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WRITING ABOUT **REAL PEOPLE**

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WRITING ABOUT REAL PEOPLE

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INTRODUCTION

NONFICTION AUTHORS OFTEN RESEARCH AND write about real people: real people feature in memoirs, biographies, and other types of nonfiction works. Yet writing about real people can be daunting for authors. Subjects may be unhappy with how they are portrayed or even that they are portrayed at all. Authors who write about real people may worry that their subjects could threaten a lawsuit or even sue based on those subjects' portrayals.

A basic understanding of the legal principles related to writing about real people can help authors understand both their strong free expression rights under the First Amendment to the U.S. Constitution and the exceptions to this principle when it comes to writing about real people, which can create legal liability for authors. These exceptions are the topic of



this guide. The following chapters seek to help authors avoid negative outcomes while empowering them to create freely. This guide is intended to help authors who want to write about real people understand some of the legal considerations that apply when they write about real people and some of the practical steps they can take to limit risk while still fulfilling their creative visions.

WHO IS THIS GUIDE FOR?


This guide is for authors writing nonfiction works—whether books, journal articles, or other textual works—about real people, and who have questions about potential legal issues in their writing. Authors could be writing about a single person throughout the text or writing about multiple people in the same work. It is relevant to first-time authors writing about real people, and also veteran authors who want to better understand the relevant law or who want tips for managing risk. This guide is not, however, intended for news reporters or fiction writers, for whom somewhat different considerations apply. For the most part, it is

not intended to cover legal issues related to the use of images in textual works, but some legal issues related to the use of images on book covers and advertising are covered in relation to the right of publicity, discussed in **Section III**.


HOW AND WHY WAS THIS GUIDE CREATED?

This guide was prepared by *Authors Alliance*, a nonprofit organization that promotes authorship for the public good by supporting authors who write to be read.¹ *Authors Alliance* regularly receives questions from authors who want to write about real people in biographies, memoirs, and other nonfiction books. Writing about real people can raise legal questions, and authors often run into questions about how to research and portray real people without unintentionally violating their subjects' rights and exposing themselves to legal liability.

Many of the issues discussed in this guide are related to a group of legal rights that lawyers and courts consider to be traditional “privacy” rights.




These protect subjects' rights to protect their reputations, privacy, and identities. Some of these rights intuitively seem like "privacy issues." For example, an author may want to reveal never-before-known facts about a person's personal life, which may implicate the subject's privacy rights. Others are less intuitively tied to privacy: an author might face a lawsuit related to mischaracterizing their subject and placing them in a "false light," or related to using another person's identity in certain ways that violate that person's right to commercially exploit their own identity. Traditionally, these are also considered "privacy" claims, though we might not think of them as privacy issues today. Another common legal issue that can come up for authors writing about real people is defamation, which does not implicate privacy directly, but concerns false statements that injure a person by damaging their reputation or standing in their communities. This guide also discusses identity or personality rights, which can implicate both personal privacy and property rights depending on the particular facts and circumstances.



Authors may also wonder how these rights are enforced. The rights that concern reputation, privacy, and identity are “actionable” (i.e., can be brought as a claim in a lawsuit) against authors writing about real people, their publishers, or both. For this reason, the means of enforcing these rights are known as “causes of action.” The various requirements of these causes of action are known as “elements.”


Authors should be aware that responsibility between author and publisher for lawsuits related to those authors’ works can vary, and is handled in the publication contract, typically in the “indemnity clause.” It is not uncommon for the costs of defending a lawsuit to be assigned to the author, so authors may want to check their publication contracts to understand who is responsible for costs and responsibilities that come with defending a lawsuit. For more on the particulars of publication contracts, including indemnity clauses, check out *Authors Alliance*’s dedicated guide to [Understanding and Negotiating Publication Contracts](#).



Each of the causes of action discussed in this guide is based on state law, rather than on federal law. In general, a person can sue an author in any state where that person *felt the effects* of the actions or violations of rights discussed in this guide. These kinds of lawsuits, if successful, can lead to financial penalties and even court orders requiring that the publisher cease distribution or printing of the work. Moreover, the Internet has enabled faster, more widespread dissemination of works, facilitating near-instantaneous and widespread distribution. This means that authors can, as a practical matter, be sued in any U.S. state where their published works are distributed. For these reasons, it is prudent for authors to be aware of the panoply of state laws that touch on these issues as they may face lawsuits in a variety of states.


WHAT THIS GUIDE IS NOT

This guide orients authors to common legal issues related to writing about real people, but it is not a replacement for legal advice. While this guide provides information and strategies for authors who have



written or are planning to write about real people, it does not apply this information to any individual author’s situation. Accordingly, this guide does not constitute legal advice, nor does using this guide create an attorney–client relationship. If you have questions specific to your project, you might consider speaking to your academic institution, publisher, or attorney.

Whether these laws apply to a particular situation also tends to depend heavily on context and the specific facts in question. In addition, many of the legal rules addressed in this guide can differ in meaningful ways based on the applicable state law. Because of this, this guide cannot provide tests or rules applicable to all possible scenarios and jurisdictions. Instead, it is intended to help authors understand the general landscape of legal issues related to writing about real people, including trends among various state laws. The “elements” of the causes of action in this guide do not necessarily map on to every state’s law, but are general components and requirements of the various causes of action.




This guide also does not cover every kind of writing project, or every kind of legal issue that might arise when writing about real people. It does not provide information for authors writing fictional works, nor does it cover non-disclosure agreements, copyright, security clearances, trademark, or trade secret issues, any of which may be relevant for authors writing about real people. Additionally, this guide does not cover law outside of the United States.

OVERVIEW AND ROADMAP

Each chapter of this guide addresses one of three main types of issues that authors may come across when writing about real people: false and misleading portrayals, invasions of privacy, and unauthorized uses of another's identity. It does this through a series of questions that authors can ask themselves to determine whether their writing might expose them to legal liability.


Importantly, the First Amendment to the U.S. Constitution plays an important role in empowering authors to write about real people, and is discussed



throughout this guide. While the right to free speech guaranteed by the First Amendment manifests somewhat differently across the different causes of action discussed in this guide, it is present in all of them and can provide a strong shield for authors writing about real people.

The First Amendment's role in safeguarding speech and other forms of creative expression mean that in many cases, factual writing about real people in a book or other written work is protected from legal liability. Indeed, the default rule in such cases is that authors can write freely about real people. Many of the examples in this guide therefore concern *edge cases* and unusual circumstances where authors may find themselves facing potential liability related to their writings about real people. Because of the potential financial and legal risks associated with facing legal claims, it is prudent for authors to be aware of the issues discussed in this guide, while keeping in mind that they are exceptions to the free expression rule, which applies in most cases.


SECTION I:
FALSE
STATEMENTS
AND PORTRAYALS



DEFAMATION AND FALSE LIGHT ARE THE TWO main legal issues that authors may face if they write something untrue, or that portrays the subject in a false manner. These causes of action are exceptions to the rule that authors can write freely about real people, and apply when certain types of untrue or misleading statements harm the subject of those statements.

Defamation law protects reputations. It allows people to defend their good names in the eyes of the public, and to redress financial and emotional harms caused by defamatory statements, through lawsuits. A defamatory statement is a published false statement of fact that harms the subject's reputation.

The law of false light, on the other hand, protects an individual's right to control how they are presented




to the public and protects an individual's privacy interests when a false portrayal causes them mental or emotional injury. False light involves portraying someone to the public in a false and highly offensive manner.

While defamation and false light have many similarities—and some states only recognize defamation because of this overlap—they protect different interests. This difference is reflected in how the requirements for defamation differ from those for false light.



CHAPTER 1: DEFAMATION



DEFAMATION IS A CAUSE OF ACTION TO REMEDY a legal injury caused by a false statement that harms a person's reputation. Defamation law allows people to be legally compensated for the reputational injury caused by certain kinds of harmful statements. Defamation is sometimes called libel, which refers to written defamatory statements, or slander, which refers to oral defamatory statements.

Defamation, like all causes of action discussed in this guide, is based on state law, which means that the specific legal requirements vary from state to state. But in general, a *defamatory statement*:

1. contains a *false fact*,
2. about an *identifiable person*,

3. that is *published*,
4. that *injures the reputation* of that person,
5. and was made with some degree of *fault* by the author or publisher.

Defamation is one of the most common legal issues that nonfiction authors writing about real people encounter. This is because authors writing about real people sometimes write about things that could affect their subjects' reputations, and this can sometimes result in emotional or financial harm for the subject. Subjects who believe portrayals of them are untrue, unflattering, or otherwise upsetting may make legal threats grounded in defamation law or initiate defamation lawsuits against authors or their publishers. This makes defamation an important topic for authors writing about real people.

While defamation law provides an important way for people to protect their reputations, it is not limitless. The law recognizes and values that authors contribute to the vibrancy of democratic discourse, and the scope of defamation law is constrained by the First

Amendment’s right to free speech. Although the particularities of defamation law vary from state to state, every state’s laws are subject to the Constitution, and thus the First Amendment’s limitations on defamation law apply nationwide.

NOTE

Defamation is usually a “tort” based on state law, and every state has civil defamation liability. A “tort” is an act or omission that injures or harms another person and carries liability in civil—not criminal—court, where the individual who is harmed can sue. But about half of the states in the United States also have criminal laws prohibiting defamation.² However, criminal defamation is uncommon in practice, and authors are unlikely to encounter it. It requires a higher burden of proof than civil defamation, and studies show that prosecutions for criminal defamation are exceedingly rare and generally disfavored.³

DOES THE STATEMENT CONTAIN A “FALSE FACT”?

The first question to ask is whether a statement contains a “false fact.” To be defamatory, a statement must be false, and it must purport to be a fact. True statements are not defamatory, and false statements can only be defamatory if they are presented in a way that implies that they reflect the truth. For this reason, when thinking about whether a statement contains a false fact, there are two important distinctions to consider: truth versus falsity and fact versus opinion.

Is the statement true or false?

To test whether a statement contains a false fact, an author should first ask herself whether the statement is true or false. A true statement cannot be the basis for a defamation lawsuit. For example, imagine that an author writes an autobiography in which the author reveals that one of his family members committed a terrible crime. Even though this statement may injure that family member’s reputation, it cannot be defamatory if it is true.

EXAMPLE

After 9/11, news agencies published reports concerning the government's efforts to cut off all sources of funding for terrorist activities. Some of the news agencies reported that Global Relief Foundation was one of the targets of related government investigations, resulting in a sharp decrease in donations to the foundation. The court determined that there was no defamation because the news agencies' statements were true. The news agencies only said that the government was *investigating* Global Relief Foundation for terrorist connections; they did not state that Global Relief was in fact connected with any terrorist activities.⁴

In addition to statements that are wholly true, "substantially true" statements are protected under defamation law. The First Amendment protections for authors are sufficiently strong that reporting true facts or facts that contain minor inaccuracies will not expose an author to defamation liability. In practice, this means that minor factual inaccuracies in a statement

do not make a statement defamatory because they do not materially alter the substance of what is being communicated. For example, in one case, a statement that a boxer tested positive for cocaine, when he actually tested positive for marijuana, was considered “substantially true” and thus not defamatory because the “sting” of the statement was that the boxer used an illegal drug before a fight.⁵ Similarly, a statement that an animal trainer had beat his animals with a steel rod was found to be substantially true when he in fact beat them with a *wooden* rod.⁶

Is the statement a fact or an opinion?

An additional consideration when determining whether a statement contains a false fact is whether the statement purports to be factual in nature. In order to be defamatory, a statement must contain or imply the existence of facts. Pure statements of opinion cannot be the basis of a defamation lawsuit because “[u]nder the First Amendment there is no such thing as a false idea.”⁷ The First Amendment provides strong protections for authors writing about their opinions and ideas

in order to preserve a vibrant “marketplace of ideas,” so only alleged facts can form the basis of a defamation claim. However, there is an exception to this principle: if an author expresses an opinion which implies the existence of false facts which themselves could be the basis for a defamation claim, they may be exposing themselves to liability for defamation. If an author implies or provides a basis for their opinion which is itself a false fact, courts may consider the statement defamatory even though it is couched as an opinion. For example, if an author states that she thinks a candidate is unfit for office because he cheated on the bar exam, and the candidate did not cheat on the bar exam, a court might find the statement defamatory, even though it is couched as an opinion.

EXAMPLE

Following an altercation at a high school wrestling match, a wrestling coach was censured at a disciplinary hearing. Then, a court overturned the censure, finding that the coach had not received due process in the disciplinary hearing. The next day, a local newspaper

published an article conveying the writer’s opinion that the coach had lied under oath in order to get his censure overturned. The Supreme Court found that the opinion implied the fact that the coach *had* lied under oath, making it actionable for defamation despite being couched as opinion.⁸

As a general rule, a factual statement is one capable of being proven true or untrue, while a statement of opinion is more subjective. For example, saying “Chef Chard is a terrible cook” is different from saying “Chef Chard served undercooked chicken at his restaurant,” at least in the eyes of defamation law. The former is purely a statement of opinion—“terrible” is subjective; others might think Chef Chard is a terrific cook. The latter is a statement of fact—whether someone served “undercooked” chicken is not a matter of opinion; it is an objective claim that can be proven true or false by, for example, a thermometer reading.

An allegedly defamatory statement can also be a mixed statement of fact and opinion. Where a statement includes both a fact and an opinion, courts

analyze each component separately. Because statements can contain both fact and opinion, authors should think about each component of a given statement regarding a real person and whether each part of that statement expresses a fact or an opinion. Yet differentiating between facts and opinions can sometimes be difficult. Courts analyze borderline statements in the context of the entire work to determine whether they can reasonably be interpreted as suggesting a false fact. For this reason, the broader context of an entire work can be important in determining whether a statement is considered a fact or opinion. As with truth versus falsity, it is prudent to craft statements carefully so that statements of opinion are easily identifiable.

EXAMPLE

The Enemy in Blue: The Renatta Frazier Story recounts Frazier's struggle to clear her name of allegations that she failed to prevent a crime while on duty as a police officer. In the book, Frazier recounts that she reached out to a local NAACP president, Carl Madison, for help,

but that Madison eventually encouraged her to “sweep it under the rug” rather than continue to fight to clear her name. Frazier speculates that Madison’s indifference to her plight arose because “[m]aybe he planned to run for some political office.” The court found that Frazier’s statement about Madison was “vague and unprovable” and that it amounted to an opinion.⁹

IS THE STATEMENT ABOUT AN “IDENTIFIABLE PERSON”?

If a statement contains a “false fact,” the next question to ask is whether the statement is about an “identifiable person.” In order to be defamatory, a statement must refer to a real, identifiable person, either directly by name or by clear implication. A statement does not need to explicitly identify the subject by name to be defamatory, as in some circumstances, a reader can identify the unnamed person an author refers to based on overall context. For example, a newspaper article falsely accusing a “local constable” of improper

behavior might be considered defamatory if the town only had a single police officer.

EXAMPLE

A group of lobbyists stated in a *Wall Street Journal* article that the owner of a dog racing track had ties to organized crime. While the article did not mention the owner by name, it did mention the specific dog racing track by name. A court found that the owner of the facility was identifiable in the article, even though his actual name was not used.¹⁰

Special case: Small Group Defamation

An author can also defame by implication when a defamatory statement refers to a small group of people instead of a specific person in the group. For example, an author writing about a real estate agent might say “the agent’s sisters previously engaged in fraudulent activity.” If the allegation is false, any of the sisters would likely have a strong claim for defamation because the author’s statement seems to implicate all of them. On the other hand, authors do not defame by implica-

tion when making a statement about a large, unquantifiable group of individuals. For example, if an author makes a general statement like “all landlords in New York City are liars and crooks,” that does not mean every one of the innumerable landlords in New York City can then sue the author for defamation. Generalizations about a class of people are not group defamation, but specific allegations made towards a specific group of people can be group defamation.

There is no set upper limit for how many people can be implicated before a statement becomes non-specific enough that it cannot be defamatory to the entire group, but when a group numbers in the hundreds, a court is unlikely to find group defamation.

EXAMPLE

In 1952, authors Jack Lait and Lee Mortimer wrote a book about crime and corruption in the U.S. In the book, the authors alleged that women employed by the department store, Neiman Marcus, were secretly engaging in prostitution. They also alleged that male salesman at Neiman Marcus were homosexual, using slurs to do so. At the time, Neiman Marcus employed

382 saleswomen and 25 salesmen. The court determined that there were few enough salesmen to give them a cause for group defamation, but too many saleswomen for group defamation to apply to that group.¹¹

While a statement about a larger group is less likely to be considered defamatory, groups with large numbers of individuals can be eligible for small group defamation in some circumstances. Courts also consider whether the statement impugns the character of all or only some of the group's members as well as the prominence of the group and its individual members in the community. When a statement damages the reputation of all of the members of the group, and when those group members are known to the wider community, a court is more likely to find small group defamation, even when the class of people is fairly large.

EXAMPLE

In 2014, Rolling Stone published an article in which a person falsely accused unnamed members of a named fraternity of raping an undergraduate student as part of an initiation ritual. The court found that, regardless

of whether a specific fraternity member was clearly implicated in the article, the fact that there were only 53 members of the fraternity, which was known to the college community at large, meant that each member was implicated and could therefore sue for defamation.¹²

WAS THE STATEMENT “PUBLISHED”?

The next question to ask when considering whether a statement was defamatory is whether the statement was “published.” In order to be defamatory, a statement about a given individual must be published, or conveyed to a third party other than the subject. As discussed above, defamation law aims to protect reputations. But if an otherwise defamatory statement never leaves the author’s notepad, it cannot create the kind of reputational harm that defamation law seeks to prevent. But only *one* other person, in addition to the author and the subject, has to hear or read the statement for it to be considered published. For this reason, nearly all statements that leave the author’s

desk are considered published for purposes of defamation law.

An important concept, “the single publication rule” determines how many different places an author can be sued for defamation. Under the single publication rule, a person can bring only one defamation lawsuit against an author per publication, and that lawsuit must address all injuries suffered by that person in every state. The purpose of this rule is to protect authors from facing multiple lawsuits in multiple states for the same allegedly defamatory statement. This rule is also important as it can limit liability over time, since claims will expire after the statute of limitations passes (typically one year in most states), based on the date of the initial publication.

Yet under the single publication rule, an individual may sue separately when a statement is republished in a new edition or publication. For example, a person may be able to bring a second defamation lawsuit against an author or publisher for publication of the same statement that was the basis of the first lawsuit if the publisher reissued the work in a new format.

Though courts aren't always clear on what constitutes a republication, some states have adopted the Uniform Single Publication Act. The Act allows someone to sue only once for each edition of a newspaper or book.¹³ Note that the Act applies beyond defamation, to all of the different rights discussed in this guide: libel, slander, invasion of privacy, and the unauthorized use of identity.

EXAMPLE

In 2019, a scholarly author and researcher conducted a series of oral histories with local political leaders, which she then deposited in a university archive and which she also published online as supporting materials for her book. One of the oral histories contained an allegation of embezzlement by another politician, Sam. Although Sam knew about the statement and its publication, he waited several years before deciding to threaten to sue the scholarly author for publishing the statement and maintaining her website with the oral history. Although the author potentially *could* have been held responsible for publishing the statement,

because Sam waited so long, and because the statement had not been re-published in a new edition, the single publication rule and statute of limitations would make his suit unsuccessful.

DOES THE STATEMENT INJURE THE SUBJECT'S REPUTATION?

Another requirement in defamation law is that the statement caused, or is highly likely to cause, reputational harm to its subject. In order to be defamatory, a statement must injure another person's reputation in the eyes of the community. This is what is known as the "harm requirement" in defamation law. While a statement does not need to harm a person's reputation in the eyes of *all* of the person's associates, or even most of them, in order to be defamatory, it must harm the person's reputation in the eyes of at least a substantial number of people in the community or deter people from associating with that person. A tarnished reputation in the eyes of one individual, or just a few people, does not suffice. For example, imagine that an

author writes in a book that a local official has dozens of adopted pet cats in his studio apartment, and that the statement is untrue. If only one or two people in that community have negative impressions about officials owning large numbers of pet cats in small living spaces, that is not enough harm to make the author's statement defamatory.

When determining whether a statement injured the subject's reputation, courts consider the specific facts of each case to decide whether the statements caused actionable harm. In some states, courts require proof of *actual* harm to the subject's reputation, but in others, courts presume harm based on whether a statement seems *likely* to cause reputational harm. An "actual harm" state would require a subject to show that the false published statement tarnished their reputation in the eyes of the community. On the other hand, in a state that does not require proof of actual harm, a court might conclude that a false published statement was defamatory because it would logically have a tendency to cause such reputational harm.

NOTE

When it comes to the harm requirement, most states not requiring actual harm follow the “reasonable construction” rule, which asks whether a reasonable person would understand a potentially defamatory statement to be injurious to the subject’s reputation. A very small number of states use the “innocent construction” rule, which is slightly more protective of authors. States that apply this rule hold that statements that can reasonably be interpreted in a non-defamatory way do not actually injure the subject’s reputation. In either case, courts look not only to the text of the statement itself, but also to the context in which the statement was given, as well as to any other relevant circumstantial factors, to decide whether a statement caused harm.

In rare circumstances, people have such poor reputations that they are no longer susceptible to harm from defamation. Under the “libel-proof plaintiff doctrine,” when a person’s reputation is so diminished in the eyes of the public that a statement could not further harm

it, the harm requirement is not met and the subject will therefore not have a valid claim for defamation.

EXAMPLE

A physician who was a proponent of assisted suicide was considered virtually “libel proof” with respect to the issue of assisted suicide, because his reputation in the community, if not the nation, was already so low.¹⁴

The libel-proof plaintiff doctrine does not mean an author has a free pass to say anything about a person who may have a criminal background or some other damaged reputation. Authors should note that courts are reluctant to apply this doctrine because defamation law protects individuals’ interests in protecting their reputations, and few people have poor enough reputations to be disallowed from obtaining redress for defamatory statements altogether.¹⁵ Because this doctrine rarely applies and has adverse policy implications, authors writing about a real person with an exceedingly poor reputation should still take care not to defame that person.

Special case: Defamation Per Se

In most states, certain types of false statements are considered so inherently harmful to a person's reputation that just saying them is considered by a court to be defamatory, even without proof that there was harm to the person's reputation. These statements are characterized as "defamation per se," and are an exception to the harm requirement in defamation law. They include:

- Falsely accusing someone of a serious crime,
- Falsely accusing someone of sexual misconduct,
- Falsely stating that someone has a "loathsome disease," and
- Making a false statement that damages a person's business.¹⁶

EXAMPLE

A teacher at a high school sent an email to the athletic director falsely alleging that a track and field coach had inappropriate interactions with student-athletes, including "hanging out" with students while they used drugs and alcohol in a hotel. An Illinois court found that this was a statement that damaged the coach's business, as it imputed a lack of integrity in the coach's

position and unfairly prejudiced the coach professionally, making the statements defamatory per se.¹⁷

NOTE

The phrase “loathsome disease” is a term used in defamation law to refer to diseases that subject those who have them to societal disapproval and shunning. Classic examples of such diseases include sexually transmissible diseases and leprosy. What constitutes a “loathsome disease” reflects evolving societal attitudes and fears. For example, despite major advances in treatment, some courts still consider HIV to be a “loathsome disease” based on studies that suggest that an HIV diagnosis still results in a risk of social ostracism.¹⁸ On the other hand, cancer is not considered to be a “loathsome disease” today, even though it once carried a great deal of stigma.

WAS THE STATEMENT MADE WITH SOME DEGREE OF “FAULT”?

Even if a statement is false and injures the subject’s reputation, the subject cannot prevail in a defamation lawsuit unless the author of the statement made it with some degree of “fault.” The Supreme Court has determined that legal liability without fault in these cases would violate the First Amendment by creating too great a chilling effect on speech.¹⁹ First Amendment protections for authors are strong enough that unintentional misstatements or minor inaccuracies generally do not expose authors to legal liability, even if those statements do harm to a subject’s reputation.

The amount of fault required for a valid defamation claim depends on whether the subject of the statement is a public figure (like a celebrity) or private figure. For defamatory statements about private figures, a statement must be made with “negligence” for the speaker to be liable for defamation, meaning that the speaker failed to take a reasonable amount of care in verifying the statement’s veracity. For defamatory statements about public figures, a statement must be

made with “actual malice” for the speaker to be liable for defamation. “Actual malice” is a legal term of art that means either *knowing* a statement is false or acting with reckless disregard as to whether it is true.

WHAT SHOULD AUTHORS KNOW ABOUT THE REAL PEOPLE THEY ARE WRITING ABOUT?

Is the person living?

One important question to ask when considering whether a statement could expose an author to liability for defamation is whether the person who is the subject of the statement is living or deceased. This is because the subject of a defamation claim must be a living person. Since defamation law exists to compensate a person for injury to their personal right to reputation, that personal right no longer exists when the person who held it dies. This means that if the subject of the statement is no longer living, there can be no liability for defaming that person.

Is the person a “private” or “public” person?

Another important consideration for authors related to defamation is whether an author’s subject is a “private person” or a “public person” under defamation law. Private people are people with no particular claim to fame or notoriety, and public people are those who have achieved some degree of fame or hold positions of power in the government.

NOTE

If you are unsure whether your subject is a private or public person, turn to the **Appendix**, which provides an overview of what kinds of people are considered private people and what categories of people are considered public people—all-purpose public figures, limited-purpose public figures, involuntary public figures, and public officials.

Generally speaking, it is harder for a plaintiff to prove that an author is at fault when a statement is about a public person than when a statement is about a private person. This is because of the different standards of fault that apply to defamatory statement made about

different types of people: recall that private people usually only need to show that an author made a statement with “negligence,” or failure to exercise the amount of care that a reasonable person would, as to whether it was false, but public people must show that a statement was made with “actual malice,” or reckless disregard for the truth, in order to prevail on a defamation claim.

In practical terms, the law provides different levels of reputational protection for different types of people by adjusting the level of “fault” required for statements to be defamatory. One reason the law makes it easier for private people to bring defamation claims is because private people have not invited public scrutiny into their lives, and are more vulnerable to reputational damage than public people are. Private people usually have less access to public forums, and are less able to correct false statements about themselves than public people do. Because actual malice is significantly more difficult to demonstrate than negligence, statements about public people receive more legal protection than statements about private people.

EXAMPLE

The New York Times published an advertisement in 1960 describing police actions taken against civil rights protesters in Alabama, which included alleging that police surrounded a college campus with shotguns and tear gas, padlocked the student dining hall to starve students “into submission,” and intimidated civil rights leader Dr. Martin Luther King with assaults and arrests. L.B. Sullivan, a local elected official supervising the police and fire departments at the time, was implicated in these statements. Even though some of the statements were inaccurate and may have damaged Sullivan’s reputation, as a public official, he was unable to recover under defamation law because the statements had not been made with actual malice.²⁰



CHAPTER 2: FALSE LIGHT

THIS CHAPTER COVERS THE BASICS OF FALSE light, another exception to the general rule that authors can freely express themselves in their writings. Because false light is less common than defamation and has similar legal requirements, this is a less detailed overview. Consequently, it may be useful to read both sections together.

False light is a cause of action to redress harm caused by a false and offensive portrayal of a person that is shared with the public. False light allows people to be legally compensated for injuries caused by certain kinds of offensive portrayals. Sometimes it is referred to as “false light invasion of privacy” or “publicity placing a person in false light.”

False light, like all the causes of action discussed in this guide, is governed by state law, which means that the specific legal requirements vary by state. But in general, a *false light portrayal* has five elements:

1. *falsely* portrays,
2. an *identifiable person*,
3. which is *widely published*,
4. is *highly offensive*,
5. and was made with some degree of *fault* by the author or publisher.

False light is similar in many ways to defamation. Because of these similarities, over half of the states do not recognize false light as its own cause of action. Other states recognize both defamation and false light. The requirements for defamation and false light differ as follows:

DEFAMATION	FALSE LIGHT
False Statement	False Portrayal
Identifiable Person	Identifiable Person
Publication to One or More Person	Widespread Publication
Injures Reputation	Highly Offensive
Fault	Fault

Defamation and false light differ in three main ways: First, false light and defamation protect different interests: while defamation protects against false statements that injure a subject's reputation, false light protects privacy interests, and specifically the mental and emotional injuries a subject might suffer by virtue of being placed in a false light in public. While false light concerns false or misleading portrayals, its protection of privacy interests means it is often considered one of the "privacy torts" such as those discussed in **Section II**. Second, defamation protects against statements that are presented as factual, but are not true, while false light more broadly protects against *portrayals* that create a misleading perception of the subject. Third, defamation requires only that the statement be "published" to at least one other person, while false light requires transmission of the portrayal to a larger group.

Like all of the causes of action discussed in this guide, false light and defamation are both subject to the First Amendment and so share some similar limitations. For example, "substantially true" portray-

als are protected from false light claims by the First Amendment, just as true statements are protected from defamation claims. Similarly, the First Amendment requires some fault on the part of the person who portrays someone in a false light before holding them responsible. Just as in defamation, these levels of fault are adjusted based on whether the subject is a public or private person. These limitations demonstrate the breadth of the First Amendment protections for authors and how narrow these causes of action really are: minor factual inaccuracies and inadvertent errors are usually not enough to overcome these principles and create false light liability.

IS THE PORTRAYAL TRUE OR FALSE?

Just like defamation, an important initial consideration in false light is whether the portrayal is true. In order to cast someone in a false light, the portrayal must contain some falsity or fiction. Some aspect of how the subject is being portrayed must be untrue or fabricated in order for the subject to have a claim for false light. Portrayals can either be direct statements about someone, or they can be implications. Sometimes, a

portrayal that falsely implies something unflattering about its subjects may be enough to support a claim for false light.

EXAMPLE

A married couple was photographed embracing on the stools of an ice cream shop. A magazine used this photo in conjunction with an article about love at first sight, described as the “wrong kind” of love that is based solely on sexual attraction and will inevitably end in divorce. The couple was known in the local community for their morality and decency, not as sex-crazed lovers headed toward divorce. Upset at how they were portrayed, the couple sued the magazine. The court found that the use of the couple’s photo with the story supported a claim of false light because it created a false and unflattering implication about the couple’s relationship.²¹

On the other hand, portrayals that are true or substantially true generally cannot serve as the basis for false light claims, just as substantially true statements

cannot support defamation claims. The so-called “substantial truth doctrine” establishes that, when it comes to false light claims, portrayals that are true in substance are treated as true even if they contain minor factual inaccuracies.²² It can be hard to predict whether an exaggerated or embellished portrayal will be substantially true enough to overcome a false light claim, because such a determination depends largely on the facts of the particular situation and the surrounding context. Omitting important information can turn an otherwise true statement into a false light portrayal.

EXAMPLE

A newspaper accurately quoted a professor who said slavery was “not so bad” but failed to include the fact that the professor was speaking of a hypothetical, coercion-free version of slavery rather than chattel slavery. When the professor sued, the court determined the newspaper could be casting the professor in a false light because the article misrepresented the professor’s belief.²³

IS THE PORTRAYAL ABOUT AN “IDENTIFIABLE PERSON”?

False light, like defamation, only applies when a statement is about an “identifiable person.” A portrayal may identify a person by using their name or by including any other description that would make them readily identifiable to the public. For example, a TV broadcast reporting on a crime did not use the victim’s name but did include numerous other details—such as the small college the victim attended, their residence, and the make of their vehicle—which made it possible for those in the community who saw the broadcast to identify the victim.²⁴

Because false light claims are focused on public perception, one special consideration is whether a sufficiently large group of people can recognize the person as the subject of the portrayal, or whether only a small group can identify the person.

EXAMPLE

A newspaper used a photo of a young boy in a special holiday collage. Neither the boy's face nor his name was included in the collage, but his mother informed her friends and relatives which photo was his. Later, the newspaper published the same photo with a caption that falsely implied that the boy had an intellectual disability and used it to illustrate an article dealing with health and welfare legislation. The court ruled that the second use of the photo could not be the basis for a false light claim because the boy's identifying features were not shown, and he could only be identified by the friends and relatives who could identify the boy based on knowing he was pictured in the image's first use in the holiday collage.²⁵

The identifiability requirement means that subjects of false light portrayals to be identifiable to a sufficiently large group of people. In the above example, if the boy's identifying features had been present in the photograph, the court may have found that the use could support a false light claim, because all persons

familiar with the boys' appearance may have been able to identify him.

WAS THE STATEMENT WIDELY PUBLISHED?

False light requires that the portrayal is widely published such that it creates “publicity” for the subject; the portrayal must be communicated to the public at large. This contrasts with defamation, which typically considers publication to even a single individual sufficient. In practice, essentially all publications in mass media—including magazines, newspapers, and books—satisfy the publicity requirement for false light. Further, publishing material on the Internet is generally viewed as making it sufficiently available to the public.

In situations where the portrayal is not being disseminated on a national scale, courts have not precisely defined how many people must be able to identify the subject of the portrayal in order to constitute publicity, but the threshold may be lower than the phrase “public at large” suggests. Authors should be aware that even

limited publication and distribution of their writing will generally satisfy the publicity requirement in false light.

EXAMPLE

A self-published author distributed thirty copies of his book and marketed it through a few different channels, including making it available on the Internet for only two months. The author's ex-wife sued the author, claiming that he had falsely depicted her as a victim of childhood abuse who suffered from mental illness, and that both these allegations were untrue. Noting that several people had read the book and that it appeared that it had been available through various means, the court suggested that this might be enough to fulfill false light's publicity requirement.²⁶

IS THE PORTRAYAL "HIGHLY OFFENSIVE"?

False light also requires that the portrayal shows the subject in a way that is "highly offensive." That the subject themselves considers the portrayal to be offensive

is not enough; instead, the portrayal must be “highly offensive” to a “reasonable person,” which is an objective standard judged by the norms of a particular community.

Because what is considered “highly offensive” derives from a community’s morals, it can vary depending on the time and context. There are no set categories of portrayals that are always highly offensive. But there are certain kinds of portrayals that courts have consistently found to be highly offensive across communities, such as linking a subject to criminal conduct, showing the subject engaged in sexual promiscuity or otherwise immoral activity, or casting aspersions on the person’s profession or finances.

Outside of these types of false portrayals, courts are less consistent in what they consider to be highly offensive. In general, portrayals that associate the subject with activities that connote unethical, dishonest, disreputable, or exceptionally unseemly behavior are likely to be considered highly offensive.

WAS THE PORTRAYAL CREATED WITH SOME DEGREE OF FAULT?

The First Amendment constrains the scope of false light by requiring some degree of fault on the part of the speaker. Otherwise, false light claims could unduly chill free speech.

Just as in defamation, the level of fault required for false light varies based on the type of person being portrayed, and in general, the levels of fault required for different types of people are identical to those in defamation. In most states, to be liable for casting a private person in false light, the author must at least be negligent in creating the portrayal, meaning that the speaker failed to take a reasonable amount of care in ensuring the statement was true. To be liable for casting a public person in false light, an author would have to make the portrayal with actual malice, meaning that they knew the statement was false or acted with reckless disregard as to whether it was true.

However, a minority of states require actual malice for false light portrayals of all persons, regardless of whether they are considered public or private.

Requiring this higher standard of fault even in cases that concern private persons creates more protection for authors in those states. However, state laws vary, and authors should keep in mind that they can generally be sued in any state where their writing is read.

WHAT SHOULD AUTHORS KNOW ABOUT THE REAL PEOPLE THEY ARE WRITING ABOUT?

Is the person living?

As with defamation, the subject of a false light claim must be a living person. The privacy right that is protected by false light is a personal right that belongs only to the individual who is being portrayed. When that person dies, the ability to sue for false light dies along with them.

Is the person a private or public person?

One final consideration is whether the subject of the portrayal is a private or public person. Private people

are people with no particular claim to fame or notoriety, and public people are those who have achieved some degree of fame or hold positions of power in the government. As with defamation, a lesser amount of fault is required on the author's part to find liability when they are writing about a private person than when writing about a public person.

NOTE

If you are unsure whether your subject is a “private” or “public” person, turn to Appendix A, which provides an overview of what kinds of people are considered private people and what categories of people are considered public people—all-purpose public figures, limited-purpose public figures, involuntary public figures, and public officials.

In most states, the different levels of fault courts use when deciding if something is false light—negligence for private people and actual malice for public people—were adopted from the levels of fault used in defamation.




SECTION II:
INVASIONS OF
PRIVACY

THIS SECTION COVERS TWO KINDS OF LEGAL actions that most people would intuitively categorize as violations of privacy rights:


- intrusion on seclusion, and
- public disclosure of private facts.

Both are issues authors might face while researching, writing, and publishing their books. These causes of action are exceptions to the general principle that the First Amendment empowers authors to freely write and express themselves. When an author intrudes on a subject's privacy or reveals private facts about them, depending on the circumstances, these First Amendment interests may become secondary to the privacy harms done to the subject.



Intrusion on seclusion is an issue that authors are most likely to encounter during the research process. It arises when someone infringes upon the physical or informational privacy of another person. For instance, using someone's personal diary as the basis of a tell-all book without their consent or covertly installing surveillance equipment in a private place to do research could both be intrusions on seclusion.

Public disclosure of private facts is likely to arise later in the writing process, most often at the time a book is made available to readers. It occurs when private information about a person that is not a topic of public interest is published without their permission.



CHAPTER 3: INTRUSION ON SECLUSION

INTRUSION ON SECLUSION IS A FORM OF IN-vasion of privacy in which a person “intrudes” upon the private affairs or concerns of another. The tort of intrusion on seclusion allows people to be legally compensated for the injury caused by certain types of invasions of their privacy.

Intrusion on seclusion, like the other causes of action in this guide, is based on state law, which means that the specific legal definition varies from state to state. And not all states recognize intrusion on seclusion. But in general, intrusion on seclusion has four elements:

1. an ***intrusion*** (physical or otherwise),
2. into a person’s ***private place*** or ***private affairs***,

3. that is *intentional*,
4. and *highly offensive*.

Authors should be aware of this tort because their research process might expose them to liability if the methods or sources they use violate others' privacy. For instance, an author who records conversations without permission, makes repeated and unwanted phone calls, or takes nonconsensual photos in a private place may be liable for intrusion on seclusion. Authors should carefully consider the intrusiveness of their methods of collecting material and avoid using deception to obtain information about their subjects.

IS THERE AN "INTRUSION"?

In initial consideration in intrusion on seclusion is whether an information-gathering technique constitutes an "intrusion." An intrusion is an act that violates someone's privacy by invading their private places or private affairs. For instance, walking into someone's home without knocking and being invited inside or

photographing someone in a private place could both be intrusions.

In many cases, intrusion on seclusion involves a physical intrusion—such as barging into a private place—but intrusions can also occur without a physical intrusion. Using technology to bypass physical boundaries and collect information in private places—like covertly obtaining access to someone’s emails or text messages through technological means—may constitute intrusion on seclusion. Eavesdropping on a private conversation that does not occur in a public place or using binoculars to peer through someone’s windows are also non-physical intrusions that can give rise to liability.

WAS THE INTRUSION INTO A “PRIVATE PLACE” OR “PRIVATE AFFAIRS”?

In order for there to be liability for intrusion on seclusion, the method of gathering information must intrude into a “private place” or “private affairs.”

A “private place” is exactly what it sounds like: somewhere people reasonably expect to conduct their affairs outside of the public eye. Whether privacy can be reasonably expected in a specific place is considered within the context of social norms, privacy laws, and previous court cases. The law considers living spaces to be private places, with the home being the strongest example of a private place. Other private places include hotel rooms, hospital rooms,²⁷ workplace restrooms,²⁸ and other places people can reasonably expect to be free from observation.

But intrusion is highly unlikely to occur where the alleged intruder was invited into a place that would otherwise be considered private, because the invitation operates as a form of consent to enter. For more on the interplay between consent and intrusion, see **page 73** of this chapter. It should be noted that the invitation must be extended by the owner or lawful occupant of the private space in order for the guest’s presence to be deemed consensual.

By contrast, much less privacy can be reasonably expected in public places. Commercial businesses,

gatherings open to the public, and essentially any other setting in which someone ought to know they might be overheard are all considered public places. This also includes parking lots and personal driveways,²⁹ “public or semi-public” workplaces,³⁰ and even areas of the home that are visible from public roads.³¹ Authors have much more freedom to gather information in public places. Yet gathering information in a public place could still constitute an intrusion if an author intrudes into the subject’s private affairs.

Unlike public and private places, which refer to physical locations, affairs are less tangible and include matters like personal information. Generally, authors will not expose themselves to liability by examining public records or information that a person has willingly publicized. This is due both to the strong First Amendment protections for authors and the principle that a person cannot claim privacy rights in information that has already been made publicly available. However, digging through private information like emails, personal banking records, or diaries could be considered intrusive. An author might be liable for

intrusion on seclusion for intruding into these private affairs, even if they never intruded in a private location.

NOTE

The issue of private affairs is an important one for authors performing archival research. Oftentimes, archival materials contain private information about people who may not even know that the archive holds it—such as in the case of a deceased person donating their personal papers. For this reason, authors using personal or intimate archival information may want to check in with the archivist or their publisher to better understand whether this might pose privacy issues.

While courts generally find no intrusion where an overheard conversation was held in public, authors should still be cautious about intentionally eavesdropping on private affairs in areas where speakers can reasonably expect to have some privacy, even if these are not entirely closed to the public, such as a gym locker room³² or a private dining room in a restaurant.³³ It would be especially intrusive to intentionally eavesdrop

on a conversation held in someone's home or another entirely private place.

NOTE

Authors may want to record interviews and conversations as part of their research. Some states have separate laws that specifically prohibit nonconsensual recording. Other states allow recordings when just one of the individuals being recorded consents. See **page 73** for further discussion of the role of consent in intrusion on seclusion.

WAS THE INTRUSION “INTENTIONAL”?

An additional requirement in intrusion upon seclusion is that the intrusion be intentional. In this context, “intentional” is considered subjectively, meaning that the intruder actually knew or believed that their actions were not consented to and would result in an invasion of privacy. However, it can be difficult to prove actual, subjective intent, so courts sometimes examine an intrusion in context to determine whether it appears

intended. For instance, entering an occupied private bedroom without permission would likely be treated as an intentional intrusion because most people would understand this to be an invasion of the occupant's privacy.

WAS THE INTRUSION "HIGHLY OFFENSIVE"?

In order for there to be liability for intrusion on seclusion, courts also require that the intrusion be "highly offensive." Like false light portrayals, invasions must be highly offensive to create legal liability for intrusion on seclusion. This is because of the powerful First Amendment protections for authors to write freely—inoffensive invasions do not create intrusion on seclusion liability because of this strong protection. Unlike the intent question, which considers whether the alleged intruder subjectively meant to intrude, the level of "offensiveness" of the intrusion is considered objectively. This means that whether something is "highly offensive" turns on whether it would be highly offensive to a "reasonable person," considered relative

to the norms of the community. For example, barging into a changing room while someone is changing clothes would be highly offensive, while barging into the public area of a clothing store after the store is closed would not be highly offensive.

DID THE PERSON CONSENT TO THE INTRUSION?


An additional consideration is whether the subject consented to the intrusion. If a person agrees to let someone take their photograph, listen to their conversation, or enter their private home, they cannot later claim that the action invaded their privacy. Obtaining consent, where it is consistent with the goals of an author's project, can be a powerful shield for authors who want access to private places or affairs to conduct their research, because it transforms unauthorized privacy violations into authorized activities that the subject consented to. However, even if authors obtain consent, it is still important to avoid exceeding the boundaries of consent. For example, if a subject consents to an author interviewing them in their living

room as part of research for the author's book, and the author later enters the subject's bedroom and records her observations, the author has exceeded the subject's consent, despite being invited into the home.

NOTE _____

Often, authors gain access to materials such as personal letters, home photographs, or other personal material through third-parties, such as a library or archives.

In those cases, it is important to evaluate how those materials arrived with the third party, and whether the creator or subject of those materials consented to the materials being shared.



CHAPTER 4:
PUBLIC
DISCLOSURE OF
PRIVATE FACTS

PUBLIC DISCLOSURE OF PRIVATE FACTS IS A form of invasion of privacy in which private information that the public has no legitimate interest in knowing is made public. Public disclosure of private facts claims allow people to be legally compensated for the injury caused by the publication of certain kinds of private information. It is sometimes also referred to as “publicity given to private life” or “publication of private facts.”

Public disclosure of private facts, like all causes of action discussed in this guide, is based on state law, which means that the specific legal requirements vary

from state to state. But in general, public disclosure of private facts has six elements:

1. gives *publicity*,
2. to *private facts*,
3. about an *identifiable person*,
4. that is *highly offensive*,
5. is not related to matters of *public concern*,
6. and was made with some degree of *fault*.

Because of the publicity element, public disclosure of private facts can become a potential issue in the later stages of the writing process, when the book is made available to readers. As with the other areas of law covered in this guide, it is important to remember that the First Amendment empowers authors to write freely and creatively without fear of public disclosure liability as long as one or more of the above elements are not met. In this way, the default rule that authors can freely express themselves provides an important guardrail against claims by unhappy subjects.

DOES THE DISCLOSURE GIVE “PUBLICITY” TO A FACT?

In order for an author to be liable for public disclosure of private facts, the disclosure must give “publicity” to facts about a person. Public disclosure of private facts uses the same definition of “publicity” as false light and generally concerns facts communicated to the “public at large.” Despite this sweeping terminology, the facts do not necessarily need to be communicated to a large audience. For example, distributing thirty copies of a book and making it available online for just two months can be enough to give “publicity.”³⁴

In practice, essentially anything published in a book, magazine, or newspaper, and anything posted on the Internet will be considered communicated to the “public at large” and thus satisfy the publicity requirement.

WAS A “PRIVATE FACT” DISCLOSED?

Unsurprisingly, public disclosure of private facts requires that a “private fact” be disclosed. Evaluating whether a private fact was disclosed involves consider-

ing whether the fact disclosed was private and considering whether the fact is true.

Is the fact “private”?

Generally speaking, “private facts” are matters that have traditionally been kept from the public eye. On the other hand, information in the public record or otherwise available to the general public will not be considered private. A marriage record, for instance, would not be a private fact. However, details of a married couple’s sex life, their intimate conversations, and their home life would be considered private facts.

EXAMPLE

A newspaper published the name and address of a man whose son was suspected of murder. Although he was upset by the negative publicity, the man was unable to bring a disclosure of private facts claim against the newspaper because his name and address were already publicly available and, therefore, not private.³⁵

Whether a fact is private or part of the public record is often straightforward, but there are grey areas to be aware of. Many authors perform research for their non-fiction works about real people at libraries and archives, and these can be powerful troves of information. But authors should be aware that just because material is available upon request in a public or semi-public archive, this does not mean that the information is considered to be part of the public record. While publication in a newspaper or government record does mean information is public, availability through an archive usually does not make information public, even if members of the public could technically access it. Additionally, it is important to understand that archivists are often unable to verify that information contained in archives does not contain private facts whose disclosure could give rise to liability. When archival information is digitized on a publicly accessible website, it is much more likely to be considered public. Authors relying on digitized information from an archive may want to consider carefully documenting how they accessed the information and whether it can be verified elsewhere.

For more tips on documenting information about the research process, see **Section IV**.

Is the fact true?

To determine whether a private fact was disclosed, it is also important to consider whether the disclosed fact is true. This is because while defamation concerns false information and false light concerns false portrayals, public disclosure of private facts concerns *true* information, since it addresses the kind of harm that results from the publication of private information that is accurate, but whose disclosure is offensive. Therefore, where defamation and false light require falsity in the portrayal of the individual, public disclosure of private facts require truth as to the contents of the portrayal. For example, publishing a book that includes details of someone else's extramarital affair or health issue might expose authors to liability for public disclosure of private facts. Publishing details of an extramarital affair that actually never happened, on the other hand, would be more likely to expose the author to liability for defamation or false light.

IS THE DISCLOSURE ABOUT AN “IDENTIFIABLE PERSON”?

Public disclosure of private facts also requires that the disclosure is about an “identifiable person.” Like defamation and false light claims, public disclosure of private facts requires that the person whose privacy has been invaded be identifiable in the work. Obviously, using someone’s real name renders them identifiable to readers. However, personal characteristics, physical features, and life experiences can also be enough to identify the real people behind unnamed or pseudonymized characters. People may also be identifiable by implication. For instance, the ex-wife of a prominent author who has only been divorced once will likely still be identifiable in his memoir about his failed marriage, even if she is not named and her features and characteristics are altered.

EXAMPLE

A therapist in California successfully brought invasion of privacy claims against a former patient who wrote about him in her book. Although the author changed

the therapist's name and physical appearance, the court held that readers could still identify the therapist through the character's personality and plot parallels to the therapist's real life.³⁶

IS THE DISCLOSURE "HIGHLY OFFENSIVE"?

Public disclosure of private facts is actionable only when the publication of these facts is "highly offensive." In general, a disclosure is highly offensive when it exposes something that a person reasonably expected to remain private. This is considered objectively from the perspective of a "reasonable person." The amount of privacy that an ordinary, reasonable person can expect is judged by the social customs of the community.

For instance, publishing a photograph of a nude person bathing would be considered highly offensive under the norms of most if not all communities. And because the home is considered highly private, and people have a reasonable expectation that the activi-

ties that take place within are protected, disclosure of private matters observed in someone's home could be considered "highly offensive." On the other hand, reasonable people expect that their daily activities outside the home will be observed and possibly commented upon. For example, a book about what an author saw while observing her neighbors in a public park is unlikely to be highly offensive.

ARE THE DISCLOSED FACTS RELATED TO MATTERS OF PUBLIC CONCERN?

There is an important exception to public disclosure of private facts liability, particular salient for nonfiction authors: disclosing facts that are related to matters of public concern will not expose an author to liability for public disclosure of private facts, because the First Amendment provides strong protection for writing on matters of public concern. If the private information disclosed pertains to a matter of legitimate public concern, then disclosure of that information is highly unlikely to constitute an invasion of privacy, even when the disclosure is highly offensive. In the context

of public disclosure of private facts, matters of public concern are defined very expansively, underscoring the strength of this exception.

Matters of public concern are defined as facts or events that are “newsworthy.” For newsworthy information, the decision of a publisher to print a book on a particular subject favors First Amendment protection. In fact, a publisher’s decision to publish a book is often seen by courts as evidence of the newsworthiness or legitimate interest in its subject matter. Rather than engaging in detailed factual analysis about whether the material is newsworthy, courts often defer to the publisher’s expert judgment instead. As one court stated, except “in cases of flagrant breach of privacy,” the publisher is best positioned to determine whether facts are matters of legitimate public concern—not the court.³⁷

In general, otherwise private facts can be published if they are related to a matter of legitimate public concern. Virtually anything can be considered a matter of legitimate public concern if it has some kind of social value that justifies telling the public about

it. Generally, this social value comes in the form of “education, amusement, or enlightenment.”³⁸ Social value is measured by the norms and standards of the relevant community. If a reasonable member of the public with “decent” standards would have no interest in something, then it is not of legitimate concern and will not be protected. Generally, interest will be considered “decent” as long as it is not morbid, sensational, or prying.

EXAMPLE

A *Sports Illustrated* writer interviewed prominent surfer Mike Virgil for an article about an extremely hazardous surfing spot. In the interview, Virgil not only provided information about his experiences at the spot but also about a variety of “bizarre incidents in his life that were not directly related to surfing.” When Virgil learned that the writer intended to publish the off-topic anecdotes he shared about being illiterate, eating insects, and intentionally injuring himself to receive worker’s compensation, he strongly objected. When *Sports Illustrated* published the article anyway,

Virgil brought a public disclosure of private facts claim against the magazine. The court held that, while the public did have legitimate interest in learning more about the famous surfing spot and Virgil's surfing career, the interest in Virgil's non-surfing eccentricities was more likely of the unprotected morbid or sensational kind.³⁹

This example illustrates the line between legitimate interest and morbid prying. Even if the focus of the story is a matter of legitimate public concern, including details that are too far afield from the information that is of public concern can expose authors to liability. However, even highly personal information can become the subject of legitimate interest if intertwined with matters of public concern.

EXAMPLE

A newspaper published a story about inadequate background screening within the medical profession and used an individual anesthesiologist accused of malpractice as a case study. The article included the

anesthesiologist's name, a photo of her, and details about her past psychiatric treatment and marital issues. The author of the article implied the anesthesiologist's personal problems were connected to her inadequate performance as a medical professional. The anesthesiologist sued the paper for public disclosure of private facts, but the court ruled in favor of the newspaper. The court reasoned that, while her psychiatric treatment and marital issues would likely be considered private facts in most circumstances, her invasion of privacy claim failed since her public malpractice cases were a matter of legitimate public concern and these facts were intertwined.⁴⁰

Facts from the past may also be considered "matters of public concern." However, courts sometimes find that the passage of time since an event transpired can weigh in favor of it *not* being a matter of public concern.⁴¹ In the absence of "continued public interest," a formerly newsworthy fact may cease to be a matter of public concern. In this context, authors should be mindful of the protection afforded to facts that are reported in a

public record. If a fact is found in the public record, its disclosure is highly unlikely to result in liability, even if it is considered private or no longer newsworthy. Authors should be mindful that limited availability to the public, such as through an archive, does not necessarily transform something into a matter of public concern. Archives contain a plethora of information from the past, which may or may not relate to matters of public concern.

Importantly, authors are empowered to write about their own lives, including private information that implicates other people, if the information contained therein is a matter of public interest. Under the First Amendment, people have the freedom to write about their own “intimate affairs” that feature other people when those intimate affairs touch on the public interest. This principle allows memoirists and autobiographers to tell their own stories, including information about their family members, significant others, friends, and other real people who inevitably play roles in these stories, provided there is a connection to the public interest. Therefore, authors may be able disclose

even extremely sensitive private facts about third parties if they are revealed in the process of telling the author's own personal story.

EXAMPLE

Susanna Kaysen, the author of *Girl, Interrupted*, was sued by her ex-boyfriend for publishing a memoir that discussed their relationship and asserted that it may have included “coerced non-consensual sex.” Although facts about sexual relationships are generally private and highly offensive when published, the court held that Kaysen had the right to write about her own sexual relationship with her ex-boyfriend, especially since her story touched on broader issues of public concern like consent.⁴²

WAS THE DISCLOSURE MADE WITH SOME DEGREE OF FAULT?

Another requirement is that the disclosure of the private fact be made with some degree of fault. As with the other causes of action in this guide, the First

Amendment requires fault on the part of authors before a subject can successfully claim a privacy violation. In most states, public disclosure of private facts involves the same level of fault—negligence—for disclosures about both private and public people. An author is negligent when they fail to exercise the amount of care that a reasonable person would under the same circumstances. This means that whether the disclosure involves a public or a private person, even if an author intended no harm in sharing the private facts, they could still be liable in most states if they were negligent in disclosing the information.

WHAT SHOULD AUTHORS KNOW ABOUT THE REAL PEOPLE THEY ARE WRITING ABOUT?

Is the person living?

The first question authors should ask about their subjects with regards to invasions of privacy is whether the person is living. If the subject is no longer living, authors are unlikely to be liable for disclosing private

facts about the deceased person. However, authors could still be subject to claims brought by the deceased person's surviving family members for invasions of the *family members'* privacy.

EXAMPLE

The Chicago Tribune published photographs of a gunshot victim's corpse in a hospital bed alongside an article discussing the city's homicide rate. The article also included comments made by the victim's mother that were overheard by reporters. The court ruled that, though the deceased man no longer had a right to privacy, his mother could still bring a publication of private facts claim related to the newspaper's invasions of her privacy at his deathbed.⁴³

Special Case: Third-Party Privacy and Archival Research

Authors often perform research for their works about real people by combing through archives. In many cases, the authors of letters and other papers contained in archives are deceased. But it may be the case that people mentioned or implicated in these

letters and papers are still living, and an author relying on archival materials about a deceased person might consider paying special attention to the other people in the papers and verifying whether they are alive or dead. Such an author may also consider contacting the archive if they have questions about the issue.

An additional issue which can arise when authors research deceased people at archives is that the records may be subject to other privacy laws which do survive death.

Is the person a “private” or “public” person?

The next question to ask is whether the subject is a “private person” or a “public person.” Generally, public people, or people who are in the public eye, have lesser expectations of privacy than private figures.⁴⁴ Information about a public person that might be considered private were it about a private person, like whether someone has undergone plastic surgery, is more likely to be a matter of public concern rather than a private fact. Practically speaking, this means that authors

generally have more leeway to publish private information about public people than private people.

NOTE

If you are unsure whether your subject is a “private” or “public” person, turn to Appendix A, which provides an overview of what kinds of people are considered private people and what categories of people are considered public people—all-purpose public figures, limited-purpose public figures, involuntary public figures, and public officials.

For public people, legitimate public interest in their lives may extend beyond their public roles and include information that would usually be considered private. The amount of publicity given to otherwise private facts about them must remain in proportion to the event or activity that makes them a public figure.

EXAMPLE

A disgruntled fan created a fake dating profile on a popular website for actress Christianne Carafano, which included her home address. Ms. Carafano sued for invasion of privacy, but the court noted that she had “voluntarily assumed a position of public notoriety by becoming an entertainment celebrity.” The court noted that Ms. Carafano regularly discussed her home life and even entertained fans who would come to visit her in Los Angeles. Therefore, the court found that the publication of her address did not give rise to liability for publication of private facts.⁴⁵

This example shows that people in especially prominent public positions, like celebrities, have a lesser expectation of privacy than people in more minor public positions. However, like anyone else, these public figures still maintain a reasonable zone of privacy around matters not related to their public activities. Authors do not necessarily have free rein to write about an actor or politician’s health issues, for instance.

EXAMPLE

When Toni Ann Diaz was elected the first female student body president of the College of Alameda, she assumed a role as a limited public figure. Legitimate interest in her public role mounted further when she accused college administrators of mishandling student funds, and multiple newspapers published stories about her. Those that focused only on her public role and the allegations were not considered intrusive. However, one article also included information about gender confirmation surgery Ms. Diaz underwent years before the election. A court held that this information fell squarely on the side of “morbid curiosity,” rather than legitimate concern, since Ms. Diaz’s birth name and the sex she was assigned at birth had no bearing on the administrative controversy or her ability to act as student body president. The court saw the mean-spirited jokes included in the article as further evidence that it was not truly written simply to educate the public about the matter.⁴⁶

Although authors can disclose some otherwise private facts about public figures where they are a matter of

public concern—for instance, whom they have accepted campaign donations from—authors may not disclose private information simply for the sake of disclosing it.

Special Case: Intentional Infliction of Emotional Distress

A related cause of action for authors writing about real people to be aware of is intentional infliction of emotional distress, or IIED. IIED imposes liability for “extreme or outrageous conduct” undertaken with the intention of causing “severe emotional distress.” If an author’s research methods involve extremely harassing conduct or severe deception, they may expose themselves to liability for IIED.

EXAMPLE

In 2010, Dr. Sindi was a visiting scholar at Harvard University. After a dinner party, an acquaintance, Samia El-Moslimany, became convinced that Dr. Sindi was carrying on an affair with her husband. El-Moslimany and her mother falsely claimed online and in emails that Dr. Sindi had falsified her educational and professional credentials. El-Moslimany also sent a series

of vicious, obscene, and violent emails to Dr. Sindi. Dr. Sindi sued El-Moslimany for IIED and the court found that the pattern of harassment, combined with the publication of falsehoods, supported Dr. Sindi's claim for IIED.⁴⁷

As with the other areas of the law covered in this guide, the First Amendment provides important protection for authors concerned about IIED—extreme and outrageous conduct is required, which is a very high bar. The Supreme Court has determined that speech on matters of public concern cannot be restricted by IIED, even though it may be highly upsetting to the subject.⁴⁸

SECTION III:
RIGHT OF
PUBLICITY AND
IDENTITY RIGHTS

AUTHORS WRITING ABOUT REAL PEOPLE should be aware of two related causes of action that can arise when they use another person's identity: "appropriation of identity" and violation of the "right of publicity." These closely-related causes of action, collectively referred to in this chapter as "unauthorized use of identity," concern an individual's right to control some of the uses to which their name, likeness, or other expressions of their identity are put. Unlike the other causes of action discussed in this guide, these legal issues arise most often in the case of images, but can also be an issue in text. Most states recognize both appropriation of identity and the right of publicity, though some states only recognize one or the other.

NOTE

The law of each state differs slightly when it comes to right of publicity and identity rights. This guide summarizes the main issues across a number of states. A great resource to help understand specific state law variations is Professor Jennifer Rothman's *Roadmap to the Right of Publicity*, available for free online at www.rightofpublicityroadmap.com.

These legal protections were originally based in the legal theory that a person has the right to control their own image for the sake of privacy. This understanding of a person's control over their identity as a privacy right is still reflected in appropriation of identity laws today. The underlying justifications for the right of publicity, on the other hand, have shifted over time, and some states now recognize the right of publicity as a property-based legal right. Unlike the privacy-based appropriation of identity, the property-based right of publicity can be sold, licensed, or otherwise transferred to another party. In marking this shift, many state governments have passed statutes explicitly recognizing such rights.

NOTE

While appropriation of identity and the right of publicity have different origins, and the two doctrines diverge in certain ways discussed in this chapter, in practice, it tends to make little difference which cause of action is applied. Whether a subject sues under a right of publicity statute or on a theory of appropriation of identity generally does not make a difference in terms of the outcome of that lawsuit.

Because they are so closely related, this guide discusses appropriation of identity and the right of publicity together, while highlighting areas where they diverge. But there are limitations on these torts. Most notably, the First Amendment protects authors' ability to write about the identity of real people to convey topics of legitimate public concern and interest. Reviewing the considerations in this chapter will help authors understand how to avoid legal issues that may result from using other people's names, likenesses, and identities in their writing. Additionally, these rights sometimes converge on the rights protected by federal copyright law, which takes precedent over state law claims.

Although this area of the law is beyond the scope of this guide, federal copyright preemption is sometimes also a viable defense to such claims.



CHAPTER 5: UNAUTHORIZED USE OF IDENTITY

UNAUTHORIZED USE OF IDENTITY” IS THE unauthorized use of a person’s name, appearance, or other identifying features for the benefit of the user. As used in this chapter, it refers to both appropriation of identity and the right of publicity. Appropriation of identity is sometimes also called “appropriation of name or likeness,” “misappropriation,” or simply “appropriation.” The right of publicity is sometimes called “personality rights.”

Unauthorized use of identity, like all causes of action discussed in this guide, is based on state law, which means that the specific legal definition varies

from state to state. In general, an unauthorized use of identity entails:

1. **The use** of another person's *identity*,
2. which is not *writing about the person* in a nonfiction work,
3. for the unauthorized user's *own benefit*,
4. which is more than *incidental*
5. and is *not authorized*.

While appropriation of identity and right of publicity protect against the same types of uses, there are three key differences, stemming from their separate groundings in privacy and property protection.

First, in line with its property-like features, the right of publicity in some states covers only uses of another person's identity made for "commercial purposes."⁴⁹

Second, like other property-like rights, the right of publicity continues after death in some states.⁵⁰ In contrast, appropriation of identity, which is grounded in personal privacy, does not apply to deceased persons.

Third, like other property rights, the right of publicity may be transferable to someone else. This means that someone could license or transfer their publicity rights to another person or company, which could then potentially enforce those publicity rights. In contrast, the right against appropriation of identity, a “personal” privacy right, cannot be transferred.

APPROPRIATION OF IDENTITY	RIGHT OF PUBLICITY
No commercial purpose required	Commercial purpose required
Does not survive past death	Can survive past death
Cannot be assigned to third parties	Can be assigned to third parties

NOTE

Sometimes, authors encounter what are known as “life rights.” So-called life rights are often discussed in the context of telling someone’s life story, like in a biography or similar work. But “life rights” have no basis in the law, as no U.S. law or policy guarantees special rights in one’s life story. Instead, life rights agreements confer to the author a variety of rights that

would otherwise belong to the individual, such as that person's right of publicity.

DOES THE PORTRAYAL USE ANOTHER PERSON'S "IDENTITY"?

A preliminary question an author should ask is whether another person's identity has been or will be used.

"Identity" is a person's name, appearance or likeness, or identifying features that evoke a particular individual. Although most of the examples here involve celebrities, anyone can sue based on the unauthorized use of their identity.

Protection for a person's name is not limited to their exact, current name.

EXAMPLE

Kareem Abdul-Jabbar successfully sued General Motors Company for the unauthorized use of his birth-name, Ferdinand Lewis Alcindor, in a television commercial. Even though the Abdul-Jabbar had not used the name for over ten years by the time the commercial aired,

it was still considered an aspect of Abdul-Jabbar's identity.⁵¹

“Identity” also includes other aspects of appearance or personality that evoke the identity of a person. Many of the examples in this section involve the use of photographs of real people, but other identifiable representations of a person might still evoke their “likeness,” or representation of their appearance.

EXAMPLE

EA Sports, a maker of video games, released a series entitled *NCAA Football*. The games used playable avatars representing college football players. In the 2005 edition of the game, EA Sports used an avatar that bore a striking resemblance to Samuel Keller, quarterback for Arizona State University. Because the character wore the same jersey number as Keller and shared his appearance, home state, play style, and school year, a court found the character was identifiable as Keller and that he had stated a claim for appropriation of identity.⁵²

As in the above example, many states protect identifying characteristics or aspects of a person's persona beyond name and likeness, such as voice, signature, styles of dress, and mannerisms.⁵³ Under some states' laws, evoking another person's identity can be grounds for a successful lawsuit, even if the person's actual appearance is not depicted.

EXAMPLE

In the early 1990s, Samsung ran a series of advertisements depicting the longevity of popular cultural touchstones far into the future, along with a Samsung product to promote their electronics' durability. One of these depicted a robot posed next to the "Wheel of Fortune" game board imitating Vanna White, hostess of the same game show, in stance, dress, and appearance. A caption also read: "Longest-running game show. 2012 A.D." White successfully sued under California's right of publicity statute even though her actual image was not used. The court reasoned that the aspects of the robot in the advertisement left little doubt as to whose image and identity it was intended to evoke.⁵⁴

WHAT TYPE OF USE IS THE IDENTITY PUT TO?

Because of powerful First Amendment protections that apply to creative expression, an important question for an author concerned about liability for an unauthorized use of a real person's name, likeness, or identity is whether they are making a purely expressive use of the person's identity, or whether the use is exploitative in nature.

Is the use of the identity writing about the person in a nonfiction work?

When an author's use of an identity is writing about a person in a nonfiction textual work, that use is highly unlikely to constitute appropriation of identity. This is particularly likely to be the case when the author's work touches on a matter of public interest, as is often the case with published nonfiction writing. To put it another way, an author writing an expressive nonfiction work—a book, article, or similar creative endeavor—about a real person, without using images of that person, generally does not have to worry about

appropriation of identity liability. In these cases, the use is purely expressive. Some expressive uses of a person's identity that generally do not implicate unauthorized use of identity include:

- Writing a nonfiction book about a real person;
- Including a description of a real person in an author's memoir;
- Discussing a real person's role in historical events in a journal article;
- Mentioning or discussing a real person in a factual blog post.

NOTE

While it is important to be aware of legal issues that can arise when writing about real people, the First Amendment means that authors who are simply using a real person's identity in their writings about that person—such as using a real person's identity in the text of a biography or memoir— or another topic do not have to worry about appropriation of identity. Authors considering using images or likenesses of real people in their works, on book covers, or in advertisements

for their work, in addition to authors who wish to use real people's identities in their textual works in ways other than writing about them, may find the rest of this chapter relevant, however.

Is the use of the identity exploitative?

When the use of a real person's identity goes beyond merely writing about that person in a text—such as when an author uses an image of a person in their work, or uses the person's identity to advertise the work—courts sometimes find the use to be “exploitative.” Exploitative uses of an identity are ones that use the identity to garner attention for a work or profit from the use of an identity rather than using it as a logical part of their creative expression. Exploitative uses encompass commercial uses of others' identity, and commercial uses are much more likely to be exploitative than noncommercial ones. Authors should also note that courts are much more likely to find uses of identity to be exploitative when images or likenesses of the person are used—recall that merely writing about someone in a nonfiction, textual work without

including their image or likeness is outside the scope of appropriation of identity.

If the unauthorized use of an identity is exploitative, such as when it is used to advertise a product, it is much more likely to constitute appropriation of identity.⁵⁵ It is important to note that while using another's name, likeness, or identity in a book or article may result in commercial gain for the author, that does not transform the use of the identity from an expressive into an exploitative one. For example, writing an unauthorized biography for which you receive a large advance does not mean your use of the subject's identity is exploitative. This is because of the powerful First Amendment protections for authors underpinning expressive uses of those identities.

EXAMPLE

The successful film, *The Perfect Storm*, tells the story of a crew of a fishing boat weathering a catastrophic storm. The story was based on a real boat, the *Andrea Gail*, and its crew, who were lost at sea in a historic storm in 1991. Although those involved in the movie's production

profited commercially, the court found that the First Amendment protected the use. Further, as the film was about the crewmembers, despite the fact that it represented them visually rather than in a text, the use of those crewmembers' identity did not constitute appropriation of identity.⁵⁶

In some cases, courts have found appropriation of identity when a person uses another's name or likeness in an expressive work, but the character of the use is exploitative. These kinds of exploitative uses include trying to falsely associate a well-known person with your own work to generate attention.

To determine whether a creator is making an exploitative use of someone's identity, courts sometimes ask whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted," in which case the use is exploitative, or if the work "containing a [person's] likeness is so transformed that it has become primarily the defendant's own expression rather than the [person's] likeness."⁵⁷ The more that

the identity is “transformed,” the more likely it is that the use is expressive.

EXAMPLE

In the 90s, DC Comics published comic book entitled “Autumns of Our Discontent,” and featured a pair of brothers named Johnny and Edgar Autumn, “depicted as villainous half-worm, half-human[s].” A performing duo, brothers Johnny and Edgar Winter, sued DC Comics, alleging their rights of publicity had been appropriated. The Winter brothers argued that the characters shared some physical features with them and pointed to the similarity of in names to support their claim. Yet the court disagreed, finding that the comic book artist had transformed the identities into something different. It further held that the comic’s primary economic value derived not from the Winter brothers’ identities, but from the artist’s creativity, becoming the artist’s own expression rather than mere representations of the Winter brothers’ likenesses.⁵⁸

Even when a person's image or likeness is used in a work entitled to First Amendment protections, that use might still be exploitative if it derives its value primarily from the person's fame or renown and does not transform the identity.

If your intended use of another's name, likeness, or identity could be considered exploitative, such that the "value" you derive from the use is based mostly on the person's celebrity or renown, the remainder of this chapter will provide information on determining whether your use may be considered appropriation of identity.

IS THE PERSON'S IDENTITY BEING USED TO OBTAIN A COMMERCIAL OR REPUTATIONAL BENEFIT?

When an author makes a use of a person's identity that is not purely expressive, the next consideration is what kind of benefit the use of the identity will provide to the author. In these cases, an author should ask herself whether she intends to use the identity to gain a commercial or (less often) reputational benefit.

Is the person's identity being used to obtain a "commercial benefit"?

The first and most common type of benefit courts look for is a "commercial benefit." In fact, some states only protect publicity rights when a person's identity is used for a commercial benefit, particularly when it comes to the right of publicity. Advertising a product is a form of a commercial benefit, for example.⁵⁹ However, using someone's identity in advertising does not always confer a commercial benefit. While advertising is generally presumed to confer a commercial benefit, advertising a book or article with the name, likeness, or identity of a person who is the topic of that work is generally not considered to confer a commercial benefit. Instead, courts treat such uses as advertising the contents of the relevant expressive work and afford these types of advertisements First Amendment protection.

EXAMPLE

Fine art photographer Arne Svenson undertook a project to photograph people in their homes, without their consent or knowledge, in order to comment on

the “anonymity” of urban life. The photographs were displayed in galleries, promoted on Svenson’s website, and sold online. The court decided that because the photographs were protected by the First Amendment, their use in promoting the exhibitions in which they featured did not confer to a commercial benefit.⁶⁰

This example illustrates that using a person’s identity in advertising may be allowable for works that are typically provided broad First Amendment protection, like books, articles, and other forms of artistic expression, if the identity is used to indicate the contents of the expressive work. In some states, these types of uses can be broadly protected. New York, for example, allows the use of a person’s identity in advertisements or other promotional materials that either “convey the nature and content” or “prove the worth and illustrate the content”⁶¹ of the work. On the other hand, in the context of advertising, First Amendment protections for expressive speech are unlikely to apply if the name, likeness, or identity used to advertise a book or article is not a representation of its content.

EXAMPLE

Edward Tellado, a veteran of the Vietnam War, was photographed during his time in battle. The photograph was included in an advertisement promoting a book series, *The Vietnam Experience*, without Tellado's consent. After discovering this, Tellado sought compensation. The photograph was used only in an insert letter included with the first volume of the series to encourage readers to buy later volumes. The photograph was not used in any of the books. Because the photograph was only used to “hype” the book series—i.e., for a commercial purpose—rather than represent its contents. Tellado was therefore entitled to right of publicity protection.⁶²

A similar principle applies to book covers: it is prudent to ensure that you do not use another's name, likeness, or identity on your book cover if they are unrelated to the content of your book, as this may give the appearance of using their identity merely to obtain a commercial benefit.

Is the person's identity being used for a reputational benefit?

In addition to commercial benefits, courts in some states find appropriation of identity where the user exploits a person's identity in order to obtain a reputational benefit, though this is much less common than courts asking whether the use is for a commercial benefit.

EXAMPLE

An anti-abortion activist posted a page on his website that used the name and online moniker of a popular legal blogger without obtaining permission. While the use did not result in a commercial benefit to the activist, because the webpage presented itself as containing the legal blogger's own writing, the court found that the activist sought to take advantage of the blogger's strong reputation and goodwill within the community, and that the blogger's identity was used to obtain a reputational benefit.⁶³ This was the case even though there was no direct commercial benefit to the activist.

IS THE USE OF A PERSON'S IDENTITY MORE THAN MERELY "INCIDENTAL"?

Unauthorized use of identity also requires that the use is more than merely "incidental." Incidental use refers to using a person's identity in a minor or limited way. There are two main situations in which the incidental use exception applies. First, merely mentioning a person's identity is an incidental use, and second, invoking or using an identity for purposes other than taking advantage of that person's celebrity or reputation is considered an incidental use. For example, a short clip of a woman getting an autograph in a documentary about a celebrity is an incidental use of that woman's identity. Brief references to a person, particularly when used to give information, are likely to be considered an incidental use.

EXAMPLE

Author Ayn Rand objected when her name appeared on a book she didn't write. Rand's name was used on the front cover in an excerpt of a review which compared the book to Rand's own works. The court noted that the

publisher had a right to inform the public of the nature of the book and thus could invoke Rand’s identity as an incidental use.⁶⁴

The second class of incidental uses overlap substantially with the purely expressive uses discussed on **page 113** of this chapter. The First Amendment also underpins the incidental use exception, allowing for the free flow of news and ideas. Because of the strong protections for expressive speech, particularly on matters of public interest, invoking a person’s identity “incident” to this speech is also protected. In this case, an author is not seeking to take advantage of the real person’s reputation or prestige, but using the identity for expressive purposes, often when discussing matters of public interest.

DID THE SUBJECT AUTHORIZE THE USE?

A person whose identity is being used can authorize the use by giving their consent. Such consent means that the use does not give rise to liability for appropria-

tion; remember that the tort covers *unauthorized* use of identity, and when that use is consented to, it ceases to be unauthorized. However, the use must be within the scope and understanding of the consent given by the person whose identity is used. If the use exceeds the initial agreement, it can expose the author to liability.

EXAMPLE

Harry Neyland, a maritime painter, agreed to be profiled in *Arts and Decoration*, a magazine published by Curtis Publishing Company. Curtis also published *The Ladies Home Journal*, which printed an offer for a pillow embroidery pattern of a ship that was advertised as “com[ing] straight from the painting by Harry Neyland” following the publication of the profile in *Arts and Decoration*. The court found that while Neyland had consented to the use of his name in the *Arts and Decoration* profile, that consent did not extend to the advertisement for the embroidery pattern in *The Ladies Home Journal*, and therefore, Curtis could be liable for appropriation.⁶⁵

As this example shows, the scope of consent is key to determining whether a use is authorized. If a person agrees to a use of their identity for one purpose, they have not necessarily agreed to its use for a different purpose, and separate consent should be obtained. See **Section IV, Practical Guidance**, for more about getting consent.

WHAT SHOULD AUTHORS KNOW ABOUT THE REAL PEOPLE THEY ARE WRITING ABOUT?

When writing about a real person, authors should remember that different legal rules can apply depending on certain characteristics of their subject. This section covers three additional important questions to ask about the person whose identity is being used: whether the person is living, whether the person is considered a “private person” or a “public person,” and whether a third party has rights over the person’s identity.

Is the person living?

An important consideration in unauthorized use of identity is whether the person whose identity will be used is still living. If this person is deceased, there can be no cause of action for appropriation of identity, though the right of publicity may still apply.

Living people have the right to protect their identities under both appropriation of identity and right of publicity. Upon death, appropriation of identity ceases to apply. Because appropriation of identity is concerned with protecting individual privacy, the personal right dies with the person. In contrast, the more property-like right of publicity lasts beyond the person's death in many states. In some states, the right of publicity can be inherited and asserted by surviving family or other inheritors, like other property. Many states provide post-mortem protection for set periods of time. Depending on the state, the right of publicity can extend anywhere from ten years⁶⁶ to one hundred years after death.⁶⁷ Because the right of publicity can pass to a person's heirs or estate upon an individual's death, these third parties are then able to enforce the rights.

EXAMPLE

After the musical artist Prince passed away, a sound engineer who worked with him attempted to release five songs that the artist had previously recorded as a new Prince album. Representatives for Prince's estate sued, arguing that the release of the recordings violated Prince's right of publicity, which the estate had the right to control. The court agreed, noting that the right of publicity in Prince's home state of Minnesota lasts beyond death, had passed to Prince's estate, and therefore could be enforced by the estate.⁶⁸

NOTE

The right of publicity can also be transferred to another party, who can then enforce the person's right of publicity, while the person is still living. For example, professional models might assign their rights of publicity to a company that specializes in enforcing those rights.⁶⁹

Is the person a private or public person?

Another consideration for authors concerned about appropriation of identity liability is whether their

subjects are private or public people. Both private and public people are protected from unauthorized use of their identities, but their classification as either a private or public person can lead to default assumptions about how the person's identity is used and how likely it is that the use is justified as expressive or incidental.

NOTE

If you are unsure whether your subject is a “private” or “public” person, turn to the **Appendix**, which provides an overview of what kinds of people are considered private people and what categories of people are considered public people—all-purpose public figures, limited-purpose public figures, involuntary public figures, and public officials.

Unauthorized uses of public people's identities are frequently justified as expressive uses. Generally, even though the identities of public people are more likely to be put to exploitative uses or to obtain commercial or reputational benefits than the identities of private people, the use of public people's identities is also more

likely than uses of the identities of private people to be protected by the First Amendment, because public people are more likely to be involved in significant public events implicating public interest.

Even generally private people can be considered public people in the context of significant events with which they are connected, such as momentous historical or social occurrences. Whether the person is protected from the unauthorized use of their identity, however, depends on the context in which their identity is used, and particularly on the commerciality of the use.

EXAMPLE

Edward Tellado, the Vietnam War veteran from an earlier example whose photograph was included in an advertisement promoting a book series without his consent, sued for unauthorized use of his identity. The court noted that Tellado would be considered a public figure within the context of the photograph. This was because he was a representative participant in a significant historical event. Even though Tellado was

determined to be a public figure, however, the court ultimately decided that he deserved compensation for the unauthorized use of his likeness.⁷⁰ This was because Tellado’s picture had been used commercially to advertise the book and not actually included in the book’s discussion of events—which would have been protected as an expressive use by the First Amendment.

But the unauthorized use of a private person’s identity may also be justified as an expressive use. When private people become involved in newsworthy events, the use is likely to be an expressive one. If relevant to the story, their identities may be used.

EXAMPLE

Sergeant Jeffrey Sarver served as a bomb squad technician in Iraq through 2004 and 2005. A journalist wrote the screenplay for a renowned film, *The Hurt Locker*, based on Sergeant Sarver’s time in Iraq. The court recognized Sergeant Sarver as a private individual, “who lived his life and worked his job” and who never sought public attention or to commercialize his life and

story, though his story may be of interest to the public. Still, the court ultimately decided Sergeant Sarver was not entitled to compensation for the unauthorized use of his identity because the use was not commercial. Rather, the story it told was a form of expression protected by the First Amendment.⁷¹

SECTION IV: PRACTICAL GUIDANCE

ALTHOUGH THE FIRST AMENDMENT LIMITS claims related to writing about real people, the possibility of a lawsuit can understandably be daunting for authors. Even if a legal claim against an author is found to be without merit, the costs of defending oneself in court can be very substantial. Understanding the legal, ethical, and practical issues that can come up in works about real people can empower authors to manage risks and write more freely. This being said, authors should be aware of the strong First Amendment protections that apply to their written work, which is considered First Amendment speech. In many cases, the First Amendment protections works of authorship receive can tip the scales in favor of the author when they face a lawsuit for privacy violations, defamation, or appro-



priation of identity. And in some cases—such as when an author writes about their own intimate affairs, or uses another’s name or likeness for an expressive purpose—the First Amendment operates as a very high bar when it comes to protecting authors from privacy violations, defamation liability, or right of publicity claims.

This section outlines some practical ways that authors can reduce risk without diminishing their ability to write about real people. Not all of these tools are appropriate for every project; authors should consider them within the specific context of their work and their goals.

USING RELIABLE SOURCES AND RESEARCH METHODS

Seeking out reliable sources and using reliable research methods are not only good writing techniques, they are sound risk management tools. Using reliable sources and avoiding intrusive research methods can go a long way towards minimizing the chances of facing legal claims for defamation or privacy violations down the line.

First, defamation and false light do not apply to truthful statements and depictions, and using reliable research sources can minimize the chance of an author unintentionally misrepresenting facts. Accordingly, authors should use sources and research methods they can confidently rely on. Government documents and public records can generally be relied on to be truthful, and statements published in established publications like prominent newspapers or magazines are similarly reliable. On the other hand, a blog post from an unknown Internet user may not be a reliable source of truthful information. Similarly, archival papers are available to the public in some cases, but just because information is contained in an archive and could be discovered by a member of the public does not mean it is part of the public record. Archives are considered to be reliable sources of information, but authors using archives may want to check in with the archivist or their publisher to ensure privacy rights are respected.

Another consideration is whether the information contained in the source can be independently corroborated by another source. Publishers and editors

often like to see that an author has relied on multiple independent sources for a given statement of fact and verified the legitimacy and accuracy of each source to the best of their ability.

Some institutions encourage authors to engage in a peer review process so that other experienced authors can read the work and check for mistakes or factual inaccuracies. Peer fact-checking is a more rigorous process in which peers comb through the author's sources to double-check for accuracy. If either of these processes are available to an author, they can be effective risk management tools. Fact checking and peer review practices can vary substantially by field and publisher. Authors may want to consider learning about their fields' accepted practices from scholarly societies, scholarly communications offices, publishers, and other intermediaries.

Second, avoiding using research sources that contain private information in which there is no legitimate public interest can help authors avoid violating their subjects' privacy rights. Authors should feel empowered to rely on public records: there are strong

protections for authors relying on the public record, since that information has already been disclosed to the public. In contrast, writing about a private person's medical files could expose an author to liability for privacy violations. However, when an author is writing about their own experiences, such as in a memoir or autobiography, she may rely on her recollections or notes—the First Amendment protects the right to disclose one's own intimate affairs, and, if there is public interest in the topic, disclose the intimate affairs of others in the process, providing strong protection for authors consulting non-public sources in these circumstances.

Third, employing non-intrusive research methods can limit the risk of violating subjects' privacy rights. It is prudent to avoid intrusive research methods when collecting information and writing about their subjects. Since intrusion upon seclusion protects against acts that infringe on someone's privacy by intruding into private spaces or private affairs, authors should carefully consider how they are collecting information and avoid using deception to obtain information. For

instance, an author who records conversations, reads mail, makes repeated phone calls, follows people, or takes nonconsensual photos to collect book material might risk infringing on their subjects' privacy rights.

DOCUMENTING YOUR RESEARCH

Careful and thorough research documentation is another risk management tool for authors to consider because it helps authors to demonstrate that their work is truthful, accurate, and does not violate their subjects' privacy rights. For this reason, it can be prudent for authors to keep notes documenting where they obtained information used in their works and what methods were employed to obtain that information.

Because a statement or portrayal must be false in order to be found legally defamatory or provide the basis of a false light claim, preserving evidence that a statement is true can serve as a backstop in the event that an author faces a defamation or false light claim. Authors who document their research and sources can more easily show that their statements are true.

Documenting research methods and sources can also help authors minimize privacy risks. First, documenting the methods used to obtain information can protect authors from invasion of privacy claims. In most cases, an author will not be liable for intrusion on seclusion if they can establish that they obtained the information without deception and without using invasive methods. In a similar vein, documenting instances where an author obtained consent can help stave off later claims of privacy violations by the person who granted the consent.

Documenting research methods can also help show that facts disclosed in an author's work should not be the basis for a public disclosure of private facts claim. For example, clearly documenting that facts were taken from the public record can protect authors from such claims. Similarly, collecting sources—like newspaper clippings—that show facts about a subject relate to matters of public concern can also help authors avoid privacy violations.

Authors can manage risk by keeping organized records of sources, such as books, articles, and contem-

poraneous meeting notes, and methods used to collect information, such as interview dates, archival material agreements, or correspondence. It can be a good idea to download online sources and any online agreements or consent forms to a personal hard drive or print a hard copy to ensure the records are preserved.

BEING PRECISE WITH YOUR PORTRAYALS

Precision can help authors ensure the accuracy of their portrayals and help them reduce legal risk by making sure that their writing reflects only what can be documented. For example, if there has been an investigation into wrongdoing but no proof of that wrongdoing, it is prudent to make that explicitly clear. As the Global Relief Foundation case, discussed in **Chapter 1, on page 21**, demonstrates, saying, “the Global Relief Foundation was being investigated for connections to terrorist organizations” is less risky than saying, “the Global Relief Foundation had connections to terrorist organizations.”

It is also important to be clear when statements are opinions and when they are factual. As discussed in **Chapter 1, on page 22**, the lines between fact and opinion can be blurry. If a statement about a person is just one person's opinion, it is best to make that explicitly clear. For example, if there is no proof that Kevin actually started the fire, an author might say, "It was the police chief's opinion that Kevin started the fire" rather than saying, "Kevin started the fire."

Sticking to the facts needed to make the point can also help reduce risk. Authors may want to avoid including superfluous facts that could be seen as only satisfying readers' "morbid curiosity" about purely private matters in which there is no legitimate public interest. For example, including sensitive medical information about someone in an article about their professional competency, when that medical information has no bearing on job performance, could be viewed as a violation of privacy. Sticking to facts relevant to the story can help authors avoid this issue.

Tone can also be an important consideration for managing legal risk, as inflammatory language is more

likely to anger someone than is a neutral statement of fact as a practical matter. Inflammatory language is also more likely to be found “highly offensive” in the context of false light and public disclosure of private facts claims. If the statement would anger you if it was written about might consider taking extra caution to make sure that the statement reflects the truth, a clear opinion, or information pertaining to a matter of public concern, and that you can back it up with reliable sources.

CONSIDERING THE SENSITIVITY OF THE TOPIC

It is important for authors to consider the type and seriousness of the conduct they impute to real people. This can help them manage risk by knowing which statements and portrayals may require extra attention and caution.

For example, a statement or portrayal claiming that someone committed a serious crime such as sexual assault, or some other egregious behavior like medical malpractice, carries more risk than a statement

claiming that someone wears ill-fitting clothes. Recall that some kinds of statements are, if untruthful, “defamatory per se,” and are therefore considered defamatory regardless of whether they actually harmed the person’s reputation, as discussed in **Chapter 1, on page 37**.

As a practical matter, portraying someone in a poor light often carries more legal risk than portraying them positively. For example, a picture implying that someone has committed a serious crime may not be a per se violation of the law, but it may be more likely to be “highly offensive” to someone than a picture showing them volunteering in their community. Other topics may not risk defamation per se or be highly offensive, but may still be especially sensitive for a particular subject or community.

Writing about particularly sensitive topics can also expose authors to public disclosure of private facts claims. Publishing information related to a private figure’s sex life, health, intimate relationships, or other private matters without a legitimate public interest in them could expose authors to liability. The

First Amendment is less likely to protect the disclosure of purely private information about private people. Although there is less risk associated with revealing personal information about public figures, it is important to ensure that this personal information is a matter of public interest and not merely salacious.

This does not mean that authors should not write about sensitive topics. But when dealing with sensitive topics, it can be especially important to employ the risk-reducing tools discussed in this section, such as careful source verification, fastidious documentation, and precise language.

CONSIDERING YOUR SUBJECT

Another important risk management tool for authors is considering the practical legal and ethical risks associated with writing about certain types of people. For example, if a person is deceased, it is unlikely that anyone would have a valid defamation, false light, or public disclosure of private facts claim—the rights underlying these causes of action do not continue past death. Additionally, if a person is a public figure or

official it will be harder for them to successfully sue for torts such as defamation because of the extra protection the First Amendment provides to authors writing about public figures.

But that does not mean that authors writing about deceased or famous people are immune from lawsuits. Depending on the circumstances, an author could still be sued for disclosure of private facts by a deceased person's family, if private facts about the deceased person's family members is revealed in the process. And because the right of publicity can last beyond death, authors should also be aware of the heirs and other third parties who may have the right to control uses of the deceased person's identity.

In addition, some people are particularly litigious or have a history of suing authors; others may be especially vulnerable, or especially likely to be upset by a particular topic. It can be a good idea to do some research into particular subjects and whether they have a history of bringing lawsuits against authors. For example, the Salinger estate is known to be very litigious, so authors writing about J.D. Salinger may

want to triple check that they are using reliable research methods, documenting their sources, and considering whether private information is in the public interest. Publishers and editors have a lot of general experience, but authors usually know their subjects best. Thinking about the likelihood that a person will sue for defamation or a privacy violation can help inform the level of caution that an author should exercise when researching and writing about that person.

PAYING ATTENTION TO MINOR CHARACTERS

Being mindful of portrayals of real people who play minor roles in a work, in addition to the main subjects, can also help authors manage and reduce risk. The causes of action discussed in this guide are often brought by people who play less prominent roles in an author's narrative. For example, an author writing about the manager at a bicycle repair shop may mention and identify a disgruntled customer when describing a typical busy morning at the shop. The

author should consider whether a statement about the customer is defamatory or places the customer in a false light, even if it is not central to the story. It can be less likely to occur to authors to scrutinize minor players, but it is important to apply the principles in this chapter to *all* real people mentioned in a nonfiction work, not just the central characters. This technique is particularly important in the context of archival research on people who are no longer living: others mentioned in that person's writings could be living, and may not even know that they are implicated in archival records.

CONSIDERING ETHICAL CONSEQUENCES

In addition to legal consequences, authors should consider the ethical consequences of writing about certain people and topics. If a work deals with a topic that is acutely sensitive for some communities, considering the non-legal consequences of publishing certain statements can reduce the chance of unintended

negative consequences for the subject as well as the chance of legal claims.

For example, an author may interview a person who criticizes an oppressive government. Even if the author's statement is truthful, publishing and attributing the quote could result in the oppressive government sanctioning or even arresting that person, even if publishing the statement would not expose the author to legal liability for the torts discussed in this guide. In this situation, an author might anonymize the source and protect their identity. Similarly, statements about religious figures can cause uproar, retaliation, and even violence in some communities. In this situation, an author might add a disclaimer explaining the relevance and importance of including a provocative statement.

COMMUNICATING YOUR CONCERNS

Maintaining communication with publishers, literary agents, lawyers, or parties involved in the writing and publication process, and asking questions about legal risks when they arise can also help manage risk. It is best to raise these concerns early in order to address

any problems on the front end. While publishers, editors, and authors may have different interests, they share a common goal: publishing the work and seeing it be successful. As a practical matter, publishers often are sued in addition to authors, so they also have an economic interest in reducing the legal risk associated with any published statements.

There is a broad spectrum of risk tolerance in the publishing industry. Some publishers are inclined to drop a book at the first sign of legal risk, while others are willing to release a potentially risky book that is otherwise of high quality and merit, especially if the author has taken care to document sources, write precisely, and address ethical issues. Other publishers prefer that authors focus on crafting the best possible work and then edit for legal risk at the end of the writing process. Communicating early to gauge both the author's and the publisher's tolerance for risk and preferred risk management approach can help the author make informed decisions during the writing processes. As a practical matter, however, the publisher will generally have the final say on whether potentially

legally risky statements can be included in the work: an author is unlikely to be able to “veto” their publisher and take on more risk than their publisher permits.

In some cases, if an author has the resources to do so, it may be prudent to consult a lawyer who is knowledgeable about the relevant area of the law. Communicating with a lawyer early on can avoid larger problems in the future, such as having to cancel a late-stage project due to a legal issue that could have been resolved earlier.

OBTAINING CONSENT WHERE PRACTICABLE

Documented, formal consent can be a powerful risk management tool for authors that may protect them from legal liability later on. While obtaining consent is unlikely to be a viable option for all works about real people, it can be a strong defense against some privacy violation claims, like unauthorized use of identity or intrusion on seclusion.

The preferred practice around obtaining consent varies by subject area and medium. Publishers of

academic books on anthropology or sociology, for example, tend to prefer formal consent from all interviewees and subjects—and this may also be required by the ethical practices in those fields. Consent requirements can vary by subject matter too. For example, consent is generally required when an author is exposing a subject’s medical record.

Consent is an issue that is especially important to discuss with publishers. Some publishers like to see that interviewees have signed an interview release form, which is a signed acknowledgment that the author may use the content of an interview and a waiver of the interviewee’s right to sue the author. Some publishers may even want the subject of a work to review the section about them for accuracy and sign a consent form to that effect. Another option is to make it clear that an author is allowing the subject to review the story for accuracy only as a courtesy and cannot guarantee any changes.

Sometimes, consent is not a viable option. For example, an author writing a book that is critical of a person is unlikely to obtain that person’s consent.

Authors in these positions should nonetheless feel empowered to create and freely express themselves. When consent is not an option, other risk management tools are especially important, like using reliable sources, thoroughly documenting research, and writing carefully.

CONSIDERING INSURANCE

Insurance can be an effective risk-management tool, so it may be useful to explore whether insurance options are available for your project if you have concerns about legal risks your writings might pose. Some authors are included on an employer's insurance plan, and others may be able to rely on academic or other institutions to provide support if legal issues arise.

Under most publishing contracts, however, the author is liable for any legal issues that arise relating to the writing, and publishers often require authors to sign a warranty that the work is free from unlawful content. To protect the author from having to pay out-of-pocket for these potential liabilities, some publishers encourage authors to buy “errors and omissions”

(“E&O”) insurance. E&O insurance can cover the cost for the claims described in this guide in addition to claims of copyright infringement, trademark infringement, and other potential legal liabilities related to the author’s written work.

CEASE AND DESIST LETTERS: DON'T PANIC!

Authors may receive cease and desist letters when a subject is unhappy with how they are portrayed and decides to threaten legal action. While receiving one of these letters can be scary, the first thing to do in this situation is not to panic. When a person makes claims in a cease and desist letter, this does not mean the person actually has a viable legal claim, and not all cease and desist letters result in litigation. In these situations, it is prudent to not only remain calm, but to talk to a lawyer *before* responding to the letter.

WORKING WITH AN INSTITUTIONAL REVIEW BOARD

Many authors who work at universities and other institutions that receive federal research funding will find that their writings about real people fall within the purview of a local committee known as an Institutional Review Board (“IRB”). An IRB exists to review, approve and monitor research involving human subjects conducted by researchers at the relevant institution. Its primary role is to ensure that human-subjects research is conducted ethically and in ways that protect the rights and interests of humans who are part of a given study.

If you do find yourself working with an IRB, it is important to highlight a few practical things:

- The most important thing to know is that an IRB review and approval does not mean that what your research or writing is free of legal issues. IRBs generally do not assess the extent to which laws such as those reviewed in this guide apply. It is entirely possible that an IRB approves a project that may later results in, for example, a defamatory publication. An IRB approval is not a defense.

- One of the main ways that IRBs address ethical issues with human subject research is by requiring researchers to obtain informed consent from research subjects. This often comes in the form of a written notice which the subject must acknowledge. As explained in this guide's last chapter on practical strategies, obtaining permission from individuals can be also be a good way to avoid many of the legal issues we review above. If you find you must obtain written informed consent for IRB purposes, it is often a good idea to use that same opportunity to ask subjects to obtain consent for any specific issues that may raise legal challenges noted above.
- Finally, while an IRB is designed to address ethical issues in human subjects research, it may fail to account for broader cultural or historical concerns that may cause tensions—and could induce a subject to pursue legal action or view your work with hostility—if they are not handled appropriately.

APPENDIX:
IS MY SUBJECT A
PRIVATE OR PUBLIC
PERSON?

GENERALLY SPEAKING, THE FIRST AMENDMENT provides more protection for speech about public people than it does for speech about private people. This is because speech that concerns matters of public interest or importance—for example, speech about political, social, or historical issues—is important for two of the main goals of the right to free speech: democratic discourse and self-governance. This protection allows us to freely discuss issues that are vital to the functioning of our society. An author's statements about a person who is part of a public discussion are therefore more strongly protected by the First Amendment than are statements about a person whose life remains private.

Because of this dynamic, whether the subject of an author's writing is a public or private person has implications for the legal issues discussed in this guide. But how can authors evaluate whether someone is a private or public person? This appendix provides an overview of what kinds of people are considered private people and what kinds of people are considered public people. The public people category is sub-divided into all-purpose public figures, limited-purpose public figures, involuntary public figures, and public officials.

WHO ARE "PRIVATE" PEOPLE?

Most people in the world are private people for purposes of the law covered in this guide. A person's default status is private; a person loses this status only if she qualifies as some type of public figure or public official, as discussed below. Private people do not have significant control over government affairs and are not part of public controversies. They lead professional and personal lives outside of the public eye—even if they are generally respected in their fields. For example, the cashier at the corner store and the doctor at the local

hospital are probably private people. Even a person who has developed a professional reputation and attracted some public attention can still be considered a private person.

EXAMPLE

A lawyer who represented the family of a young person shot by a Chicago police officer in a civil trial was a private person. The lawyer appeared at the coroner's inquest into the young person's death, but he did not engage with the media or participate in the criminal trial of the police officer. Although he had worked for several civic and professional organizations, published multiple books and articles, and was relatively well-known among certain groups of people, he had not achieved widespread celebrity. The Court concluded that the lawyer was neither a public official nor public figure and therefore was a private person for the purposes of defamation law.⁷²

WHO ARE “PUBLIC” PEOPLE?

Determining if someone is a public person can be difficult and depends on the particular facts of a given situation. For example, what if a private person with no celebrity status makes a viral video that is viewed by billions of people on the Internet—does she become a public person? As discussed below, several factors are relevant to this consideration.

There are two main legal categories of public people, each with their own set of context-specific definitions: “public figures” and “public officials.” Within the public figures category, there are several different types of public figures.

Public figures

The first category of public people is the “public figure.” There are three types of public figures: limited-purpose, all-purpose, and involuntary. These categories can sometimes overlap: someone might be found to be an involuntary, limited-purpose figure, for example.

Limited-purpose public figures

Many public figures are “limited-purpose public figures:” people who have become part of a specific “public controversy” or debate but who are not otherwise known to the public. This type of public figure status is limited to statements about that specific controversy. For example, the director of the local art league may become involved in a heated debate about an art installation in town. If an author writes about the director’s response to critics of the installation, the director may be considered a public figure for the limited purpose of that debate. But if an author writes about the director’s unrelated personal financial issues, courts would consider the director a private person when analyzing the author’s statements about the financial issues.

To be considered a “public controversy,” a debate must implicate a matter of public concern. This is not the same as a private controversy that garners public attention. Public controversies are those that relate to topics such as “community values, historical events,

governmental or political activity, arts, education, or public safety.”⁷³

EXAMPLE

Russell Firestone, heir to a wealthy family business, was embroiled in a contentious divorce proceeding with his wife, Mary Alice Firestone. Mrs. Firestone was known in Palm Beach society, but otherwise did not engage with the public. The court determined that a divorce proceeding between wealthy individuals was not a public issue, even if it was of interest to the public. Because there was no public controversy, Mrs. Firestone was a private person, not a limited-purpose public figure.⁷⁴

NOTE

There is not a clear-cut rule for what makes something a matter of public concern, but it does not have to be of national or political importance. For example, saying a small business is slow at answering its phones can be a matter of public concern because having good customer service is an important consideration for consumers.

If there is a public controversy, it is important to consider whether a person voluntarily “thrust himself into the vortex” of the controversy and whether they had access to media outlets for rebuttal.⁷⁵ This is because people who voluntarily enter into public debate and have the opportunity to defend themselves against attack are more likely to be considered limited-purpose public figures who need less legal protection than private people.

Courts often consider several other factors when determining whether someone is a limited-purpose public figure: Did the person try to shape the debate? Did the public controversy pre-date the statement? Was the person still a public figure at the time that the statement was made? If the answer to any of these questions is yes, that weighs in favor of considering the subject a limited-purpose public figure.

EXAMPLE

At one point, the economic prospects of grocery cooperatives and the specific policies of Greenbelt, the second-largest consumer cooperative company in the country at the time, were subjects of public debate. Greenbelt's CEO, Eric Waldbaum, was an outspoken critic of traditional industry practices whose policy advocacy garnered significant media and public attention. Because Waldbaum had thrust himself into several public controversies in the supermarket and merchandising industries, attempted to influence the outcome of those issues, and actively engaged with the media throughout, he was considered a limited-purpose public figure in the context of statements made about Greenbelt's policies.⁷⁶

All-purpose public figures

“All-purpose public figures” are those people who are widely famous or notorious in all aspects of their lives. These people are generally famous celebrities who have become household names. Being considered an all-purpose public figure is a high bar requiring a high level of notoriety.

EXAMPLE

Johnny Carson was known as the “king of late-night television.” During his time hosting *The Tonight Show* from 1962 to 1992, he became a household name and “one of the most beloved performers in the country.” Because he was nationally and internationally well-known as “one of the more popular and outstanding” television entertainers, he was considered an all-purpose public figure.⁷⁷

EXAMPLE

A local television reporter had worked on over a thousand stories and reports, reported live from local events, was on the board of a charity, and referred to herself as a “local celebrity.” The court found that these were mostly professional duties that did not demonstrate that the reporter had reached a high level of fame or notoriety in the community. Accordingly, she was not considered an all-purpose public figure.⁷⁸

Involuntary public figures

“Involuntary public figures” are people who have become central to a public controversy without trying

to do so. This category of public figures is exceedingly rare. Being pulled into a controversy by “sheer bad luck” is usually not enough to make someone an involuntary public figure. Instead, the person must have become a main figure in the public issue and then “assumed the risk of publicity” by acting in a way that would reasonably attract public attention.

EXAMPLE

Television commentator Glenn Beck erroneously identified a Massachusetts student of Saudi Arabian descent as a participant in the 2013 Boston Marathon bombing. The student had attended the marathon, sustained injuries from the bombing, and was questioned by federal law enforcement afterward, but had been exonerated by the authorities by the time Beck made the statements. Because the choice to become a spectator at a sporting event is not expected to result in publicity, the court determined that the student did not act in a way that would attract publicity and therefore was not an involuntary public figure.⁷⁹

Some state courts have applied a somewhat broader standard for involuntary public figures, finding people to be involuntary public figures when their profession places them at a particular risk of generating a type of public attention, such as security guards who uncover threats to the public which go on to become a public controversy.⁸⁰ Regardless, this category of public person is exceedingly rare.

Public officials

The second main category of public people is the “public official.” A public official is a government employee who has (or appears to have) some measure of control over government conduct. While there is no precise definition of a public official, the public official determination is based entirely on the nature of the person’s employment; unlike public figure status, it is independent of the issue that gives rise to a lawsuit. This is because the purpose of the “public official” category is to protect the public’s interest in discussing the people who hold positions of power in government.

The President of the United States, for example, is a public official, as is a state governor. However, a person does not have to be as high-ranking as a president or governor to be considered a public official for purposes of the causes of action discussed in this guide. Even a local official in a small town may be considered a public official if his position is elected.

EXAMPLE

An elected town meeting representative in a relatively small town sued the local newspaper for publishing an article alleging that he had stolen water from a town fire hydrant. He was one of 104 unpaid representatives that met annually to vote on bylaws, budgets, and bond issues for less than 50,000 residents. The court determined that while his limited responsibilities placed the town representative “at the far end of a continuum of elected public officials from that of the President of the United States,” the fact that he occupied an elected government position made him a public official.⁸¹

Even a person who does not hold a leadership position, but whose official position carries governmental control, can be considered a public official.

EXAMPLE

A rank-and-file police officer in a town of 30,000 people was considered a public official. The court determined that even a “normal street patrolman” with little control over department policy was a public official because patrolmen are highly visible to the public, are authorized to use force, and have the potential to deprive people of rights and freedoms through misuse of their authority. Because even those officers who are not high-ranking have duties that are “governmental’ in character and highly charged with the public interest, police officers are generally considered public officials.⁸²

Still, not all government employees are public officials. Whether or not a court will determine that someone is a public official depends on the particular characteristics of the person’s position. The stronger the public

interest is in the position’s duties and the more control the position affords, the more likely it is that the government employee will be considered a public official. Some positions—even if they come with “a government paycheck”—do not provide sufficient control over governmental affairs for a person holding that position to be considered a public official.

EXAMPLE

A public high school’s lead basketball coach supervised several assistant coaches, controlled the team’s strategy, scheduled games, and oversaw the basketball program. The court determined that the coach was not a public official because his role did not affect core government functions, affect a substantial subset of the public, concern a strong public issue, or give him control over government affairs. In other words, the “mere fact that he received a government paycheck” was insufficient to categorize the coach as a public official, and the court determined that coaching high school basketball does not entail the kind of control

over governmental issues and affairs that the public official category is meant to capture.⁸³

ENDNOTES

- 1 For more information, please visit the *Authors Alliance* website: <http://www.authorsalliance.org/about>.
- 2 For a list of states with criminal defamation laws, see <https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation/>.
- 3 See Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm. L. & Pol'y 433, 464–68 (2004).
- 4 *Global Relief Found. v. N.Y. Times*, 390 F.3d 973 (7th Cir. 2004).
- 5 *Cobb v. Time, Inc.*, 278 F.3d 629, 639 (6th Cir. 2002).
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