

# Reality Bites

**Use real people, places and things in your writing without getting into trouble.**

**W**riters are always being told, "Write what you know." Is the logical next step, "Write who you know?"

As an attorney and literary agent, the most common questions I hear are variations of, "Can I base my novel on a real-life event as long as I change the names?" Or, "Will there be a problem telling the story of how Aunt Mary swindled \$10,000 from me? It's all true!" Other popular "characters" include ex-spouses, bosses, first loves and teachers.

In most instances, using real people, places and things in your writing won't be a problem. It's inevitable that writers will be inspired by real life—everything from personal relationships to community or historical events, such as media coverage about a gripping murder trial. There are, however, several areas in which you must take care. Disclaimers, such as the familiar, "Names, characters, places and incidents either are the product of the author's imagination or are used fictitiously, and any resemblance to actual persons, living or dead, events or locales is entirely coincidental," are a good start, but don't provide blanket protection for fiction writers.

Turning in a manuscript free from legal potholes is imperative, because almost every publishing contract contains a section on warranties and indemnities. You're guaranteeing that your work will not result in a lawsuit against the publishers and that, if a claim is made, you will bear some or all of the costs and expenses of defending the suit and paying the damages.

Here are four ways in which reality can bite.

## Defamation

Defamation is the general term for libel (print) and slander (oral). It occurs when you make a statement of fact that tends to lower someone's reputation in the community or deter people from associating or dealing with that person. Common examples of defamatory statements include those relating to honesty/ethics, criminal behavior, certain physical and mental illnesses, alcohol/drug abuse and sexuality (either promiscuity or impotence). Only living people can sue for defamation. If you write a biography of Bizet or a novel based on an 1840s pioneer family, you're in the clear as far as defamation goes.

To succeed on a defamation claim, the plaintiff must show that his or her reputation was harmed and that the author acted negligently (in the case of a private citizen) or with "actual malice" (for a public person). Negligence is shown when the author or publisher fails to meet a standard of care that a reasonable person would be expected to meet in researching, writing and publishing the offending work. Courts have set a higher threshold for public figures—politicians, celebrities and the like—because generally they've submitted themselves voluntarily to enhanced scrutiny, and because they have greater access to the media to contradict anything said about them. The actual malice standard requires them to prove that a writer acted with actual knowledge of the falsity, or with reckless disregard for the truth or falsity of the statement.

If you're writing fiction based on a real, still-living person and depicting him or her in a negative, false way, changing a name from Sherry Kerns to Mary

Burns won't suffice. Court decisions vary, but some have found that if a single reader can identify the person by the setting, physical description or other characteristics, the person is entitled to sue.

In a well-known California lawsuit, author Gwen Davis Mitchell wrote a novel in which the main character conducted nude therapy sessions. Turned out, she had attended similar sessions conducted by a Dr. Bindrim, who promptly sued her for defamation. Even though her psychotherapist character differed in many ways from Dr. Bindrim, the court ruled for the doctor, finding that the character had been based on him, that the public would be able to identify him, and that certain traits of the character injured his professional reputation.

Bottom line to avoid the bite of a defamation suit: Do a thorough job in changing identifying features of characters based on real people.

### Invasion of privacy

Invasion of privacy entails disclosing a private fact about a living, identifiable person that's offensive or embarrassing. Unfortunately, the law does not provide a clear-cut definition of "offensive," but it's probably safe to say that the examples mentioned above for defamatory statements are applicable here. Use common sense. Would your sister or neighbor be offended by the facts you want to publish?

You have broader leeway in writing about people when they are newsworthy or are of legitimate public interest. For instance, Sylvia Nasar, author of *A Beautiful Mind*, the biography of schizophrenic mathematician John Nash, said that she first heard of his story before he won the Nobel Prize, but, "I waited a year and a half until he actually did win the prize, because it was such a long shot it would have been an invasion of privacy to write about him in *The New York Times*."

Bottom line to avoid the bite of an invasion of privacy suit: Stick to using facts commonly known or available in public records, and/or of legitimate public concern. Think twice before disclosing matters that might be highly embarrassing, especially about private citizens.

### Right to publicity

The right of publicity is a person's right to use his or her name, image or likeness for commercial use, such as advertising, promotion, merchandising or endorsement. Unlike defamation and the right to privacy, the right of publicity is a property right that passes to heirs. As a general rule, however, the right of publicity of a dead person is recognized only when the individ-

ual's name or likeness had some measure of commercial value during his or her lifetime.

Some states don't recognize a right of publicity at all, and that right generally isn't a factor for writers of books and articles because of broad First Amendment protections. The fact that a book is published for profit isn't enough to make it a "commercial" use of someone's name or likeness.

Bottom line to avoid the bite of a right to publicity suit: Steer clear of any implications that the person is endorsing or promoting your work, and exercise caution using a celebrity's name or image on any promotional goods associated with the book.

### Real places and things

Can you set your fictional story at Microsoft? Have a brand-name diet plan cause a character's death? The issue in trademark infringement cases is whether the public will likely be confused as to the allegedly infringing product's affiliation with the true trademark owner. Using trademarked goods incidentally in your fiction (e.g., your character drives a Toyota, eats Cheerios) generally won't get the corporate lawyers' attention. Using a trademark in the title of your book or article can be riskier. Insert a prominent disclaimer that your work is not endorsed or affiliated with the trademark owner.

Product disparagement or trade libel occurs when you write about a product in fiction or nonfiction with the intent of harming the product's reputation. Generally, the plaintiff will have to show that the author acted with knowledge of falsity and an intent to cause injury. These cases are rare.

Bottom line to avoid the bite of a trademark infringement suit: As with publicity rights, don't give the impression your book or article is endorsed or sponsored by the trademark owner. When writing fiction, don't use a real company or product if you are depicting it negatively.

Your mother probably told you that if you can't say anything nice about someone, don't say anything at all. Good words to live by, but not always practical for novelists, screenwriters and journalists. So how do you write interesting stuff while staying out of your lawyer's office? Simple. If you're going to write about someone in a way that might be construed as unflattering or invasive, be sure they're dead, be sure it's true or be sure it's newsworthy. And that's the bottom line. ●

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