

When Movie Research Leads to Contract or Copyright Claims

By David Halberstadter

This article was originally published by Law360 on April 15, 2016.



David Halberstadter

Given the staggering number of motion pictures and television productions that are based on or loosely inspired by true events, perhaps it is not all that surprising that real people who are depicted in such works — or who merely believe that they have been depicted — assume that they are entitled to compensation. After all, someone is making money by telling “their” story, so why shouldn’t they get to share in the wealth?

The simple answer is that the creators of such works have a First Amendment right to produce movies and television programs, whether based on actual events and real people and whether made for profit, without compensating or obtaining permission from those portrayed. The Ninth Circuit U.S. Court of Appeals made that clear most recently in *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), in which it held that the motion picture “The Hurt Locker” “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.”

It is not uncommon for such storytellers to conduct extensive research into the stories they want to tell, reading books and magazine articles, watching documentaries and news reports, and even interviewing individuals with firsthand knowledge of key events. If the interviewer is a reporter for the New York Times who is working on an article for the newspaper’s Sunday magazine, most interviewees would neither ask for nor expect to be compensated. But it can be another story altogether when the interviewer is a screenwriter, a well-known producer or a movie star about to direct her first film.

Sarver: “There Was An Implied Agreement”

The plaintiff in Sarver was an explosive ordnance disposal (EOD) technician in the [U.S. Army](#) who was deployed to Iraq in 2004, one of approximately 150 EOD technicians stationed in the country at that time. Mark Boal, a journalist embedded with various units serving in Iraq during 2004, spent approximately two weeks with Sarver’s unit. Boal interviewed Sarver at length as part of the research he was conducting on EOD teams working in Iraq. Boal then wrote a nonfiction article for Playboy magazine that focused on Sarver and his experiences.

Boal subsequently also wrote the screenplay for “The Hurt Locker.” A fictional work about fictional characters, the screenplay was drawn from Boal’s creative imagination, military history and the research Boal conducted while embedded in Iraq. The film had its U.S. premiere on June 26, 2009. It was nominated for nine Academy Awards and won six, including best picture, best director and best original screenplay.

Five days before the Academy Awards ceremony, Sarver commenced an action against “The Hurt Locker” filmmakers and distributors, essentially in order to extract compensation for participating in Boal’s research and interviews. Sarver asserted that the film both misappropriated his likeness and life experiences and, at the same time, defamed him. In addition, he alleged a claim for breach of an express and/or implied contract. Sarver claimed that in exchange for providing Boal with personal protection, “an up front seat on all missions participated in and led by [Sarver]” and Sarver’s cooperation with Boal’s “reporting requests/activities,” Boal agreed to refrain from releasing, publishing or using Sarver’s name and/or likeness, and to refrain from releasing or publishing specific and/or personal information about him. This express/implied contract purportedly was breached by the release of “The Hurt Locker.” All of Sarver’s attempts to circumvent the filmmakers’ First Amendment protections failed.

The Lost Boys: “There Was A Joint Venture Agreement and a Work of Joint Authorship”

Now, a group of 54 plaintiffs is trying a similar tactic — asserting both contract and copyright claims — to obtain compensation for their participation in research interviews conducted during the initial development of what eventually became the motion picture “The Good Lie.” (Foundation for Lost Boys and girls of Sudan Inc. v. Alcon Entertainment LLC, Case No. 15-CV-00509-LMM, U.S. District Court for the Northern District of Georgia.) It remains to be seen whether these plaintiffs’ claims ultimately meet the same fate as Sarver’s. But for now, they have been permitted to proceed with numerous causes of action based on allegations that they and the film’s original creators entered into an oral joint venture agreement entitling the plaintiffs to compensation and other consideration if the film was ever made.

According to their complaint, the plaintiffs are Southern Sudanese refugees who fled the genocidal activity occurring during the Second Sudanese Civil War. As repeated militia raids on Southern Sudanese villages made militia tactics more predictable, male children were instructed to flee their villages at the first signs of attack. These thousands of wandering refugees became known as The Lost Boys. Eventually, many of The Lost Boys, including the plaintiffs, were granted asylum and residency in the United States; the plaintiffs settled in and around Atlanta.

The plaintiffs allege that a few of them met with film producer Robert Newmyer in 2002. When they told Newmyer about some of their experiences prior to arriving in the United States, Newmyer allegedly expressed interest in making their stories into a feature film and agreed to travel to Atlanta to interview with them. Newmyer then recruited Margaret Nagle (an Emmy award-winning screenwriter) to write a screenplay incorporating “real, personal and emotional details” of the plaintiffs’ stories “otherwise unavailable to the public at large.”

The plaintiffs allege that next, Nagle and Newmyer interviewed a number of them in 2003, ostensibly to provide Nagle with background, stories, facts and other material to write the script. Before beginning these interviews, the plaintiffs allegedly demanded to know what compensation they would receive for their assistance. After conferring, Newmyer and Nagle purportedly explained that until the details of any film production using the not-yet-written script were determined, agreeing on compensation was impossible. Nevertheless, plaintiffs further claim, Newmyer and Nagle orally offered (1) to pay The Lost Boys \$55,000 “immediately” in exchange for giving the interviews; (2) to withhold permission for any studio or filmmaker to use the script for a film without the plaintiffs’ consent; (3) that the plaintiffs’ consent would only be given after reaching an agreement as to their compensation; and (4) to ensure that any film production would include a fundraising effort, the proceeds of which would be directed solely to a new nonprofit foundation to be organized and run by the plaintiffs.

The plaintiffs thus characterize this supposedly oral agreement as a partnership or joint venture in the creation of the interviews. Moreover, because the interviews supposedly were recorded, the plaintiffs claim that they are copyright-protected works of which the plaintiffs are joint authors because their contributions to the recorded interviews satisfy the low threshold for creativity. And, since Nagle’s screenplay is based (in part) on the recorded interviews, it is a derivative work of those recordings, as is the film itself.

Not surprisingly, the defendants have a different version of these preliminary events and their legal significance. As explained in their motion to dismiss the complaint, Newmyer began developing a film about The Lost Boys after watching “60 Minutes” coverage of the Sudanese Civil War. Newmyer then hired Nagle to draft a screenplay. Thereafter, Newmyer and Nagle traveled to a number of U.S. cities, meeting with several Lost Boys’ organizations and speaking to numerous Lost Boys about their film project. The plaintiffs were merely one group of such Lost Boys that met with Newmyer and Nagle on one evening in 2003.

The defendants deny that any agreement was reached regarding the plaintiffs’ compensation, much less that a partnership or joint venture was formed. Rather, the plaintiffs merely agreed to be interviewed, as did many other Lost Boys, in the normal course of conducting background research for a fictional story inspired by true events and the

experiences of many people. None of the plaintiffs is identified by name in the film, and the fictional Sudanese refugees in the film resettle in Kansas City, Missouri, not Atlanta.

The Claims That Were Asserted and Those That Survived

In any event, the plaintiffs asserted 18 claims against the defendants, although not every claim was asserted against every defendant. Among other claims, the plaintiffs alleged that Nagle and Newmyer's estate (Newmyer having passed away in 2005) breached their supposed oral joint venture agreement, breached the fiduciary duties they purportedly owed to the plaintiffs and violated the plaintiffs' rights of publicity. The plaintiffs also sought a judicial declaration that they were joint authors of the recorded interviews, and a permanent injunction preventing the continuing infringement of their copyright rights in those recorded interviews by the ongoing distribution of "The Good Lie."

The defendants thereafter filed a comprehensive motion to dismiss the plaintiffs' claims. After extensive briefing and oral argument, the district court issued its 54-page ruling on March 22, 2016. The court's order was a mixed bag for the litigants. For example, the court dismissed the plaintiffs' claim for a judicial declaration that they are joint authors of the recorded interviews and therefore entitled to share all of the exclusive rights in those interviews. The court found that (1) plaintiffs could not proceed with this claim until they either obtained or were refused a copyright registration for the interviews (copies of which the plaintiffs did not possess in order to deposit with any such application); and (2) there was no judicial authority for applying equitable estoppel against the defendants in order to prevent them seeking dismissal of this claim based on a failure to register. The court granted the plaintiffs leave to refile this claim in the future.

The court denied the defendants' motion to dismiss the claim for a permanent injunction preventing the infringement of the plaintiffs' purported copyright rights in the recorded interviews. The court concluded that the express provisions of the Copyright Act permit a court having jurisdiction over a copyright action to grant temporary and final injunctions to restrain infringement of any copyright, irrespective of the registration status of the copyrighted work.

The defendants sought dismissal of the plaintiffs' claims for unjust enrichment, quantum meruit and conversion on the basis that they were preempted by the Copyright Act. But the court rejected this argument. It found that the claims for unjust enrichment and quantum meruit were pleaded as an alternative to the contract claims, and therefore included the requisite "extra element" that made them ineligible for copyright preemption. The conversion claim also was not preempted, according to the court, because it was based upon the alleged wrongful use of the plaintiffs' ideas, which are not subject to copyright protection.

Finally, the court rejected all of the defendants' challenges to the remaining causes of action that were rooted in an alleged oral agreement (including breach of contract and breach of fiduciary duty), allowing all of them to proceed to the discovery phase of the litigation.

What Could the Creators Have Done Differently?

To be sure, the conducting of interviews can be an inherent, even essential, part of the creative process of writing of nonfiction works and the development of fact-based motion pictures and television productions. With firsthand accounts of critical events, writers can imbue their works with a degree of verisimilitude that might not be possible with only secondhand source materials, such as books and articles. But if interviewees can assert contract rights arising from their interviews or copyright interests in recordings of those interviews, the development, production and ultimately the distribution of important, First Amendment-protected works could be severely impacted.

All of the plaintiffs' surviving claims (including for a permanent injunction based on copyright infringement) depend on the allegation that a joint venture had been formed orally by the parties before the interviews commenced. Such claims might

have been avoided altogether, however, if the creators had taken a few prophylactic steps before conducting their interviews. The fact these plaintiffs have been permitted to proceed and prove the formation of a creative partnership and the creation of a work of joint authorship is a reminder of the importance of establishing in advance and in tangible form the terms under which the subject has agreed to be interviewed.

In a perfect world, every interview subject would sign a simple, clear writing that expresses his or her agreement to be interviewed, the purpose for which the interview was requested, any consideration granted in exchange for the interview (or the fact that no promise of consideration has been made or relied on), and any limitations, if any, on the use of the interviewee's responses or the individual's name or likeness. In the ideal situation, this writing would also disclaim any rights of the interviewee, including rights of copyright, in the interview, the recording, or any subsequent works based in whole or in part on the interview.

More realistically, the interviewers could recite a basic preamble at the beginning of each audio or audiovisual recording of an interview, identifying the interviewee by name, explaining why the interview is taking place, and reciting any agreed-upon terms under which the interviewee has agreed to answer questions. Even more simply, the interviewer could thank the interviewee on the record for agreeing to answer some questions about the relevant event and his or her experiences and for doing so without any promises of compensation having been made; and then ask the interviewee to confirm this, also on the record.

It may be a natural reaction for real individuals who were involved in the true events that inspire a fictional work to feel exploited by the commercial success of a motion picture or television production, especially if they have voluntarily provided information to those involved in the creative process. But after-the-fact demands for compensation can be reduced or even avoided if the ground rules under which a person consents to be interviewed are established up-front and adequately documented.

—By David Halberstadter, [Katten Muchin Rosenman LLP](#)

[David Halberstadter](#) is a partner in Katten's Century City, California, office and deputy general counsel for the firm's four California offices.

DISCLOSURE: David Halberstadter represented the filmmakers and distributors of "The Hurt Locker" at the Ninth Circuit in the case discussed above.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.