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Commentary

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Introduction

Film historians David Bordwell and Kirstin Thompson defined the documentary genre, in the simplest of terms, as media that “purports to present factual information about the world outside the film.”¹ Pioneer filmmaker John Grierson—who is credited with coining the term “documentary”—described documentaries as the “creative treatment of actuality.”² Grierson’s description perfectly put in perspective that documentaries are a *version* of reality because they are the filmmaker’s view and perception of the subject. This version of reality resonates with a huge segment of society. Between 2019 and 2022, the number of documentaries available for streaming increased by 77%.³ Relatedly, the demand for media such as documentaries, docu-dramas, and true crime series increased by 44% from early 2021 to the end of 2023.⁴ The recent popularity does not look to be slowing anytime soon; the market for such media is expected to nearly double from \$3.94 billion in 2023 to \$7.3 billion by 2032.⁵

As demand for documentaries and related content continues to grow, streaming platforms and others in the industry with a hand in the different phases of the media’s release (e.g., production, marketing, casting) have found themselves facing challenges that other media categories don’t. In recent years, filmmakers’ creative portrayals of their subjects have led to some of the leading streaming platforms facing multimillion dollar lawsuits, in which plaintiffs allege that documentaries, docu-dramas, and related content on streaming platforms have falsely or misleadingly portrayed them, causing harm. While producers and streaming platforms have obtained favorable decisions in many such cases, legal victory does not come cheaply; even early wins at the motion to dismiss stage still require defense counsel to analyze the case, draft top-notch briefs, prepare for and attend hearings, and face the potential for an appeal even if their motion is granted. And those lawsuits that settle might do so at substantial amounts.

Given the frequency and costs of these lawsuits, those in the documentary business may be wondering how to secure protection against potential lawsuits and settlements. Depending on their specific insurance programs, insurance policies may be one such source of funding. Most companies carry commercial general liability (“CGL”) insurance that insures the business against third-party claims, including those claims that may arise from a project’s depiction of its subject. CGL policies often impose on insurers a “duty to defend,”

meaning the insurer must defend the lawsuit if there is even one claim alleged that is potentially covered. This may allow streaming platforms and other policyholders to get the defense funding necessary to fight a lengthy lawsuit. Another type of insurance that those in the documentary industry may already have is an errors and omissions (“E&O”) policy. An E&O policy, or a specific media liability policy, can be curated to protect policyholders in the media industry through specific coverage grants that might be beneficial for running their business. With the right protections in place, companies involved in the documentary business, such as film producers and streaming platforms, can take comfort in continuing to produce and release blockbuster documentaries and related content.

Even with a robust coverage portfolio, streaming platforms and others in the documentary business should still be wary that certain policy exclusions may bar or limit their coverage. For example, some policies may have an exclusion that disclaims coverage if the policyholder had knowledge of the alleged falsity of a statement prior to its release to the public. Similarly, an insurance policy could also contain a criminal/fraudulent acts exclusion that operates in a similar fashion by disclaiming coverage for any alleged intentional acts and violations of criminal law. These exclusions, among others, could hinder a policyholder’s insurance recovery. At the same time, media policyholders should feel empowered to know that exclusions do not apply just because insurers say they do. Indeed, policyholders across the nation have successfully argued that many exclusions, like the knowledge of falsity or criminal/fraudulent acts exclusions, do not apply in certain specific circumstances under CGL and E&O policies.

As the volume of documentaries and related content grows, so too does the number of lawsuits stemming from such content, so filmmakers, streaming platforms, production companies, and others with the greatest risk to face lawsuits should carefully review their policies to ensure they have the necessary coverage or seek to purchase a policy that provides adequate coverage. As explained further below, courts have held that certain coverage specifically covers actions arising from a documentary or related content, while certain exclusions may bar coverage. Streaming platforms and other policyholders in the entertainment industry should take note of both when reviewing or

purchasing a policy to protect themselves from the recent spike in lawsuits.

I. Recent Lawsuits Stemming from Documentaries and Related Original Content

Documentaries and related content have been around for decades, but their recent popularity and widespread availability on streaming platforms have led to numerous notable lawsuits of late. These lawsuits highlight the common claims that plaintiffs may assert, including defamation, invasion of privacy, and misappropriation of name, image, and likeness.

- In 2017, FX was sued over its eight-part docu-drama *Feud: Bette and Joan*, which recounts the historic rivalry between Hollywood actresses Joan Crawford and Bette Davis. The plaintiff, actress Olivia de Havilland (played by Catherine Zeta-Jones in the show) alleged that she was portrayed in a false and negative manner. Ms. Havilland alleged causes of action for: (1) the common law privacy tort of misappropriation; (2) violation of California’s statutory right of publicity; (3) false light invasion of privacy; and (4) unjust enrichment.⁶ In 2018, the lawsuit was dismissed.
- In 2019, Michael Jackson’s estate sued HBO for breach of contract after the release of *Leaving Neverland*, a documentary about Michael Jackson’s alleged sexual abuse of children. According to Mr. Jackson’s estate, the documentary violated a 1992 contract between Mr. Jackson and HBO, which prohibited HBO from making disparaging remarks about Mr. Jackson.⁷ The case was moved to private arbitration and voluntarily dismissed on November 5, 2024.
- In 2023, Hulu faced a lawsuit for the alleged misappropriation of Rachel Heller’s voice, image, and likeness in the true crime docuseries *Betrayal*. Ms. Heller alleged that Hulu used a filmed presentation of her at a public university, despite Ms. Heller expressly denying Hulu permission to use the presentation.⁸ Ms. Heller brought causes of action for misappropriation of likeness, breach of contract, specific performance, promissory estoppel, unjust enrichment, and punitive damages. The court dismissed Hulu from the action, but the case continues against another defendant.

- In 2023, Adam Rosendorff sued Hulu for defamation over his portrayal in the docuseries *The Dropout*, which documented the controversial health technology company Theranos. Mr. Rosendorff alleged that the series falsely portrayed or misrepresented his actions, profession and character, casting him in a false and defamatory light.⁹ The court dismissed Hulu from the action earlier this year.

II. Coverage Exists for Streaming Platforms and Other Policyholders in the Documentary Industry

These numerous lawsuits stemming from documentaries and related content come hand in hand with significant litigation costs for streaming platforms, content creators, producers, and other media companies. A party responsible for an aspect of the documentary or related content may be able to offset these costs through their CGL and E&O policies, which may provide defense and indemnity coverage.

A. Commercial General Liability Insurance

The first line of coverage that a streaming platform can look to is its CGL insurance. A CGL policy is the prevailing policy that companies purchase to protect themselves and their employees from financial loss due to third-party claims of bodily injury, property damage, and personal and advertising injury.

While the extent of coverage varies depending on the policy, the “personal and advertising injury” part of a CGL policy may provide coverage for alleged defamation and other common claims alleged in the lawsuits. For example, in the case *KM Strategic Management, LLC v. American Casualty Company of Reading PA*, 156 F.Supp. 3d 1154, 1160 (C.D. Cal. 2015), the court held that the definition of “personal and advertising injury,” which was defined to include injury arising out of: “oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services” created a potential for coverage for allegations of defamation. Accordingly, the court found that the CGL insurer had a duty to defend the entire lawsuit. Considering a CGL policy’s “personal injury” definition,¹⁰ the court in *12th Street Gym, Inc. v. General Star Indemnity Co.*, 93 F.3d 1158, 1163 (3d Cir. 1996) clarified that slander and libel

are both forms of defamation before finding that an underlying action’s cause of action for defamation constitutes a “personal injury.”¹¹

CGL policies are uniquely situated to cover defense costs and fees for defamation and similar claims because they are generally duty to defend policies. Depending on the applicable law, this means that an insurer’s defense obligation is triggered “where the allegations in the complaint are reasonably susceptible to an interpretation that states or even roughly sketches a claim covered by the policy terms, notwithstanding the possibility that the underlying claim may ultimately fail, or that the merits of the claim are weak or frivolous.”¹² This valuable coverage is enhanced by the fact that an insurer is typically required to honor its duty to defend obligation for the whole action, even if there are non-covered claims or allegations in the complaint.¹³ Thus, coupling the duty to defend standard with coverage under a CGL policy’s “personal and advertising injury” may provide a policyholder like a streaming platform the protection when faced with a lawsuit stemming from documentaries and related content.

B. Errors and Omissions Insurance

Another type of insurance that can provide the necessary coverage for streaming platforms and others in the documentary business from claims that arise from documentaries is E&O insurance. E&O insurance, also known as professional liability insurance, is a specialized type of coverage designed to protect professionals or specific industries from third-party liability arising out of negligence, omissions, mistakes, and errors inherent in the practice of their profession or course of their business.

Media liability insurance, a form of E&O insurance, is specifically designed to cover risks associated with media activities. Given its specific use by companies in the entertainment industry, media liability insurance contemplates the unique claims that are inherent from media activities such as casting, producing, and marketing documentaries and related features. These claims include exposures associated with the alleged infringement of intellectual property rights, quasi- or implied-contractual interests, and claims arising out of personal rights such as the right to privacy and defamation claims.¹⁴ For example, in *Federal Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 638 So.2d 1132 (La. Ct. App. 1994) the court found

coverage for an underlying action alleging a claim for defamation under a Media Special Perils/Broadcast Coverage Policy that specifically enumerated coverages for claims arising out of:

- A. any form of defamation or other tort related to disparagement or harm to the character, reputation or feelings of any natural person or organization, including but not limited to, libel, slander, product disparagement, trade libel, infliction of emotional distress, outrage or outrageous conduct;
- B. any form of invasion, infringement or interference with rights of privacy or publicity, including but not limited to false light, public disclosure of private facts, intrusion and commercial appropriation of name or likeness;....¹⁵

Thus, media liability insurance can be crucial for mitigating risks either as another layer of coverage in addition to CGL insurance or filling the gaps in coverage left by CGL insurance.¹⁶

III. Insurers May Raise Exclusions (But Don't Lose Hope!)

Exclusions are a feature of every insurance policy. They operate to bar or limit coverage in certain instances, but critically, insurers have the burden of proving the applicability of exclusions. In the context of lawsuits arising from documentaries and related content, insurers may raise several exclusions to limit their exposure, including a knowledge of falsity exclusion and/or criminal/fraudulent acts exclusion. But just because insurers raise exclusions or limitations does not mean they necessarily apply. In fact, policyholders have had great success arguing and obtaining defense and/or indemnity coverage under CGL and E&O policies where the insurer raised the below exclusions. Accordingly, it is important for policyholders to carefully consider the terms of their policies, especially any exclusionary language, as they are not an automatic bar to coverage.

A. “Knowledge of Falsity” Exclusion

While a CGL policy may provide coverage for defamation and other claims common in lawsuits involving documentaries and related content, the standard “personal and advertising injury” coverage may exclude

“personal and advertising injury” arising out of oral or written publication of material, if done by or at the direction of the insured *with knowledge of its falsity*.”¹⁷ The purpose of the knowledge of falsity exclusion is to bar coverage where the insured knew that it was making a false statement, but still chose to make it anyway. In the context of documentaries and related content, this exclusion could apply where the policyholder had knowledge that it was portraying a subject in a negative manner and had knowledge that its portrayal was not true. However, coverage may not be barred if the allegations in the underlying action are supported by anything less than the requisite intent knowledge – mere negligence or reckless disregard of falsity would not suffice. If the underlying complaint contains at least one allegation or claim that is likely to trigger the insurer’s duty to defend, courts have refused to apply the exclusion until there is an adjudication of liability finding that the alleged actor had the requisite intent.¹⁸ Since most underlying actions include allegations of both intentional and non-intentional conduct, the knowledge of falsity exclusion will generally not bar coverage for a policyholder’s defense.

B. Criminal or Fraudulent Acts Exclusion

Another common exclusion insurers may contend is applicable to lawsuits stemming from documentaries and related content are criminal/fraudulent acts exclusions. This type of exclusion can be found in both CGL and E&O policies and typically excludes coverage for claims arising from illegal activity or intentional wrongdoing, such as dishonest or fraudulent conduct or any intentional violation of law.¹⁹ Given the exclusion’s focus on intentional conduct, insurers will likely allege that the criminal/fraudulent exclusion operates in similar fashion as the knowledge of falsity exclusion. Policyholders, in turn, have had success in the CGL context arguing that insurers must still offer a defense until there is no remaining possibility of covered liability, even if one of the claims alleges a violation of criminal law.²⁰

Streaming platforms often can overcome an E&O policy’s criminal/fraudulent acts exclusion. In E&O policies, the criminal/fraudulent acts exclusion will often require a “final adjudication” before it can apply. This means that insurers must wait until there is an actual finding of liability establishing criminal/fraudulent conduct on the part of the policyholder. Until that time, insurers must provide a defense. Moreover,

settlements will not satisfy the “final adjudication” language.²¹ Thus, streaming platforms still have some protection against lawsuits even if their E&O insurer raises the criminal/fraudulent acts exclusion.

Conclusion

Based on viewership trends, the viewing public has given the documentary category an enthusiastic “two thumbs up.” Streaming platforms have responded by ramping up production on their networks. But, in recent years, streaming platforms and others in the industry have come to realize that subjects of documentaries may not share the same enthusiasm as the rest of the viewing public. Certain of these subjects of interest have responded by filing lawsuits, often at great cost to their targets. To effectively mitigate this risk, it is crucial for policyholders to review their CGL insurance, media liability insurance, and/or E&O insurance. These policies may offer essential protection to the streaming platforms and provide coverage for the costs of litigation, including defense expenses, settlements, and potential judgments. With these protections, streaming platforms can continue to invest in more documentaries and related content, rather than defense costs and settlements.

Endnotes

1. Allison Milewski, *Honest Truths: Ethics in Documentary Film, Icebreaker: What Makes a Film a Documentary*, American Documentary, <https://www.amdoc.org/engage/resources/honest-truths-ethics-documentary-film/icebreaker-what-makes-film-documentary/> (last visited Dec. 4, 2024).
2. Allison Milewski, *Honest Truths: Ethics in Documentary Film, Icebreaker: What Makes a Film a Documentary*, American Documentary, <https://www.amdoc.org/engage/resources/honest-truths-ethics-documentary-film/icebreaker-what-makes-film-documentary/> (last visited Dec. 4, 2024).
3. Mia Galuppo & Katie Killenny, *Inside the Documentary Cash Grap*, *The Hollywood Reporter* (Sept. 16, 2022), <https://www.hollywoodreporter.com/movies/movie-features/documentary-streaming-age-filmmaker-debate-ethics-payments-1235221541/>.
4. *Growing Demand for Documentaries*, Parrot Analytics (Jan. 17, 2024), <https://www.parrotanalytics.com/insights/growing-demand-for-documentaries/>.
5. *Documentary Films and Shows Market Overview*, Market Research Future, [https://www.marketresearchfuture.com/reports/documentary-films-and-shows-market-28344#:~:text=Documentary%20Films%20and%20Shows%20Market%20Overview,period%20\(2024%2D2032\)](https://www.marketresearchfuture.com/reports/documentary-films-and-shows-market-28344#:~:text=Documentary%20Films%20and%20Shows%20Market%20Overview,period%20(2024%2D2032)) (last visited Dec. 4, 2024).
6. *Olivia de Havilland v. FX Networks, LLC et al.*, No. BV667011, (C.A. Sup. Ct. Jun. 30, 2017).
7. *Optimum Productions et al. v. Home Box Office et al.*, Case No. 2:19-CV-01862 (C.A. Sup. Ct. Mar. 13, 2019).
8. *Rachel Heller v. ABC News, Inc. et al.*, No. 1:23-cv-04595-ELR (N.D. Ga. Oct. 9, 2023).
9. *Adam Rosendorff v. Hulu LLC, et al.*, No. 152734/2023 (Sup. Ct. N.Y. Cnty. 2023).
10. Personal injury” was defined in relevant part as: “injury, other than “bodily injury,” arising out of one or more of the following offenses: . . . (d) Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products, or services; or (e) Oral or written publication of material that violates a person’s right of privacy.”
11. Although the two exemplar cases focus on defamation allegations and claims, CGL policies also cover other claims that can arise from documentaries and related original features. *Thermostex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, 595 F. Supp. 3d 677, 686 (N.D. Ill. 2022), *aff’d*, 102 F.4th 438 (7th Cir. 2024) (coverage for false light claim); *Aroa Mktg., Inc. v. Hartford Ins. Co. of Midwest*, 198 Cal. App. 4th 781, 787 (2011) (noting that a misappropriation of likeness claim falls within the coverage grant but is otherwise excluded by an intellectual property exclusion).
12. *EL Grp., LLC v. Utica Nat’l Ins. Grp.*, 2022 Mass. App. Unpub. LEXIS 12, 2022 WL 53118, *2 (Mass. App. Ct. 2022) (quotations and citations omitted).
13. *Barnett v. Fireman’s Fund Ins. Co.*, 90 Cal. App. 4th 500, 509 (2001).
14. *See Sony Computer Ent. Am. Inc. v. Am. Home Assur. Co.*, 532 F.3d 1007, 1014 (9th Cir. 2008) (noting

- that media liability insurance respond to “types of claims normally faced by media publishers, such as defamation, copyright infringement, and so on”).
15. 638 So. 2d at 1134. *See also Alltru Fed. Credit Union v. Starnet Ins. Co.*, 631 F. Supp. 3d 741, 745 (E.D. Mo. 2022) (a Management Liability Insurance Policy coverage language included claims of “defamation, libel, slander, disparagement or invasion of privacy;...”).
 16. CGL insurance will generally exclude breach of contract claims, but that is not the case with E&O insurance. *Cincinnati Ins. Co. v. Stonebridge Fin. Corp.*, 797 F. Supp. 2d 534, 539 (E.D. Pa. 2011) (“Breaches of contract are not, and cannot be, automatically excluded from coverage in all types of insurance policies simply because they are excluded in CGL policies...”). Consequently, the documentary *Leaving Neverland*, which was based on a breach of contract would likely have been barred from coverage under a CGL policy but may not have been excluded under an E&O policy.
 17. § 6:3. Material published with knowledge of falsity, Oh. Ins. Coverage § 6:3.
 18. *Cincinnati Ins. Co. v. Pro Enterprises, Inc.*, 394 F. Supp. 2d 1127, 1132 (D.S.D. 2005) (holding that action for defamation contained allegations that false statements were negligently made or made with reckless disregard, and thus, the insurer has “not carried its burden of showing that all of the claims . . . clearly fall outside of the coverage”); *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 445 (2002) (finding a duty to defend and knowledge of falsity exclusion inapplicable where liability for underlying defamation claim could be predicated on reckless disregard for the truth); *West Bend Mutual Ins. Co. v. Ixthus Medical Supply, Inc.*, 385 Wis. 2d 580, 605 (2019) (holding that the knowing violation exclusion did not preclude insurer from its duty to defend obligation where the “complaint alleges at least one potentially covered advertising-injury claim, which does not depend on whether [policyholder] acted with knowledge that it was violating [underlying plaintiff’s] rights or with knowledge that it was inflicting advertising injury”).
 19. *See, e.g., Health Net, Inc. v. RLI Ins. Co.*, 206 Cal. App. 4th 232, 247–48, (2012) (exclusion in E&O policy barred coverage for claims “arising out of or alleging any criminal, malicious, dishonest or fraudulent act, error or omission of any Insured”); *W. Bend Mut. Ins. Co.*, 385 Wis. 2d at 606 (exclusion in CGL policy precluded coverage for “personal and advertising injury’ arising out of a criminal act committed by or at the direction of the insured”).
 20. *W. Bend Mut. Ins. Co.*, 385 Wis. 2d at 606 (requiring insurer to offer defense where “[t]he complaint alleges claims that are not dependent on a showing of criminal conduct”). *Cf. Covington Specialty Ins. Co. v. Omega Rest. & Bar, LLC*, 666 F. Supp. 3d 528, 541 (E.D. Va. 2023) (holding that the duty to defend was not triggered for a criminal acts exclusion where no claim existed for which the policyholder could be held liable in the underlying action).
 21. *U.S. Bank Nat. Ass’n v. Indian Harbor Ins. Co.*, 68 F. Supp. 3d 1044, 1050 (D. Minn. 2014) (explaining that when an underlying action settles before trial, there is no final adjudication establishing the exclusionary conduct). ■

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