Honorable Holly E. Kendig, Presiding, Dept. 42

AMICUS CURIAE BRIEF OF INTERNATIONAL DOCUMENTARY ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

UCI INTELLECTUAL
PROPERTY, ARTS, AND
TECHNOLOGY CLINIC
JACK LERNER (SBN 220661)
jlerner@law.uci.edu
University of California,
Irvine School of Law
401 E. Peltason Drive
Irvine, CA 92697
Tel.: (949) 824-7684
Fax: (949) 824-8926

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The International Documentary Association confirms that there are no interested entities or persons that must be listed in this certificate under California Rule of Court 8.208.

Dated: January 25, 2018

UCI INTELLECTUAL PROPERTY, ARTS, AND TECHNOLOGY CLINIC
JACK LERNER

By /s/Jack Lerner
JACK LERNER
STATE BAR #220661

Counsel for Amicus Curiae
International Documentary Assoc.

The International Documentary Association respectfully requests leave to file the attached amicus curiae brief in support of Defendants-Appellants FX Networks, LLC and Pacific 2.1 Entertainment Group Inc. in the above-captioned matter.

California Rule of Court, Rule 8.200(c) provides that, "[w]ithin 14 days after the last appellant's reply brief is filed or could have been filed under rule 8.212, whichever is earlier, any person or entity may serve and file an application for permission of the presiding justice to file an amicus curiae brief." Defendants-Appellants' reply brief was filed on January 11, 2018, meaning that this combined application and proposed brief is timely if filed on or by January 25, 2018. This brief has been drafted entirely by the International Documentary Association (IDA) without compensation or monetary contribution from any party or counsel for a party, and has been served on all parties (proof of service attached).

IDA contends that most of the discussion and arguments about the impact of the trial court's decision on documentary films contained in the attached proposed brief will not be presented by the parties in the case before the court.

INTEREST OF THE AMICUS CURIAE

IDA is the leading organization dedicated to assisting the growth and development of documentary film and the documentary community. IDA believes that documentary storytelling expands our understanding of shared human experience, fostering an informed, compassionate, and connected world. *See About Us*, International Documentary Association, https://www.documentary.org/about-us (last visited Jan. 24, 2018). IDA provides educational programs and resources to documentary makers of various skill levels all over the world, and creates grant programs that help filmmakers attain the financing necessary to create documentary films.

Protecting and advancing the legal rights of documentary filmmakers is central to IDA's mission. IDA is at the forefront of numerous major issues confronting documentary artists, activists, and journalists. Recent efforts have focused on promoting net neutrality, fair use and government arts funding, as well as defending filmmakers' First Amendment rights. IDA seeks to provide this Court with expertise on the various types of documentaries that have depicted celebrities and describe the

chilling effect that would be caused by the affirmation of the lower court's alarming interpretation of the right of publicity.

IDA has a strong interest in this case because the ruling below threatens to chill documentary filmmaking by imposing right of publicity liability on any work that uses a "literal depiction" of a celebrity and by characterizing any work including celebrities as a "commercial use" for right of publicity purposes. This unprecedented and unsupported expansion of the right of publicity creates a real danger that celebrities will be able to veto or censor any documentary that does not pay royalties—or that the celebrity simply does not like.

IDA also has an interest in this case because documentaries often employ dramatic techniques, such as the use of actors, imagined dialogue, and reenactments, that are used in docudramas like Defendants-Appellants' *Feud: Bette and Joan*. If this Court does not consider the impact of the lower court's ruling on documentaries and their use of dramatization of actual events, important speech about public figures and public controversies could be chilled.

IDA is not taking a position on Plaintiff-Respondent Olivia de Havilland's claims for libel and false light/invasion of privacy.

Dated: January 25, 2018

UCI INTELLECTUAL PROPERTY, ARTS, AND TECHNOLOGY CLINIC
JACK LERNER

By /s/Jack Lerner
JACK LERNER
STATE BAR #220661

Counsel for Amicus Curiae International Documentary Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Films

INTRODUCTION AND SUMMARY OF ARGUMENT

The public has long depended on documentaries and other journalistic works to provide insight into controversial subjects like murder, sexual abuse, law enforcement, courts, politics, abuse of power, and how our culture and social values are shaped by celebrities and other public figures. For as long as the right of publicity has existed in California, documentary filmmakers have been immunized from right of publicity liability by the strong First Amendment protection for free expression and a free press. But that constitutional protection has been endangered by the court decision below.

In a stunningly broad decision, the trial court has held that it is against the law for a filmmaker to make an unauthorized portrayal of a celebrity with the goal of "mak[ing] the appearance of the [celebrity] as real as possible," using a "literal depiction or imitation of a celebrity" if that use can be construed as "for commercial gain" or having an "economic benefit." The court's decision paints a target on the back of *all* creators of documentaries and other journalistic works. It gives celebrities—and any other public figure—the right to demand budget-busting

payments and impose private censorship of constitutionally protected, non-commercial speech.

If this Court does not correct the decision below, countless past and future unauthorized documentary films about celebrities will be in danger. Consider the unauthorized documentary films about O.J. Simpson (*O.J.: Made in America* (ESPN Films 2016)), Harvey Weinstein (*Unauthorized: The Harvey Weinstein Story* (Melbar Entertainment Group 2011)), Martha Stewart (*Martha, Inc.: The Story of Martha Stewart* (Jaffe/Braunstein Films 2003)), Jerry Sandusky (*Happy Valley* (A&E IndieFilms 2014)), and Lance Armstrong (*Stop at Nothing: The Lance Armstrong Story* (ABC Commercial 2014)). All of these films feature a "literal depiction" of their celebrity subjects. These filmmakers no doubt expected their films would result in "commercial gain" and "economic value," deriving from both the filmmaker's artistry and analysis on the one hand, and from "the fame of the celebrities depicted" on the other.

It is hard to imagine that any of these celebrities would have freely given permission to these works. Most likely, they would have demanded major changes to the works to cut out unflattering scenes, and demanded impossibly high fees. Either

tactic would have killed or disemboweled the projects. The same is true for many other types of works: if the lower court's decision were allowed to stand, celebrities would have veto power not only over documentaries, but over docudramas, biopics and any other dramatized works focusing on a celebrity's life. The decision is so broad, in fact, that it suggests that other "literal" portrayals of celebrities could be in danger—such as photographs used in magazines, newspapers, and news websites.

Until now, works examining real-life events have been perfectly legal when it comes to the right of publicity. California courts have held repeatedly that the First Amendment and right of publicity statute provide immunity to documentaries and other journalistic works like news reports, magazine articles, and non-fiction books. California courts have also held that the First Amendment protection extends to dramatized films and television programs based on real-life events. The court below has put that long-standing protection in jeopardy with its unconstitutional interpretation of the right of publicity. This Court should correct the lower court's decision and reaffirm the First Amendment and statutory protection for non-commercial speech about celebrities and other public figures.

The First Amendment requires a narrow interpretation of all laws restricting speech, including the right of publicity, which must be subjected to strict scrutiny. This Court should therefore narrowly construe the right of publicity and direct that it applies only to commercial speech, not to docudramas like *Feud* or documentaries like *O.J.: Made in America* (Plan B Entertainment 2017).

ARGUMENT

I. The Trial Court's Ruling Threatens to Strip Away the Long-Standing Constitutional and Statutory Protection for Documentaries Against Right of Publicity Claims

The trial court's erroneous ruling threatens documentaries in two ways. First, the court concluded that the fact-based docudrama, *Feud*, violated the right of publicity because it was not sufficiently "transformative." The court held that *Feud* was not transformative because "Defendants admit that they wanted to make the appearance of Plaintiff as real as possible." Joint Appendix (JA) at 1095. The court also said that the docudrama was not transformative because the filmmakers had "the overall goal of creating literal, conventional images" of Plaintiff Olivia de

Havilland and used a "literal depiction" of her. *Id.* (quoting *Comedy III v. Gary Saderup, Inc.*, 25 Cal. App. 4th 387, 405 (2001). This part of the ruling would be fatal to documentaries that contain "literal" depictions of celebrities and other public figures, as many documentaries do.

Second, the court wrote that "[w]hen artistic expression takes the form of a literal depiction . . . of a celebrity for commercial gain," the artistic work violates the right of publicity. *Id.* (quoting *Comedy III*, 25 Cal. App. 4th at 405). This, too, threatens to cripple documentary filmmaking. Documentarians often focus on people who have attracted public interest; and by their very nature, celebrities attract audiences, which might impact the project's commercial success. If a commercially successful documentary about a celebrity or other public figure violates the right of publicity, an entire class of documentaries would suddenly face a great legal risk. The public would be harmed by the loss of in-depth analysis and commentary on real events involving public figures. The trial court's decision therefore poses a significant danger to documentarians.

A. The Trial Court's Decision Endangers the Well-Established First Amendment Safeguard for Documentary Films and Other Journalistic Works

More than 20 years ago, the Second District Court of Appeal held that an unauthorized documentary about a celebrity is protected from right of publicity liability by the First Amendment. Documentary filmmakers and other creators have relied on it ever since. In *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542-44 (1993), the court held that "legendary" surfing icon Mickey Dora could not maintain right of publicity claims against the producers of the documentary. The court cautioned that "[t]hough both celebrities and non-celebrities have the right to be free from the unauthorized exploitation of their names and likenesses, every publication of someone's name or likeness does not give rise to an appropriation action." *Id.* at 542.

The court first dismissed Mr. Dora's common law right of publicity claim under a constitutionally based "public interest" privilege. "[W]e conclude that the public interest in the subject matter of the program gives rise to a constitutional protection against liability." *Id.* As the court explained, "[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not

ordinarily actionable." *Id.* (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 421 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574 (1977); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).

In *Dora*, the court emphasized that the First Amendment "guarantees for speech and press are not the preserve of political expression or comment on public affairs," nor are those protections "restricted to [reports about] current events." *Id* at 542-43 (citation omitted). "[M]agazines and books, radio and television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies." *Id.* at 543 (citation omitted).

The court concluded that the constitutional right to inform the public about matters of public interest placed the documentary outside the reach of the right of publicity. "The program in question in this case is a documentary about a certain time and place in California history and, indeed, in American legend. . . . This is the point of the program, and it seems a fair comment on real life events which have caught the popular imagination." *Id.* at 543 (quotation and citation omitted).

The court also dismissed Mr. Dora's claim under the state's statutory right of publicity, Civil Code § 3344. The court relied on subsection (d), which exempts from liability the "use of a . . . likeness in connection with any news, public affairs, or sports broadcast or account." The court concluded that subsection (d)'s protection for "public affairs" reports is broader than its protection for a "news . . . broadcast or account." Rather, the "public affairs" exemption covers accounts "related to real-life occurrences," including "things that would not necessarily be considered news" and are "less important than news." *Id.* at 545. "As it has been established in the cases involving common law privacy and appropriation," the court said, reports about matters of "public interest" must be protected by subsection (d) because "the public is interested in and constitutionally entitled to know about things, people and events that affect it." *Id.* The court again cited *Zacchini*, the Supreme Court's only right of publicity decision, describing the decision as reaffirmation that "the right of publicity does not prevent reporting on newsworthy facts." *Id.*

Many other court decisions have affirmed that literal depictions of celebrities in journalistic works documenting real-life events are exempt from the California right of publicity under

the First Amendment and Section 3344(d)'s protection for works about "public affairs." In *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790 (1995), celebrity San Francisco 49ers quarterback Joe Montana sued a newspaper for selling souvenir poster reproductions of two front page stories featuring a photograph and a sketch of Montana and news stories about his NFL Super Bowl victories in the 1989 and 1990. The court rejected Montana's common law and statutory right of publicity claims, saying that the newspaper had the First Amendment right to report about newsworthy events—and to market the celebrity value of Montana to sell newspapers. *Id.* at 797. *See also New Kids on the Block v. News America Publ.,* 971 F.2d 302, 309-10 (9th Cir. 1992) (newspaper's use of celebrity pop group members' names and photos for profit-making telephone poll exempt from California's statutory and common law right of publicity laws because use was in connection with news stories about band, which was matter of public interest); *Maheu v. CBS, Inc.*, 201 Cal. App. 3d 662, 666-67 (1988) (authors and publishers of biography about public figures Howard Hughes and his agent not liable under California's common law and statutory right of publicity statute because book was constitutionally and

statutorily protected account about "matters in the public interest").

Dora, *Montana*, *Maheu,* and *New Kids* were all decided before the Supreme Court created a new "transformative" test in *Comedy III* and *Winter v. D.C. Comics*, 30 Cal. 4th 881 (2003). But *Comedy III* and *Winter* did not overrule *Dora*. In fact, the Supreme Court tacitly acknowledged that factual reports about newsworthy subjects do not violate the right of publicity and are transformative *per se*. As the court stated, "[w]e emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms," including "factual reporting[.]" *Comedy III*, 30 Cal. 4th at 406. The court cited *Rosemont Enterprises, Inc. v. Random House, Inc.*, a copyright injunction case that emphasized that "biographical works do not fall within the terms" of the New York right of publicity due to the "necessity for avoiding the restriction of free speech" and the requirement "to view nature of the work, i.e., whether it is in the public interest, rather than possible profit motives as controlling." 294 N.Y.S.2d 122, 129, n.5 (N.Y. Sup. Ct. 1968), *aff'd. mem.* (1969) 301 N.Y.S.2d 948 (1969) (citations omitted).

In *Comedy III*, the court also relied on *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860 (1979), which, as here, involved a dramatized ("fictionalized") made-for-television retelling of the life of 1920s movie star Rudolph Valentino. The film used Valentino's name in its title, *Legend of Rudolph Valentino: A Romantic Fiction*, and marketed the film as "represent[ing] a portion of the life of Rudolph Valentino and employs the name, likeness and personality" of the star, although the plaintiff said that film was a "work of fiction" and a "fictionalized" biography. *Id.* at 862. Valentino's nephew sued for violation of Valentino's right of publicity, which he claimed he inherited, but the court issued a short decision that California did not (yet) recognize that right was inheritable.

Chief Justice Rose Bird added a concurrence that was joined by the majority of the court, and which Amicus suggests should guide the Court in this appeal. As Chief Justice Bird wrote, "[i]t is clear that works of fiction are constitutionally protected in the same manner as political treatises and topic news stories," and "no distinction may be drawn in this context between fictional and factual accounts of Valentino's life." *Guglielmi*, 25 Cal. 3d at 867 (Bird, C.J., concurring). Bird rejected

the plaintiff's argument that the unauthorized biography of Valentino was stripped of its First Amendment immunity because it made a profit: "The First Amendment is not limited to those who publish without charge." *Id.*

Instead of overruling *Guglielmi*, the Supreme Court in *Comedy III* recites Bird's sweeping language about the constitutional protection that immunizes free speech about celebrities in the form of dramatized versions of history. *Comedy III*, 25 Cal. App. 4th at 398. *Comedy III* and *Winter* certainly do not hold, or even suggest, that literal depictions of celebrities in a film violate the right of publicity. Nor did those decisions say that a work is automatically actionable if the film's value "derive[s] primarily from the fame of the celebrities depicted," as the trial court wrote. JA at 1095 (quoting *Comedy III*, 25 Cal. App. 4th at 405). Rather, the court said that even if "the value of the work comes principally from . . . the fame of the celebrity . . . it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work." *Id.* at 387.

This case presents this Court with the opportunity to reaffirm the long-standing rule that unauthorized documentaries

about celebrities and other public figures are privileged against right of publicity claims by First Amendment and statutory "public affairs" exemption. Without the right to inform the public about public figure and public controversies, unauthorized documentaries that criticize public figures will be chilled and many are likely to be shelved to avoid the risk of incurring high legal expenses and legal uncertainty.

B. The Expansive Interpretation of the Right of Publicity Adopted by the Trial Court Invites Private Censorship

The court's broad expansion of the right of publicity to cover "literal depiction[]s" of celebrities delivers those public figures a powerful new censorship tool. First, celebrities and other public figures would feel emboldened to demand multimillion-dollar fees from documentarians, endangering countless documentary films that do not have large feature film budgets. But the *coup de gras* would come when celebrities decide that they don't like the way a film portrays them. It is hard to imagine that a celebrity would grant permission to any film that recounts unsavory facts like criminal charges and convictions, unethical behavior, drug use, infidelity, or accusations of murder

and sexual abuse. To gain celebrity permission, filmmakers would either have to self-censor by taking out sections that portray the celebrities in a negative light, or scuttle the project. Either way, this newly expanded interpretation of the right of publicity gives celebrities the power to censor documentaries.

If this Court does not correct the decision below, here is just a sample of unauthorized documentary films that feature "literal depictions" of celebrities and use their name and likeness to promote films, which now could be targeted with lawsuits:

- *O.J.: Made in America*, an unauthorized 2016 documentary about the rise and fall of O.J. Simpson, the football star, broadcaster, and Hertz advertising spokesman. The documentary focused on police abuse in Los Angeles and Mr. Simpson's controversial acquittal of murder charges in the still-unsolved fatal stabbing of his ex-wife.
- *Happy Valley*, an unauthorized 2014 documentary that details how the once-beloved Pennsylvania State football coach Jerry Sandusky was brought down by accusations of sexually sexual molesting young boys.

- *Stop at Nothing: The Lance Armstrong Story*, an unauthorized 2014 documentary that recounts how the hugely popular bicyclist became a pariah after his years-long secret doping scheme was exposed.
- *Bill Cosby: Fall of an American Icon*, an unauthorized 2017 documentary discussing allegations that Cosby had been using his celebrity status to privately drug and rape women with impunity throughout his acting career. (Sugar Films 2017).
- *Martha, Inc.: The Story of Martha Stewart*, a 2003 documentary that portrays business tycoon Martha Stewart's story, behind the facade of her motherly housewife appearance, including the crime she committed that brought her fame to a halt. (Jaffe/Braunstein Films 2003).
- *Vick: A Bleacher Report Documentary*, a 2016 documentary that depicts the rise and fall of Michael Vick, the pro-football player who was convicted for running a dog-fighting and gambling ring. (Bleacher Report 2016)

- *Prodigy: An Unauthorized Story on Tiger Woods*, a 2009 documentary that follows the unprecedented dominance of Tiger Woods in pro golfing and his very public battles with sex addiction and ensuing fall from grace.[1] (MoMedia 2009)
- *The Jinx: The Life and Deaths of Robert Durst,* the 2015 HBO documentary miniseries about New York real estate mogul Robert Durst, who is suspected of murdering his first wife, a neighbor, and his girlfriend and seemed to confess on tape. Durst was arrested on murder charges the day before the finale aired. (HBO Documentary Films 2015)

[1] Many of these documentaries feature sports stars, who are among the most well-known celebrities of our time and use their celebrity to command huge endorsement deal fees.

C. Documentaries Are Powerful Voices of Change

The importance of documentaries cannot be understated in terms of their cultural, social, and government impact. Simon Kilmurry, executive director of IDA, recently wrote, "[d]ocumentary film is essential to a healthy and democratic society—that is why it is feared by autocrats."[2] Kilmurry explained that "[d]ocumentary film is a form that allows us to walk in another's shoes, to build a sense of shared humanity, that gives voice to the marginalized and the scorned, that strives to hold those in power to account."

Documentaries combine traditional news reporting with creative storytelling to go into depth on public controversies and public figures, often supplying more detail and nuance than breaking news stories. Documentaries dig deep into historical events to transport viewers to a different time and place.

Documentary films have had the ability to change business practices, government policies, and public conduct. *Lioness*

---

[2] Simon Kilmurry, *Why Documentaries Matter Now More Than Ever*, The Hollywood Reporter (Feb. 15, 2017), https://www.hollywoodreporter.com/news/why-documentaries-matter-more-ever-guest-column-976290.

resulted in introduction of a bill in Congress and eventual legislation winning combat benefits for women in the Army. (Room 11 Productions 2008). *Invisible War* resulted in New York Senator Kirsten Gillibrand introducing legislation (not yet passed) to protect women in the military from sexual assault by changing the reporting procedures. (Chain Camera Pictures 2012). *Fahrenheit 911* broke the media silence about the Bush Administration's fabricated intelligence used to push for the invasion in Iraq. (Fellowship Adventure Group 2004). The 2013 expose *Blackfish* helped force the San Diego sea animal entertainment park, Sea World, to end its captive breeding of killer whales. (Manny O Productions 2013). *Making a Murderer*, a 2015 documentary television series, brought public attention to the coercive interrogation methods used in a murder case. (Synthesis Films 2015). Former Vice President Al Gore's 2006 documentary about global warming, *An Inconvenient Truth*, has been credited with raising international public awareness about climate change and leading to legislation to combat climate change. (Lawrence Bender Productions 2006). If the right of publicity is expanded to "literal depictions" of celebrities and other public figures, it will cast a deep pall over the documentary

genre's powerful ability to shed light on important events, expose injustice, and explore the human condition.

D. The First Amendment Protects All Documentaries and Biographies, Whether They Use Traditional Journalistic Techniques or Dramatizations

The court's decision also threatens the free speech rights of documentarians by treating dramatized biographies such as *Feud* as deserving less First Amendment protection than more traditional journalistic works. Documentarians should not be bound by such a rigid distinction between dramatic and journalistic techniques. Both traditional journalistic story-telling and dramatization are equally protected by the First Amendment. "[T]he First Amendment draws no distinction between the various methods of communicating ideas." *Superior Films, Inc. v. Dep't of Educ. of State of Ohio, Div. of Film Censorship*, 346 U.S. 587, 589 (1954).

Documentaries are known for their traditional tools of filmed interviews, archival film footage, photographs, and documents. But documentary filmmaking, like other genres, depends on an astounding variety of storytelling tools. Documentary filmmakers often add dramatic techniques used by

biopics and docudramas, including actors and guessed-at dialogue. Commentators and other speculate as to what may have happened. In the entertainment industry, screenwriters must create an imagined dialogue to fill in the blanks of the historical record. Or they might create a fictional character to help with the narrative flow. This is called "fictionalization" in the entertainment industry, but it is hardly new. Imagined dialogue and invented characters have been used to fill in the missing parts of history since the plays of Shakespeare. *See, e.g.*, W. Shakespeare, Henry V, act III, sc I (attributing the phrase "[O]nce more unto the breach, dear friends, once more" to King Henry V of England (1386-1422)).

Filmmaker Errol Morris broke ground in his film *The Thin Blue Line* (American Playhouse 1988) by combining documentary and dramatization techniques. The film suggests that a man was wrongfully convicted of murdering a police officer and uses actors to reenact the crime scene while also using more traditional documentary techniques. The man's case was subsequently reviewed, and he was released from prison not long after the film's release. "'Blue Line' inmate freed after 12 years,' Chicago Tribune, March 22, 1989.

Morris's most recent work, *Wormwood*, is a documentary-docudrama hybrid. The 2017 six-part Netflix television series explores the mysterious death of government scientist Frank Olson in 1953. (Fourth Floor Productions 2017). Once again, Morris uses the full range of filmmaking tools: filmed interviews with Mr. Olson's son, archival television news footage, archival photographs, newspaper clippings, government documents—and reenactments. To emphasize the conflicting government stories about Mr. Olson's fatal fall or push from a window in a high-rise Manhattan hotel, Morris uses actors to stage various scenes suggested by the CIA. In one scene, the Mr. Olson, played by an actor, is drugged with LSD by CIA agents, also played by actors, causing him to suffer a mental breakdown. The series later suggests that the CIA fabricated the LSD scene to hide their culpability in Mr. Olson's murder. Netflix describes the series as a "genre-bending tale," and Imdb.com labels the work as "Documentary/Biography TV Mini Series." *Wormwood*, Netflix Official Site (2017), https://www.netflix.com/title/80059446 (last visited Jan 25, 2018); *Wormwood* (TV Mini-Series 2017), IMDb, http://www.imdb.com/title/tt7306056/ (last visited Jan 25, 2018).

Wormwood and *The Thin Blue Line* illustrate the difficulty with the trial court's suggestion that dramatizations of actual events should be outside the protection of the First Amendment. Both docudramas and documentaries employ "literal depictions" of celebrities and dramatizations to inform the public about these public figures and their places in history. Documentaries and dramatizations of real-life events are two sides of the same coin. Both are expressions of free speech. Both warrant equal First Amendment immunity from the right of publicity. "No such constitutional dichotomy exists in this area between truthful and fictional accounts. They have equal constitutional stature and each is as likely to fulfill the objectives underlying the constitutional guarantees of free expression." *Guglielmi*, 25 Cal. 3d at 871 (Bird, CJ, concurring).

The court's decision also threatens the free speech rights of documentarians and other filmmakers by adopting a so-called television industry expert's claim that "whenever a script or production calls for the inclusion of the name, identity, character, performance or image of a celebrity," under "[t]he standard practice in the film and television industry generally" "consent from the celebrity . . . must be obtained," and if the "use is

significant, . . . compensation needs to be paid for the value of that use." JA at 1089-1090 [Ruling 7-8].

Even if this is the "practice" by some studios and production companies, it is not a legal requirement, and it is far from universal. Most independent productions cannot afford such licensing fees, and when they can, it is often done simply to avoid the expense of a meritless right of publicity lawsuit. *See generally Campbell v. Acuff-Rose Music, Inc.*, 510 US 569, 585 n. 18 (1994) (defendants' rebuffed request for permission to use copyrighted song did not concede permission was legally required). Moreover, many journalists consider paying for access to be unethical. *See, e.g.*, SPJ Code of Ethics - Society of Professional Journalists, Society of Professional Journalists - Improving and protecting journalism since 1909, https://www.spj.org/ethicscode.asp (last visited Jan 25, 2018) ("[D]o not pay for access to news.").

II. The First Amendment Requires a Narrow Judicial Construction and Clear Rule That the Right of Publicity Applies Only to Commercial Speech

Amicus respectfully urges this Court to consider the recent decision of the United States Court of Appeals for the Ninth

Circuit in which it concluded that California's right of publicity laws are subject to strict scrutiny. *Sarver v. Chartier*, 813 F. 3d 891, 905-906 (9th Cir. 2016). The court decided that the film, *Hurt Locker*, a dramatic film based in part on real-life events involving plaintiff Sgt. Jeffrey Sarver, "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." *Id.* In such cases, the court concluded, California's right of publicity law is "simply a content-based speech restriction" and "presumptively unconstitutional[.]" *Id.*

In order to ensure that the California right of publicity is applied in conformance with the First Amendment, Amicus urges this Court to construe the statute and common law narrowly and restrict them to commercial speech. The "core notion of commercial speech" is that it "does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). The right of publicity must be narrowly applied to the use of a person's name and likeness on non-expressive commercial merchandise such as key chains, and on

advertisements for commercial products, such as cigarettes or perfume. In cases such as *Newcombe v. Adolf Coors Company*, 157 F.3d 686, 691 (9th Cir. 1998) (use of pitcher's image in printed beer advertisement violates California's right of publicity), *Abdul–Jabbar v. General Motors Corporation*, 85 F.3d 407, 409 (9th Cir. 1996) (same for use of basketball star's former name in television car commercial), *White v. Samsung Electronics of America, Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (as amended) (same for use of game-show hostess's "identity" in print advertisements for electronic products), and *Midler v. Ford Motor Company*, 849 F.2d 460, 461 (9th Cir. 1988) (same for television car commercial using "sound-alike" rendition of professional singer's song and voice), the defendant used an aspect of the celebrity's identity entirely and directly for the purpose of selling a commercial product. In such circumstances, liability under the right of publicity does not raise the same constitutional concern.

Documentaries are not commercial speech; they are "stories about real life with claims to truthfulness" that use the full panoply of filmmaking techniques including original footage, interviews, archival materials, animation, dramatization, and

reenactments. Pat Aufderheide, Documentary Film: A Very Short Introduction 2 (2007). Nor does the fact that commercial success may derive from the notoriety of a film's subject make that film a "commercial use" for right of publicity purposes. Until the trial court decision, that principle had been well-established. In *Hoffman v. Capital Cities/ABC, Inc.*, the Ninth Circuit rejected the argument that the use of an unauthorized photograph of actor Dustin Hoffman in an article in *Los Angeles Magazine* "was not protected speech because it was created to 'attract attention.'" *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001). "While there was testimony that the Hollywood issue and the use of celebrities was intended in part to 'rev up' the magazine's profile, that does not make the fashion article a purely 'commercial' form of expression." *Id.* There is no reason to depart from this sound principle, and Amicus urges the Court to make clear that where a project does more than propose a commercial transaction, the right of publicity does not apply.

CONCLUSION

If the right of publicity law expands to cover dramatized works based on real-life events because they contain "literal depictions" of celebrities and other public figures, there is a significant danger that documentary filmmaking and many other forms of expression will face a chilling effect. This expansion will give celebrities and public figures veto power over speech about matters of public concern.

The only way to safeguard speech about public figures and public issues is to construe the California right of publicity narrowly and limit it to commercial speech. Celebrities will still have the right to assert other claims such as libel or invasion of privacy if they believe they have been harmed.

Dated: January 25, 2018

UCI INTELLECTUAL PROPERTY, ARTS, AND TECHNOLOGY CLINIC
JACK LERNER

By /s/ Jack Lerner
JACK LERNER
STATE BAR #220661

Counsel for Amicus Curiae
International Documentary Assoc.

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks, and this Certificate, consists of 6695 words in 13-point Times New Roman type as counted by the Microsoft Word word-processing program used to generate the text.

Dated: January 25, 2018

UCI INTELLECTUAL PROPERTY, ARTS, AND TECHNOLOGY CLINIC
JACK LERNER

By /s/ Jack Lerner
JACK LERNER
STATE BAR #220661

Counsel for Amicus Curiae International Documentary Association

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is UC Irvine School of Law, UCI Law Clinics, PO Box 5479, Irvine, CA 92616-5479

On January 25, 2018, I served true copies of the AMICI CURIAE BRIEF OF INTERNATIONAL DOCUMENTARY ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

AS TO SERVICE BY MAIL: I caused the document to be enclosed in a sealed envelope addressed to the persons at the addresses listed in the Service List as being served by mail, and to have it placed in the U.S. Postal Service mailbox with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2018, at Los Angeles, California.

/s/ Debi Gloria
Debi Gloria
Law Clinics Administrator
UC Irvine School of Law

SERVICE LIST

Glenn D. Pomerantz Kelly Klaus Fred A. Rowley Jr. Mark R. Yohalem Munger, Tolles, & Olson 350 South Grand Ave. Los Angeles, CA 90071	Attorneys for Defendants-Appellants FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc.
Don Howarth Suzelle M. Smith Zoe E. Tremayne Howarth & Smith 523 West Sixth St., Suite 728 Los Angeles, CA 90014	Attorneys for Plaintiff-Respondent Olivia de Havilland, DBE
Clerk of Court Los Angeles County Superior Court Stanley Mosk Courthouse 111 N. Hill Street Los Angeles, CA 90012 Hon. Holly Kendig, Dept. 42	Superior Court Case No. BC667011
Clerk of Court California Supreme Court 350 McAllister Street San Francisco, CA 94102-4797 [Served electronically]	