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Portraying people in your work: fact vs. fiction

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When a writer or filmmaker wants to portray a person or character in their work, a host of complex issues can arise including copyright, right of publicity and defamation.

Fictional characters

If a script or film contains fictional characters - characters from a writer's imagination - you generally do not need to obtain any permissions or releases. However, if there is a chance that the public could mistake imaginary characters for real people, the author could be liable if the subject's rights have been infringed.

You can protect yourself by making sure your fictional characters cannot be mistaken for real people. Give characters unusual names that no living individual would have. 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. 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 a use is considered a fair use. You may borrow personality traits, so long as you do not infringe 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.

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.

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 have in the character, and engaging in unfair competition.

In some circumstances you may have the right to portray real-life individuals without their permission, especially if those persons are public figures or public officials.

Fictional characters based on real individuals

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A writer's imagination necessarily draws upon one's life experiences and people the writer has met. A writer can freely borrow ideas, historical facts, personality traits of characters and themes from other copyrighted work without liability. These items are not copyrightable.

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. 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," said that it is a work of fiction, and given the characters fictitious names, readers may nevertheless believe you are writing about Jackie Kennedy. If you defame her, or otherwise invade her rights, she may have 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, Nathan Leopold, pled guilty in 1924 to kidnapping and murdering a young boy. Because of the sensational nature of the crime, the case attracted international notoriety, which did not wane over time.

In 1956, Levin, the defendant, wrote a novel titled "Compulsion." The framework for the novel was the *Leopold* case, although Leopold's name did not appear in it. The book was described as a fictionalized account of the *Leopold* murder case. A motion picture based on the book was released with fictitious characters 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 was faced with the issue of whether Leopold, who had fostered continued public attention after having engaged in an activity placing him in the public eye, had a right of privacy in a fictitious account of that activity, or in the use of his name in promoting such an account. 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 noted that a documentary 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.

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