

Self Defense for Screenwriters

BY MARK LITWAK, ESQ.

AS AN ENTERTAINMENT ATTORNEY I AM often called upon to assist writers who have gotten themselves into trouble because they don't understand how their work infringes the rights of others. A writer who learns the fine points of the law through trial and error is receiving an expensive education. Here is a brief explanation of how to protect yourself.

Purely fictional characters

If your script or film contains fictional characters—characters from your imagination—you generally do not need to obtain any permissions or releases. However, if there is a chance that the public could mistake your imaginary characters for real people, you could be liable if you have thereby infringed their rights.

You can protect yourself by making sure your fictional characters cannot be mistaken for real people. Check the phone book to see if any people with your character's name reside at the location portrayed in your story. If there is a person in that community with the same name or a similar one, consider changing the locale or setting the story in a fictional locale. Give characters unusual names that no living individual would have. Add a disclaimer at the beginning of the film stating that any resemblance to persons living or dead is purely coincidental.

If fictional characters are drawn from another's literary work, you might be infringing that author's copyright unless the work has gone into the public domain, or your use is considered a fair use. You may borrow personality traits, however, without infringing another's copyright. The first author to create a hard-boiled private eye, for example, cannot prevent other authors from creating their own hard-boiled private eyes.

Characters that have a visual component, such as comic book characters, are more likely to be protected under copyright law. Moreover, if you borrow the name of someone else's character you may be infringing trademark rights they may have in the character, and engaging in unfair competition.

Fictional characters based on real people

A writer's imagination necessarily draws upon one's life experiences and people the writer has met. If a fictional character is loosely based on a real life individual, and the public cannot identify the real life individual from the context in which the fictional character is portrayed, there is little risk of liability.

"Truth is an absolute privilege because our society values truth more than a person's reputation."

On the other hand, suppose you wrote a novel about the widow of a former American president assassinated in Dallas, and the widow character later marries a Greek shipping tycoon. Although you have labeled the book a "novel," have said that this is a work of fiction, and have given the characters fictitious names, readers may nevertheless believe you are writing about Jackie Kennedy. If you had defamed her while she was alive, or otherwise invaded her rights, she might have had a good cause of action against you. You can be liable for defaming an individual even if you do not name her.

An interesting case is *Leopold v. Levin*. The plaintiff pleaded guilty in 1924 to kidnapping and murdering a young boy. Because of the sensational nature of the crime, the case attracted international notoriety that did not wane over time.

In 1956, Levin, the defendant, wrote a novel entitled *Compulsion*. The case was the framework for the novel, although Leopold's name was not in it. The book was described as a fictionalized account of the Leopold murder case. The motion picture based on the book featured actors who resembled the actual persons from the case. The promotional materials referred to the crime but made it clear that the story was a work of fiction suggested by real life events. Leopold sued for invasion

of privacy. After the novel was published, but before the movie was released, Leopold published his own autobiography.

The court found against Leopold, stating that books, magazines and motion pictures are forms of public expression protected by the First Amendment. The court noted that while the book and movie were "suggested" by Leopold's crime, they were evidently fictional works. The novel and film depicted portions of Leopold's life that he had caused to be placed in public view. The court did not consider the fictionalized aspects highly offensive, which is the standard for determining invasion of privacy.

The court also noted that a documen-

tary account of the Leopold case would be constitutionally protected. Also, an entirely fictional work inspired by the case would be protected if matters such as locale were changed and the plaintiff was not identified.

Portraying identifiable persons

A person's right to privacy has to be balanced against other people's rights under the First Amendment. If Kitty Kelly wants to write an unauthorized biography about Frank Sinatra, she can do so without his permission. Likewise, Mike Wallace and his "60 Minutes" camera crew can film others without their permission. However, journalists' rights are not absolute. If Wallace placed a hidden camera in a department store dressing room, he would be liable for damages for invading the privacy of customers.

Determining whether a filmmaker has infringed upon the rights of a subject who has not consented to be portrayed can be a complex matter. The status of the subject—whether he is a public figure or public official, and whether he is alive or deceased—may be important. Whether the activities portrayed are newsworthy may also be decisive. And the manner in which a person's likeness is used—whether in a film or on a coffee cup—is relevant as well.

Here are some guidelines you may follow to avoid liability from subjects portrayed in your script or film:

1) OBTAIN RELEASES

Obtain releases whenever possible. It never hurts to have a release even if it is not legally required. Do not forget to get releases from the immediate family and friends of a subject if those people appear in the story.

2) FICTIONALIZE THE STORY

Change the identity of the individuals, the names of the characters and the location so that the public will not be able to identify any characters with any living individuals.

3) ADD A DISCLAIMER

If your characters are fictional, add an express disclaimer to that effect so viewers will not be confused.

4) PRIVATE INDIVIDUALS

Be especially careful about portraying living individuals who are not public officials or figures. Remember that deceased individuals cannot sue for defamation or invasion of privacy, and that public figures and officials have to prove actual malice in order to recover. Thus, a filmmaker is most vulnerable when portraying living private individuals.

5) ASSEMBLE EVIDENCE TO PROVE THE TRUTH

Make sure you can prove that any defamatory statements you make are true. Annotate your script with the sources of your information so that you can document its truth and show that you acted carefully and without actual malice.

6) CLEAR THE SCRIPT

Have an attorney closely review your script for potential liability before production. If you can change the names of subjects and the setting without detracting from the dramatic value of the story, do so.

7) OBTAIN INSURANCE

Make sure the production company obtains an Errors and Omissions (E & O) insurance policy and that it includes you as a named insured.

These are the most likely grounds upon which to sue for an unauthorized portrayal:

Defamation: Defamation is a communication that harms the reputation of another so as to lower him in the opinion of the community or to deter third persons from associating or dealing with him. For example, those communications that expose another to hatred, ridicule or contempt, or reflect unfavorably upon one's personal morality or integrity are defamatory. One who is defamed may suffer embarrassment and humiliation, as well as economic damages, such as the loss of a job or the ability to earn a living.

The law of defamation can be very confusing. That is because the common law rules that have developed over the centuries are subject to constitutional limitations. To determine the current law, one must read a state's defamation laws in light of various constitutional principles. For example, recent United States Supreme Court decisions have imposed significant limitations on the ability of public officials and public figures to win defamation actions. If a state's law is inconsistent with a constitutional principle, the law is invalid.

There are a number of defenses and privileges in defamation law. Therefore, in some circumstances a person can publish an otherwise defamatory remark with impunity. Why? Because protecting a person's reputation is not the only value we cherish in a democratic society. When the right to protect a reputation conflicts with a more important right, the defamed person may be denied a recovery for the harm suffered.

The most important privilege, from a filmmaker's point of view, is truth. If your remarks hurt someone's reputation, but your remarks are true, you are absolutely privileged. An absolute privilege cannot be lost through bad faith or abuse. So even if you maliciously defame another person, you will be privileged if the statement is true. Truth is an absolute privilege because our society values truth more than a person's reputation.

Keep in mind that while truth is an absolute defense, the burden of proving the truth may sometimes fall on you. So if you make a defamatory statement, you should be prepared to prove that it is true—which may not be an easy task.

Journalists are protected by the fair

comment and criticism privilege, which applies to communications about a newsworthy person or event. Conditional privileges may be lost through bad faith or abuse. This privilege has been largely superseded, however, by a constitutional privilege applied in the context of statements about public officials or public figures.

Public figures, such as celebrities or senators, have a much higher burden to meet to prevail in a defamation action. They must prove that the defendant acted with "actual malice." Actual malice is a term of art meaning that the defendant intentionally defamed another or acted with reckless disregard of the truth.

Plaintiffs often find it difficult to prove this. That is why so few celebrities sue the *National Enquirer*.

Invasion of privacy: Like defamation, the right of privacy is subject to constitutional restrictions. The news media, for example, is not liable for newsworthy statements that portray another in a false light unless the statements are made with actual malice. Unlike defamation, a cause of action for invasion of privacy does not require an injury to one's reputation.

Many defenses to defamation also apply to invasion of privacy. (Truth, however, is not a defense.) Revealing matters of public record cannot be the basis for an invasion of privacy action. Express and implied consent are valid defenses. If you voluntarily reveal private facts to others you cannot recover for invasion of your privacy.

Privacy actions typically fall into four factual patterns: the intrusion into one's private affairs, which includes wiretapping, unreasonable surveillance and other acts that are highly offensive; the public disclosure of embarrassing private facts, ones of a kind that would be highly offensive to a reasonable person, if the matter is not of legitimate concern to the public; appropriation of another's name or likeness; publicity that places a plaintiff in a false light (unlike defamation, harm to reputation is not required), such as placing the name of a prominent Republican on a list of Democratic contributors.

Failing to Respect the Right of Publicity: The right of publicity is the right of individuals to control the use of their name and likeness in a commercial setting. You cannot put a picture of another person on your brand of pickles without

their permission. The right of publicity is typically exploited by celebrities who earn large fees by endorsing products.

Under either a publicity or privacy theory, subjects can recover for some unauthorized uses of their names and likenesses. A problem arises, however, when one person's publicity/privacy rights come in conflict with another person's rights under the First Amendment. Suppose a newspaper publisher wants to place a picture of Cher on the front page of its paper. Is her permission needed? The answer is no.

Although Cher's name and likeness is portrayed in the newspaper, this "product" is also a form of "protected expression." Products such as books, movies and plays are modes of expression protected by the First Amendment. The First Amendment also allows journalists to write about others without their consent. Otherwise, subjects could prevent any critical reporting of their activities. When one person's right of publicity conflicts with another person's rights under the First Amendment, the First Amendment rights are often, but not always, paramount.

When the likeness of Elvis Presley is used on an ashtray, however, there is no expression deserving protection. The seller of this product is not making a statement or expressing an opinion. He is simply trying to make money by exploiting the name and likeness of Elvis. Since there are no competing First Amendment concerns, the right of publicity in this instance should prevent the unauthorized use of Elvis's likeness. In summary, the law draws a distinction between products that contain protected expression and those that do not.

Courts have struggled with the issue of whether the right of publicity descends to a person's heirs. In other words, when a celebrity dies, does his estate inherit his right of publicity? Can the estate continue to control the use of the celebrity's name or likeness, or can anyone use it without permission?

Some courts have held that the right of publicity is a personal right that does not descend. These courts consider the right similar to the right of privacy and the right to protect one's reputation (defamation). When a person dies, heirs don't inherit these rights. Suppose, for instance, that you were a descendent of Abraham Lincoln. An unscrupulous writer publish-

es a defamatory biography claiming Abe was a child molester. You couldn't sue for defamation or invasion of privacy. Perhaps this is why many scandalous biographies are not published until the subject dies.

Unfair Competition: The law of unfair competition prevents a person, for instance, from establishing a movie studio and calling it "Paramount Pictures" if he/she is not affiliated with the well-known company. A person would also be barred from displaying the Paramount logo or using any other mark that might mislead or confuse consumers by leading them to believe that films are genuine Paramount movies when they are not.

The names of persons and businesses may become associated in the public mind with a supplier of products or services. The name can thus acquire a secondary meaning, and the supplier can acquire trademark rights even if he does not register the name as a trademark. In *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, the defendant exhibited a pornographic movie, *Debbie Does Dallas*, which portrayed a "Texas Cowgirl" engaged in sex acts. The character wears a uniform strikingly similar to that worn by the Dallas Cowboys Cheerleaders. Ads for the movie showed the character in the uniform and included such captions as "Starring ExDallas Cowgirl Cheerleader Bambi Woods."

The Dallas Cowboy Cheerleaders brought suit alleging that they had a trademark in the particular combination of colors and the design of their uniforms. The court agreed and issued an injunction against further distribution of the film. Filmmakers should take note that if they portray people or products in a way that is likely to confuse the public as to the origin of a product, they may be liable for unfair competition.

A basic understanding of the rights of individuals is especially important for independent producers who may not have the resources to investigate the finer points of the law. By using care when creating and depicting fictional characters, producers can greatly reduce their potential liability.

Mark Litwak (atty@marklitwak.com) is an entertainment and multimedia attorney based in Beverly Hills. Litwak is the author of several books including *Dealmaking in the Motion Picture and Television Industry*, and *Contracts in the for the Film & Television Industry*, 2nd Ed. For additional info visit www.marklitwak.com.

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