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A CURTAIN CALL FOR DOCUDRAMA-DEFAMATION ACTIONS: A CLEAR STANDARD TAKES A BOW

In September 1973, a violent military coup took place which deposed the Chilean government of Salvador Allende Gossens.¹ The coup resulted in the death or disappearance of many people,² including a young American citizen, Charles Horman.³ Horman disappeared from his home in Santiago a few days after the military takeover and a body with fingerprints matching his was subsequently found elsewhere in Chile.⁴ The extent of the United States' involvement in the coup was the topic of considerable speculation.

Thomas Hauser researched and wrote a nonfictional account of the circumstances surrounding the disappearance and death of Charles Horman in his book entitled *The Execution of Charles Horman: An American Sacrifice*.⁵ The book became the basis for the motion picture *Missing* directed by Constantin Costa-Gavras.⁶ The book as well as the film became the subject of a libel action brought by State Department officials and a naval officer.

The case eventually came before the United States District Court for the Southern District of New York in *Davis v. Costa-Gavras* ("Davis").⁷ The *Davis* court illustrated the standard for applying First Amendment protections to dramatized accounts of true events. The court held that minor fictionalizations in docudramas which do not distort the essence of the facts believed to be true do not support a finding of actual malice in a public figure defamation action.

1. *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1373 (S.D.N.Y. 1985).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* The book was published in hardcover in 1978 by Harcourt Brace Jovanovich, Inc. It was republished in paperback by The Hearst Corp. *Id.*

6. *Id.* The film was released by Universal City Studios, Inc., a wholly owned subsidiary of MCA, Inc. *Id.*

7. 654 F. Supp. 653 (S.D.N.Y. 1987). Originally this action named as defendants: Hauser, the author of *Execution*; Harcourt, Brace, Jovanovich, Inc., publishers of the hardback version of Hauser's book; Hearst, publisher of the paperback; and Costa-Gavras the director. *Davis v. Costa-Gavras*, 580 F. Supp. 1082 (S.D.N.Y. 1984). Hauser's and Harcourt, Brace, Jovanovich, Inc.'s motion for summary judgment was granted. *Davis v. Costa-Gavras*, 595 F. Supp. 982 (S.D.N.Y. 1984). Hearst's motion for summary judgment was granted. The case subsequently came before the court for a judgment on the pleadings. The motion was granted with respect to two State Department Officials who were originally plaintiffs in the suit. *Davis v. Costa-Gavras*, 619 F. Supp. 1372 (S.D.N.Y. 1985).

This casenote briefly reviews the development of the law of defamation concerning public figures and discusses the applicability of this law to dramatizations of true events. The note concludes by stating why the court sets forth the proper rule applicable to this genre of speech.

*Davis*⁸ involved a libel action brought by Ray Davis⁹ against the makers of the film *Missing* for their alleged portrayal of him in the movie. The case was before the court on a motion by the defendants for summary judgment. *Missing* was a docudrama,¹⁰ portraying the American military presence in Chile at the time of the uprising and the Allende coup. The theme of the film is the search for a missing man, Charles Horman, by his wife and his father. Charles Horman is finally found to have been executed by the Chilean military.

While the film does not purport to depict a chronology of the events precisely as they occurred,¹¹ *Missing* is based on a true story. The film reflects the composite conduct of the American governmental representatives in Chile at that time and the degree of their assistance in the search for Charles Horman. It is in this setting that the film came under scrutiny and criticism. While no character in the film is named "Ray Davis", the character with whom Davis associates himself is Ray Tower,¹² a symbolic fictional composite of the American political and military entourage in Chile at that time.¹³ Tower is depicted as someone with the power or authority to order the Chilean military to execute Horman; he is shown as having close connections to the recently installed junta.¹⁴

The movie is a dramatic portrayal of events and interpretations detailed in Thomas Hauser's book, *The Execution of Charles Horman: An American Sacrifice* ("Execution"). The filmmakers met with Hauser¹⁵ inquiring about his investigation and his sources. They supplied him

8. 654 F. Supp. 653 (S.D.N.Y. 1987).

9. Ray Davis was the Commander of the United States Military Group, and Chief of the United States Mission to Chile at the time of the 1973 coup in Chile. *Id.* at 654.

10. Docudramas differ from documentaries. Docudramas utilize simulated dialogue, composite characters, and telescoping of events occurring over a period into a composite scene or scenes. A documentary is a non-fictional story or series of historical events portrayed in their actual location: a film of real people and real events as they occur. A documentary maintains strict fidelity to fact. *Id.* at 658.

11. The film opens with the prologue: "This film is based on a true story. The incidents and facts are documented. Some of the names have been changed to protect the innocent and also to protect the film." *Id.* at 657.

12. In the film, Ed Horman, the father of the missing man, asserts the theory that Ray Tower ordered or approved a Chilean order to kill Charles Horman because he "knew too much" about the alleged American involvement in the Chilean coup. *Id.* at 659.

13. *Id.* at 655.

14. *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1377 (S.D.N.Y. 1985).

15. Thomas Hauser was a lawyer who had served as a judicial clerk in the chambers of a

with drafts of the script and were satisfied that there was no reason to doubt his work. They knew that Hauser had interviewed Davis, as well as other United States officials in Chile while writing *Execution*. The filmmakers also knew that no legal action was taken against the book during the approximately four years since its publication.¹⁶

While the filmmakers never attempted to verify the facts with Davis, they did consult with other parties involved prior to making the film. They met with Charles Horman's parents, his wife, and Terry Simon, a close friend who was with him at the time of his disappearance. Each of these individuals made clear that Hauser's book accurately and reliably depicted events as they knew and believed them.¹⁷

Davis' complaint alleged four general categories of evidence in his opposition to defendant's motion for summary judgment from which the court could find "actual malice" on behalf of the defendant.¹⁸ The district court, however, concluded that plaintiff had not presented any provable, clear and convincing, affirmative evidence nor specific facts showing actual malice on the part of the defendants in publishing the alleged defamation. Thus, the complaint by Davis, a public figure, was not sustainable under the law.¹⁹

The district court first set forth the standard which the plaintiff must prove in order to sustain a cause of action for defamation. The plaintiff, a public official, must show "actual malice" to sustain a cause of action for defamation. "Absent such evidence, the action cannot be maintained as a matter of law."²⁰ To show actual malice, the public figure claiming to have been defamed must show that the defendant published a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."²¹ After a careful analysis of the record, the court concluded "that to accept the plaintiff's opposition to summary judgment would require a distortion of the proofs, deviation from applicable law and wrenching the film out of its plain context."²²

federal judge and then worked for a prestigious Wall Street law firm. *Davis*, 654 F. Supp. 653, 656 (S.D.N.Y.).

16. *Id.*

17. *Id.*

18. (1) Defendants' "entire purpose in making *Missing* was to show plaintiff as responsible for Charles Horman's death;" (2) Defendants' reliance on Thomas Hauser's book *Execution* was unreasonable; (3) Defendants never consulted with plaintiff on the facts presented in the film; and (4) *Missing* contains scenes portraying certain episodes which the defendants knew were embroidered. *Id.* at 655.

19. *Id.* at 659.

20. *Id.* at 654 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

21. *New York Times*, 376 U.S. at 279-80.

22. *Davis v. Costa-Gavras*, 654 F. Supp. 653, 655 (S.D.N.Y. 1987).

A. *The Thesis of the Film*

The first of the four grounds alleged by Davis was that Costa-Gavras' entire purpose in making *Missing* was to show that Davis was responsible for Charles Horman's death. The court determined that while the film *Missing* is based on a true story, it does not purport to be a non-fictional documentary establishing that Ray Davis was responsible for Charles Horman's death. "To the contrary, the papers unalterably establish that the film is not . . . aimed at Ray Davis as an individual, and cannot be understood as other than the dramatization of a true story."²³ Davis failed to come forward with the necessary evidence that the filmmakers "knowingly and falsely published the alleged defamation in the film, or in fact entertained serious doubts about the truth of the film's alleged defamatory statement, yet recklessly disregarded those doubts."²⁴ The filmmakers based their docudrama on Hauser's book *Execution* and on the stories told by Horman's wife and father. The filmmakers thoroughly investigated and confirmed the sources. They entertained no serious doubts of the truth of their sources nor did they have any knowledge to the contrary of what was portrayed. The court further noted "the First Amendment does not even include 'spite, hostility or intention to harm' " in finding actual malice.²⁵

B. *Filmmakers' Reliance on Hauser's Book*

Davis then suggested that the defendants' reliance on the book was unreasonable and that Hauser's credentials would have disclosed him to be suspect had the defendants performed a good faith search.²⁶ "As a matter of law, to prevail on a defamation claim against a public official a plaintiff must do more than propound potential avenues of investigation that a defendant might have pursued. '[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth.'"²⁷ In order to support a finding of "actual malice," Davis would need to show that the defendants entertained serious doubts about the veracity of Hauser's book, or there were obvious reasons to doubt the veracity of the

23. *Id.*

24. *Id.* at 656; see *New York Times*, 376 U.S. at 279-80.

25. *Davis*, 654 F. Supp. at 655 (quoting *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 (1970)).

26. By claiming that Hauser's credentials were suspect, Davis was referring to Hauser's political satires where he had written on public issues to officials in the voice of a nine year old boy, "Martin Bear." These satires were solicited from Hauser by the *New York Times* and published on the "op-ed" page. This is hardly reason to suspect the veracity of his book. *Id.* at 657.

27. *Id.* at 656 (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 332 (1974)).

book. "Absent such evidence, reliance on *Execution* is not evidence of actual malice."²⁸

C. *Failure to Consult Plaintiff Prior to Making Film*

Davis further argued that the filmmakers' failure to personally consult with him prior to presentation of the film was evidence of actual malice. The district court did not agree:

While "verification of facts" of a story with its subjects and with others is a desirable and responsible practice and an important reporting standard, a reporter, without a "high degree of awareness of their probable falsity," may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution²⁹

It concluded that unless Davis had proof that Costa-Gavras knew his film contained falsities or entertained serious doubts as to its truth, or had obvious reason to doubt the veracity or accuracy of his sources, his failure to check with third parties prior to presentation of the film is not evidence of actual malice.³⁰

D. *Scenes in Missing as Evidence of Actual Malice*

Davis finally set forth nine scenes in the film in which he alleged the filmmakers distorted the context or made baseless suggestions. The court determined that none of the scenes listed supplied the requisite evidence of actual malice necessary to maintain the action.

In reaching this conclusion the court focused on the uniqueness of "docudrama" as an art form. It drew the distinction between the docudrama and the documentary, the latter being a "non-fictional story or series of historical events portrayed in their actual location; a film of real people and real events as they occur. A documentary maintains strict fidelity to fact."³¹ Conversely, "the docudrama is a dramatization of an historical event or lives of real people, using simulated dialogue, composite characters, and telescoping of events occurring over a period into a composite scene or scenes."³²

Time constraints of films and the attention spans of viewers create a necessity for the use of such techniques. Hence, partaking of artistic license is permissible so long as the "alterations of fact in scenes portrayed

28. *Davis*, 654 F. Supp. at 657.

29. *Id.* (quoting *New York Times v. Conner*, 365 F.2d 567, 576 (5th Cir. 1966)).

30. *Davis*, 654 F. Supp. at 657.

31. *Id.* at 658.

32. *Id.*

are not made with serious doubts of truth or the essence of the telescoped composite"³³ In other words, "minor fictionalizations cannot be considered evidence or support for the requirement of actual malice."³⁴

The court relied on several cases³⁵ to support its finding that the First Amendment protects this type of speech and did not require literal truth in every episode in a dramatization of an historical event. Because Davis did not support his allegations with sufficient proof of malice, the court granted the defendants' motion for summary judgment.

The *Davis* court provided First Amendment protection to a dramatization of a true event which does not distort "the essence" of those facts which it believes to be true. The standards which the law has developed to protect speech are not necessarily easy to apply when the speech is not of conventional non-fictional reporting form. This does not mean however, that speech which falls outside this limited category is not deserving of equal constitutional protection. What it does mean is that the standards applied to one genre of speech may require modification so that protection is afforded to other genres of speech. Courts have recognized the need to modify and adapt standards developed for non-fiction when applying them to works of fiction. The development of defamation law demonstrates that the First Amendment does protect fictional as well as non-fictional speech and in *Davis* the court developed the necessary standard for the unique genre "docudrama."

At common law, defamation is "the unconsented to and unprivileged intentional communication to a third person of a false statement about the plaintiff which tends to harm his reputation in the eyes of the community."³⁶ Under common law, defamation is a strict liability

33. *Id.*

34. *Id.*

35. The court relies on several cases in reaching its conclusion: *Street v. Nat'l Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981) (dramatization embodied in defendant's broadcast program on Scottsboro rape trial, which contained some literal falsehoods, was protected by the *New York Times* standard, and not chargeable with actual malice when it was based in all material respects on the judge's findings and historical documentation); *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974) *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (book based on letters written by Ethel and Julius Rosenberg, convicted spies, containing minor fictionalizations did not supply the requisite evidence of actual malice); *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (Defendant did not print literal words in a book which purported to quote derogatory remarks made by Ernest Hemingway about the plaintiff. Actual malice could not be inferred because "the change did not increase the defamatory impact or alter the substantive content" of Hemingway's original statement which defendants relied upon.).

36. Note, *The Supreme Court's Limiting of First Amendment Protection for Defendants in Defamation Cases*, 16 N.C. CENT. L. REV. 171, 172 (1987) (citation omitted).

tort. Hence, "the only intent required is that the defendant intended to communicate something to a third person; it does not matter if the defendant did not intend to defame or harm the plaintiff."³⁷

While truth is a defense, the defendant has the burden of proving the statement is completely true.³⁸ "Belief as to truth, however honest it may be, is no justification for defamation."³⁹ The defendant may also establish a complete defense by showing privilege.⁴⁰ A defendant may claim a qualified privilege which calls for "fair comment" upon the conduct of public officers and public employees.⁴¹ This privilege extends to publication of matters that are of general concern to the public.⁴² There is disagreement over whether the privilege is restricted to statements expressing only comment or opinion, or whether it includes misstatements of fact.⁴³ The majority view is that privilege extends only to comment or opinion, while the minority view is that privilege extends to misstatements of fact, made for the public benefit with an honest belief in their truth.⁴⁴

Ultimately, great works of fiction stimulate thought, promote discussion and provoke debate on a multitude of issues. Whether an artist does this through written expression or through the medium of film, his role is an important one.

The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and a more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our system rests.⁴⁵

Indeed works of fiction are central to our system of free expression and

37. *Id.*

38. *Id.*

39. *Id.* at 173.

40. *Id.* (citation omitted). The defendant may be totally immune from liability if an absolute privilege exists. Statements entitled to absolute immunity are (1) those made in the course of legislative proceedings, (2) executive communications made in the discharge of official duties, (3) those made in the course of judicial proceedings, and (4) those uttered by political candidates who have been granted equal time under the Federal Communications Act. *Id.* at 174 (citations omitted).

41. *Id.* (citations omitted).

42. *Id.* (citations omitted).

43. *Id.*

44. *Id.* at 174-75.

45. *Cohen v. California*, 403 U.S. 15, 24 (1971).

are as deserving of constitutional protection as any political treatise or topical newstory.⁴⁶

The Supreme Court has noted that fiction often serves as the vehicle for commentaries on our values, habits, customs, laws, prejudices, heritage and future.⁴⁷ To provide less protection to works of fiction than other forms of speech would only serve to inhibit the "robust debate" which the First Amendment protects.

Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield. Such authors are no less entitled to express their views than the town crier with the daily news or the philosopher with his discourse on the nature of justice.⁴⁸

Because film is the medium chosen for the fictionalization of an event, does not lessen its First Amendment protections. The Supreme Court long ago recognized that informing can be accomplished through entertainment just as entertainment can be informative: "The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."⁴⁹

The Supreme Court determined for the first time in 1964,⁵⁰ the extent to which the Constitution protects free speech and the press, by limiting a state's power to award damages in a libel action brought by a public official against critics of his official conduct.⁵¹ One authority has concluded that to find liability for defamation of a public figure under the *New York Times* standard, the plaintiff must demonstrate: (1) that the statement is false; (2) that the content defamed the plaintiff's reputation; (3) that the alleged defamatory statement is "of and concerning" the plaintiff; and (4) that the defendant acted with the knowledge that the statement was false or acted in reckless disregard of the truth.⁵²

The fourth prong of the *New York Times* test, the "actual malice" test, is perhaps the most significant since it is the most difficult to prove.

46. *Gugliemi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 867, 603 P.2d 454, 459, 160 Cal. Rptr. 352, 357 (1979) (nephew of Rudolph Valentino brought a "right of publicity" action based on a fictionalized film depicting portions of Valentino's life).

47. *Winters v. New York*, 333 U.S. 507, 516-20 (1948) (crime magazine containing true stories of bloodshed, lust or crime deserving of First Amendment protection as is "propaganda through fiction").

48. *Gugliemi*, 25 Cal. 3d at 868.

49. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

50. *New York Times v. Sullivan*, 376 U.S. 254 (1964) [hereinafter "*New York Times*"].

51. *Id.* at 256.

52. Rich & Brilliant, *Defamation-In-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOKLYN L. REV. 1, 5 (1986).

In *New York Times*, the Supreme Court defined "actual malice" as publishing a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."⁵³ This differed from common law malice which was frequently expressed in terms of ill-will, spite, or a deliberate intention to harm the plaintiff. The new standard focuses on the defendant's attitude toward the *truth* or *falsity* of the material published.⁵⁴ "Malice" in the common law sense is constitutionally insufficient to support a finding of "actual malice."⁵⁵ The application of the actual malice standard experienced a period of expansion and later a narrowing in the years following *New York Times*.⁵⁶

While the "actual malice" test set forth in *New York Times* works quite well for a publication claiming to be a recitation of an event, it has its shortcomings when applied to the equally protected area of works of fiction. The danger in applying the "actual malice" standard to fiction becomes evident when one realizes that fiction, by its very nature, is published with conscious disregard as to its falsity, thus rendering all works of fiction potentially defamatory. Hence, fiction requires First Amendment protection under a standard appropriate to its own nature.

Courts have recognized the difficulty in applying the actual malice standard, which is predicated on the defendant's knowledge of the falsity or reckless disregard of the truth, to works of fiction.

[I]n defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to "the facts." There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense "false." That is the nature of the art. Therefore, where fiction is the medium . . . it is meaningless to charge that the author "knew" his work was false.⁵⁷

Rather than focusing on the "actual malice" prong of *New York Times*,

53. 376 U.S. at 280.

54. Note, *The Supreme Court's Limiting of First Amendment Protection for Defendants in Defamation Cases*, 16 N.C. CENT. L. REV. at 192 (citations omitted).

55. *Id.*

56. The "actual malice" standard was extended to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Associated Press v. Walker*, 388 U.S. 130 (1967). Justice Brennan writing for a plurality extended the "actual malice" standard to all matters of general and public interest in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). The Supreme Court later retreated, holding that the *New York Times* standard was inapplicable in a case where the plaintiff was a private individual. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

57. *Gugliemi*, 25 Cal. 3d at 872, 603 P.2d at 461, 160 Cal. Rptr. at 359.

which carries the potential of stifling all fiction, the courts have tended to focus on the "of and concerning" or third prong of the test. With non-fiction, all that is needed is a straightforward analysis of the allegedly defamatory material. Typically, the statement includes a specific reference to the plaintiff, either by name, occupation or photograph.⁵⁸ In a non-fiction setting any reference that identifies an individual is assumed to be "of and concerning" that individual.⁵⁹

The application of the "of and concerning" test differs somewhat in works of fiction where it is insufficient for the plaintiff to prove only that the allegedly defamatory material referred to him. Instead, the plaintiff must also show that the statements can reasonably be understood as describing actual facts about him or his actual conduct.⁶⁰ The test is "whether a reasonable person reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."⁶¹

The necessity of focusing on the "of and concerning" aspect of the test as opposed to the "actual malice" aspect in fiction-defamation claims is clear. It is meaningless to charge that an author of fiction "knew his work was false" and is therefore guilty of defamation when fiction by its very nature is false. To claim that because some "truths" do exist in a fictional work, it is therefore held to the "actual malice" standard of defamation, shows a fundamental misunderstanding of the nature of fiction. Fiction by its very nature starts with an element of reality onto which it embroiders fancy and fantasy. To require otherwise would stifle the creative process requiring an author to create "mythological worlds of characters wholly divorced from reality."⁶² With these cases as background, the *Davis* court had to formulate an appropriate standard for the docudrama.

The decision to focus on the "of and concerning" element in a fiction-defamation action is the logical choice. While this focus is still relevant, it is not the crucial focus in the docudrama-defamation setting. Works such as *Missing*, which are dramatizations of true stories, require

58. Rich & Brillant, *supra* note 52 at 8.

59. *Id.*

60. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 440 (1983) (magazine article could not possibly have been reasonably understood as describing facts about plaintiff, who was a beauty pageant contestant, where portions of the article described the contestant as performing oral sex on her coach, on national television, causing him to levitate).

61. *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (1979) (novel made claims that plaintiff conducted "nude therapy sessions" in order to help clients shed their psychological inhibitions).

62. *Gugliemi*, 25 Cal. 3d at 868, 603 P.2d at 460, 160 Cal. Rptr. at 358.

yet another modification of the *New York Times* standard if they are to truly receive the constitutional protections of the First Amendment.

A look at the "of and concerning" test is relevant at some point during the docudrama-defamation action. Earlier, the case was before the court for a judgment on the pleadings on the ground that the motion picture *Missing* was not, as a matter of law, reasonably susceptible to the defamatory meaning ascribed to it by the plaintiffs.⁶³ The test the court applied was "whether a reasonable person, viewing the motion picture, would understand that the character portrayed in the film was, in actual fact, the plaintiff acting as described."⁶⁴ The court found that the movie *Missing* was reasonably susceptible of the interpretation that Davis ordered or approved the order for the murder of Horman, thus the court denied the motion.⁶⁵

At this point the focus was on the "of and concerning" test out of procedural necessity. The issue of "actual malice" could not even be considered yet. This motion was for judgment on the pleadings, hence the plaintiff had not been afforded the opportunity to conduct any discovery. Without this opportunity, he would be unable to make the determination regarding the defendant's state of mind necessary for a showing of actual malice.

When the case came before the court again, Costa-Gavras brought a motion for summary judgment.⁶⁶ The court reached the four conclusions outlined above: (1) the filmmaker's reliance on the book did not show actual malice; (2) failure to consult with plaintiff prior to making the film did not show actual malice; (3) the filmmaker's purpose was not to make a non-fictional film establishing that Davis was responsible for Horman's death, it was clearly a dramatization of a true story; and (4) dramatizations of actual events did not show actual malice. The fourth conclusion was the most significant in terms of its message to the entertainment industry. It clarified the standard to be applied in defamation actions concerning the unique art form which attempts to dramatize a true story. While a work of fiction may be inspired by an actual event,⁶⁷ the author changes names and settings in an exercise of creative

63. *Davis*, 619 F. Supp. 1372 (S.D.N.Y. 1985).

64. *Id.* at 1375.

65. *Id.* at 1383. (Motion was granted with respect to Consul Purdy and Ambassador Davis. Although both were portrayed unfavorably in the movie, the movie could not be reasonably interpreted to suggest that either of them ordered or approved the killing of Horman.)

66. *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987).

67. Fictional characters "grow out of real persons the author has met or observed. . . . The end result may be fictional . . . but the acorn of fact is usually the progenitor of the oak,

expression. The author makes no claims as to the truth of the work, hence the difficulty in applying "actual malice."

Conversely, the dramatization of the true life event draws elements from both fact and fiction. It overtly claims to be based on a true story but nevertheless may, of artistic necessity, create a character, which bears a close resemblance to the person claiming to be defamed, but which is actually meant to represent a composite of several characters who took part in the actual event. The dramatization also may of artistic necessity telescope the time frame under which certain events took place. In this sense all docudrama would be subject to claims of "actual malice" since all docudramas would contain "knowing falsehoods." The question then becomes, what is an artist to do to avoid liability in a situation where he wants to depict a true story, but must out of necessity alter the "truth" of the work?

A strict adherence to the *New York Times* "actual malice" standard has the potential of leaving options open to the docudramatist so absurd, that this form of creative expression would effectively be eliminated. By that test, if a filmmaker attempting docudrama is to be certain to avoid liability for defamation, he would have to produce a film which runs as long as the actual event in order to include every minute and every word of every character. Omitting anything which he knew actually occurred might be construed as acting with the knowledge that the statement was false or with reckless disregard for the truth. Certainly, to require this would create such a burden that it would in effect eliminate this form of creative expression.

Film is an obvious vehicle for communicating to a wide range of people on a wide range of topics. Film however, because of time constraints, is often forced to telescope time frames and make use of composite characters thus altering in some ways the truth of what actually took place. Nevertheless, in keeping with our constitutional commitment to "open and robust dialogue" this type of speech must be protected from potentially chilling defamation actions.

The court in *Davis* stated that "the cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted;⁶⁸ publishing a dramatization is not

which when full grown no longer has any resemblance to the acorn." *People v. Scribner's Sons*, 205 Misc. 818, 821, 130 N.Y.S.2d 514, 517 (1954).

68. There are many other instances when a defamation action has been brought against the author who employs minor fictionalizations in recounting a true event. *See, e.g., Hotchner v. Castillo-Puche*, 551 F.2d 910, 914, (1977) (minor fictionalizations which did not increase the defamatory impact or alter the substantive content of Hemingway's statements about plaintiff did not support a finding of actual malice); *Leopold v. Levin*, 259 N.E.2d 250, 256, (1970)

of itself evidence of actual malice."⁶⁹ An author who attempts to create a dramatization of a true event "partakes of author's license," his work is a "creative interpretation of reality and if alterations of fact in scenes portrayed are not made with serious doubts of *truth of the essence* of the telescoped composite, such scenes do not ground a charge of actual malice."⁷⁰

This modification of the *New York Times* "actual malice" standard works well for the docudrama. It allows the filmmaker the freedom to make necessary dramatic embellishments, yet still imposes a "good faith" requirement on him not to distort the truth of the fundamental story being told. A filmmaker who entertains no serious doubts as to the veracity of his sources, may make changes, so long as the changes do not increase the defamatory impact of the facts which he believes to be true. The modified standard also allows the filmmaker to express his own political leanings in the film which may color his historical perspective, so long as there is no extreme disregard for the truth. This comports with the actual malice standard which is "flexible and encourages diverse political opinions and robust debates about social issues."⁷¹ The standard however, is not without limits. "It does not abolish all the common law of libel even in the political context. It still protects us against the 'big political lie,' the conscious or reckless falsehood."⁷²

Davis v. Costa-Gavras clarifies the precautions a filmmaker should take in order to protect himself from potential liability for defamation, if he attempts to create a docudrama. Initially, he should conduct careful research on the issue surrounding his film. His research should be thorough to the point that he entertains no serious doubts as to the truth of any sources he relies on in his film. Any dramatic overlays should not create a more defamatory impact than the sources themselves. In other words, every element in the dramatized scene should be traceable to an actual fact derived from the filmmaker's source. Finally, care should be

(novel and film derived from notorious crime were not defamatory when fictionalized aspects of the book and motion picture were reasonably comparable to, or conceivable from facts of record from which they were drawn); *Street v. Nat'l Broadcasting Co.*, 645 F.2d 1227, 1237 (1981) (no evidence to support a finding of actual malice in author's attempt to create a television historical drama about the Scottsboro rape trial, when there was no evidence of bad faith or conscious disregard of the truth); *Meeropol v. Nizer*, 560 F.2d 1061, 1065 (1977) (minor fictionalizations in book about Ethel and Julius Rosenberg can be attributed to the leeway afforded an author who attempts to recount and popularize an historic event and do not rise to the constitutional level of a clear and convincing showing of reckless disregard).

69. *Davis*, 654 F. Supp. at 658.

70. *Id.* (emphasis added).

71. *Street v. Nat'l Broadcasting Co.*, 645 F.2d 1227, 1237 (1981).

72. *Id.*

taken that the film clearly represents itself as a docudrama to ensure that the viewer does not mistakenly believe it to be a documentary. This can be accomplished in the prologue and epilogue to the film, as was done in *Missing*.

To conclude, the application of the First Amendment to docudramas is essential to the protection of a valuable vehicle for the exchange of ideas. Restricting speech in this area would subvert the policies upon which freedom of speech is based. An author should be free to exercise necessary artistic license without the chilling effects of defamation actions. Condoning such actions would result in suppressing vital expression. Thus, the holding that actual malice is found only where an author has distorted the essence of that which he believes to be true should be embraced by all jurisdictions if free speech is truly to flourish.

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