



Use caution when basing characters on real people

Q Can I use real people, or characters based on real people, in my writing?

A Well, maybe. When you write about a real, live person, you expose yourself to legal liability—even if you tell the truth. And simply changing the name is no solution if the person can be identified by circumstance, appearance or setting. Yes, disclaimers may help, but you can't rely on them. Let's take a quick look at the law of defamation, privacy and the right of publicity.

Defamation. Defamation is written or spoken injury to the reputation of a living person or organization. Injury to reputation generally is considered to be exposure to hatred, contempt, ridicule or financial loss. *Libel* is the written act of defamation; *slander* is the spoken act. Whether libel or slander, the defamation must be "published"—communicated to someone other than the subject of the defamation. Truth is an absolute defense to defamation: If what you say is true, it cannot be defamatory. Another defense to defamation is proving that the statement was an opinion, not an assertion of a fact. In fiction writing, a publisher can be liable for a defamatory statement only upon a showing of negligence, and public figures have an even higher standard: They must show that the defamatory statement was published with "actual malice."

Right of privacy. Privacy law consists of four distinct "torts," or legal wrongs: intrusion upon seclusion; appropriation of name or likeness; public disclosure of private facts; and publicly placing a person in a false light. Generally, only the latter two—public disclosure of private facts, and "false light"—are relevant for writers.

Public disclosure of private facts occurs when a writer discloses private and embarrassing facts about a living person that are not of "public concern," such as details of a person's physical or mental ailments. For example, publicizing the fact that your brother-in-law has failed to pay his mortgage for three months, although true, would be an invasion of his privacy.

Matters of public record, even if private, are not protected by privacy law. If a writer publishes a story disclosing facts obtained from a police publication or a court opinion, the matter is of

public record and no lawsuit will be successful.

Public figures (politicians, movie stars, professional athletes, etc.) have a somewhat lessened right to privacy because of the public's legitimate interest in their affairs. For example, a magazine may publish a profile of a politician without fear of being sued for invasion of privacy.

"False light" privacy lawsuits occur when a writer publishes facts about a person that create a deliberately false and misleading impression, such as when a newspaper publishes a story about convicted felons and includes the name or photograph of an innocent person. Once again, there is a different standard for when the pub-

lished material is in the public interest or about a public figure. In such cases, the public figure must prove that the publisher acted with malice or with reckless disregard for the truth.

Right of publicity. Most states now have laws that protect living celebrities—and in some states, de-

ceased celebrities such as Elvis Presley—from the commercial exploitation of his or her name, likeness or persona. News stories, biographies and fiction, however, are protected by the First Amendment. To the extent you portray a celebrity in such works without defaming him or his family, you need not seek the celebrity's permission. You would, however, need permission to exploit purely commercial "spin-offs" of your work, such as T-shirts or posters.

If you have any doubt about the use of real names in your work, be sure to consult a publishing attorney *before* publication. #

Our guest expert, Daniel Steven, practices publishing, media and entertainment law in Rockville, Md. (www.publishlawyer.com), and is the author of two suspense novels. © Daniel Steven 2002.

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Submit your questions about writing to jreich@writemag.com or Dear Writer, *The Writer*, P.O. Box 1612, Waukesha, WI 53187. Answers should not be construed as legal advice.