SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

THE FIRST AMENDMENT & THE ARTS PROJECT
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9601 Wilshire Boulevard, Suite 500
Beverly Hills, California 90210

Re: "James Franco and Me" September 27, 2017

Messrs. Collier, Dern and Sauer:

We are aware of your letter of July 7, 2017 (the "Demand Letter") concerning Kevin Broccoli's stage-play *James Franco and Me*. We are also in disbelief.

Like you, we are lawyers. We run a First Amendment program at a law school. Assisted by our talented students, who are not yet lawyers, we take cases to protect the public's constitutionally-protected interests in artistic expression and creative freedom.

Also like you, we are interested in Mr. Broccoli's play. But we wish to see it performed. Though we cannot believe that Mr. Franco specifically instructed you to threaten an author for exercising the very right that protects his own *oeuvre*, we know the threat you issued in his name achieved its goal: censoring the scheduled production of Mr. Broccoli's play at the Peoples Improv Theater in Manhattan. As you may be aware, this compromises not only Mr. Broccoli's First Amendment freedoms, which we understand he still seeks to exercise, but also our constitutionally protected rights, as theater-going members of the public, to receive lawful speech, including plays and other entertaining works of fiction.[1]

We are not, however, dramatists, as you will see when you compare the scripts appended hereto. One is Mr. Broccoli's, *James Franco and Me*. It is a good play, and we understand that Mr. Broccoli attempted to provide a copy to your client because he thought Mr. Franco would appreciate its imaginative homage to his filmography and thoughtful portrayals of other artists. It also happens to be fully and obviously insulated by the First Amendment (as is any advertisement for its production) against the claims you threatened.

The other, *Sloane, Offer, Weber and Dern, LLP and Us*, is a parody of our own creation, composed in the spirits of Flann O'Brien and Douglas Hofstadter. It is a not a good play, and may prove nothing more than Baudelaire's adage that lawyering makes debris of poets. But in light of your humorless overreaction to Mr. Broccoli's play, we hope it may prove another playwright's words wise, catch your conscience, and draw your prompt attention to an amicable resolution. Here, as in *Hamlet*, the play's the thing.

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[1] The First Amendment "embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (citations omitted). The "right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. Of Ed. v. Pica*, 457 U.S. 853, 867 (1982) (Brennan, J., plurality opinion) (emphasis in original).

Make no mistake: we are quite serious.[2] However well-intentioned, your bluster denied a playwright the audience he richly deserves, his audiences an expressive work they have a right to receive, and (perhaps) your client a good laugh. If we do not receive your assurance that further interference with Mr. Broccoli's rights will cease, we will be constrained to pursue all remedies available to us at law without further notice.

Mr. Broccoli had every right to feature a fictional version of James Franco in his play. The First Amendment squarely precludes your claim under controlling authority in both New York and California, lest "works inspired by actual events and people would be off limits to the fictional author." *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460-62 (Cal. 1979) ("[I]t is difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation, for the use made of (an individual's identity in a work of fiction)."); *Sarver v. Chartier*, 813 F.3d 891, 905-906 & n. 9 (9th Cir. 2016) (The First Amendment "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."). These protections include advertisements for the play. *Polydoros v. Twentieth Century Fox*, 67 Cal. App. 4th 318, 324-25 (2d. Dist. 1997) ("Because respondents were creating a fictionalized artistic work, their endeavor is constitutionally protected. This right was not diminished when respondents advertised then sold their work as mass public entertainment."); *see also Guglielmi*, 603 P.2d at 872-73 (same); *Montana v. San Jose Mercury Sun News*, 34 Cal. App. 4th 790, 797 (6th Dist. 1995) (same).[3]

We are prepared to file an original action in the Southern District of New York to declare the fully protected status of Mr. Broccoli's play, the unconstitutionality of applying any right-of-publicity statute to it, and our right to see it performed.[4] Should litigation become necessary to protect our rights, we will assert all cognizable claims, and seek to recover all available damages and fees.[5]

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[2] If you find any content in this settlement offer and its Exhibits objectionable, please be advised that courts consider not only the selfsame First Amendment rights that protect Mr. Broccoli's play, but also the full content and context of this privileged pre-litigation communication. *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 167 (2d Dist. 1999). Notwithstanding its unconventional format, which we use to highlight and reinforce the legal rights at issue, we hope you will engage the authorities we provide. If you believe any cited or omitted herein merit further discussion, we are available for an encore at any mutually convenient time.

[3] New York, where Mr. Broccoli's play was to run, is even more vigilant. *See* Exhibit A, *infra*.

[4] Audiences, as "potential recipients of speech," may enforce their right to receive speech, *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988), and have standing to assert "rights that may belong to a broad portion of the public at large," *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994), particularly where speakers may, for whatever reason, fear reprisal. *FOCUS v. Allegheny County Court*, 75 F.3d 834, 839 (3d Cir. 1996). Declaratory relief is appropriate where there is a reasonable danger that a constitutional right will be impaired "as a result of the statute's operation or enforcement." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)).

[5] *See, e.g.*, CAL. CIV. CODE § 3344(a); CAL. CODE CIV. P. § 425.16(c)(1); *see also Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25-26 (2d Cir. 1998) (damages available in declaratory judgment action); *Klinger v. Conan Doyle Estate*, 761 F.3d 789 (7th Cir. 2014) (fee-shifting available in declaratory judgment action).

Nonetheless, we believe our dispute can and should be amicably resolved. As a sign of good faith, and our high respect for Mr. Franco,[6] we are authorized to convey the following offer of settlement.

We will fully release any claims relating to your client James Franco if he will instruct you to publicly retract the claims asserted in the Demand Letter, and inform us whether he is willing to:

1. Perform the role of "Franco's Ghost" at the Cleveland premiere of *Sloane, Offer, Weber and Dern, LLP and Us*;[7]
2. Tweet "Clever. Very meta. See it." or a substantially similar announcement before the next public performance of *James Franco and Me*; or
3. Read Mr. Broccoli's script and provide him with honest criticism.

We ask that you convey this settlement offer directly and in full to your client.[8] Please provide your client's response no later than October 6, 2017, that we may make appropriate arrangements, if necessary, for the production of our premiere.

Yours very truly,

Patrick Kabat
Andrew Geronimo
THE FIRST AMENDMENT & THE ARTS PROJECT
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW[9]

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[6] *See* Patrick Kabat, *The Lies of Poets*, (Media Law Resource Center, Aug. 2014), Exhibit D hereto, *available at* http://www.lskslaw.com/documents/Kabat%20-%20MLRC%208.14%20article%20(00759609).PDF.

[7] The play will premiere at *The Spotted Owl* in Cleveland on October 13, 2017 at 9:00 PM. We will accept service of any process during Act III, sequester box office profits, and furnish you with copies of all advertisements therefor.

[8] *See* CAL. R. PROF. COND. R. 3-500 & 510(A)(2).

[9] Messrs. Kabat and Geronimo gratefully acknowledge the superb research assistance provided by CWRU law students Shannon Meyer, Lidia C. Mowad, Michael Hattery, and Thomas Lindeman, members of the First Amendment and the Arts Project.

EXHIBIT A

SLOANE, OFFER, WEBER AND DERN, LLP AND US

A FARCE

-by-

Patrick Kabat, Esq.
Andrew Geronimo, Esq.
-&-
Shannon Meyer, Lidia C. Mowad, Michael Hattery, & Thomas Lindeman
THE FIRST AMENDMENT AND THE ARTS PROJECT
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

* * *

A person is seeking an enormous sum of money for claims that the New York State courts have rejected for decades. This could be the plot for an episode in a situation comedy.

-New York Supreme Court, New York County (Tomkins, J.)[7]

* * *

DRAMATIS PERSONAE

James Franco.....(not portrayed)

Franco's Ghost.....(himself, a hologram)

Thomas B. Collier, of Sloane, Offer, Weber & Dern, LLP.....(Patrick Kabat)

Warren Dern, of Sloane, Offer, Weber & Dern, LLP.....(Andrew Geronimo)

Jonathan Sauer, of Sloane, Offer, Weber & Dern, LLP.....(Kevin Broccoli)

Chorus.....(members of THE FIRST AMENDMENT AND THE ARTS PROJECT)

SETTING: The conference room of a Beverly Hills law firm. Well-appointed, but only two chairs.

AT RISE: **COLLIER** and **DERN** sit at table. **COLLIER** is dour. **SAUER**, standing, bothers a yo-yo. A spotlight highlights a conference phone on the table; the only source of light onstage. A large **DISCLAIMER** is prominently projected across the backstage wall:

> "The following production is a work of **FICTION**. The events depicted on this stage **NEVER HAPPENED**. The characters depicted **DO NOT EXIST**. In the following Acts, we explore the fevered IMAGINATION of a law professor and his students, for whom these characters are avatars in a metafictional fugue; bugaboo caricatures enlisted to represent concepts in the war between authorship and censorship."

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[7] *Costanza v. Seinfeld*, 693 N.Y.S.2d 897, 898 (N.Y. Sup. Ct. 1999).

ACT 1

Mr. Broccoli Writes A Play

COLLIER: Can you believe this s#*t? I just got a Google alert – some play in New York mentions James Franco's name in its title.

DERN: What's it about?

COLLIER (*sarcastic*): Dunno. Franco?

FRANCO'S GHOST (*materializing*): Hey guys!

COLLIER is oblivious. DERN is startled. SAUER is nonplussed, and continues playing with his yo-yo.

DERN: Did you hear that?

COLLIER: No. What?

DERN: Never mind. Wait – what's this?

A sheaf of papers drift from the eaves. Highlighted by the spotlight beam, they settle on the table.

SAUER (*breaking fourth wall*): A clumsy plot device.

COLLIER (*grabbing papers*): Wait—looks like . . . Yep, it's the script. *James Franco and Me*. By Kevin Broccoli.

COLLIER scrutinizes the script. DERN taps his foot impatiently.

DERN (*looking up, breaking fifth wall*): A little help?

A second sheaf of papers drifts from above. DERN plucks it from the air and peruses it. FRANCO'S GHOST walks behind DERN, peering over his shoulder, and the three begin to read. COLLIER grows increasingly grim with each page; DERN stifles chuckles and casts an occasional guilty look at COLLIER. SAUER continues with his yo-yo.

DERN: This seems OK to me. It's just like that Ginger Rogers case. The use is fully protected by the First Amendment.

A second spotlight illuminates the CHORUS, standing at the base of the stage.

CHORUS (*singing*): The right of publicity doesn't "bar the use of a celebrity's name in a title so long as the item [is] a literary work and not 'simply a disguised commercial advertisement for the sale of goods or services.'"[8]

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[8] *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

DERN: We couldn't even make out the elements of a claim. New York, like other states, drafted its right-of-publicity statute to avoid offending the First Amendment, and limits the right of publicity to uses "in trade or advertising."[9] As plenty of courts have squarely ruled, plays and other works of fiction just *aren't.*

CHORUS: "[W]orks of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'."[10]

DERN: This play is obviously a fictional satire. It opens with a disclaimer: the "role of James Franco will not be played by James Franco. I know—it's disappointing." The script says the play is a fictional work where Broccoli sits in a hospital waiting room with James Franco, waiting for his father to die.

To FRANCO'S GHOST: Kind of touching, actually. The big reveal is at the end, where he realizes he is imagining you, drawing comfort from what he thinks you'd say, and working through his feelings by imagining how he'd discuss your films with you.

CHORUS (*disapproving*): Spoilers!!!

FRANCO'S GHOST: Yeah, man. Not cool.

DERN (*to FRANCO'S GHOST*): Sorry. But he gets wise to his subconscious, and explores how he feels about you, sublimates the emotional issues on tap while he argues with himself about whether his imaginary version of you gets it right. Talking about your movies is equal parts catharsis and avoidance, and the effect is like pop Godot – you sit with him waiting for The End, and discuss life. Kinda sounds like something you'd do, actually, which is probably why you're artistically relevant.

FRANCO'S GHOST: I would! Like my first short—the boy who confronts his mortality when his goldfish dies.[11] Did he like it?

DERN: Well, dunno. He's ambivalent, and a little judgy as he works through how he feels about the real you. Check out page 6.

FRANCO'S GHOST: Can't. Ghost.

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[9] N.Y. Civ. Rights Law §§ 50 & 51.

[10] *Hampton v. Guare*, 195 A.D. 2d 366, 367 (1st Dept. 1993) (actor had no claim against author of play "Six Degrees of Separation"); *see also Costanza*, 693 N.Y.S.2d at 900 (Sup. Ct. 1999) ("The Seinfeld television program was a fictional comedic presentation. It does not fall within the scope of trade or advertising.").

[11] *See* Staff, *Playboy Interview: James Franco* (PLAYBOY MAGAZINE, July 11, 2011), http://www.playboy.com/articles/james-franco-interview. Read it for the interview.

DERN: Sorry. Here it is (*reading*): "He's not really this dumb. It's just that, in my head, he sounds this dumb. Or maybe I want him to be this dumb." And again: "He's not this bombastic and he doesn't swear this much. I mean, he swears a little, but not this much. I can't seem to portray him the way he really is. It's tricky. It's tricky to get a handle on all this."

He really *worries* about how he feels about you. And that's the whole point. We use movie stars as avatars to work through our *own* experiences, and this isn't about Franco, it's about *him*. So he gets self-critical: "I'm making him stupid again. I apologize." And again: "Now I'm making him childish. Petulant. Way too defensive."

GHOST FRANCO (*petulant*): I'm not defensive.

DERN: Whatever. Not the point. Not *everything* is about you. Broccoli makes the abstraction explicit and invites the audience to join him in *his* imagination, telling the audience: "In no way is the James Franco you see in this play meant to resemble the real James Franco, but every time you look at the actor playing James Franco, we want you to think of him." It's celebrity-as-vessel, and you're an expressive conceit; a concept.

FRANCO'S GHOST (*delighted*): Yeah, I am! (*pause...*) Wait. Conceit? Am not.

DERN: No. I mean a storytelling device; a trope.

FRANCO'S GHOST (*comprehending*): Ohhhhh. Like Tinkerbell?

DERN: Ugh. No. Well—actually, kinda like Tinkerbell.

COLLIER: Who are you talking to?

DERN (*rolls eyes*): The client.

FRANCO'S GHOST waves. COLLIER can't see him. SAUER claps, shrugs, then attends to his yo-yo.

COLLIER: Weirdo.

DERN (*to COLLIER*): Philistine. Anyways, the audience isn't supposed to believe the Franco character is real. He's clearly fictional—an imagined projection from Broccoli's subconscious. And there's no suggestion anywhere that Franco endorsed the play. *Rogers* and the First Amendment don't even need to come into play. Under settled law in New York, where the play was set to run, the claim just won't fly. Just like the Notre Dame case, it's obviously fiction.

CHORUS: "The only critique we are permitted to make is a threshold one shaped by a consistent line of cases. It is this: Is there any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction or that the real [James Franco] is in some way associated with its fabrication or presentation? In our judgment there is none whatever. They know they are not seeing or reading about" him, "and there is nothing the text" or performance from which they could reasonably infer 'connection or benefit'" to him. "'Nobody is deceived. Nobody is confused,' and plainly nobody was intended to be."[12]

COLLIER: So? Screw New York. California courts use a different test, and it's a mess. There must be room in there somewhere for a threat. Gotta keep the lights on...

*Lights flicker. Confused, **SAUER** tries clapping again, shrugs, and returns to his yo-yo.*

DERN: Well, probably not, even if we could do this in California. The First Amendment applies to all fifty states, and the tests that courts use are *themselves* subject to the First Amendment. That's what the Ninth Circuit said in the *Hurt Locker* case. It doubted that California's "transformative use" test would let the claim proceed, but said that it didn't really matter one way or the other, because however that test might be applied, it couldn't *constitutionally* be applied to stop *Hurt Locker* from fictionalizing its lead.[13]

But the test, if correctly applied here, would reach the same result the *Rogers* test would require. In fact, the Second Circuit drew heavily from California law in fashioning that test, relying on a landmark decision from the California Supreme Court holding that fictional uses of persona are fully protected against right-of-publicity claims by the First Amendment.

CHORUS: "[T]hree courts, citing their concern for free expression, have refused to extend the right of publicity to bar the use of a celebrity's name in the title and text of a fictional or semi-fictional book or movie."[14]

DERN: One of those three was the California Supreme Court. The case, *Guglielmi*, was also brought on behalf of an actor, Rudolph Valentino, against a movie that fictionalized a version of his life.

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[12] *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 455 (1st Dep't 1965).

[13] *Sarver v. Chartier*, 813 F.3d 891, 905-906 (9th Cir. 2016)

[14] *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

The California Supreme Court affirmed dismissal, and the ensuing opinion makes it crystal clear that fictionalizing celebrities is OK, even if the work sells tickets and makes profits from its public display. Chief Justice Bird's opinion is so thoughtful and well-written that courts around the country look to it on this very point.

CHORUS: "Fiction writers may be able to more persuasively, more accurately express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality.

The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.

Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction."[15]

FRANCO'S GHOST: Preach, sister.

COLLIER: That case is from the '70s. Screw it. Times change.

SAUER (*without looking up*): The First Amendment doesn't.

DERN: Yeah, it's still good law. *Guglielmi*'s protections were explicitly incorporated into the "transformative use" test the California Supreme Court articulated in the Three Stooges case. Citing *Guglielmi*, the Court specifically identified "fictionalized portrayal" as a transformative use "that require[s] First Amendment protection."[16] That was in 2001.

CHORUS: "[T]he very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity's meaning."[17]

DERN: Right. And that's exactly what Broccoli did.

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[15] *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring).

[16] *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

[17] *Id.*, 21 P.3d at 803.

Continuing, in a pretentious tone.

The play is an expressive work that uses the main character's delusional interaction with an imagined James Franco to lend pathos and insight to its portrait of a cinephile dealing with death.

Less obnoxiously.

Sure, it's irreverent, but it needs to be to comment on the meaning of celebrity in an age where we mediate our own dilemmas through our opinions about public figures, whether reality or film stars. It's clearly transformative.

COLLIER (*frustrated*):

OK, *fine*. But it's not all about the play. There was advertising. Those ads—*they're* not plays. They're commercial speech, which receives less rigorous constitutional protection, right? States' publicity laws can skate right through your little constitutional thicket if they just punish ads.[18]

DERN:

Nope, not quite. There's an exception. Full constitutional protections are carried through to protect advertisements, because you need to invite folks to see the play if it's going to do the things the Constitution values it for.

CHORUS:

"Because respondents were creating a fictionalized artistic work, their endeavor is constitutionally protected. This right was not diminished when respondents advertised then sold their work as mass public entertainment."[19] "It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise."[20]

DERN:

Yeah. And none of the ads claimed that Franco endorsed or was affiliated with the show. They're fully protected too.[21]

COLLIER:

Stop it. This First Amendment stuff seems pretty academic, and you're overthinking this. It's not that complicated. Broccoli used Franco's name and likeness, and the theater advertised it to make money. I'll shoot off a form C&D and we can get outta here.

Curtains.

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[18] Patrick Kabat, *The Right of Publicity: Through the Thicket?* (Yale Law School Information Society Project, May 31, 2016), https://law.yale.edu/system/files/area/center/isp/documents/yls_right_of_publicity_workshop_report_final.pdf.

[19] *Polydoros v. Twentieth Century Fox*, 67 Cal. App. 4th 318, 326 (2d. Dist. 1997).

[20] *Guglielmi*, 603 P.2d at 454.

[21] *Polydoros*, 67 Cal. App. 4th at 325 ("advertising to promote a story is protected by the First Amendment and is not actionable under an appropriation of publicity theory so long as the advertising does not claim that the story subject endorses [it]."); *see also Groden v. Random House, Inc.*, 61 F.3d 1045, 1049 (2d Cir. 1995) ("New York courts have recognized an exception to section 51 for the 'incidental' use in ads or other promotional items of material that 'prove[s] [the] worth and illustrates [the] content' of the works being advertised.").

ACT 2

Et tu, James Franco?

COLLIER (*from offstage, in office*): Hey, Siskel. Do you think we can get him for defamation?

FRANCO'S GHOST (*thundering*): Oh no he DIDN'T! (*sotto voce*) Did he?

DERN (*to FRANCO'S GHOST*): Nope. Fiction doesn't state facts.[22] And it's all opinion; at most a critical evaluation of your celebrity persona and your films. You actually come off pretty well: he thinks you're "one of the most spontaneous and unique performers of [your] generation."

FRANCO'S GHOST (*nodding*): Yup.

DERN: But seriously. Remember *127 Hours*? He could have riffed on your disastrous Oscar-hosting performance, but just talks about how you felt about being nominated for best actor. You said the same thing to *Vanity Fair*.[23] He appreciates your attitude towards genre hierarchies among theater and the soaps – just like you told *Playboy* and *The New York Times*.[24] And he gets it right.

FRANCO'S GHOST: Hold up. This guy didn't steal my lines, did he?

DERN: Nope. He discusses your work and paraphrases some interviews, but it's all non-infringing and clearly fair use – he's using them to comment on the nature of your celebrity and persona, and to advance the narrative. Even the staging supports his commentary. He does that whole *auteur* thing you do, very minimalist, about the craft. Just two chairs as props. It's quite literally a *scène à faire*.[25]

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[22] *Polydoros*, 67 Cal. App. 4 at 326 ("There is no law providing relief for defamation by a fictional work which does not portray the plaintiff at all."); *Rogers*, 875 F.2d at 1005 ("The film is manifestly not about Rogers. It is about a pair of fictional characters who are like Rogers and Astaire only in their imagination and in the sentimental eyes of their fictional audience.").

[23] Staff, *Danny Boyle, James Franco, and Aron Ralston Discuss 127 Hours* (VANITY FAIR, Oct. 20, 2010), https://www.vanityfair.com/hollywood/2010/10/danny-boyle-james-franco-and-aron-ralston-discuss-127-hours.

[24] *See* Playboy Interview (discussing Franco's time on General Hospital and how he once felt that soap operas were a "lower form of entertainment"); *see also* Sarah Lyall, *Broadway Bromance* (THE NEW YORK TIMES, Mar. 19, 2014), https://www.nytimes.com/2014/03/23/theater/james-franco-and-chris-odowd-on-their-rapport-in-of-mice-and-men.html.

[25] *See Novak v. Nat'l Broad. Co.*, 716 F. Supp. 745, 754 (S.D.N.Y.), *on reargument*, 724 F. Supp. 141 (S.D.N.Y. 1989) (finding no infringement by Saturday Night Live spoof of television program that used ideas and *scènes à faire*, which "are not copyrightable as a matter of law '[b]ecause it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices.'") (citing *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980)).

CHORUS: "[F]actual information is in the public domain," and "random duplications of phrases" are not infringement. An author has the right to "use such information, whether correct or incorrect, in his own literary work." "[W]e refuse[] to 'subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . . It is just such wasted effort that the proscription against the copyright of ideas and facts . . . . are designed to prevent.'"[26]

FRANCO'S GHOST (*mollified*): Hmm. All right. He doesn't make me ugly, though, does he?

DERN: Who knows. Maybe. You could be played by anyone—man or woman—and the script instructs the actor playing you *not* to try and evoke you visually. "Don't feel like you have to look like James Franco would—in fact, nobody should feel that they have to look the way James Franco would—I'm not sure what that look would be anyway." Point is, it's not *you.* We're experiencing how Broccoli *imagines* you, and his examination about what that says about *him.*

COLLIER (*still offstage, impatient*): OK, nerd. This isn't lit-crit. We have a client who expects us to protect his commercial interests and police unauthorized uses of his likeness. You can write theater reviews on your own time. When you're in the office, you better be vigorously asserting Mr. Franco's rights.

DERN (*shouting back*): But that's exactly it! Our client *needs* you to be wrong about this.

FRANCO'S GHOST (*confused*): Huh?

DERN (*to FRANCO'S GHOST*): This is exactly what you do! And you need the First Amendment to fend off the estates of all those actors, poets, artists, and public figures you like to make movies about.

FRANCO: It's true. I do *love* that s#*t. Did I tell you I went to Yale?

SAUER (*halts yo-yo, rolls eyes*): You tell *everybody* you went to Yale.

DERN (*to FRANCO'S GHOST*): You really do. But you also rely heavily on these rights for your roles, your films, and even random s#*t you do on the internet.

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[26] *Hoehling*, 618 F.2d at 979; *see also Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) (*de minimus* use of quotations from unpublished journal entries was either "beyond the protection of the Copyright Act" or fair use, being "modest" and serving "to illustrate factual points."); *Arrow Productions v. Weinstein Co.*, 44 F. Supp. 3d 359, (S.D.N.Y. 2014) (no infringement of pornographic film Deep Throat by biopic that recreated scenes: "Lovelace has an entirely different purpose—it is a critical, biographical film.").

I mean, come on. Remember that short story you sent to Vice? Didn't you do exactly the same thing to Lindsay Lohan? Like, *exactly*?[27]

Turning to ***COLLIER****, frustrated.*

S#*t, man. Franco did *Howl*. He *was* Ginsburg. He set out to "reproduce a sense of what Ginsburg's poem might have sounded and felt like at the moment of its creation."[28] You really think he wants us to f*@k with this guy? I don't even know if he had to license *Howl*, but he sure as hell didn't have to license Ginsburg's likeness. (We didn't make him, did we?)

And what about *The Color of Time*? He was C.K. Williams. That was just like this: its "non-linear plot is one of many ways that the film's creators try to give viewers the sense that the fictionalized experiences they're seeing are authentic reflections of Williams's subjective memory."[29] And *The Broken Tower*? He was Hart Crane. At this rate, he's gonna run out of poets.

SAUER (*musing*):

Still hasn't done Yeats, though. He should really do Yeats.

DERN (*to* ***COLLIER****, shouting*):

This is what James Franco *does*. Remember that NPR interview about Howl? He tried to *become* Ginsburg. And where he didn't have the facts, he obsessed over the fidelity of his fictional portrayals, JUST LIKE BROCCOLI.

GHOST FRANCO (*strikes a pose*):

"And there is an alternation between great exuberance and this kind of sympathetic tone, depending on what section [of "Howl"] he's reading. So I tried to find out how he'd be responding to each section and deliver it accordingly."

"So there's this lost interview and no transcripts exist but [the filmmakers] decided they were going to use that idea for this interview. But the way that they created this interview was they compiled bits from interviews that Ginsberg had given his entire life. So everything that I say in that interview, everything that I say in the courtroom, is based on things people actually said."[30]

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[27] James Franco, *Bungalow 89* (VICE, June 10, 2014), https://www.vice.com/en_us/article/ppm379/bungalow-89-0000347-v21n6; *see also* Ben Beaumont-Thomas, *James Franco pens short story with central character Lindsay Lohan* (THE GUARDIAN, June 10, 2014), https://www.theguardian.com/books/2014/jun/10/james-franco-short-story-lindsay-lohan-bungalow-89.

[28] A.O. Scott, *Leaping Off the Page, a Beatnik's Poetic Rant* (THE NEW YORK TIMES, Sept. 23, 2010), http://www.nytimes.com/2010/09/24/movies/24howl.html?mcubz=3.

[29] Simon Abrams, *The Color of Time* (ROGEREBERT.COM, Dec. 12, 2014), http://www.rogerebert.com/reviews/the-color-of-time-2014.

[30] Staff, *James Franco, Modern-Day Renaissance Man* (FRESH AIR, Oct. 5, 2010), http://www.npr.org/2010/10/05/130325310/james-franco-modern-day-renaissance-man

DERN (*still shouting*): THIS IS WHAT HE DOES. He did a parody of Justin f@*king Bieber. Bieber! And he took heat from the Beliebers, but didn't back down. Oh *heeeeeeellll* no. Know what he said about it? And keep this in mind while you're over there f*#king with Broccoli—

FRANCO'S GHOST (*interjecting*): "To me that wasn't a criticism of Bieber as such, it was just having fun and reflecting a bit of pop culture. The thing is, when I do something like that, the response is very positive, people say 'He did Bieber, that's genius', but if I do something that has the slightest bit of pretension or inclination towards something deeper, people just go crazy. It drives them cr-aaaaaaaa-zy that an actor would dare write a poem or a book or make a piece of art."[31]

DERN (*still to COLLIER, but calmer*): And he tells everyone to do the same damn thing. He told a boatload of Cornell grads to push boundaries.

FRANCO'S GHOST: "Because I've pursued what interests me and what excites me, my life is mine to control. And that's my little bit of wisdom to you. Don't be afraid to be beginners."[32]

DERN: Do you really think he really wants us to shut this guy down? Especially now, with all the buzz about *The Disaster Artist*? I'll bet you one *billion* dollars he's going to tell everyone at South By about it.

Reading an open copy of the July 18 Los Angeles Times, ***FRANCO'S GHOST*** *walks to center stage.*

FRANCO'S GHOST: At SXSW, Franco told the crowd -- who gave him multiple standing ovations -- that he related to Wiseau in "ways that I don't want to admit."

"What we talked about more than anything else while we were putting the movie together was, 'Why do we love this movie?'" added Seth Rogen, who co-stars in the movie and produced it. "Not, 'Why do we make fun of this movie?' Or, 'Why do we laugh at this movie?' But, 'What is great about that movie?' And at the end of the day, it was the earnestness of a guy who put himself out there."

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[31] Helena de Bertodano, *James Franco interview for Oz the Great and Powerful: 'I'm not afraid of embarrassment,'* (THE TELEGRAPH, March 7, 2013), http://www.telegraph.co.uk/culture/9897502/James-Franco-interview-for-Oz-the-Great-and-Powerful-Im-not-afraid-of-embarrassment.html.

[32] Joe Wilensky, *Pursue passions, be generous, Franco tells senior class* (CORNELL CHRONICLE, May 28, 2016), http://news.cornell.edu/stories/2016/05/pursue-passions-be-generous-franco-tells-senior-class.

As for Franco, the actor said he devoted serious time to perfecting Wiseau's affect, even continuing to speak in the filmmaker's voice while directing "The Disaster Artist."[33]

DERN: No *way* is Franco some bully who gets applause for doing Wiseau, but can't handle it when someone does him. He's a visionary, man. And he knows that in the arts, all ships rise.

COLLIER (*still offstage*): Whatever, fanboy. It's late and I've got a demand letter to get out.

DERN (*calling back*): I'm not gonna sign it. Copy me if you *must.*

Fade to black; curtains.

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[33] Amy Kaufman, *Is 'The Disaster Artist' James Franco's next shot at Oscar gold?* (L.A. TIMES, July 18, 2017), http://www.latimes.com/entertainment/la-et-entertainment-news-updates-july-1500393792-htmlstory.html.

ACT 3

The show must go on!

Empty stage. No set. The full cast files onstage to stand with ***CHORUS.*** The Real Slim Shady, *by Eminem, plays insistently.*

ENSEMBLE (*rapping*): Will the real James Franco please stand up?

Please stand up. Please stand up.

Will the real James Franco please stand up?

Please stand up. Please stand up.

Repeat and fade to black.

Fin.

EXHIBIT B

(*Script: James Franco and Me*)

James Franco and Me

By Kevin Broccoli

(401) 368-7689
Kevin071984@yahoo.com

A Note to the Actor(s) Playing James Franco

Welcome!

Thank you for signing up for this. I'm not sure you know what you've gotten yourself into, but it's too late to turn back now.

You will perform the script you are about to read with me onstage without any rehearsal at all. I will have learned the lines and you will do the same, but we will not be talking about anything we're going to do onstage before the show. We'll discover the play together onstage in front of an audience.

A few things before you read the script:

- You might think the trick to doing this is memorization, and that's certainly a large part of it. An equally big part, however, is thinking about all the other stuff that goes along with learning the lines. There is specific blocking that you should pay attention to, particularly at the beginning and end of each scene. The show will be performed with only two chairs, but lighting/sound cues will be put in place, and if you have the first line of the scene, you want to be aware of that and what you're supposed to be doing at the top of each scene. I would recommend doing all the blocking that's written in the script, but that isn't the *only* blocking you're allowed to do. In fact, part of the fun of the show—and what'll make it different each night—is the blocking you come up with and the choices you make. I'm happy to roll with whatever you do, but please don't feel like you need to be stuck to the chair all evening unless the script says otherwise. James Franco is your role—make it yours. Go nuts. I'll go nuts right along with you.

- We'll have all the props ready for you, but you might want to use your own phone when it calls for it. People always seem more comfortable when they use a phone that's actually theirs.

- I don't care what you wear for a costume. Just be comfortable. If you're a woman playing James Franco, you might want to wear something more gender-ambiguous, but don't feel like you have to look like James Franco would—in fact, nobody should feel that they have to look the way James Franco would—I'm not sure what that look would be anyway.

- Although you can't rehearse with me before the show, I'm not suggesting you can't rehearse *at all*. If I were doing what you're doing—and in a sense, I am—I would find a friend or loved one, and have them play Kevin a few times so I could get comfortable with it before I go in front of an audience. The point of this project is to see what can occur between two actors with the same script and no notion of what the other is going to do onstage, but it's not meant to be a challenge where you learn all the lines in your head and see if you can deliver them for the first time in front of an audience without ever having spoken them aloud. Do the play before you do the play. And be nice to that friend or loved one—you're going to drive them crazy.

Thanks again—I'll see you onstage.
Kevin

The Address to the Audience

(Before the lights come up, KEVIN enters and addresses the AUDIENCE under the house lights.)

KEVIN

Hi everyone, thank you for coming tonight.

(At this point, he could do the pre-show announcements—cell phones, exits, etc—or just launch right into the play if those need to be done by the house manager or someone else at the theater.)

This is a play called "James Franco and Me." It features a character named Kevin—that's me—and the role of me will be played by me at this performance. And the role of James Franco will not be played by James Franco. I know—it's disappointing.

But never fear—a fantastic actor will be taking on the role tonight. Will that actor please come up onstage now?

(The ACTOR PLAYING JAMES FRANCO walks onstage.)

Hello.

(ACTOR responds.)

Please tell the audience your name.

(ACTOR responds.)

Give them a round of applause.

(AUDIENCE applauds.)

Now, ladies and gentlemen, in the spirit of James Franco, one of the most spontaneous and unique performers of his generation, we have not rehearsed the play you are about to see tonight. Isn't that right, (Name of Actor)?

(ACTOR responds.)

Are you nervous?

(ACTOR responds.)

Don't be nervous./You should be very nervous.

(If the ACTOR and KEVIN have performed the show before, this would be where you would put the line: "Now, [Name of Actor] and I have

done this [Number of Times] before, but we've still never rehearsed it.)

(Name of Actor) and I have not spoken about the show, nor will we speak about it after, except to say things like 'Good job' or 'Wow, that was horrible.' We have not come to any agreement about how to do the show. All we have is the agreed-upon text, which I have written, detailing the events of a fictional night where my father was in the hospital on his deathbed, and I was sitting in a waiting room with Academy-Award nominee, James Franco.

I should mention that in no way is the James Franco you see in this play meant to resemble the real James Franco in any way, but every time you look at the actor playing James Franco, we want you to think of James Franco. Got that? Good.

Now because what we're about to do here tonight is unrehearsed, we thought it would be a good idea to have a little...insurance policy.

That's why I've handed a copy of the script—broken down into several, clearly marked folders—to a designated member of the audience. If (Name of Actor) can't remember one of the lines, he/she will yell 'Franco!' and the designated audience member can bring them the folder that contains the scene we're currently performing. (Name of Actor) must then be on-book for rest of the scene. And as we all know, being on-book during a performance is shameful and wrong, so let's hope (Name of Actor) doesn't call out the name 'Franco!' too often.

One last thing—we're performing the show simply, with two chairs, and nothing else, because we believe that's how James Franco would want it. If he stands for anything, it's for artistic simplicity.

With that, we bring you—James Franco and Me.

(The TWO take their seats. House lights go down, stage lights go up on—)

Prologue: 127 Hours

(A hospital waiting room. KEVIN and JAMES FRANCO are sitting in two chairs. It's very late at night. KEVIN seems exhausted. JAMES does not.)

JAMES
So I'm in the canyon, or the ridge, the whatever—

KEVIN
Uh huh.

JAMES
And I cut my arm off.

(A beat.)

Now...that's big.

KEVIN
Right.

JAMES
I mean, that's...really big.

KEVIN
Right.

JAMES
And so, you know, the movie ends—

KEVIN
Is that it?

JAMES
What?

KEVIN
The movie—is that the whole movie? You cutting your arm off?

JAMES
I mean...that's the gist of it.

KEVIN
How long is this movie?

JAMES
Well, it takes awhile. I mean, I don't just cut it off, like, I think about it a lot first.

There are flashbacks and—

KEVIN
Oh. Okay.

JAMES
--Like, you see how I got to that point in my life, where I'm, you know, like, sitting in a cavern, canyon, ridge, hole, whatever—

KEVIN
Okay.

JAMES
For a long time.

KEVIN
What?

JAMES
I mean, I'm down there for a long time.

KEVIN
Oh.

JAMES
In the, you know, crevice.

KEVIN
127 hours.

JAMES
Right, yeah, that's how long. That's a long time. That's, like, ten days.

KEVIN
Five.

JAMES
What?

KEVIN
Never mind.

(To the AUDIENCE.)

He's not really this dumb. It's just that, in my head, he sounds this dumb. Or maybe I want him to be this dumb. I don't know.

(A second. Shaking his head.)

I don't know.

(A beat.)

My father's dying.

(A second.)

Dying.

(A second. A second.)

Dead. Well...not yet.

JAMES
And I didn't get the Oscar.

KEVIN
I'm sure you were...I'm sure it wasn't personal.

JAMES
And I was hosting that year. Do you know that?

KEVIN
Yeah, I...I think everybody remembers you, you know, hosting.

JAMES
How humiliating is that? Losing and then having to be like 'Well that's great! Good for you, Colin Firth. Now here's Dustin Hoffman to present the award for Sound Editing.' Like—fuck all that.

KEVIN
Well, I mean, Colin Firth had been waiting a really long time to get an Oscar.

JAMES
I'd been waiting since I was born!

KEVIN
Well, King's Speech was a really good movie.

JAMES
I cut my arm off!

KEVIN
Not really.

JAMES

Emotionally I did.

KEVIN
You emotionally cut your arm off?

JAMES
I had to emotionally embrace the idea of cutting my arm off so it would be believable.

KEVIN
So...did it hurt?

JAMES
Um, yeah it hurt!

KEVIN
Well, at least you still physically have an arm—not like the guy you were playing.

JAMES
What guy?

KEVIN
You were playing a real life person, right?

JAMES
Oh right, yeah. Him. He was on the set once. I think we took a picture. He put an arm around me. Not the one he cut off, the other one.

KEVIN
Right, yeah I—right.

JAMES
I was kinda creeped out. Like—ooohhhhh this guy's missing an arm.

KEVIN
Jesus...

JAMES
Not that I'm discriminating, I just think it's gross.

KEVIN
Right, well—right.

JAMES
It's weird. I mean, I didn't think it was weird when I was playing him, but as soon as I was done playing him, I was like—Man, this is weird.

KEVIN

Right.

JAMES
It's still a really good movie though.

KEVIN
I'll have to watch it.

JAMES
I have it at home from Netflix if you want.

KEVIN
Is it streaming?

JAMES
I don't know if it's streaming. It might be.

KEVIN
If it's streaming, I'll definitely watch it. I just can't watch anything non-streaming anymore.

JAMES
Oh, I totally get that.

KEVIN
Like, if I have to actually go anywhere near my tv in order to watch a movie, I just don't watch the movie. Or like a DVD player or whatever.

JAMES
No, of course. That makes sense. Everything should be streaming. It's not the Stone Age.

KEVIN
Right.

JAMES
Yeah, but...

(Decent pause.)

You know, you hear your name? 'And the winner is—' And then you hear your name. You swear you hear it, even though you don't. It's really wild, like—Like your mind wants it so bad that you manifest it in your own experience, and so then when it doesn't happen, it's even worse, because you just heard it, and then you hear something else, and for as econd, you're not sure what was real and what wasn't, and so it's disappointment, yeah, but it's also this total, uh, uh, shock to the system, because, for a second, you question the very nature of reality, and whether or not life is just an elaborate joke where the things you

want are held in front of you and then snatched away just because you're not meant to achieve true happiness ever, you know?

KEVIN
That...sounds rough.

JAMES
But then, it's like, you're a millionaire, so—you can't really bitch too much.

(Sound of 'And the Oscar goes to...Colin Firth!' plays. Lights shift.)

Scene One: Freaks and Geeks

(JAMES is behind KEVIN talking on the phone.)

KEVIN
My father is dying.
My father is dying.
My father is dying.

My father had a heart attack.
My father is in critical condition.
The last thing I said to my father was 'Dad, I can't talk now, let me call you right back.'

(A beat.)

...That was two years ago.

(JAMES is off the phone. He sits back down next to KEVIN.)

JAMES
They want to do this 'Freaks and Geeks' reunion.

KEVIN
Are you going to do it?

(JAMES thinks about that.)

JAMES
I don't know. Doesn't seem like a great idea.

KEVIN
Why not?

JAMES
(Shrugs.)
It's never as good as people remember it being.

KEVIN
I think it'd be interesting.

JAMES
Well, Seth, Jason, Busy, and Linda want to do it, but John doesn't.

KEVIN
John?

JAMES
John Francis Daley, the kid who played Sam.

KEVIN
Oh...Yeah. He'd be important...I guess.

JAMES
I mean, he was kinda the lead.

KEVIN
Yeah.

JAMES
I mean, it was really an ensemble show, but—

KEVIN
Yeah, no, you'd need him.

JAMES
He was on *Bones*, and he's all like—I've moved on. Fuck you, dude. You were on *Bones*.

KEVIN
Bones sucks.

JAMES
My mom watches Bones.

KEVIN
Maybe you should just do it without him.

JAMES
Yeah, you know, here's me—like, I'm a movie star, okay? And I don't say that lightly. I realize how—that sounds, but it's, I mean, it's true, right?

KEVIN
No, I mean, however people may feel about it, you are a movie star. You...star in movies.

JAMES
And I'm willing to do it! And so is Seth! And John doesn't want to do it. Man, fuck him.

KEVIN
Maybe it's like you said—maybe he just has a really good memory of it, and he doesn't want to, like, tarnish that.

JAMES
Of course he has a good memory of it. Doing that show was, like, the highlight of his fucking life. What did he do after that? A procedural, for godsakes. And I get that it's not like doing tv is what it was, you know, like back in the day, but he's not even doing good tv. It's not even HBO—it's Fox—it's like a step above porn. Fuck.

KEVIN

(To the AUDIENCE.)

He's not this bombastic and he doesn't swear this much. I mean, he swears a little, but not this much. I can't seem to portray him the way he really is. It's tricky. It's tricky to get a handle on all this. My mind isn't where it should be,and hanging out with James Franco is only making things more...surreal. Plus, we've been in this waiting room for hours. Nobody else is around. No nurses, no doctors—nothing. Just me and some guy who used to be on Freaks and Geeks.

JAMES
I'm sort of proud of the fact that we were only on for one year. I bet if we had done more than that it would have sucked. Judd can barely can the quality up in a two hour movie before things start to fall apart. No way could he have handled doing, like, a six-year series. You know, you do a show like that, and it gets cancelled, and people try bringing it back, but in my heart, like, my heart of hearts? I wanted it to stay dead. Dead and perfect, you know?

KEVIN
Right.

JAMES
People are like that too. You get this one streak of time when you're amazing, and then after that, you're either reliving the streak over and over again, or trying to make a new streak, and it's like, no can do, bucko. No can do.

KEVIN
What was your streak?

(A beat.)

JAMES
What do you mean?

KEVIN
Like, when you were perfect? When were you in your streak?

JAMES
I mean—I don't know. I guess I'm still in it.

KEVIN
You think so?

JAMES
Are you intentionally being an asshole?

KEVIN
No.

JAMES
I mean, I know your dad's dying and you're gonna lash out, but—

KEVIN
How long do you think streaks last?

JAMES
What does that have to do with it?

KEVIN
Because you've been really successful—

JAMES
And I'm still really successful.

KEVIN
As successful as you were when you were the most successful you've ever been?

(JAMES thinks about that.)

JAMES
I don't want to think about that!

KEVIN
Fine.

JAMES
Things are good.

KEVIN
I didn't say they weren't. I'm just wondering...

JAMES
What?

KEVIN
I don't know if I've had a streak yet, or...if I already had one and I didn't even realize it.

JAMES
No, you'd know. It's like losing your virginity. You know when you've had a streak.

KEVIN
So I just haven't had one then.

JAMES
That's great. It's always better to not have had one than to have had one and be on the other end of it.

KEVIN
What do you do?

JAMES
What?

KEVIN
When you're on the other end of it?

JAMES
You just...die, I guess? Or like, wait to die.

KEVIN
Dead and perfect.

JAMES
Right. Dead and perfect. You don't want to fuck that up.

KEVIN
Right.

JAMES
Real artists—true artists?—know how to quit when they're ahead.

(Sound of the FREAKS AND GEEKS THEME MUSIC. Lights shift.)

Scene Two: Spring Breakers

(KEVIN and JAMES stare straight ahead for a moment, then look at each other, JAMES nods, KEVIN nods, they go back to staring straight ahead.)

JAMES
Yeah, you know, Spring Breakers...

(A beat.)

KEVIN
Yeah.

(Lights shift. JAMES takes off his jacket and puts it around KEVIN.)

Scene Three: Pineapple Express

(JAMES is finishing up a thought.)

JAMES
...And he got all bent out of shape because I said I thought *Pineapple Express* was a really landmark film.

KEVIN
Uh...

JAMES
Do you *not* think that?

KEVIN
That it was?

JAMES
Yeah.

KEVIN
I—Wait, what?

JAMES
Do you think that *Pineapple Express* was a landmark film?

(A beat.)

KEVIN
What would the definition of landmark be?

JAMES
That, like, defines a culture.

KEVIN
I mean...it's a movie about stoners.

JAMES
Yeah. So—stoner culture.

KEVIN
There are a lot of movies about stoner culture.

JAMES
Yeah, but, like, this one is—I mean, it's sort of the movie.

KEVIN
I...I don't know. I mean, I haven't seen a lot of stoner movies—

JAMES
So you can't really judge.

KEVIN
But, I mean, I think the word 'landmark—'

JAMES
Nobody appreciates that movie.

KEVIN
It made a lot of money.

JAMES
Kevin, money is nothing to me. Do you understand that? It's nothing. Not a thing.

KEVIN
Right, nothing.

JAMES
Right.

(A beat.)

KEVIN
But you have a lot of it.

JAMES
Do you want it?

KEVIN
What?

JAMES
My money.

KEVIN
Your money?

JAMES
Yes, do you want it?

KEVIN
All of it?

JAMES
I—Well, like, metaphorically, do you want it?

KEVIN
...Yes?

JAMES
Okay, but—

KEVIN
I would also like it not-metaphorically.

JAMES
Okay, but—

KEVIN
Do you have any idea what the bills are going to be for this?

JAMES
For what?

KEVIN
For my father laying in a hospital bed, dying? There's, like, a board in my mind with numbers and a dollar sign on it and the number keeps going up and up, and it's...It's a thing to think about that I shouldn't be thinking about but I am.

JAMES
Isn't he covered?

KEVIN
Yeah, but, there's still...I don't think it covers everything. I mean, he's been in here forever.

JAMES
I don't mean to be judgmental or anything, but you sound really cold right now.

KEVIN
I'm sorry, it's just—wait, why am I apologizing to you? You're sitting here talking about some stupid movie and my father is *dying*.

JAMES
It's not stupid.

KEVIN
It is stupid. And it strives to be stupid. It wants to be stupid. And you want it to be something else, and I don't know why.

JAMES
I—

KEVIN
You're in denial.

JAMES
You're in denial!

KEVIN
About what?

JAMES
You're sitting here talking about finances and money, and meanwhile there's this powerful moment in your life that you're, like, totally detached from and it's really unfortunate, you know? Like, deeply just—sad to watch. Damn, man.

KEVIN
I've been sitting here for days, James. Days, okay? You haven't been here that long. You don't know.

JAMES
Hey, I don't have to be here.

(A beat.)

KEVIN
I know. I'm sorry.

(A beat.)

JAMES
It's okay.

(A slight pause.)

It's just—sometimes you think something's going to be one thing and—

KEVIN
It's still a very successful movie, James.

JAMES
But it's not Dazed and Confused.

KEVIN
Well, very few movies are.

JAMES
It's not enough for me to, like, just make a stoner movie. I would never just make a stoner movie. It would have to be, you know, a commentary on something—bigger, or—

KEVIN
Well I think the commentary was—Stoners get into some fucked up shit.

(A beat.)

JAMES
So that was clear?

KEVIN
Yeah, that was pretty clear.

(A short moment. KEVIN exhales. JAMES looks around.)

JAMES
It's not a bad hospital.

KEVIN
No, it's a great hospital.

(A slight pause.)

It's just still a hospital.

JAMES
Yeah.

(A second.)

I guess you can't do much about that.

(KEVIN looks at JAMES looking around. Then he looks out at the AUDIENCE. Lights shift.)

KEVIN

Yeah.

Scene Four: Of Mice and Men

(KEVIN and JAMES don't move.)

JAMES

I think every film actor has that moment when you're doing theater for the first time, and—Also, to start off on, like, Broadway—I mean, I'd done high school stuff, theater, but not much, and so to jump from that to Broadway with nothing in between—like, no regional theater, no out-of-town anything, no Chicago, which I would have loved, I would have fucking loved to have played Chicago—screw Broadway, if I could have done Chicago?—but, I mean, I don't know, maybe I should have mentioned that. Anyway, you're on Broadway and nobody's really aware that, like, this is all new to you—and suddenly you're a novice in the Olympics, you know what I mean? You're up there in this incredibly vulnerable position that you're not used to being in, doing this American, uh, uh, classic, you know?—Play? And, you're up there, and it hits you—all of a sudden—what you're doing. That you're doing this thing that actors hone and practice at for years, and suddenly, you're doing it, and you think of Lawrence Olivier who, like, had such disdain for film and tv, oh my god, tv, and thought theater was like, the most respectable thing you could do, a whole generation felt that way, and now here you are, up there, doing it, this thing that's so respectable, or was so respectable, before, like, fucking Disney took over and turned everything into puppets and shit, and so you're there, onstage, doing this play, and you become aware...And that's the problem. Like, you want to be aware, but not of yourself. Not of the situation. You want to be aware in character, aware of the story, in the moment of the story. Not of the audience. Not of this thing you're doing—and so, and I should mention, I was never worried about lines. Like, some people are worried about lines, some actors, film actors—How am I going to memorize those lines? I never worried about that. I have a great memory. I look at things once—it's like, not photographic, but pretty damn good. So I didn't worry about that, and so that's why I said 'Yes' right away to doing the play, because I wasn't worried about that, and, I mean, that's the thing people will come after you for—forgetting your lines. That's what everybody goes to the theater wondering—is the guy going to remember his lines? I mean, not everybody, but the idiots, that's what they wonder. So I'm up there, and I become aware—really aware—really self-conscious all of a sudden, which isn't like me at all, and...

...And I don't know my next line.

I'm standing there, or sitting?—Was I sitting? I don't know. But I didn't know my next line. And Chris is just staring at me, like—Hello? Dude? You there? And I'm not looking at him, because I don't know what to say to him, and then I'm like, Wait, look at him, where are you looking?—You're looking at the floor.

People are looking at you looking at the floor. What are you doing? Jesus Christ. Stop looking at the floor. So then I'm looking at the ceiling. Like that's any fucking better. And then I'm like—Look at Chris. Chris will help you. He is your partner. He is your savior. He is your fellow actor—look at him! So I look at him...And then I realize—he's a film actor too. He's just as much up shit creek as I am, if not more, because I'm the guy who can't remember his lines, and he's the guy onstage with the guy who can't remember his lines, and there isn't a fucking theater actor in sight! And then I'm like, Who the hell came up with the idea of putting two guys with little-to-no stage experience onstage together and giving them pages-upon-pages of text to memorize and deliver convincingly in front of an audience. People read those reviews wanting to know if we were good or bad? It's a miracle we weren't fucking standing up there gaping at each other like too simians! BUT WE WERE! THERE WE WERE DOING JUST FUCKING THAT!

So I'm looking at Chris, Chris is looking at me, and I do not know the next line. I mean, I do not know it. Gun to my head, I don't know it. Nazis-holding-a-gun-to-my-head I do not know it. And Chris doesn't know it. He's only been hearing me say it for weeks on end, but was he listening? Of course not. He's an actor. He doesn't fucking listen. He's supposed to listen, we're all supposed to listen, but we don't. We don't listen. We're too busy making sure we don't forget our next line, and sometimes, we forget it anyway. So I'm standing there, he's standing there, nobody knows anything, nobody knows what's going on, and that fine line that appears when an actor doesn't remember his line, that line that separates you knowing that you don't know your line and the other guy knowing that you don't know your line and the audience knowing? That line disappears. I mean, we whiz by that line, we go right fucking by it. We zoom over it. And you hear murmuring. And you hear mumbling. From the audience. Those fuckers. Those rich fuckers who paid two hundred bucks or whatever to come watch me do this fucking play so they can judge me. Not so they can enjoy me. Not so they can appreciate my craft. No, it's just so they can go to brunch on Sunday and say they saw James Franco in a play and he was 'Eh' or, even better, even fucking better—He didn't know his lines!

You know the hysterical part about all this? Like, the really hysterical part? I've read Of Mice and Men like eighteen million fucking times. It's a small book. You can read it in an hour. I read it before I agreed to the play, and then I read it over and over again once I knew we were doing it—I could probably recite that book to you right now, cover-to-cover, so that's how well I knew it, the book—not even the play—and I'm still standing there with my thumb up my ass.

And I can't open my mouth. I mean, my mouth is closed and I can NOT open it. I can't breathe. Sweat just appears. I don't, like, start to sweat—Sweat is just there. It is just there and covering me. My ass is just a bucket of sweat at that point. I had this image of, like, a flood of sweat water just pouring out of every part of my body—mouth, ass, eyes, wherever—okay? You got that image in you head now? Because that's what I was picturing.

And I'm thinking—can I call 'Line?' Is that possible? Can I do that? Does anybody have the script? Does anybody anywhere have the script to this FUCKING play?

I picture people in the audience having it. The script. In their hands. Looking at the part I'm supposed to be saying and reciting it quietly in their seats. Saying the line, but not loud enough for me to hear it. I picture the line—but I don't picture it. I picture words that make up the line, but I can't read the line. Kind of like in a dream—when your ability to read is just—gone. So I'm picturing the line everywhere, but I'm just, you know, not able to read it. So I'm seeing it on the marquee outside the theater. Blasted across Times Square. On billboards all across America. Across Chris O'Dowd's forehead. Not on the floor or ceiling though, that would be too easy.

The line is everywhere, and I don't have it. I don't have the line.

And I'm about to say that. I'm about to turn to the audience and say—I'm sorry, ladies and gentlemen. I'm so sorry—But I just don't have the line.

So I open my mouth—

And the line comes out.

I say the line.

It's there.

Was it always there?

I don't know.

I have no idea.

But it's there.

And I say it.

And Chris responds—with his line.

And we keep going.

The scene keeps going.

And the audience doesn't seem too upset. I mean, I guess I have no way of knowing if they were really upset or not, but they don't, like, leave or anything, and the mumbling and the murmuring stop immediately, and we just keep going.

And they know exactly what's happened, and I know what's happened, and fucking Chris, he knows what happened, but he can't really say anything, because the fucker didn't bail me out either, and that's sort of his job, to be, like, there for me, when shit like that happens, but—

We just sort of agree to, you know, forget about it, and move on.

And it mars the performance. I mean, it taints it. I'll remember that forever—not just about that show, but about myself, that I did that. That I screwed up in that basic, quintessential, clichéd way, but...

But we kept going.

And because it's theater—it never happened. Right? I mean—right? Like, nobody will ever know that happened. I mean, the people who were there, and maybe the people they tell, if they tell anyone, but other than that? Nobody.

It's not captured on film. It's not memorialized anywhere. Eventually it'll disappear from the minds of everybody but me.

I'll remember it. I'll always remember it.

(A beat.)

You don't screw up like that in the movies.

You screw up, but...

You screw up in other ways.

You make choices that you shouldn't make. Fuck, you make whole movies that you shouldn't make.

And then it's there—forever.

Your bad choices.

The things you shouldn't have done.

And people don't have to remember them, they can just stream them on Netflix and have a good laugh at you.

You go to IMDB and there it is—

A list of everything you've ever done
Laid out before you
Yay's and nay's
And no explanation from you

About why you did this
Or why you did that
Or if you're sorry about any of it.

It fucking sucks.

(Beat.)

It just fucking sucks.

(A beat.)

KEVIN
What was the line?

(A slight pause. JAMES looks at KEVIN.)

JAMES
What?

KEVIN
The line that you forgot. What was it?

(JAMES looks away. He thinks about that.)

JAMES
Huh.

(A slight pause.)

God, I don't fucking remember. You'd think I would, but—

KEVIN
It's okay.

JAMES
Yeah, no, I should, but—

KEVIN
It's fine.

JAMES
I guess it wasn't that good of a line.

(A beat. Starts to remember—)

It...

(Three seconds. Maybe he almost thinks of it?)

No. Nope.

(Any chance? One second goes by. Then—)

Fuck.

(Lights shift.)

Scene Five: Interlude

(A song plays. KEVIN and JAMES hum along, then sing along, then stop singing along, then JAMES starts singing along again. KEVIN just listens. Lights shift.)

Scene Six: Rise of the Planet of the Apes

(KEVIN is looking at his phone. JAMES is eating a bag of M&M's.)

KEVIN
So it was your movie, and then *Rise of the Planet of the Apes*, and then the original *Planet of the Apes*. Like, that's the chronology?

JAMES
Right—and then the next one, and the next one—

KEVIN
So yours was a prequel?

JAMES
A prequel but also a remake, sort of, of—

KEVIN
Yeah, like the fourth movie. So you remade the fourth movie?

JAMES
We rebooted it.

KEVIN
It was a reboot and a remake?

JAMES
A remake of a prequel which served as a reboot.

KEVIN
Can you do that?

JAMES
Well, you can *do* anything.

KEVIN
Did you think it was going to be a hit?

JAMES
I think everything's going to be a hit.

KEVIN
Everything?

JAMES
Yup.

KEVIN
Everything you do?

JAMES
Yup-po.

KEVIN
You thought that movie you directed about the mentally challenged cannibal was going to be a hit?

JAMES
Based on what I believe the definition of 'hit' to be—Yes.

KEVIN
So you didn't necessarily think it was going to make money?

JAMES
Kevin, we talked about money.

KEVIN
I know.

JAMES
(Overlapping.)
We talked about it.

KEVIN
Yeah, I just—

JAMES
And I thought it had a good message.

(A beat.)

KEVIN
The movie about the handicapped man who eats people?

JAMES
No, the Apes movie.

KEVIN
The Apes movie? You thought *Rise of the Planet of the Apes* had a good message?

JAMES
Yeah.

KEVIN
What was the message?

JAMES
To, like, treat animals well, or they'll take over your planet.

(A beat. KEVIN addresses the AUDIENCE.)

KEVIN
I'm making him stupid again. I apologize.

(He turns back to JAMES.)

Try that again.

JAMES
I'm an avid supporter of animal rights, and yes, you can make fun of it for being some stupid movie that made lots of money and reinvigorated a franchise, but you can also look at it as a movie that a lot of people saw that depicted cruelty to animals, and maybe—maybe—got some people thinking about it, which is more than you can say for a lot of other summer blockbusters, or really, any movies that—

(He freezes. KEVIN turns to the AUDIENCE again.)

KEVIN
Okay, now I'm giving him too much credit.

(A second.)

My dad is finishing up his life. Isn't that crazy? In my head, I imagine a spiritual version of him putting clothes into a suitcase, putting on a hat, and writing a beautiful farewell letter.

Even though he would never do any of those things.

I have a memory of the two of us watching a movie at his house. It's the last memory I have where we're...together.

Just sitting on the couch in his living room—him, falling asleep, chin on chest, lightly snoring. Me—glancing at my phone, wondering if I can casually sneak out without saying good-bye.

I hate to be one of those people who talk about their parents dying and then says dramatically—I never got to say good-bye, but...

It's true.

I never did.

(JAMES unfreezes.)

JAMES
And I got to work with John Lithgow, which was awesome. Did you see him when he was on *Dexter*?

KEVIN
I—heard about it.

JAMES
Probably one of the greatest acting performances of all time.

KEVIN
Really?

JAMES
Absolutely. Not in a movie, not onstage, but in a recurring guest spot on a cable show. Art is happening in the weirdest places. Just not on fucking *Bones*.

KEVIN
Why weren't you in the sequel?

JAMES
Scheduling problems—and where they wanted to take the story and stuff. There are, like, photos of my character in the movie—kind of like visual cameos, I guess, well, I guess all cameos are visual, but—Anyway, I don't think it would have been necessary for me to, like, be a focal point of the story anyway. It's really about the apes.

KEVIN
Right.

JAMES
Now, see, that—the sequel—if you think about it—it's a sequel to a prequel, but it's also a remake of a prequel's sequel.

KEVIN
Huh. Who would've thought that *Planet of the Apes* could be such a mindfuck?

JAMES
When it was a hit, everybody was so surprised, and I was like—Yeah. Just nodded my head, because I knew.

KEVIN
So have you ever been wrong? Like, totally wrong about something you've done? Where you just went—I mean, actually said, even just to yourself—Wow, I was wrong.

(JAMES thinks about this for awhile.)

JAMES
Yes.

(A beat.)

KEVIN
Well?

JAMES
What?

KEVIN
What was it?

(A beat.)

JAMES
You know, Kevin, there are just...some things you don't want to talk about.

(They look at each other. Lights shift.)

Scene Seven: General Hospital

(JAMES is talking on the phone, as is KEVIN.)

KEVIN
I don't know. There's no way of knowing these things.

JAMES
They know what they have to do to get me back.

KEVIN
They don't think it's going to be much longer though.

JAMES
I want an evil twin.

KEVIN
Probably just another few hours, if that.

JAMES
What do you mean they think that's a stretch? THAT'S a stretch?

KEVIN
I'm just getting really tired.

JAMES
It's a soap opera, for chrissakes. They do evil twins all the time.

KEVIN
I had some coffee and a bag of raisins. I don't even like raisins.

JAMES
You know, maybe soap operas wouldn't be dying off so fast if they let their actors actually collaborate with the—You know, I am a writer. I'm not just—Okay, but what if I wrote the episode? Fuck, I'll write the whole storyline.

KEVIN
Shouldn't I be hyper? From the coffee? I just feel dead. Am I immune to coffee now? Oh, the dead thing, yeah, sorry, poor choice of words.

JAMES
I'm not asking for the moon here.

KEVIN
I'm supposed to call people. I know that much. I should call people and let them know what's happening. Something this happens and you just...assume everybody knows—that they can feel it. This intense disturbance in the Universe. That somebody is about to exit. So you don't call anybody. Well—it's also that you just don't feel like talking to anybody. Really—anybody. The doctor walks by and I grunt things at him. I can't form words. Just the thought of forming words is—Well, tiring, but also, it feels like it's helping this thing along—moving it along—and I don't want to move it along. I want it to stop. I keep thinking if I just refuse to speak, it won't be able to progress. Like a play where I'm an actor and have some semblance of power instead of real life where I'm just a person and things happen whether I want them to or not. In the play, I don't talk and nothing can continue. In real life, it doesn't matter because nobody's listening anyway. You're the first person I've spoken to all

night.

JAMES
They know they don't need to hire another actor, right? Like—I can play both parts. They film me as Franco, and then they film as the evil twin. It takes a little bit longer, but—But I won't even charge them for the extra time! I just want to play twins!

KEVIN
No, I'm not alone. I'm here with James Franco.

JAMES
Look, do they want me to audition for the evil twin? Is that what this is about?

KEVIN
He just showed up, and he's been sitting here with me—this whole time.

JAMES
I'm not above auditioning. I mean, I'm too good for it, but I'm not above it.

KEVIN
I would have preferred Michael Cera—

(JAMES shoots KEVIN a look. KEVIN mouths 'I'm sorry, but it's true and we talked about this already." JAMES goes back to his phone call.)

--But he's really been very, uh, well, he's been here.

JAMES
No, I'm not Facetiming with them. They're not my fourteen-year-old girlfriend.

KEVIN
I should be in the room with him, but when I'm in the room with him I feel like I'm going to throw up, and that's not going to help anybody. So I'm out here, but now I'm having anxiety attacks, thinking—Did it happen? Did it just happen and I wasn't there? They said they're going to come and get me when it happens, but how are they going to know when it happens? What If he just dies all of a sudden and I'm not there because I'm too big of a pussy to sit inside a hospital room with my dying father? This feels like the opposite of how it must feel to sit in a waiting room when someone you know is about to give birth. I can almost feel that other experience—like, it's outside of some invisible wall. Some happier time in some parallel Universe that I'm creating in my mind because I have to create something right now. I'm a writer, I write, I bring things into being, and sometimes, in my loftier moments, I think of myself as almost magical, but now I'm in a real situation where it's very, very clear to me that I am not magical, that I cannot transcend reality, that I can't get past that invisible wall into that happier time where someone's waiting for a baby instead of for death. I'm helpless. I'm...I don't know what I am.

JAMES
I don't know when I'm flying out. It depends on when Kevin's father dies.

KEVIN
(To JAMES.)
James, you don't have to—

JAMES
(Holding up his hand to KEVIN.)
Well, I'm not a fucking barbarian. I'm not just going to walk out on someone whose Dad is dying. Who the—What the fuck difference does it make who Kevin is? You don't need to know who Kevin is. Kevin is someone whose father is dying, that's who Kevin is, you stupid fuck. Does he need to be more than that? I'm—Is he a fan? Like is he a fan of mine?

(JAMES looks at KEVIN. KEVIN wiggles his hand back and forth as if to say "So, so.")

He's a huge fan. My biggest. And you're a fucking, soul-sucking agent. Is your father dead? Is he?

(A beat.)

Oh Jesus, I'm so sorry. I'm so sorry, man, I—Was I around for that? When did that happen?

(A beat.)

Last month?!? Jesus! Did you—Did you e-mail me about it, because a lot of stuff has been going to Spam and I—

(A beat.)

Well, now I feel like an asshole.

KEVIN
(On the phone, looking out at the AUDIENCE.)
You know what's crazy about this? Even if James Franco weren't here, this would still be the weirdest night of my life.

JAMES
He was sick for that long and you never took time off?

KEVIN
They're going to want me to do the eulogy. Because I'm a writer, and because I'm an actor, and so I'm good at public speaking, and everybody else in the family is going to look at me like—You're a writer and an actor and you're his

son—you're doing the eulogy. And how can I argue with that? Even though I have nothing to say. It hasn't even happened yet, and I can already tell, I'm not going to have anything to say about it. And if I don't say anything, I'm going to be sitting there, and people are going to think—Look at him, just sitting there. His father's dead and he's got nothing to say. What an asshole.

JAMES
Not even a sick day? You're—Wow, you're, like, the best agent ever.

KEVIN
What can I say about him? He was my dad. Can I just say that? Is that enough?

JAMES
Well, I'm—really sorry for your loss.

KEVIN
I can't imagine that not being enough.

JAMES
And I'm sorry I said you were soul-sucking. That was—an exaggeration.

KEVIN
I've never planned a funeral before. I have no idea how to plan a funeral. Is that something people know how to do? How do you do that?

JAMES
You know what? Don't push for the evil twin thing. I just figured that since the point of this was to, you know, explore the essence of the genre, that I wasn't really—I just feel like I wasn't digging deep enough. Like, I'm in a hole—but it's a shallow hole, you know? It's not enough—like you could maybe fit a body in it, but not a big body. Not, like, a tall person.

KEVIN
Oh God.

JAMES
Nobody over 5'6.

KEVIN
This is going to go on forever and then it'll be done. Imagine that. I have all the time with him in the world, and I'm out of time, and it's all the same time. How fucked up is that?

JAMES
Do you think they'd give me a brain tumor?

(Looks at KEVIN.)

Your dad doesn't have a brain tumor, does he?

KEVIN

No.

JAMES

Oh, okay. I didn't want to be insensitive.

(To the phone.)

Yeah, give me a brain tumor would be amazing.

KEVIN

I'm his only son.

(A beat.)

Well, technically, I...Never mind. That's too much. It's too much to...Yeah.

JAMES

I don't need to win an Emmy or anything—

KEVIN

It's a long story.

JAMES

Do they still have Daytime Emmy's?

KEVIN

It's—It's a really long story.

JAMES

I mean, what's the point? There are, like, two soap operas left.

KEVIN

But I'm the only son who's going to bury him. That's a definite.

JAMES

Tell them I'll be back once Kevin's dad is dead and the funeral's over, and like, maybe a few weeks have gone by. I don't want to just up and leave him. He seems okay now, but I think it's one of those things where he's going be washing dishes six months from now and just break down sobbing.

(KEVIN looks at him. JAMES mouths the words "I'm sorry, but it's true, and we sort of already talked about this.")

But as soon as that happens, I'm free and clear.

KEVIN
(To JAMES.)
Are you my imaginary friend or something?

JAMES
(To KEVIN.)
To be honest, I've been wondering if you're mine.

KEVIN
What kind of imaginary friend has a dying father?

JAMES
What kind of imaginary friend is James Franco?

(A beat. They look at their phones.)

KEVIN and JAMES
Are we even talking to anybody?

(They look at each other. Lights shift.)

Scene Eight: Interior. Leather Bar.

(JAMES is tossing a ball up in the air and catching it. He probably misses as much as he catches it. KEVIN is watching a movie on his phone. This goes on for a minute until KEVIN's line--)

KEVIN
What is this?

JAMES
Huh?

KEVIN
What am I watching?

JAMES
It's called—

KEVIN
Interior. Leather Bar. Yeah, I know—what the hell is it?

(To the AUDIENCE.)

It's close to 4am. I'm tired. I'm depressed. I'm despondent, but even worse than that, I'm bored. Isn't that awful? How can I be bored right now? My father is dying. It's like I started to process the news and then I just...stopped. It's as if I have to keep reminding myself so I don't forget. My father is dying.

My father is dying, my father is dying, my father is—

(To JAMES.)

I'm sorry. You made a gay porn movie?

JAMES
You don't have to say 'movie' you can just say a gay porn. Porn means movie.

KEVIN
Why did you do this?

JAMES
Are you even paying attention to it?

KEVIN
Sort of, James, I mean, I am a little distracted by the impending death of my dad, but I think I know a gay porno when I see it.

JAMES
It's an exploration of the footage that was cut from the Al Pacino movie *Cruising*. Or is it *Cruisin*? *Cruisin*? *Cruising*?

KEVIN
You don't even remember the name of the movie you're allegedly paying homage to?

JAMES
I didn't say I was paying homage to it. It's a movie about censorship.

KEVIN
Is it a movie or is it a documentary?

JAMES
It's neither and both.

KEVIN
Could you please stop talking like the Cheshire Cat for five seconds and just answer a goddamn question?

(To the AUDIENCE.)

Yes, I'm getting irritable. Nobody will talk to me. For hours I couldn't speak to anyone and now I can't shut up, and I have nobody to talk to except this idiot. It can't be a good sign that nobody will talk to me, right? I mean, if my dad was making a miraculous recovery, they'd be excited to talk to me, right? They'd be tripping over themselves to give me the news. Instead, nobody will make eye contact with me. Or is that me being paranoid?

(Turns to JAMES.)

So you filmed the footage that was cut out of the Al Pacino movie?

JAMES
Yes.

KEVIN
And then what did you do with it?

JAMES
With what? The footage?

KEVIN
Yes.

JAMES
Nothing. It's in the documentary.

KEVIN
So you made a documentary about filming something that's only going to be in the documentary?

JAMES
Yeah, so we could talk about it.

KEVIN
The footage?

JAMES
Yes.

KEVIN
Couldn't you just show the original footage?

JAMES
You can't find the original footage. It's, like, lost or something. So we got new actors and had them recreate it.

KEVIN
And did you direct it?

JAMES
It wasn't like your typical—

KEVIN
I just want to know if you, yourself, participated in either watching or instructing

men to do sexual things to other men.

(A beat.)

JAMES
Kevin, I'm an artist—

KEVIN
Oh my God, here we go.

JAMES
What difference does it make if I'm directing men to do sexual things with other men or women to do things with men or men to do things with me or with themselves or—

KEVIN
Did you just say 'with you?'

JAMES
It's an exploration of how sexuality is censored in a way that other things aren't—specifically gay sexuality, and I would think that you'd be all about that exploration.

KEVIN
It's just...odd that it's...you.

JAMES
Well, that's discrimination.

KEVIN
How is it discrimination?

JAMES
Because I'm a straight guy I can't be fascinated with gay sex?

KEVIN
Yes. YES! As a straight man, you should not be fascinated with gay sex.

JAMES
Well, I am. I'm fascinated, Kevin. It FASCINATES me.

KEVIN
Have you ever had sex with a man?

JAMES
On-camera or off?

KEVIN

Off—wait—you've had sex with a guy on-camera?

JAMES
Not for money.

KEVIN
When was this?

JAMES
College. Everybody films themselves having sex with guys in college.

KEVIN
No, no, everybody does not do that. Even I didn't do that and I'm gay.

JAMES
(Shrugs.)
It wasn't that big a deal.

KEVIN
Wait, which of the colleges did this happen at, because you're enrolled in seven different colleges right now.

JAMES
I think it was RISD, but that might be because the guy was covered in paint.

KEVIN
Jesus!

JAMES
I'd have to review the film to really know for sure.

KEVIN
James, I think you might be gay.

JAMES
I think sexuality is another form of spiritual enslavement.

KEVIN
Well, that's insane, and you're gay.

(He watches a little bit more of the movie on his phone.)

Is that guy wearing assless chaps?

JAMES
It's a leather bar, Kevin. Have you never been to a leather bar?

KEVIN

No, James, I haven't.

JAMES
And you call yourself a writer. You're very limited in your experience. That's going to be reflected in your work if you don't do something about it.

KEVIN
I guess the good news is that now that I've watched your whatever-the-fuck-this-is, I don't actually need to go to a leather bar. I think I know everything I need to know.

JAMES
Do you know what Wolf-ing is?

(A beat.)

KEVIN
Wolf-ing?

JAMES
Yeah. Do you know what that is?

(A beat.)

KEVIN
,,,No.

JAMES
Huh.

(He goes back to throwing the ball up and catching it. A moment passes.)

KEVIN
Are you going to *tell* me what it is?

JAMES
You sure you want to know?

KEVIN
No, James, I probably don't want to know, but I need you to tell me anyway.

JAMES
(Sighs.)
Oooooooookay.

(JAMES leans over and whispers something in KEVIN's ear. It takes about twenty seconds to explain it. When he's finished, KEVIN stares

straight ahead, and then bolts from his chair offstage with his hand over his mouth as if he's going to vomit.)

Yup.

(Throwing the ball up in the air.)

That's what I thought would happen.

(Lights shift.)

Scene Nine: Palo Alto

(MUSIC plays. Probably bad, gay club house music. KEVIN returns and sits next to JAMES. JAMES hands KEVIN a gift bag.)

KEVIN
What's this?

JAMES
A gift. I bought you a gift. I, you know, I feel bad.

KEVIN
Oh well—where did you get it?

JAMES
Just—the gift shop. Downstairs.

KEVIN
(Touched.)
Oh, well, thank you, James. That's really nice of you. You even bought a gift bag for it.

JAMES
Yeah, well—it's a gift.

(KEVIN takes the gift out of the gift bag. It's a book—"Palo Alto" by James Franco.)

KEVIN
(Reading the cover.)
Palo Alto.....by James Franco.

(A beat.)

You gave me...your book?

JAMES

No, I gave you my short story collection.

KEVIN
Why?

JAMES
I thought it might be meaningful to you.

KEVIN
Wow, I don't even—

JAMES
Wait, wait, wait!

(He takes a pen out of his pocket, takes the book from KEVIN, opens it to the front cover, signs it, and then hands the book back to him.)

I can't believe I forgot to do that. Sometimes I'm really oblivious.

KEVIN
James, this...is the worst gift anybody has ever gotten me...Ever.

JAMES
Why? Did you want it in hardcover? I have a few copies in my car.

KEVIN
I don't want your book!

JAMES
Short—

KEVIN
Who gives somebody a copy of THEIR BOOK?

JAMES
Clearly, this collection means a great deal to me, and now I am giving it to you, because now you mean a great deal to me.

KEVIN
You barely know me! You've only been here for a few hours!

JAMES
Wars have been waged and won in a few hours, Kevin.

KEVIN
No—no wars have ever been waged and won in a few hours. Days maybe, but not hours.

JAMES
Hey, I was narrating this documentary for the History Channel—

KEVIN
Why are you narrating documentaries for the History Channel? And why is the History Channel allowing you to narrate documentaries for them? You should not be doing anything and people should stop letting you do things and this book—this BOOK!—is ridiculous, it—Wait—they sell this book in the hospital gift shop?

JAMES
Kevin, BrooklynBoys.com called that book a new American classic.

KEVIN
What's BrooklynBoys.com?

JAMES
It's a blog I started about Brooklyn performance artists.

KEVIN
Are there seven of you? How do you DO all this? Where do you even find the time?

JAMES
It's my passion, Kevin.

KEVIN
No, it's fifteen passions, James.

JAMES
Look, I'm sorry. I thought I was doing something nice, getting you a gift, but I guess—

KEVIN
Don't get me any gifts, okay? I don't want your gifts.

JAMES
That's a terrible thing to say. We're friends.

KEVIN
We're not friends! We're not anything. You. Don't. Know. Me. Not at all. Not even a little bit.

(A beat.)

JAMES
Kevin, when I met you, your father was alive, and when this is over, he's going to be dead. Whether you like it or not, I'm going to be present for a major

event in your life. One that's going to change you forever. The people who knew you before? They're going to be like strangers to you. I'm going to be the first person to really know the new you.

(A beat. KEVIN gets behind JAMES' chair and attempts to push it out of the room. Obviously, he's unsuccessful.)

JAMES

Hey!

KEVIN

Go away!

JAMES

No!

KEVIN

Go away, I don't want you here!

JAMES

You don't know what you're saying!

KEVIN

I want to be alone!

JAMES

No, you don't!

KEVIN

Yes, I do! I hate you! I want to be alone! I don't want you here!

JAMES

But then who will witness your transformation?

KEVIN

Not you, you fucking ass douche!

(Finally, KEVIN gives up. He falls to the floor. Then, softly, we hear he starts to cry. JAMES waits a second, gets on the floor, and pulls KEVIN into an embrace. They sit back against the chairs facing the AUDIENCE.)

JAMES

It's okay, dude.

(A beat.)

I forgive you.

(The crying has now turned into sobbing.)

Okay...okay.

(The sobbing continues.)

Look, I don't know what to say so—

(The sobbing starts to taper off.)

I can't believe nobody's coming to check up on us. I mean, you were crying really loud—

(The sobbing stops. KEVIN is asleep. He has, actually, cried himself to sleep.)

I'm so cool with this right now.

(A beat.)

I'm totally cool with it.

(A beat.)

When you wake up, it'll all be over.

(A moment.)

Then you'll be really happy to have something to read.

(Lights dim.)

Scene Ten: Spiderman

(The lights slowly come up. It's early morning. JAMES is still sitting on the floor. KEVIN is laying down with his head in JAMES' lap, facing the audience.)

KEVIN
The day I went to see *Spiderman*, the first boy I ever liked asked me to go out with him. Like, to be his boyfriend.

JAMES
How old were you when Spiderman came out?

KEVIN
I was...seventeen, almost eighteen. God, I loved that movie.

JAMES
I do too.

KEVIN and JAMES
Fuck Andrew Garfield.

KEVIN
I was on such a high that night. I probably would have loved whatever movie I saw. It was—this perfect night. Somebody liked me, maybe even loved me, and I was sitting there, in this air-conditioned theater, on this gorgeous night, high school almost behind me, college in front of me, and this movie—this well-made—event. This MOVIE. It...It was just...Everything was right. Correct, you know?

(A beat.)

And the next day he broke up with me. Well—not broke up with me. I mean, it was high school, it was so trivial, we—he—he changed his mind. That was it. He just—liked me one day, and the next day he didn't. I should have just stayed in that movie theater.

(A beat.)

Ask me what my biggest fear is, James.

JAMES
What's your biggest fear?

KEVIN
Tomorrow. Tomorrow is my worst fear. Because today is here, and I'm looking at it, and I know what it is. And tomorrow? Tomorrow is unknown. Tomorrow could be the day somebody stops liking me, or things start going downhill, or my father dies. I hate tomorrow. I fucking hate it. Fuck tomorrow. And fuck Annie and that stupid red afro of hers.

JAMES
It's after midnight, Kev. Tomorrow's already here.

(A beat.)

And he's still here.

KEVIN
You know why people like superhero movies, James?

JAMES
Why?

KEVIN
Never mind. I sound drunk.

JAMES
Kev, why do people like superhero movies?

KEVIN
You know, if you keep me up late enough, I just—start to sound drunk. No point in actually getting drunk. Just keep me awake, and I turn into a drunk—poof. It's like magic. And it's—So. Much. Cheaper.

JAMES
Superhero—

KEVIN

Because there's a clear good guy and a clear bad guy and the clear good guy beats the clear bad guy.

JAMES
Not always. In the first movie, I was a good guy. Then I became the bad guy. Then I was defeated, and at the end, I was a good guy again.

KEVIN
That's because you died. Everybody dies as a good guy. You get near death and all's forgiven.

JAMES
Is it?

(A beat.)

KEVIN
But then I guess...What's there to forgive? What should I forgive him for?

JAMES
I don't know. You tell me. Or don't tell me. Not if you don't want to.

KEVIN
Childhood.

(A beat.)

JAMES
All of it?

KEVIN
Most of it. As far as my dad's concerned? Most of it.

JAMES
That's a lot.

KEVIN
More than I care to think about.

JAMES
Was it like a...Gay thing?

KEVIN
Yes, my father was gay and I had a very hard time accepting it.

JAMES
I—

KEVIN
We never even talked about it.

JAMES
Really?

KEVIN
Yeah. I mean, I assume he knew—knows—God, tense is impossible right now. We didn't talk about it, but I never hid it either. Or maybe I did, but I didn't pretend. It's not like I, you know, brought girls to meet him or anything. We just didn't—he must have thought I was asexual. Like a caterpillar. And now he's going to die and we've never actually talked about this...huge thing. This huge thing that's...Yeah.

JAMES
I had a crush on Kirsten.

KEVIN
Dunst?

JAMES
Yeah.

KEVIN
How did that go?

JAMES
She had a crush on one of the cameramen.

KEVIN
I thought you were going to say Tobey.

JAMES
Tobey like Tobey Maguire?

KEVIN
Yeah.

JAMES
Sorry, when you say Tobey and nothing else I assume you're, like, best friends with these people.

KEVIN
Okay, asshole.

JAMES
Nobody has a crush on Tobey. You know how weird he seems onscreen?

KEVIN
Yeah.

JAMES
Multiply that by, like, a thousand in real life.

KEVIN
So she could have had you and she chose a cameraman?

(A beat. Small smirk.)

That must have stung.

JAMES
Now who's being an asshole?

(KEVIN laughs.)

He was a very good-looking cameraman.

KEVIN
Oh, I'm sure he was.

JAMES
And I wasn't, you know—I was still just a...like an up-and-coming...guy.

KEVIN
What difference would it have made? She chose someone who wasn't famous. Being more famous wouldn't have helped you.

JAMES
I know.

(A beat.)

It's so weird.

(A second.)

It was weird then—it's even weirder now. It's all so weird. And Tobey was weird. That whole movie was such—I mean, I love it. I love that movie. I have a special place for—and I love that you love it, but man, making it was one thing. Seeing it was—I was so proud of it. I was so happy about it. And I forgot about all the shitty stuff. At the end of things, it's easier to forgive it all. You're right about that.

KEVIN
I can't wait for it.

(A beat.)

The forgiving.

(A beat.)

I'm looking forward to it.

JAMES
Spiderman 3 though...

KEVIN
That's unforgivable.

JAMES
Yeah.

(A beat. He sighs.)

Yeah.

(The lights shift.)

Scene Eleven: Oz the Great and Powerful

(JAMES and KEVIN are facing off.)

KEVIN
It was a terrible movie.

JAMES
Oh yeah. That's probably why it made eight trillion dollars!

KEVIN
(To the AUDIENCE.)
Now I'm making him childish. Petulant. Way too defensive.

(Back to JAMES.)
By that logic, *Avatar* is a masterpiece.

JAMES
Avatar IS a masterpiece!

KEVIN
You're insane!

JAMES
What about the movie made you hate it so much?

KEVIN
It was unimaginative.

JAMES
Well not everything can be imaginative!

KEVIN
It was about *The Wizard of Oz*!

JAMES
You're probably one of those people who went into the movie expecting to hate it.

KEVIN
I go into every movie expecting to hate it! That way, if it's good, I'm always pleasantly surprised!

JAMES
How do you live like that?

KEVIN
Oh, come on, James.

JAMES
No, seriously, like—how do you do it? Isn't it miserable? Like, you go to a movie or you watch a tv show, and the whole time, you're just sitting there thinking—What am I going to say about this on Twitter when I get home? Oooh, what snappy Facebook status can I put up about it? You're sitting there the whole time just dying to pick something apart, because the fact is, if you sincerely liked anything, you wouldn't be able to benefit from it. You only get attention from hating things.

KEVIN
I like things.

JAMES
Name one thing you like.

KEVIN
I—

JAMES
Not *Spiderman*. You already conceded that you might just love it because you have a happy memory attached to it. Name something else.

KEVIN
I like things, James.

JAMES
Then name them. Or one. Just one. Name something that isn't, like, ironic. That you don't like ironically. That you actually, sincerely love. Without conditions. Without minor criticisms. Just something that makes you happy. Go ahead. Name one thing.

(A beat.)

KEVIN
Storage Wars.

(A beat.)

JAMES
Storage Wars?

KEVIN
Yes. *Storage Wars*.

JAMES
I—what?

KEVIN
Like where they bid on the items in the—

JAMES
I know what *Storage Wars* is! That's the one thing you like?

KEVIN
It's just—it's soothing, you know? They open the lockers, they look inside, they bid on what's there, somebody wins, they argue a little bit, and then go get the stuff appraised. It's...I enjoy the routine of it.

JAMES
And you're giving me shit about *Oz the Great and Powerful*.

KEVIN
You asked me and I answered. I'm not saying it's *Gone with the Wind*—

JAMES
What about *Gone with the Wind*? You couldn't have picked that.

KEVIN
It's a little long for me—

JAMES
Oh my God!

KEVIN
I like that *Storage Wars* doesn't try to be anything. It just IS *Storage Wars*. That's all it is.

JAMES
Well, I'm glad you have something in your life that doesn't let you down.

KEVIN
Oh, don't get all psychological about it. It's a guilty pleasure.

JAMES
And maybe—for some people—*Oz the Great and Powerful* is a guilty pleasure.

KEVIN
Fine. Fine. Fair point.

(A beat. JAMES is genuinely wounded.)

JAMES
I was proud of that movie, you know.

KEVIN
You were?

JAMES
Yes.

KEVIN
Oh. I just...

JAMES
What?

KEVIN
I assumed you did it for the money.

JAMES
Kevin, money—

KEVIN
I know, I know, but I just can't imagine doing that movie for—literally any other reason.

JAMES
The Wizard of Oz was my grandma's favorite movie.

(A beat.)

KEVIN

Oh.

JAMES

So that might've...I thought it was cool. When they offered it to me, I—I went back and I watched *The Wizard of Oz*, and I thought, Wow—this'll be cool. Because my grandma never really got to see me be a movie star. She would have loved to see me as the Wizard, you know?

(A beat.)

KEVIN

I'm sorry.

JAMES

Imagine if everything you did—everything thing you ever wrote—got like, torn apart by, you know—

KEVIN

People like me?

JAMES

Yeah.

(A moment, then a discovery.)

KEVIN

I'm kind of an asshole.

JAMES

(Shrugs.)

Whatever. Everybody is.

KEVIN

It wasn't the worst thing I've ever seen.

JAMES

Wow, what a compliment.

KEVIN

And—I thought you were...pretty good in it. All things—I mean, you were definitely good in it. You shouldn't be—you know, you should be proud of it, I think.

JAMES

Are you always this good at apologizing?

KEVIN
Usually I put up more of a fight.

(JAMES laughs.)

JAMES
You should go check on him. It's been awhile.

KEVIN
It's too quiet. I'm...Before when people were running back and forth, I actually felt ready—for it to happen. But now it's quiet and—if it happens now, I just feel like it'll be too easy. Like it'll just be over and that'll be it. I'll go home. And it'll all be...

JAMES
Quiet.

KEVIN
Yeah.

(The lights shift.)

Scene Twelve: Fuck, Marry Kill

(KEVIN is throwing the ball up in the air and catching it. He's even worse at it than JAMES is. JAMES is reading Palo Alto.)

KEVIN
Okay—Sean Penn, Emile Hirsch, annnnnnnd Josh Brolin.

JAMES
Hmmm...Kill Sean Penn.

KEVIN
Really?

JAMES
I just don't think I'd be that into him.

KEVIN
Not even, like, talent-wise?

JAMES
No, I mean, totally talent-wise, but we're talking about, like, do I want to fuck him? No. Do I want to marry him? No. I mean, he's a great actor, but he's fucking nuts.

KEVIN
Okay, so he's killed.

JAMES
I'd fuck Emile Hirsch, marry Josh Brolin.

KEVIN
Good call.

JAMES
Emile would fucking love it too.

KEVIN
Really?

JAMES
I'm not saying he's gay, but I definitely think he'd like getting it in the ass.

KEVIN
Well, then—never mind.

JAMES
Give me another one.

KEVIN
Michael Cera—

JAMES
Kill Michael Cera.

KEVIN
I didn't even say the other two names yet.

JAMES
It doesn't matter. I'm killing Michael Cera.

KEVIN
Okay, okay—Uh...Mila Kunis—

JAMES
Everything Mila Kunis. Fuck, marry, and then she can kill me. I'm done.

KEVIN
Will you let me get one in without interrupting?

JAMES
Sorry, sorry. God, this book is kinda shitty, huh? Was I on drugs when I wrote

this?

KEVIN
How would I know?

JAMES
I even made a movie out of this. Remind me never to watch that.

KEVIN
Okay, I have a good one—Jennifer Lawrence—

JAMES
Ooohhh—

KEVIN
Amy Adams.

JAMES
Okay.

KEVIN
And Anne Hathaway.

JAMES
Kill Anne Hathaway, but, like, gently, because she's really not bad.

KEVIN
Okay.

JAMES
Like, she gets a bad rap.

KEVIN
Okay, okay.

JAMES
I feel like the smart thing to do is to marry Amy and fuck Jennifer.

KEVIN
Yeah, I mean, that seems sort of obvious.

JAMES
But if I marry Jennifer I get to have sex with her all the time, so—

KEVIN
Yeah, I don't know what they're saying with this game.

JAMES

Assuming you continue to have sex with people once you're married to them.

KEVIN
Maybe the game assumes you don't, but, like, you just get to hang out with them a lot?

JAMES
In which case—Mmm, I still think I'd rather be with Jennifer long-term. She's so cool.

KEVIN
She's really cool. I mean, I don't know her, but—

JAMES
Yeah, marry Jennifer. Fuck Amy. Hey, I still get to fuck Amy. I feel like that works out really well for me.

KEVIN
Give me one.

JAMES
Okay, uh—Channing Tatum.

KEVIN
Okay.

JAMES
Tom Hiddleston.

KEVIN
This is gonna be easy.

JAMES
And James Franco.

(A beat.)

KEVIN
You?

JAMES
Yeah, me.

KEVIN
No.

JAMES
Why not?

KEVIN
You can't put yourself in Fuck, Marry, Kill.

JAMES
Why not?

KEVIN
Because. That's awkward.

JAMES
Just do it, c'mon.

KEVIN
James—

JAMES
Go ahead. It's not like I'm going to be offended.

KEVIN
Okay, so, uh...Kill you.

JAMES
WHOA!

KEVIN
What?

JAMES
You killed me that fast?

KEVIN
I—

JAMES
Like, drop of a hat—and I'm dead?

KEVIN
You said you wouldn't get offended.

JAMES
Because I thought you were going to say that you would fuck me and kill Channing.

KEVIN
No, I'm going to fuck Channing and kill you.

JAMES

You're going to FUCK Channing Tatum?!?

KEVIN
Are you kidding me? Of course I'm going to fuck Channing Tatum!

JAMES
Oh my god, man. You are so pedestrian.

KEVIN
It's Channing Tatum. Have you seen Magic Mike?

JAMES
I'd rather get fucked by Hellraiser.

KEVIN
Channing Tatum is the reason they invented the Fuck option if Fuck, Marry, Kill. He's the perfect Fuck.

JAMES
You don't know that.

KEVIN
Well, in our theoretical game, I'm sure as hell going to find out.

JAMES
And you're going to marry Tom Hiddleston.

KEVIN
Do you blame me?

JAMES
Oh, yeah, no. Not at all. It's Tom Hiddleston.

KEVIN
Right?

JAMES
I mean, that's a no-brainer.

KEVIN
Like—c'mon. Loki.

JAMES
Fuckin' Loki. I know.

KEVIN
Like, he's British—

JAMES
Dude, it's fine. He's not the one I'm upset about.

KEVIN
Okay, fine. Fine! I'll fuck you.

JAMES
You're just saying that.

KEVIN
No, really. Now that I know how upset you are—I'd fuck you.

JAMES
So, you'd pass on Channing Tatum and fuck me instead?

KEVIN
Yup.

JAMES
You'd kill Channing Tatum for me?

KEVIN
Yes, I would. I mean—Channing Tatum hasn't been sitting here with me all night waiting for my dad to die, so...you. I choose you.

JAMES
Wow. That...That means a lot to me, Kev.

KEVIN
I'm glad, James.

(A beat.)

You don't have Channing Tatum's number, do—

JAMES
Oh, fuck off.

(JAMES laughs. KEVIN laughs. They look at each other. Lights shift.)

Epilogue: This Is The End

(The lights come up on JAMES sleeping on the chairs. KEVIN enters looking shaken. He stands there for a moment. JAMES opens his eyes, and sees KEVIN standing there. He jolts up.)

JAMES
Did it...?

KEVIN
No. He's fine.

(A beat.)

JAMES
He's fine?

KEVIN
Well, he's not fine, I mean, he's dying. He's just...not going to die today.

JAMES
What about tomorrow?

KEVIN
Yeah, maybe tomorrow.

(JAMES moves and KEVIN sits down next to him. They sit still for a moment.)

I'm a terrible person.

JAMES
Why?

KEVIN
Because I wanted it to happen. Well, not wanted it to, but...wanted it to be...over, you know?

JAMES
That doesn't make you a terrible person.

KEVIN
(Shrugs.)
What scares me the most is...I don't know what I'll do when it happens. Like—will I cry? Will I just stand there—frozen? Will I do that thing where people laugh because their mind just can't...I hate not knowing that. I hate not knowing what I'm going to do.

(A beat.)

JAMES
Do you want to practice?

KEVIN
Practice what?

JAMES
Like, finding out what you'll do.

KEVIN
Like role-playing?

JAMES
Yeah.

(A beat.)

KEVIN
So, you'll be, like, the doctor and tell me and I'll—

JAMES
No, I'll be you.

KEVIN
Huh?

JAMES
You be the doctor. That way you're, you know, distanced from it, and I'll react all different ways, and you can sort of see which one feels the most authentic.

(A beat.)

KEVIN
Okay.

JAMES
Okay?

KEVIN
Yeah, why not?

(A beat. They take a second, then face each other.)

You ready?

JAMES
Yeah. Go for it.

KEVIN
Unfortunately, your father passed away.

(JAMES takes a second. Then says--)

JAMES

Oh.

(A beat.)

That was frozen you.

KEVIN
Yeah, that doesn't seem right.

JAMES
Okay. Do it again.

(A beat.)

KEVIN
Your father is dead.

(JAMES laughs. It's a long, building laugh. Then he stops.)

JAMES
So?

KEVIN
No. Although it was an interesting choice.

JAMES
Okay, go again.

(A beat.)

KEVIN
Your father's gone.

(JAMES starts to cry. Softly at first, then audibly. Heavily. He slowly falls into KEVIN's chest. KEVIN holds him, and whispers.)

It's okay.

(JAMES continues to cry.)

That's it. That's the one.

(Lights.)

End of Play

EXHIBIT C

(*Demand Letter*)

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July 7, 2017

VIA U.S. MAIL & EMAIL

Peoples Improv Theater a/k/a The Pit
123 E. 24th Street
New York, NY 10010
info@thepit-nyc.com

Re: ***"James Franco and Me"***

To Whom It May Concern:

This firm represents James Franco. It has come to our attention that your company, Peoples Improv Theater a/k/a The Pit, is advertising, marketing, distributing and/or otherwise exploiting our client's name and likeness in connection with the public performance of a show entitled "James Franco and Me" (collectively, the "Performance"), including, inter alia, via the website:

https://thepit-nyc.com/event/2017-08-20-james-franco-and-me

Your unauthorized exploitation of our client's name and likeness in connection with the Performance exposes you to a variety of claims. Among other things, your actions constitute an invasion of our client's valuable right of publicity, unauthorized and tortious misappropriation of our client's name and likeness for commercial purposes, common law trademark infringement, a violation of the Lanham Act, unfair business practices in violation of the California Business and Professions Code Section 17200 et seq., and a violation of California Civil Code Section 3344, among other violations of applicable United States federal and California state law. Section 3344 provides in relevant part:

> "Any person who knowingly uses another's **name**, voice, signature, **photograph** or **likeness** on or in products, merchandise or goods or for purposes of advertising or selling, or soliciting purchases of products ... shall be liable for any damages sustained by the person or persons injured as a result thereof."

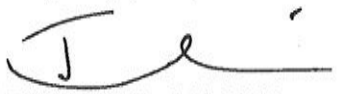
Based on the above, we hereby demand that you immediately cease any and all usage of our client's name, likeness and/or other attributes in connection with the advertising, marketing,

distribution and/or exploitation of the Performance or any of your other activities. Please contact this office immediately to confirm your compliance with the foregoing and to discuss appropriate redress, including, without limitation, disgorgement of any amounts received in connection with your infringing activities. Otherwise, our client will have no choice but to aggressively pursue any and all of his legal and equitable remedies, including, without limitation, seeking substantial compensatory damages, punitive damages, and injunctive relief.

This letter does not purport to constitute a complete or exhaustive statement of all of our client's rights, contentions or legal theories. Nothing contained herein is intended as, nor should it be deemed to constitute, a waiver or relinquishment of any of our client's rights or remedies, whether legal or equitable, all of which are hereby expressly reserved.

This letter is a confidential legal communication and is not for publication. Any publication, dissemination or broadcast of any portion of this letter will constitute a breach of such confidence and a violation of the Copyright Act, and you are not authorized to publish this letter in whole or part absent our express written authorization.

Very truly yours,



THOMAS B. COLLIER
of SLOANE, OFFER, WEBER and DERN, LLP

TBC:jl

cc: Warren Dern, Esq.
Jonathan Sauer, Esq.
(w/attachment via email)

EXHIBIT D

(*The Lies of Poets*)

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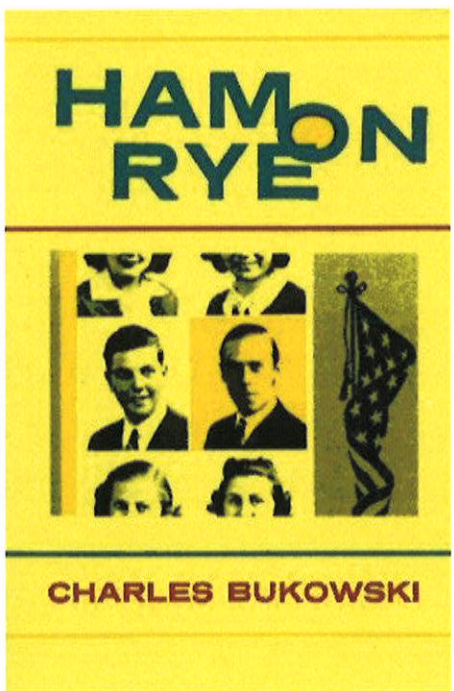
The Lies of Poets: Copyright in Literary Biopics

When Are "Fictional" Episodes Uncopyrightable "Historical Facts"?

By Patrick Kabat

It is axiomatic that no author may lay claim to the facts of her life. This is no less true for poets who write autobiographies than public servants who publish memoirs, but the former are particularly prone to make art from life, producing autobiographical works that blend fiction with fact.[1] As the literary memoir occupies center stage in the catalogs of publishing companies,[2] and Hollywood gives us a spate of recent biopics about celebrated writers,[3] it is increasingly important to understand how copyrights materialize within the blurred lines between fact and fiction in literary autobiography.

The freedom to make films about writers depends on it, because however significantly their semi-fictional writings may illuminate their lives, authors (or more commonly, their estates and assigns) may claim copyright in episodes from those works, even if the episodes reflect uncopyrightable facts. So how do we know an autobiographical fact when it appears in a work of fiction?



This novel question has been teed up by *Humphris v. James Franco et al.*,[4] a recently filed copyright suit against the polymath actor James Franco and his production company. The plaintiff says he owns the film rights to bar-poet Charles Bukowski's semi-autobiographical novel *Ham on Rye*, and that Franco violated those rights by developing his own film about the poet, *Bukowski*. In addition to the usual allegations about access and similarity, and some less usual allegations about the parties' prior dealings, the complaint identifies three scenes that the plaintiff says are stolen from *Ham on Rye*.

Bukowski being Bukowski, the suit lands awkwardly between two well-trodden bodies of copyright law: the uncopyrightability of fact, and the fair use of copyrightable expression. The former is straightforward: copyright simply "does not recognize private ownership of historical information, nor does it enforce efforts to hoard, suppress, sell or license historical fact, or to govern who may and who may not disseminate it."[5]

Biographical facts, therefore, "may not be copyrighted and are part of the public domain available to every person" with only "thin" copyright protection lingering in the arrangement of those facts.[6] A dearth of caselaw specifically addresses autobiographies, but settled principles governing the use of personal letters (tiny autobiographies published to an audience of one), journals (serial autobiographies published to an initial audience of zero) and different biographical works about the same subject make plain that historical works making use of

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purely factual autobiographical material are doubly insulated from copyright claims: factual information is not protected by copyright, and the doctrine of fair use excuses the biographer's measured appropriation of the autobiographical expression itself. [7]

Where original works of fiction are concerned, by turn, a literary biographer's first line of defense is fair use, for even the stronger protection copyright affords to original works of fiction does not prevent a biographer's use, in appropriate measure, for an "illustrative" or "instructive historical purpose."[8] Literary biography simply could not exist without this accommodation, but in the context of factually based works the doctrine unsatisfactorily concedes copyright; in the context of literary expression it is vulnerable to judgments about the appropriation of particularly "radiant" expression;[9] and in the context of transposition across mediums—say, from verse to screen—fair use invites speech-chilling uncertainties about the extent to which innovative uses of creative material are transformative, and so on.

Ham on Rye straddles both bodies of law. Like most of the Bukowski corpus, it is both fictional and autobiographical – a thinly veiled *roman à clef* about the author's childhood in which the character Henry Chinaski serves as Bukowski's narrative avatar. In such a work, or innumerable others that both contain original invention and reveal biographical facts—Joyce's *Portrait*, Hemingway's *Moveable Feast*, or Franco's own recent pseudoconfessional, *Bungalow 89*, that "reads a lot less like fiction and a lot more like vignettes from his own life,"[10] First Amendment principles that afford "broad latitude" to "authors who contemplate tackling an historical issue or event"[11] protect biographers who appropriate factual content. But how do we know fact from fiction? More precisely, to whom does the law of copyright entrust that judgment?

Authors, of course, can tell us themselves, and even when the extent of fictionalization is disputed, courts will hold them to their word. Copyright estoppel precludes authors from ginning up stronger rights than properly vest in works they have represented to be factual, for "equity and good morals will not permit one who asserts something as a fact which he insists his readers believe as the real foundation for its appeal to those who may buy and read his work, to change that position for profit in a law suit."[12]

On this basis, the owner of film rights to a biography could not claim that a Mel Brooks biopic about actress and activist Frances Farmer infringed even fictionalized elements of the biography, where promotional materials represented the work to be a true story, and reasonable readers would have understood it as such.[13] Likewise, where the author and publishers of a book about a famous medical examiner held the book out as factual, the author was estopped, as a matter of law, from proceeding against a television show on the basis that it was a protectable work of fiction.[14] The doctrine offers writers a sensible bargain, insisting that they choose between trading on the factual appeal of a true story, and asserting the more robust control over later use that copyright entitles fiction writers.

But copyright estoppel asks only how a work is held out to the public, not whether the underlying episodes are or are not factual,[15] and courts may be leery of applying the doctrine where an author's representations are anything short of unambiguous. Authors speak about their craft with varying degrees of conclusiveness, whether writing plainly, as Bukowski did of his novels, that "they're more fact than fiction" and "in the real sense they can't be called novels,"[16] or more equivocally, as Hemingway instructed readers of *A Moveable Feast*, that

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though they may understand the collection of his Parisian reminisces as fiction, "a book of fiction may throw some light on what has been written as fact."[17]

Courts, in turn, may arrogate to themselves the task of separating uncopyrightable "historical facts" from authors' fictional contributions, as two courts recently did when declaratory judgment actions against different claimants became necessary to quiet threats against *Effie*, a biopic about John Ruskin. In *Effie Film v. Pomerance*, Judge Oetken took extensive judicial notice of "historical facts" relating to the Victorian art critic,[18] a term prominent historiographer Richard J. Evans defines as "something that happened in history and can be verified as such through the traces history has left behind,"[19] and granted judgment on the pleadings for the film company on the basis of noticed facts.

His thorough and scholarly opinion explains that judicial notice may be used for the "careful parsing of protectable fictionalizations from unprotectible interpretations," and that federal courts "may take judicial notice of the existence of certain historical facts and interpretations prerequisite to analysis of the protectible and unprotectible elements of the disputed works" on a Rule 12 motion.[20] As Judge Griesa put it in the other *Effie* action, this is "the court's role."[21]

Courts may also consider news reports[22] or weigh affidavit evidence from "reputable and knowledgeable authors"[23] to determine the factual nature of a work. In *Mosley v. Follett*, the court rejected a copyright plaintiff's argument that his book about the exploits of a German secret agent in Cairo during the Second World War was entitled to the fuller protections afforded fiction. The defendant, who wrote an historical novel in which the secret agent appeared, was entitled to use the same "essential historical facts,"[24] because the plaintiff, a British journalist, introduced his book as a memoir of his time with spies, described having located and interviewed the secret agent after the war, and was understood by affiants (and at least one CIA analyst, who wrote in a recently declassified document that it was a book "of considerable interest" with a "factual basis"[25]) to have been telling true tales.

Though autobiographical accounts would seem to be uniquely authoritative historical "traces," courts may have less comfort scrying facts from a partially fictionalized autobiography, or wading into a thicket of academic debates about historical truths, than conducting a review of peer-reviewed secondary literature or newspapers of record. As with copyright estoppel, courts may want more clarity than may be available outside the four corners of a partially autobiographical work. But does the law require juries to determine whether T.S. Eliot dared to eat a peach,[26] if no court dares to take judicial notice?

No. That is a task for biographers, not juries, and basic copyright and First Amendment principles protect a biographer's freedom to undertake it. Ambiguity as to whether a work conveys an historical fact must be resolved, as a matter of law, in favor of the biographer who elects to treat it as fact, because resolving that ambiguity is an act of historical interpretation. *Feist* made plain that biographical facts "may not be copyrighted and are part of the public domain available to every person,'"[27] so "[w]hen a biographer or historian, using a copyrighted work as a source, takes historical information from it, he does not infringe the copyright."[28] A semi-autobiographical novel or poem is not just an exploitable narrative work, it is also itself an historical fact, and an important *source* about the author's life, however much or for whatever reason his biographers may distrust it.

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Courts may notice such facts as they are comfortable finding, but it is the *biographer's* prerogative, not that of the author (and his profit-maximizing assignees) or the courts, to decide whether to trust a source: that judgment is idea, not expression. If an autobiographical novel is the only source for a particular vignette, whether to understand that event as fact or fiction is an exercise in historical interpretation, and if "the idea at issue is an interpretation of an historical event," "such interpretations are not copyrightable as a matter of law."[29]

In this way, the First Amendment's solicitude for historical inquiry reinforces the same bargain that drives copyright estoppel. By declaring, implicitly or explicitly, his work to be at least partly confessional in character, the author of an autobiographical poem or novel creates both a work of literature and a primary source about his life. He abandons the stronger copyright protections afforded to pure invention, and becomes, for those interested in telling his story, a source of factual information. His biographers, in turn, approach that source (as do all historians when analyzing records of the past) according to their judgments about authenticity, reliability, and truthfulness.[30]

Indeed, a partially fictional autobiography may provide a biographer with a more reliable view of his subject than an autobiography emphatically held out as fact, for a thin veil of fiction has often left writers *freer* to tell true tales, whereas a memoirist's table-pounding that his version is true may protest too much, stinking of calculated revisionism.

Autobiographical novels can also provide additional evidence that supplements our understanding of otherwise well-documented events, such as when a young James Joyce knocked impertinently on the Dublin door of another Irish writer, "A.E. the mastermystic" in the "small hours / of the morning to ask him / about planes of consciousness."[31] Exercising that judgment is the very essence of biography, and depicting brief vignettes from partially fictionalized autobiographical works as biographical fact simply does not appropriate protectable expression; it announces a judgment that the source *can* be trusted. No biographer should avoid advancing that judgment because she fears a court may later disagree.

Admittedly, translating these principles across mediums is imperfect and untested. A film that interprets a source as a reflection of a biographical fact and depicts it onscreen does so less explicitly than a biographer who drops a footnote saying as much. Joyce's leading biographer, for example, was able to confirm that Joyce had indeed accosted George Russell (A.E.) through an interview with one of Joyce's contemporaries and accounts in A.E.'s letters, but whether A.E. also spoke with an American interviewer about the midnight interruption relied on "the evidence of *Ulysses*."[32] But directors of biopics are not disentitled to the latitude the Constitution affords biographers in older mediums. Doubts as to whether a particular episode amounts to an interpretation must be resolved in the biographer's favor: courts "construe the scope of 'facts' and 'interpretations' broadly" to avoid chilling the historical enterprise.[33]

Fair use may be necessary to justify poetic, rather than historical, appropriation—that is, where a biographer does not interpret (and portray) a vignette as reflecting a biographical fact, but rather quotes it outright *as a work of fiction*. A biopic screening Eliot at his desk, spliced with a visual depiction of *The Love Song of J. Alfred Prufrock* and its peach, is the on-screen equivalent of the poet's biographer dropping a stanza or two in-text. *Howl*, for example, in which James Franco played Allen Ginsberg, punctuated the obscenity trial to which Ginsberg's poem

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was subjected by screening the poem itself, alternately in animated form and at its seminal 1955 reading at San Francisco's Six Gallery.

These "quotations" may be justified under the familiar grounds of transformativeness, market overlap and similarity of expression, but they are, at root, reproductions of a fictional work *as fiction*, rather than the historical interpretation of a source's factual basis.[34] Whether Eliot's symbolic peach was biblical or sexual is a matter for critics to debate, and if quoted or depicted *as a poem* for a *critical* purpose, fair use is the appropriate response.

But imagine a biopic in which T.S. Eliot resolutely dares to *eat* that peach. Whether he agonized over its eating is a matter for biographers, who may make *biographical* use of the episode, or directors, should they choose to depict it as a factual occurrence onscreen. Or a biopic in which Matthew Arnold, who wrote *Stanzas from the Grand Chartreuse* while staying at the eponymous monastery, rides "[t]hrough Alpine meadows / soft-suffused / With rain, where thick the crocus blows."[35] A biographer may take him at his word, and a biopic depicting those episodes *as they happened*, rather than quoting the poem *qua* poem through Arnold at his desk or at a reading, need not concede copyrightability in Arnold's ride, crocuses, ragged pines, and all, and protest only that the use was fair. Nor need a production company wait to develop such a film until an army of scholars source the Alpine ride. The poem *itself* is a source for autobiographical facts, and their historical interpretation is reserved to those making historical use.

Assignees of rights in these poems may protest, but only to the extent that they bear unrealistic expectations about conveyable rights.[36] Likewise, holders of film rights in autobiographical works may be frustrated to discover that they lack claims against films that depict episodes described in those works, although certainly not in greater degree than production companies may be frustrated by the pragmatic expedient of licensing an autobiography, a biography, or a handful of each to avoid the cost of defending meritless copyright suits.[37] So *caveat emptor* to purchasers of film rights in a thinly fictionalized autobiographical work.[38] To the extent that episodes in a semi-autobiographical work are interpreted (and depicted) to state historical facts, they are no one's property.

Patrick Kabat is an associate in the New York office of Levine, Sullivan, Koch & Schulz, LLP. The views expressed in this article are his own. Those interested in licensing biographical facts disclosed in it should contact the Media Law Resource Center.

NOTES

1. *E.g.* Ernest Hemingway, *Preface*, A MOVEABLE FEAST ("a book of fiction may throw some light on what has been written as fact."); Letter from Charles Bukowski to Jeff Weddle (1988), in 3 CHARLES BUKOWSKI: SELECTED LETTERS, 1978-1994, at 99-100 (Cooney, Seamus ed., 1999) ("On the novels, I'm afraid they're more fact than fiction and I suppose in the real sense they can't be called novels.").
2. James Atlas, *Confessing for Voyeurs; The Age of the Literary Memoir is Now*, The New York Times Magazine (May 12, 1996); *available at* http://www.nytimes.com/1996/05/12/magazine/confessing-for-voyeurs-the-age-of-the-literary-memoir-is-now.html; Ben Yagoda, MEMOIR: A HISTORY (2009) (genre sales in the U.S. increased by 400% between 2004 and 2008).

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3. *E.g.* PAPA (Bob Yari, forthcoming 2015) (Hemingway biopic); THE INVISIBLE WOMAN (BBC Films 2013) (Dickens); YOUNG GOETHE IN LOVE (Senator Film Produktion 2011); HOWL (Werc Werk Works 2010) (Ginsberg); BRIGHT STAR (Pathé Renn Productions 2009) (Keats); BECOMING JANE (HanWay Films 2007) (Austen); MOLIÈRE (Fidélité Productions 2007); Infamous (2006) (Warner Independent Pictures 2006) (Capote).
4. *Humphris v. Franco et al.*, No. 2:14-cv-03162 (C.D. Cal. Apr. 24, 2014).
5. *Craft v. Kobler*, 667 F. Supp. 120, 123 (S.D.N.Y. 1987) (citations omitted).
6. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).
7. *E.g. Craft v. Kobler*, 667 F. Supp. 120, 126 (S.D.N.Y. 1987); *Wright v. Warner Books*, 953 F.2d 731, 736 (2d Cir. 1991) ("Most of the passages [from journal entries and private correspondence] on which plaintiff bases her allegations of copyright infringement convey facts or ideas.").
8. *Id.*
9. *Id.* at 127 (Stravinsky's biographer disentitled to make extensive use of composer's "radiant" prose); *see also Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (J.D. Salinger's biographer disentitled to paraphrase unpublished expressive content too closely).
10. Ben Beaumont-Thomas, *James Franco pens short story with central character Lindsay Lohan*, The Guardian (June 10, 2014), *available at* http://www.theguardian.com/books/2014/jun/10/james-franco-short-story-lindsay-lohan-bungalow-89; James Franco, *Bungalow 89*, Vice (June 10, 2014), *available at* http://www.vice.com/read/bungalow-89-0000347-v21n6.
11. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978, 980 (2d Cir. 1980).
12. *Oliver v. Saint Germain Foundation*, 41 F. Supp. 296, 299 (S.D. Cal. 1941).
13. *Marshall v. Yates*, No. 81-1850, 1983 WL 1148, at *2-3 (C.D. Cal. Oct. 26, 1983).
14. *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26 (C.D. Cal. 1984).
15. *Houts*, 603 F. Supp. at 31.
16. Bukowski, *supra* n.1.
17. Hemingway, *supra* n.1.
18. *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 296 (S.D.N.Y. 2012).
19. Richard J. Evans, IN DEFENSE OF HISTORY 66 (2000); *see also Pomerance*, 909 F. Supp. 2d at 296 (citing Evans).
20. *Pomerance*, 909 F. Supp. 2d at 298.
21. *Effie Film v. Murphy*, 932 F. Supp. 2d 538, 554 (S.D.N.Y. 2013), *aff'd*, --- Fed. App'x ---, 2014 WL 1797466 (2d Cir. May 7, 2014) ("In a work of historical fiction, very many elements of a work are drawn from historical events, not from the author's own creativity. Historical 'facts' and interpretations themselves are not copyrightable.").

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22. *Walker v. Time Life Films*, 784 F.2d 44, 50 (2d Cir. 1986) ("The killing of two police officers actually occurred and was reported in the news media, which placed the historical fact of the murders in the public domain and beyond the scope of copyright protection."); *see also Wager v. Littell*, 549 F. App'x 32, 34 (2d Cir. 2014) (summary order) ("the two fictional works are set in World War II and focus on the Holocaust and its tragic consequences. Plainly, no author can claim a copyright in such historical themes or in public source material relating to them.").
23. *Mosley v. Follett*, No. 80 CIV. 5628, 1980 WL 1171, at *3 (S.D.N.Y. Nov. 5, 1980) (denying motion for preliminary injunction; copyright plaintiff unlikely to succeed on the merits).
24. *Id.*
25. *See* 3 *Studies in Intelligence* 139-140 (Central Intelligence Agency 1959) (*The Cat and The Mice* "is evidently simplified and embellished for popular consumption, but it has a factual basis and makes good reading."), *available at* http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000607323.pdf.
26. T.S. Eliot, *The Love Song of J. Alfred Prufrock*, Poetry (June 1915).
27. *Feist*, 499 U.S. at 348 (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981)).
28. *Craft*, 667 F. Supp. at 123; *see also Lott-Johnson v. Studio 620*, 11-CV-2205, 2011 WL 3468372, at *2-3 (N.D. Ga. Aug. 8, 2011) ("biographical details . . . are not subject to copyright").
29. *Hoehling*, 618 F.2d at 978.
30. E.g. Evans, DEFENSE OF HISTORY at 94.
31. James Joyce, ULYSSES at 115 (The Bodley Head 1986).
32. Richard Ellman, JAMES JOYCE (1965) (citing *Ulysses*, personal interview with Irish poet Monk Gibbon, and letters of A.E.).
33. *Pomerance*, 909 F. Supp. 2d at 296.
34. *Howl* (the film) does this as well, screening biographical episodes from Ginsberg's life as reflected in the poem.
35. Matthew Arnold, *Stanzas from the Grande Chartreuse*, Fraser's Magazine (April 1855), *available at* http://rpo.library.utoronto.ca/poems/stanzas-grande-chartreuse.
36. *See Nelson v. Grisham*, 942 F. Supp. 649, 656 (1996) (responding to memoirist plaintiff's concern "that a ruling against her will be a dangerous acknowledgment that those who write their own memoirs cannot expect to receive protection from the copyright laws" by observing that "often in non-fiction work there are many uncopyrightable elements.").
37. *Hofheinz v. AMC Prods., Inc.*, No. CV-00-5827, 2003 WL 25293919, at *4 (E.D.N.Y. Apr. 23, 2003) ("a litigant may have any number of reasons for seeking licenses, including to avoid litigation such as this.").
38. If misled by an author about the representations of a book's semi-autobiographical nature, however, a publisher can prosecute a fraud claim. *Antidote Int'l Films, Inc. v. Bloomsbury Pub.*, PLC, 467 F. Supp. 2d 394, 401 (S.D.N.Y. 2006).

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