

New Jersey Law Journal

VOL. 214 - NO 4

MONDAY, OCTOBER 28, 2013

ESTABLISHED 1878

IN PRACTICE

ENTERTAINMENT LAW

Cashing In on Crime: Whose Right Is It To Profit?

By Ethan Bordman

There are always high-profile criminal cases in the news. O.J. Simpson, Casey Anthony, George Zimmerman and Jodi Arias have all captured the attention of the national media and the public. As these cases develop, we often learn that the accused has received offers from publishers, television networks and movie studios to tell his or her story for a large sum of money. Can these individuals keep the money, potentially profiting from the alleged crime? “Son of Sam” laws may lead one to believe the answer is “no.” But, in fact, it depends.

• *Can criminal activity result in a financial windfall?*

Between July 1976 and August 1977, David Berkowitz terrorized New York City, killing six people and injuring numerous others. Berkowitz called himself the “Son of Sam,” explaining that the black Labrador retriever owned by his neighbor, Sam Carr, told him to commit the killings. Once captured, Berkowitz received numerous offers to have his story published. In

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an effort to thwart criminals’ attempts to profit from their crimes, New York State passed the first “Son of Sam” law (N.Y. Exec. Law § 632-a), authorizing the state crime board to seize any money earned from entertainment deals to compensate the victims. But in 1991, the United States Supreme Court overturned the New York code in *Simon & Schuster v. Crime Victims Board* (502 U.S. 105), concluding that the content-based statute was a free-speech violation because it was “significantly overinclusive.” Moreover, the broad definition of “person convicted of a crime” would include anyone who admitted to committing a crime, regardless of whether there was an accusation or conviction. As a result, New York has since amended its law. Interestingly, the law named after him was never applied to David Berkowitz, who was deemed incompetent to stand trial. Berkowitz voluntarily paid his book royalties to the crime board.

New Jersey Stat. § 52:4B-62(b), the “Criminal Injuries Compensation Act,” defines “profits from a crime” as: (1) “any property obtained through or income generated from the commission of a crime of which the defendant was convicted;” (2) income generated from the sale of proceeds from the commission of a crime; or (3) assets obtained through the unique knowledge gained

during the commission or preparation of a crime. In New Jersey, representatives, spouses, children, parents and siblings of the convicted person may not be paid in return for telling their story of the convicted individual if the representative or relative currently are—or within the last three years have been—in prison or under probation.

• *Profiting from notoriety.*

When an individual is not compensated to recount his criminal act but rather uses the notoriety or popularity resulting from the accusation or conviction, he may be entitled to keep any money received. In 2010, former Illinois governor Rod Blagojevich was removed from office and later convicted of lying to federal authorities amid corruption charges alleging he plotted to sell the U.S. Senate seat vacated by Barack Obama. While awaiting trial, Blagojevich served as a paid spokesperson for Wonderful Pistachios in the “Get Crackin’” advertising campaign, a move designed to capitalize on his notoriety. Despite the “Elected Officials Misconduct Forfeiture Act” (Illinois HB 4078)—a “Son of Sam” bill for politicians designed to “recover all proceeds traceable to the elected official’s offense”—Blagojevich was allowed to keep the money because the ads were not “traceable” and made no mention of the criminal charges against him. Moreover, federal law 18 U.S.C.S. § 3681, “Special Forfeiture of Collateral Profits of Crime,” establishes that proceeds “relating to a depiction of such crime” can be forfeited upon a motion by the United States attorney

after conviction. Although he was later convicted, Blagojevich kept the money from these ads as enjoying pistachios was not considered a “depiction” of lying to federal authorities.

In another example of profiting from notoriety, 17-year-old Amy Fisher was accused in 1992 of the attempted murder of Mary Joe Buttafuoco, the wife of Fisher’s 36-year-old alleged boyfriend. Fisher received \$80,000 for a bail payment from a television production company in exchange for the rights to her story. This was permitted since she had not yet been convicted of a crime.

• *There is no monopoly on anyone’s life story.*

Purchasing the rights to someone’s life story *does not* give the purchaser an exclusive to write about that individual—something that is often misunderstood. The First Amendment permits anyone to write about newsworthy events or another person’s life story—with or without their permission—provided the information is truthful. This was recognized in *Rosemont Enterprises v. Random House* (58 Misc.2d 1, N.Y. Sup. Ct. 1968), in which Howard Hughes, upon learning that Random House was going to write his unauthorized biography, wrote the biography himself and copyrighted his book to prevent Random House from releasing its book. Hughes then sued for copyright infringement and violation of his right of privacy under New York’s Civil Rights Laws. The court concluded that “a public figure (has) no right to suppress truthful accounts of his life,” and “a public figure can have no exclusive rights to his own life story, and others need no consent or permission of the subject to write the biography of a celebrity.”

Additionally, the First Amendment prevents the individual being profiled from receiving any compensation unless contracted to tell their story. In 1993, ABC, NBC and CBS each broadcast its own version of Amy Fisher’s story, marking the first time any topic was made into a movie by all three networks. NBC produced Fisher’s version and CBS produced the Buttafuocos’ side of the story. Interestingly, ABC’s “unofficial” version, which incorporated mul-

iple viewpoints, received the highest ratings of the three versions — 18.2 million households. As no contract existed between ABC and Fisher or the Buttafuocos, the network was not required to share its profits with either party.

• *Paying for the rights pays off.*

Though it is not necessary in order to write the story, purchasing the rights to tell someone’s life story has several advantages. The contract between the author and the individual being profiled will state that the individual agrees to speak exclusively with the author, which establishes the work as the “official” or “authorized” story. The profiled individual also agrees to contact friends, family, former classmates and co-workers to encourage them to speak with the author. The First Amendment gives people the right to speak or not to speak; no one is obligated to cooperate with any author, even if the story is deemed “newsworthy.” Most importantly, the exclusivity encourages “full and open disclosure” in which the profiled individual agrees to share information that may not be known to the public—yet.

• *Following the law can yield profits.*

Following the letter of the law can also result in avoiding “Son of Sam” laws. In 2010, Colton Harris-Moore—named “America’s Most Wanted Teenage Bandit” by *Time*—was captured and accused of committing more than 70 crimes, including theft of airplanes, luxury vehicles and pleasure boats, totaling more than \$3 million. Washington’s “Payment of re-enactment of crimes” law (Wash. Rev. Code § 7.68.200) defines a victim as “a person who suffers bodily injury or death as a proximate result of a criminal act;” because Harris-Moore never physically hurt anyone during his burglaries, he was permitted to keep the money he earned from retelling his story.

In cases where the law allows a convicted person to keep the money, prosecutors typically offer a plea bargain to a lesser charge or recommend less jail time in exchange for turning over the money to compensate victims and their families. As part of a plea deal, Colton Harris-Moore gave up the rights to the proceeds from entertainment deals on

his story.

One New York case, which involved following “Son of Sam” laws to the letter, had an unexpected twist. In January 2011, 24-year-old Brandon Palladino was charged with the 2008 killing of his mother-in-law Dianne Edwards. A year after the killing, Palladino’s wife Deanna, the victim’s only child—and the sole beneficiary of her mother’s entire estate—died of an alleged drug overdose. Because Palladino and Deanna had no children, he stands to inherit the entirety of Edwards’ estate, through his wife, after he is released from prison. “Son of Sam” laws do not apply here, because Palladino’s inheritance will not come directly from his victim or the “commission of the crime,” but rather from his wife—who had inherited it from the victim. Moreover, there were no allegations that Deanna had anything to do with her mother’s death. According to a news source, the Suffolk County District Attorney’s office asked Palladino, who pleaded guilty to manslaughter, to give up the inheritance as part of a plea bargain, but he refused. The value of the estate was estimated at \$241,000. Furthermore, the victim’s daughter had used an additional \$190,000, which was inherited from her mother’s savings account, to pay for her husband’s defense. Therefore, the victim, in effect, paid for her accused killer’s defense and left him a substantial inheritance.

• *Can media or literary rights serve as payment for legal services?*

Discussions of “Son of Sam” laws give rise to questions about whether attorneys may receive the client’s media or literary rights as payment for legal services. The American Bar Association (ABA) and New Jersey Rules of Professional Conduct, Rule 1.8(d) states: “Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.” The ABA *Comments* state: “[m]easures suitable in the representation of the client may detract from the publication value of the account of the representation.” One such detraction is that a lawyer may be tempted to subordinate

the client's best interests by pursuing a course of conduct that will enhance the value of the story to the client's detriment. One illustration, not provided in the *Comments*, is that the value of a client's story is most likely worth more if a verdict occurs—as opposed to reaching a quiet or confidential settlement—even though the latter might be in the client's best interest. Unlike other states, such as New York, the ABA and New Jersey rules do not address whether the attor-

ney can sell his or her story about the case to third parties before the conclusion of the representation. Though not explicitly stated in New Jersey's Rules, an attorney who sells his or her story to a publisher before the conclusion of representation could create a conflict of interest between attorney and client.

- *From local case to national sensation...overnight.*

A local criminal case can become a national story overnight. As clients

receive offers to tell their stories, attorneys familiar with criminal procedure and the rules of evidence suddenly find themselves faced with entertainment industry terms such as “work for hire,” “cross-collateralization” and “back-end points.” When this arises, it is best to contact an attorney who specializes in entertainment law to assist in this area of representation, allowing the criminal attorney to focus on the defense side of the case. ■