

Law 101 - When changing names is not enough

By Mark Litwak, Attorney at Law

A common concern of filmmakers and writers is how to protect themselves from being sued by people they actually or loosely portray in their works. Sometimes changing the names of characters can provide a measure of protection, but not always.

In the recent case *Clark v Random House, Inc*, library-worker Daria Carter-Clark filed suit against Joe Klein, author of the best-selling novel *Primary Colors* and his publisher for injuring her reputation. *Primary Colors* was based on the 1991 presidential primary campaign of Bill Clinton although the novel's candidate is named Governor Stanton. Carter-Clark's claims arose from a scene in the novel in which the fictional Governor Stanton emerges from a hotel room unkempt and tucking in his shirt, with a character named Ms Baum. Carter-Clark alleged that people who read the novel falsely assumed that she was Ms Baum and that she had romantic relations with Governor Clinton. In real life Clinton had made an appearance at the library where she had worked, but there was no intimate contact between them.

The Court noted that "any purported similarities" between Carter-Clark and Ms Baum's character, such as that they both worked at the library, were "superficial" and thus the scene that Carter-Clark objected to in the novel was not really "of and concerning" her. In response to Carter-Clark's claim that the publisher was negligent in not investigating the facts, the court noted that be-

cause the book was fiction, the publisher was not obligated to undertake such an investigation.

Quite the opposite result was found in the 1934 English case of *Youssouff v. MGM*, where MGM was found liable for a film that it marketed as factual, although it was a fictionalized account of historical incidents. MGM's film featured a character named Princess Natasha who resembled the real-life Russian Princess Irina Youssouff. In the film Princess Natasha was either ravaged or seduced by Rasputin, a man with the worst possible character. The movie showed Rasputin's murder by several men, including the Prince that the Princess was intended to marry. Irina brought suit for libel claiming that the public had come to identify her as a female of questionable repute as a result of the movie.

Prior to the release of this movie, Irina's husband had published a book discussing his participation in the murder of Rasputin. As a result, the court found that the Prince character in the film, Prince Ched-god ieff, was likely to be perceived by viewers to be Prince Youssouff and lead viewers to conclude that Natasha was indeed Irina. Because MGM had described the film as factual and commented that some of the principal characters were alive the jury concluded that a reasonable viewer would perceive Princess Natasha to be Princess Irina. This case is often cited as an illustration of the principle



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that you can defame a person even if you don't name them provided that the context and circumstances of the remark would enable the listener to know the identity of the person defamed.

Courts are likely to approach such claims on a case-by-case basis and to make very fact-specific decisions. One factor that courts and juries may consider is the format and marketing of the movie or book. Is it advertised as purely fictional, as based on real-life events or as authorized by the subject? Obviously, the more a film or book is purported to reflect real events, the more responsibility the filmmaker or author has to represent its characters accurately and the greater the liability the filmmaker may face for failing to do so. Likewise, the more similarities between the fictionalized and real-life characters, the greater the likelihood that the plaintiff will have a valid claim.

As these cases show, both the nature of the work in question and the specificity of the fictional characters in relation to their possible real-life counterparts are crucial factors in the determining liability. If characters share substantial rather than superficial similarities, such as killing Rasputin, merely changing the fictional character's name is not likely to insulate against liability, regardless of whether the work is touted as factual or fiction.

To read the full cases see *Youssouff v. MGM*, Eng Ct of App, 50 Times LR S81, 99 ALR 864 (1934); *Carter-Clark v. Random House, Inc*, 793 NYS 2d 394, 2005 NYAppDiv 4202 (App Div 2005).

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