

Virginia State Court Dismisses Right-Of-Publicity Claim Involving Oscar and Emmy Nominated Documentary Film

By Cindy Gierhart and Christine Walz

A Virginia Circuit court [dismissed](#) a right of publicity claim against the makers of the short documentary film *Edith + Eddie*, finding the film depicts a matter of public interest and therefore falls under the newsworthiness exception to the Virginia right-of-publicity statute. *Barber v. Kartemquin Films Ltd.*, Case No. CL18001993 (Va. Cir. Ct. Aug. 8, 2018).

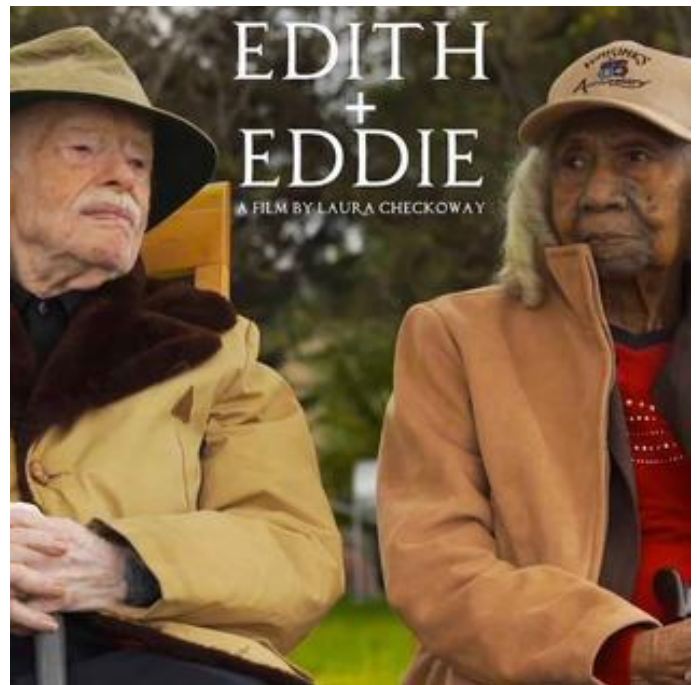
The film *Edith + Eddie* is a short documentary film exploring the relationship between 95 and 96-year-old newlyweds struggling to keep their autonomy while a court-appointed guardian and daughter direct the choices in their lives. At a pivotal point in the film, Edith Hill's daughter arrives to take her mother to Florida, separating Edith and Eddie against their wishes. The Film explores the degradation of rights that occurs as people age and exposes the reach of a legal guardian's powers and influence over those in their care.

The film was nominated for an Academy Award for Best Documentary-Short Subject, as well as a 2018 News & Documentary Emmy for Outstanding Short Documentary.

Following her mother's death, the daughter sued the filmmakers for use of her and her mother's names and likenesses without their written consent. The suit alleged violations of Virginia's right-of-publicity statute against Kartemquin Educational Films, the film's director, and her production company. The entertainer Cher, an executive producer of the film, was also named as a co-defendant.

Virginia does not recognize a common law right of privacy and permits only a limited cause of action for the use of one's name or likeness without permission "for the purposes of trade or advertising," pursuant to Virginia Code § 8.01-40. Virginia courts have held that reports of newsworthy events or matters of public interest are exempt from the statute as they do not constitute uses "for the purposes of trade or advertising."

Virginia's statute is modeled after New York's right-of-privacy statute, and the two jurisdictions have broadly applied the newsworthiness exception. While New York courts have



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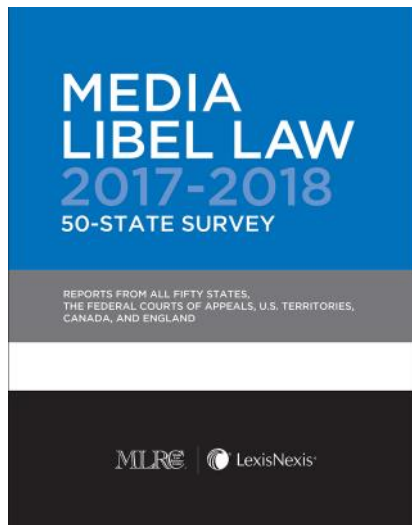
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previously applied the newsworthiness exception to films such as *Super Size Me* and *Borat* to dismiss claims by individuals appearing in those films, this is the first time a Virginia court has held that a documentary film falls under the statute's newsworthiness exception.

Plaintiffs argued that there should be a balancing test that favors Plaintiffs' right of privacy because of the extensive use of their names and likenesses in the film. However, as Defendants argued, the scope of use has no bearing on the actionability of the claim. Plaintiffs further argued that the film was "fictionalized" because, they allege, it dramatized events and left out important details. Defendants successfully argued that choosing what content to include in a film and the manner in which it is depicted is an editorial decision and cannot be equated to fictionalization.

Alexandria Circuit Court Judge James Clark issued a letter opinion on August 8, 2018, finding that *Edith + Eddie* "has a substantial newsworthiness component, in addition to relatively wide commercial distribution." Given this, the Court found that the "public's right to information and the protections afforded by the 1st Amendment prevail" over the individual right to privacy protected by the Virginia statute. As a result, the Court dismissed the case as to all defendants.

Christine Walz, Cindy Gierhart, and Kevin D'Olivo of Holland & Knight LLP represented Defendants Kartemquin Educational Films, the film's director, and the director's production company. Benjamin Chew of Brown Rudnick LLP represented Cher. Plaintiffs were represented by Dirk McClanahan of McClanahan Powers, PLLC.



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