Fiction Based on Fact: Writers' Liability for Libel or Invasion of Privacy

This comment examines a writer's libel or invasion of privacy liability for creating fiction based on real people or events. Under either cause of action, the author will be liable only if the trier of fact determines that the fictional representation was "of and concerning" the plaintiff. This determination is influenced by a number of factors, an understanding of which will help writers predict and possibly avoid liability.

INTRODUCTION

Recent litigation has made it difficult to determine an author's[1] liability for creating fiction based on real people or events.[2] These writings, which combine fact and fantasy,[3] range

---

[1] As used in this comment, "author" refers to novelists, screen writers, and playwrights and does not include journalists. Although the same work may give rise to actions against producers and publishers as well as authors, this comment focuses on the liability of the author only. For cases holding the publisher liable, see, *e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist. 1979) (publisher found jointly and severally liable with the author); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920). The potential liability of both writers and publishers is exemplified by the recent federal district court decision in Pring v. Penthouse, C. 79-251 (D.C. Wyo. Feb. 20, 1981) *appeal filed*, 81-1480 (10th Cir. 1981). The plaintiff obtained a $26.5 million judgment against Penthouse magazine and a $35,000 judgment against the writer for an article—labeled fiction—involving a woman closely resembling Miss Wyoming of 1978, the plaintiff. The article narrated the sexual exploits of a baton-twirling beauty queen. The trial court subsequently halved the amount of damages on a remittitur.

[2] The problem of fictionalized portrayals of real people is also addressed in Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065 (1978), and Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979). Both articles suggest that a social policy rationale should protect fictionalizations of life stories.

[3] The combination of fact and fantasy in both novels and screenplays is not

from true stories with a few fictitious embroideries[4] to made-up works that include a few real characters or actual events.[5]

Actions against writers of fictionalized true stories are usually founded on libel[6] or invasion of privacy theories.[7] Under either

---

new. Examples of these writings include fictionalized stage, motion picture or television simulations of real events, mimicry, parody and purely fictional works set against an historical background. Felcher & Rubin, *supra* note 2, at 1598.

[4] *See, e.g.*, Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967) (purported biography of professional baseball player Warren Spahn, containing several fictionalized events and conversations), *appeal dismissed*, 393 U.S. 1046 (1969).

[5] For example, Hicks v. Casablanca, 464 F. Supp. 426 (S.D.N.Y. 1978), involved the motion picture "Agatha." At one point in her career as a mystery writer, Agatha Christie vanished for 11 days. This single real occurrence served as the starting point for the fictional motion picture, which explained the events that took place during her disappearance.

[6] *See, e.g.*, Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966).

[7] *See, e.g.*, Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931); Cohn v. National Broadcasting Co., 67 A.D.2d 140, 414 N.Y.S.2d 906 (1979), *aff'd mem.*, 50 N.Y.2d 885, 408 N.E.2d 672, 430 N.Y.S.2d 265 (1980); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969). Most cases involving libel and invasion of privacy in fictionalizations have arisen in California and New York. *See* cases cited in notes 26, 46, 47 & 50 *infra*. *But see* Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) (South Carolina); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962) (Illinois); Davis v. R.K.O. Radio Pictures, Inc. 191 F.2d 901 (8th Cir. 1951) (Missouri).

Actions have also been based on copyright violations, *see, e.g.*, Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968), and the right of publicity, *see, e.g.*, Hicks v. Casablanca, 464 F. Supp. 426 (S.D.N.Y. 1978); Gugliemi v. Spelling-Goldberg Prod., 25 Cal. 3d 860, 603 P. 2d 454, 160 Cal. Rptr. 352 (1979). The right of publicity is a relatively new theory often resorted to by heirs to recover for a fictionalization of their ancestor. California courts, however, have held that the right of publicity is not descendible and expires upon the death of the person so protected. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). Additionally, a New York district court has held that no right of publicity attaches "where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and . . . it is evident to the public that the events so depicted are fictitious." Hicks v. Casablanca, 464 F. Supp. 426, 433 (S.D.N.Y. 1978). *See also* Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51

cause of action, a writer can be held liable only if the trier of fact determines that the fictional representation was "of and concerning" the plaintiff.[8] A variety of factors may influence the trier of fact in deciding whether or not the plaintiff has been believably portrayed in a fictional depiction.[9] This comment analyzes the interrelationship of these factors so that authors may assess the likelihood of liability and make changes in their works so as to avoid liability.

I. How Liability Arises

A. Libel

An author is subject to a libel action when the person supposedly depicted in a fictionalization believes that his or her reputation has been damaged.[10] To establish liability for libel, a plaintiff first must show that the fictional representation was "of and concerning" the plaintiff.[11] The trier of fact[12] uses an objective

---

Tex. L. Rev. 637 (1973).

[8] *See* notes 11-13 and accompanying text *infra*.

[9] *See* notes 40-43 and accompanying text *infra*.

[10] "Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." Restatement (Second) of Torts § 568 (1) (1977). Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript, *Id.* § 568A.

This discussion merely outlines libel law. For more detailed discussion, see Anderson, *Libel and Press Self-Censorship,* 53 Tex. L. Rev. 422 (1975); Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment,* 26 Hastings L.J. 777 (1975); Frakt, *The Evolving Law of Defamation:* New York Times Co. v. Sullivan *to* Gertz v. Robert Welch. Inc., *and Beyond,* 6 Rut.-Cam. L.J. 471 (1975); Green, *Political Freedom of the Press and the Libel Problem,* 56 Tex. L. Rev. 341 (1978); Henn, *Libel-by-Extrinsic-Fact,* 47 Cornell L.Q. 14 (1961); Note, *The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?,* 55 Ind. L.J. 389 (1980).

[11] "It is necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff." Restatement (Second) of Torts § 564, Comment a (1977). *See also* Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966):

> [T]he question is whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant.

test in making the "of and concerning" determination. This test is whether a reader with some knowledge of the plaintiff could reasonably believe that the fictitious character represents the plaintiff.[13]

A libelous representation lowers the community's estimation of the plaintiff or deters people from associating with the plaintiff.[14] This damage to reputation occurs when the portrayal is

---

Id. at 651.

[12] Determining if the "of and concerning" requirement has been met is an issue for the trier of fact. Geisler v. Petrocelli, 616 F.2d 636, 640 (2d Cir. 1980).

[13] A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. Mere similarity of name alone is not enough; nor is it enough that the readers of a novel or the audience of a play or a moving picture recognize one of the characters as resembling an actual person, unless they also reasonably believe that the character is intended to portray that person. If the work is reasonably understood as portraying an actual person, it is not decisive that the author or . . . producer states that his work is exclusively one of fiction and in no sense applicable to living persons . . . if readers actually and reasonably understand otherwise. Such a statement, however, is a factor to be considered by the jury in determining whether readers did so understand it, or, if so, whether the understanding was reasonable.

RESTATEMENT (SECOND) OF TORTS § 564, Comment d (1977). *See, e.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 142 (4th Cir. 1969) (test is whether "the fictional character could reasonably be understood as a portrayal of the plaintiff"); Davis v. R.K.O. Radio Pictures, Inc., 191 F.2d 901, 904 (8th Cir. 1951) (test is whether "screen character was capable of being reasonably understood to refer to plaintiff"). *Cf.* Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962) (Words which merely suggest the plaintiff are not actionable.); Levey v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1944) (Merely being reminded of the plaintiff is not enough.). In *Levey*, a performer brought suit for the portrayal of a character resembling her in a motion picture. The court said:

> It may be that persons who knew the plaintiff or saw her act in plays from which scenes were reproduced in the picture may have been reminded that the plaintiff took part therein but neither the plaintiff herself nor anyone who knew her or saw her act . . . would reasonably be led to believe that Joan Leslie (the actress in the movie) portrayed the plaintiff.

Id. at 41.

[14] "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third

unfavorable[15] and contains a false statement of fact.[16] Whether or not a reasonable person could find the statement defamatory is a question of law. The trier of fact then determines if the statement actually injured the plaintiff.[17]

The author's state of mind is also important in a libel action. To establish liability, a private figure must show that the author made the depiction either with knowledge that it was false or with negligent disregard for its truth or falsity.[18] Writers who base fictional characters on public figures[19] or public officials[20]

---

persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[15] An unfavorable depiction may show the plaintiff's counterpart acting immorally, *see, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962) (plaintiff's fictional counterpart had an illegitimate daughter); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist. 1979) (psychiatrist in novel used obscene language and had sexual relations with patients), or criminally, *see, e.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) (fictional character shown as a juvenile thief); Corr v. Sun Printing & Publishing Co., 177 N.Y. 131, 69 N.E. 288 (1904) (plaintiff mistaken for a femme fatale thief); Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rptr. 2516 (Sup. Ct.) (attorney depicted as soliciting a paid assassin through gangster Lucky Luciano), *aff'd mem.*, 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978).

[16] RESTATEMENT (SECOND) OF TORTS § 580B (1977); *see* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 76-78, 155 Cal. Rptr. 29, 38-39 (2d Dist. 1979).

[17] RESTATEMENT (SECOND) OF TORTS § 614 (1977), *cited in* Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 121-22 (D.C. Md. 1974); Pace v. McGrath, 378 F. Supp. 140, 143 (D.C. Md. 1974). *See also* D. PEMBER, MASS MEDIA LAW 109 (1977).

[18] RESTATEMENT (SECOND) OF TORTS § 580B (1977). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

[19] Public figures are people who have

> assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); *see, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 140-41, 155 (1967) (person who spoke to crowd during riot is a public figure); Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977) (children of Julius and Ethel Rosenberg are public figures because of the debate about their parents); Sidis v. F-R Publishing Co., 113 F.2d 806, 809 (2d

have added protection from liability. Because public figures have attained positions that invite public attention, they must show "actual malice" to recover for libel. That is, these plaintiffs must prove that the writer either knew that the representation was false or acted with reckless disregard for its truth or falsity.[21] Absent such a finding, the writer will not be held liable for an alleged libel of a public figure.

B. Invasion of Privacy

The cause of action for invasion of privacy[22] protects a per-

---

Cir. 1940) (child prodigy who later became obscure is still a public figure).

Becoming a public figure may or may not be voluntary. The existence of the "involuntary" public figure has been extensively noted by the courts. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 384 (1967) (recognizing that a person may be "newsworthy" by choice or involuntarily); Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977); Sidis v. F-R Publishing Co., 113 F.2d 806, 809 (2d Cir. 1940). *Cf.* Hutchinson v. Proxmire, 443 U.S. 111, 133-36 (1979) (a person cannot become a public figure as a result of the libelous statement itself, but must have been a public figure before the alleged libel); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-67 (1979) (taking actions not calculated to attract public attention but used to defend oneself in a court of law will not necessarily make a person a public figure); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (the majority of litigants, "drawn into a public forum largely against their will in order to obtain the only redress available to them" are not public figures).

[20] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) (police commissioner); Rosenblatt v. Baer, 383 U.S. 75, 89 (1966) (recreation area supervisor).

[21] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[22] This discussion merely outlines invasion of privacy law. For more detailed discussion, see A. WESTIN, PRIVACY AND FREEDOM (1967); Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 IOWA L. REV. 1061 (1979); Bloustein, *The First Amendment and Privacy: the Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Ellis, *Damages and the Privacy Tort, Sketching a Legal Profile*, 64 IOWA L. REV. 1111 (1979); Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421 (1980); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong*, 31 LAW AND CONTEMP. PROB. 326 (1966); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693 (1972); Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Swan, *Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties With a Developing Tort*, 58 OR. L. REV. 483 (1979).

son's right to be left alone.[23] An invasion of privacy may take the form of intrusion upon the plaintiff's private affairs; appropriation to the defendant's advantage of the plaintiff's name or likeness; public disclosure of embarrassing private facts about the plaintiff; or publicity which places the plaintiff in a false light in the public eye.[24] Fictionalization cases usually do not involve physical intrusions into an individual's personal life or affairs.[25] However, the other three forms of privacy invasion—appropriation, public disclosure of private facts and false light—frequently do arise in fictionalization cases.[26]

---

[23] T. COOLEY, TORTS 29 (2d ed. 1888) quoted in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802 (4th ed. 1971).

[24] For discussion of these four types of invasions, see RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977); Prosser, *supra* note 22.

[25] Intrusion ordinarily involves a physical act, *e.g.*, eavesdropping, wiretapping, an illegal search or other act which under common law would give rise to an action for trespass or nuisance. Prosser, *supra* note 22, at 392. For more detailed discussion of intrusion *see* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Lee, *Privacy Intrusions While Gathering News: An Accommodation of Competing Interests*, 64 IOWA L. REV. 1243 (1979); Note, *Invasion of Privacy by Intrusion:* Dietemann v. Time, Inc., 6 LOY. L.A. L. REV. 200 (1973); RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[26] For fictionalization cases involving appropriation, see Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967); Univ. of Notre Dame v. Twentieth Century-Fox, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1965), *aff'd mem.*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965); Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rptr. 2516 (Sup. Ct.), *aff'd mem.*, 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978); Toscani v. Hersey, 271 A.D. 445, 65 N.Y.S.2d 814 (1946).

For cases involving public disclosure of private facts, see Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958); Sidis v. F-R Publishing Co., 113 F.2d 806 (2d Cir. 1940); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931).

For cases involving false light privacy invasions, see Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rptr. 2516 (Sup. Ct.), *aff'd mem.*, 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978).

Most cases involving invasion of privacy in fictionalizations have arisen in California and New York. See cases cited *supra*. These two states take different approaches to liability for alleged privacy invasions. In California, a privacy action may be based on a privacy statute, common law or the state constitution. CAL. CIV. CODE § 3344 (West Cum. Supp. 1979) provides:

> (a) Any person who knowingly uses another's name, photograph, or likeness, in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior

Appropriation occurs when the author uses the plaintiff's

---

consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount no less than three hundred dollars ($300). . . .
(d) For purposes of this section, a use of a name, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for purposes of advertising or solicitation.
(e) The use of a name, photograph or likeness in a commercial medium shall not constitute a use for purposes of advertising or solicitation solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the complainant's name, photograph or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertising or solicitation. . . .

For examples of common-law actions, see Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (2d Dist. 1974); Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 238 P.2d 670 (2d Dist. 1951); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931).

CAL. CONST. art. I, § 1 (as amended in 1972) provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

For judicial interpretations of this provision, see White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1st Dist. 1976).

In contrast, New York's privacy statute provides the sole basis of liability for invasion of privacy. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1979) provides:

> § 50. Right of privacy.
> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.
> § 51. Action for injunction and for damages.
> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and re-

name, photograph or likeness without consent for commercial purposes.[27] Such use often involves capitalizing on the plaintiff's fame for the author's commercial benefit.[28] In fictionalization cases, a writer will be liable for appropriation only if he or she uses the plaintiff's name or picture in the work or to promote its sales.[29] A mere literary description of events from the plaintiff's life without the actual use of the plaintiff's name does not make the author liable for appropriation.[30]

Liability for public disclosure[31] results when a writer pub-

---

> cover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article; the jury, in its discretion, may award exemplary damages . . .

[27] Both New York and California statutorily prohibit the use of "the name, portrait, or picture," N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1979), or "name, photograph or likeness," CAL. CIV. CODE § 3344 (West Cum. Supp. 1979), of any person without consent for purposes of trade, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1979), or advertising and solicitation, CAL. CIV. CODE § 3344 (West Cum. Supp. 1979).

In California, the appropriation must be the primary reason for creating the work or a substantial factor in later sales. *See* Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (2d Dist. 1974) (article about plaintiff reprinted in an English textbook as an educational tool found not directly connected with sale of the book and therefore not actionable within the meaning of this statute).

Noting the purpose and interpretation of the New York Privacy Act, the U.S. Supreme Court found that this act had "been held in some circumstances to authorize a remedy against the press and other communications media which publish the name, pictures or portraits of people without their consent." Time, Inc. v. Hill, 385 U.S. 374, 382 (1967).

[28] RESTATEMENT (SECOND) OF TORTS § 652C, Comment c (1977).

[29] *See, e.g.*, Hicks v. Casablanca, 464 F. Supp. 426 (S.D.N.Y. 1978); Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969). *See also* RESTATEMENT (SECOND) OF TORTS § 652C, Comment c (1977).

[30] *See, e.g.*, Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D.D.C. 1955), *aff'd* 232 F.2d 369 (D.C. Cir. 1956); Levey v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1944); Toscani v. Hersey, 271 A. D. 445, 65 N.Y.S.2d 814 (1st Dept. 1946). However, "It is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy." Prosser, *supra* note 22, at 401 n.155.

[31] California case law and a recently enacted state constitutional provision prohibit disclosure of private facts. Melvin v. Reid, 112 Cal. App. 285, 291-92,

licizes private facts about a plaintiff[32] which, while true, would be highly offensive to a reasonable person.[33] However, writers will not be held liable for truthful disclosures that are of "legitimate public concern" or a matter of public record.[34] This protection may apply to writers of fictionalizations to the extent that their works truthfully portray real people and events of public interest.

A false light action arises if a writer alters or sensationalizes a plaintiff's attributes, thus damaging the plaintiff's reputation and giving the public an untrue picture of the plaintiff.[35] In false

---

297 P. 91, 93-94 (4th Dist. 1931)(implied California's right of privacy from the state constitutional guarantee to "pursue and obtain safety and happiness"). CAL. CONST. art. I. § 1, set out in note 26 *supra*, affirms the principles of *Melvin* and makes privacy an inalienable right.

In New York, an author may be liable for disclosure of private facts under N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1979). Although the statutory language suggests that it only applies to commercial appropriations, the New York courts have construed the statute to include non-commercial applications as well. *See* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 327, 274 N.Y.S.2d 877, 879, 221 N.E.2d 543,544 (1966) *quoted with approval in* Time, Inc. v. Hill, 385 U.S. 374, 381 (1967) (New York's privacy statute construed broadly so as to serve its underlying purpose).

[32] In an action for invasion of privacy, the fictional representation must be shown to be identifiable with the plaintiff. Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962); *see* notes 12-13 *supra*.

[33] RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977). *See also* W. PROSSER, *supra* note 23, at 811.

Dean Prosser compared the cases of Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931), and Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940). Noting that the *Melvin* court found liability where there was a disclosure of plaintiff's past as a prostitute and murder suspect, and that the *Sidis* court did not find liability for disclosure of plaintiff's background as a boy genius, Dean Prosser suggested that courts have applied a "mores test." Under this test, there will be liability only for publicity given to things that the community views as highly objectionable. This use of social mores was expressly acknowledged in Sidis v. F-R Publishing Co., 113 F.2d at 809.

[34] RESTATEMENT (SECOND) OF TORTS § 652D(b), & Comment d (1977) *citing* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (no liability for publicizing a rape victim's name that the reporter obtained from the grand jury indictments and trial proceedings).

[35] Prosser, *supra* note 22, at 398. If the plaintiff believes that his or her reputation has been damaged, the false light action may be brought jointly with an action for libel. *See, e.g.*, Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rptr. 2516 (Sup. Ct.), *aff'd mem.*, 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978).

California's false light action derives from common law and the state consti-

light privacy actions—as with libel[36]—the courts distinguish between private and public figure plaintiffs by requiring public figure plaintiffs to prove that the writer acted with "actual malice."[37]

II. Factors in Determining Liability

In assessing a writer's liability for libel, public disclosure of private facts, or false light privacy invasion actions, the principal element is the "of and concerning" requirement.[38] The trier of fact will find that a fictional depiction represents a plaintiff if a reader could reasonably believe "that the fictional character . . . was, in actual fact, the plaintiff acting as described."[39] Four factors are relevant to this determination: (1) the presentation of the work as fiction,[40] (2) the fictional character's resemblance to the plaintiff,[41] (3) the similarities between events occurring in the work and the plaintiff's experiences,[42] and (4) the prominence of the role that the plaintiff's counterpart plays in the fictional work.[43] Recognizing how these factors apply to a particular fictional work can help a writer predict and thus possibly avoid liability.

The first of the four factors focuses on whether or not a writer

---

tution. *See, e.g.*, Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 543, 483 P.2d 34, 44, 93 Cal. Rptr. 866, 876 (1971); Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 893-94, 118 Cal. Rptr. 370, 380-81 (2d Dist. 1974).

New York redresses false light invasions under N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1979). *See* Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Polakoff v. Harcourt, Brace, Jovanovich, Inc., 3 Media L. Rptr. 2516 (Sup. Ct.) *aff'd mem.* 67 A.D.2d 871, 413 N.Y.S.2d 537 (1978).

[36] *See* notes 19-21 and accompanying text *supra*.

[37] Time, Inc. v. Hill, 385 U.S. 374, 390-91 (1967); *see* note 21 and accompanying text *supra*.

[38] *See* Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969); Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962); Levey v. Warner Bros. Pictures, 57 F. Supp. 40, 41 (S.D.N.Y. 1944).

The plaintiff carries the burden of proving that he or she is represented by the fictional character. *See* Fetler v. Houghton Mifflin Co., 364 F.2d 650, 653 (2d Cir. 1966) ("[T]he burden on the plaintiff to show that a statement is of and concerning him is not a light one.").

[39] Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (2d Dist. 1979).

[40] *See* notes 44-46 and accompanying text *infra*.

[41] *See* notes 47-52 and accompanying text *infra*.

[42] *See* notes 53-54 and accompanying text *infra*.

[43] *See* notes 55-56 and accompanying text *infra*.

has presented a work as fiction. An author may present a work as fiction by expressly labeling it as such[44] or by stating that any similarities between characters in the work and real persons are unintentional.[45] Readers are less apt to believe representations in fictional works because such works presumably do not refer to real people. However, a fictional setting will not prevent liability if a reasonable person still could find that the fictional character actually depicts the plaintiff.[46]

The fictional character's resemblance to the plaintiff—the second factor—involves the character's name,[47] physical appearance,[48] age,[49] location[50] and occupation.[51] By altering these char-

---

[44] Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) (magazine article labeled as fiction and indexed under heading of fiction in magazine's table of contents); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (2d Dist. 1979) (book labeled as novel).

[45] A standard disclaimer may provide: "All characters in this book are fictitious, and any resemblance to actual persons, living or dead, is purely coincidental."

[46] Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (2d Dist. 1979). *See also* Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 65, 126 N.E. 260, 262 (1920) ("Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest.").

But see Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969); Lyons v. New Am. Library Inc., 432 N.Y.S.2d 536, 538 (App. Div. 1980). The courts in both cases considered the labeling of the work fiction a reason for not finding the writer liable.

[47] A writer will likely be considered to have made statements "of and concerning" the plaintiff when minimal investigation by the writer would show that he or she was using the name of a real person in such a manner that actions or words of a fictitious character might easily be imputed to and injure the plaintiff. Smith v. Huntington Press, 410 F. Supp. 1270 (S.D. Ohio 1975); Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (2d Dist. 1942). *See also* Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Corr v. Sun Printing & Publishing Co., 177 N.Y. 131, 69 N.E. 288 (1904).

[48] *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, 37 (2d Dist. 1979).

[49] *See, e.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969); Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962).

[50] *See, e.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969); Wheeler v. Dell Publishing Co., 300 F.2d 372, 375 (7th Cir. 1962); Lyons v. New Am. Library, 432 N.Y.S.2d 536, 536-37 (App. Div. 1980); Toscani v. Hersey, 271 A.D. 445, 65 N.Y.S.2d 814 (1946).

[51] *See, e.g.*, Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969); Levey v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1944).

acteristics, an author can hinder the identification of a plaintiff and thereby decrease the chances of liability.[52]

The third factor concerns similarities between real events and those depicted in the fictionalization. Such factual similarities usually involve unique events or occurrences and a character's behavior in response to those events.[53] Clear parallels between real and fictional events may establish that the representation refers to the plaintiff despite the author's alteration of other physical attributes.[54]

---

[52] *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962). The plaintiffs in *Wheeler* were the victim's wife and daughter in a widely publicized murder trial. The author of the novel and screenplay based on that trial was not liable because he changed the names of the characters. The court also found that the author's presentation of the wife's fictional counterpart in an exaggerated and deliberately unattractive way prevented the reasonable reader from clearly identifying the plaintiff as the person so depicted. The wife, like her corresponding fictitious character, had used a henna hair rinse and also had cut her face. The judge found that, despite the physical similarities, "none who knew Hazel Wheeler could reasonably identify her with Janice Quill (the fictitious character), 'that dame with the dyed red hair and livid scar on her right cheek who had sworn at him in everything but Arabian . . . such a noisy foul-mouthed harridan.' " *Id.* at 376.

The author avoided liability to the daughter by changing her age. Changing the age of a fictionalized character from that of the real person is particularly effective in defeating identification if it alters the type of role the character has in the events. The *Wheeler* court held that no reasonable person would identify the murder victim's 9-year-old daughter with the 16-year-old romantic lead in the novel and movie. It held that the seven-year age change transformed a little girl into an ingenue, obviously giving her a far different role in the events. *Id.* at 376.

[53] *See* Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966) (plaintiff and fictional counterpart both depicted as the oldest son of a minister and part of a family of 13 children touring Europe in a bus giving concerts in the 1930's); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 70-71, 155 Cal. Rptr. 29, 34 (2d Dist. 1979) (court noted similarity between a conversation that the plaintiff had with a patient and dialogue in the novel). The authors were held liable in both cases. *Cf.* Lyons v. New Am. Library, Inc., 432 N.Y.S.2d 536, 538 (App. Div. 1980) (writer not liable for depiction of a sheriff in a novel based on New York's "Son of Sam" killings, where plaintiff had no role in the investigation of the real killings and therefore could not be linked to sheriff in novel who was portrayed as hindering the investigation).

[54] *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist. 1979) (although the character's name, age, physical appearance and occupation were distinguishable from the plaintiff's, satisfaction of the "of and concerning" requirement was based on factual similarities between the events described in the work and those of plaintiff's life).

The trier of fact occasionally may consider the prominence of a character's role in a fictitious work—the fourth factor—in making the "of and concerning" determination. When the plaintiff's fictional counterpart plays an inconspicuous role, a reasonable reader probably would not even remember the character, let alone connect the representation with the real person.[55] Thus, when the character patterned after the plaintiff plays a major and memorable role, liability is more likely to result.[56]

In addition to these four factors, the trier of fact's "of and concerning" determination may be influenced by two underlying considerations. These are the representation's detrimental effect on the plaintiff and the extent to which the work informs as well as entertains. An extremely harmful depiction increases the likelihood that the "of and concerning" requirement will be met. An unsavory depiction can generate sympathy for the victim. The trier of fact may be more receptive to finding a connection between the plaintiff and the fictional character. This reaction may persuade the trier of fact that an otherwise tenuous identification is sufficient to meet the "of and concerning" requirement.[57]

The extent to which a fictionalization informs the public may also affect the writer's liability. Although usually written to entertain, fictionalizations can be informative by portraying real people, events or issues.[58] To the extent that a fictionalization

---

[55] *See* Wheeler v. Dell Publishing Co., 300 F.2d 372, 376 (7th Cir. 1962) (plaintiff's fictional counterpart played "an inconspicuous part in the novel. . . . No average reader of the book would remember the very minor sub-plot in which [plaintiff's counterpart] had a place."). *See also* Wojtowicz v. Delacorte Press, 58 A.D.2d 45, 395 N.Y.S.2d 205 (1977) *aff'd mem.* 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978).

[56] *See, e.g.,* Fetler v. Houghton Mifflin Co., 364 F.2d 650, 652 (2d Cir. 1966) (plaintiff was "a prominent character throughout the novel" and as such memorable to the average reader).

[57] *See, e.g.,* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (2d Dist. 1979) (despite labeling of the work as fiction and alterations of physical characteristics, the court noted the highly unfavorable nature of the depiction and upheld the jury's finding that the "of and concerning" requirement was met); *cf.* Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) (plaintiff's name similar to that of fictional character and fictional work set in plaintiff's town, yet innocuous nature of the work seemed to influence the finding that the plaintiff was not identified by the work).

[58] Entertaining works are those "primarily designed for artistic or entertainment purposes. . . . Because the portrayal of real people is involved, these works often will have some informational content." Felcher & Rubin, *supra* note 2, at 1598. This informative value is not diminished because the work was

truthfully documents a subject of public interest, it will be protected under the first amendment.[59] Thus, in libel and false light privacy causes of action, a statement written about a public official or public figure without "actual malice" will not result in liability for the author.[60] Similarly, in an action for public disclosure of private facts, a truthful disclosure of matters that are of "legitimate public concern" or contained in public records will not result in liability.[61] Accordingly, except when accurately depicting public figures or current or historical events, the writer who seeks to avoid liability should clearly distinguish fictional characters from any real-life potential plaintiffs.

III. Application of the Factors

The following hypothetical[62] shows how a trier of fact might weigh the four factors to determine liability for a fictionalization. David Dalton wrote a popular novel which included a disclaimer that any resemblance of the work's characters to real people was mere coincidence. The novel featured a professional

---

originally designed to entertain. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[59] The first amendment serves two functions: (1) protecting nondefamatory speech that contributes to public debate on political or social issues in order to maintain the integrity of the political process, *see, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) and (2) communicating and expanding our cultural experience, *see* Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970); Univ. of Notre Dame v. Twentieth Century-Fox, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1965), *aff'd mem.*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965); Felcher & Rubin, *supra* note 2, at 1597.

[60] *See* notes 20-21 and accompanying text *supra*. When the author bases a fictional character on a real person and knowingly alters facts about the real person for the sake of the story, such "knowing falsification of facts" clearly satisfies the "actual malice" test. Hence, the first amendment provides limited protection to an author basing a fictional character on a real person. The author would not, however, be liable for inadvertent alteration of facts about the plaintiff. *See* Time, Inc. v. Hill, 385 U.S. 374, 394-96 (1967).

[61] *See* note 34 and accompanying text *supra*.

[62] Any resemblance of characters in this hypothetical to real persons living or dead is coincidental. Although the facts of this hypothetical seem incredible, some published works provide equally improbable fact patterns. *See, e.g.*, Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980) (novel about trans-sexual tennis player's athletic and romantic experiences); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 76, 155 Cal. Rptr. 29, 38 (2d Dist. 1979) (novel about nude encounter therapy that results in distressed patient's death in car accident).

tennis player who suffered from an injured elbow. Of the five doctors that the tennis pro consulted for treatment, one was Dr. Marina Cole, a tall, striking, fortyish brunette. The doctor was well known for her controversial treatments, which included hypnosis, massage and the daily use of marijuana. Dr. Cole, an alcoholic, also engaged in sexual relations with her patients and routinely distributed cocaine to them. While a group therapy session was taking place at the doctor's seaside Malibu clinic, a massive mud slide caused the building to collapse.

The author, Dalton, was sued for libel and invasion of privacy by a casual acquaintance, Emily Peters, M.D., who maintained that Dalton had modeled his book on her life. Peters alleged that her reputation had been damaged by Dalton's claims that she advocated using illegal drugs and had sexual relations with patients. Peters also claimed that the work improperly disclosed her former drinking problem. The forty-two year-old plaintiff was five feet, nine inches tall and had dark hair. A number of years ago, Peters had passed out from drinking at a European medical convention, an incident unknown to her colleagues and patients. As a prominent arthritis specialist practicing in Beverly Hills, she regularly treated professional athletes. The Malibu beach house where Peters lived had been damaged in a mud slide two years ago.

As is true in most libel and invasion of privacy actions based on fictionalizations, Dalton's liability hinges on the "of and concerning" determination. An initial factor in this determination is whether or not the work is presented as fiction. Dalton's work was presented as fiction, since it was labeled as a novel and contained a disclaimer. Liability may nevertheless result if a reasonable reader, by considering the other factors, could find that the work depicted the plaintiff.[63]

The trier of fact also may consider physical similarities between Dalton's character, Dr. Cole, and the plaintiff, Peters.[64] The character and the plaintiff have the same appearance and age, and they both treat arthritis in southern California. While giving the character a name other than the plaintiff's certainly

---

[63] *See* notes 44-46 and accompanying text *supra; see* Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist. 1979) ("of and concerning" requirement met despite labeling of work as "a novel").

[64] *See* notes 47-52 and accompanying text *supra.*

helps Dalton,[65] the other similarities here would probably lead the trier of fact to find the "of and concerning" requirement satisfied.[66]

To avoid liability, authors should determine exactly what it was that inspired them to write about a person or event, and then include in their fictional works only those characteristics which are indispensible. By leaving out similarities not crucial to the work, the writer can safeguard against liability without necessarily making artistic sacrifices. For example, Dalton could have made additional changes to make his character less identifiable with the plaintiff.[67] Altering age, physical appearance or occupation (e.g., making the character a petite, blonde podiatrist in her thirties) often will not affect the flavor of the work, but such changes will make identification less likely.[68] Similarly, setting the story in another state will make the connection between plaintiff and character more tenuous.[69] Although individually these alterations are minor, collectively they help protect the author.

The similarity in depicted events—the third factor—also affects the "of and concerning" determination. Both the plaintiff and the fictional character experienced a Malibu mud slide and treated professional athletes. Dalton could argue that "sensationalization" adequately disguised the character, but the factual parallels may nevertheless provide a sufficient basis for identification.[70] To be safe, Dalton should have made additional changes. For example, if the work required a disaster, a hurricane could have been substituted for the mud slide.

---

[65] *See, e.g.*, Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962); Levey v. Warner Bros. Pictures, Inc., 57 F. Supp. 40 (S.D.N.Y. 1944); Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970). In each of these cases, the author avoided liability by using a name other than the plaintiff's for the fictional character.

[66] *See, e.g.*, Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist. 1979) (plaintiff's name was not used, but identification of the plaintiff with the work was based on other factors).

[67] *See, e.g.*, Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962), *discussed in* note 52 *supra*.

[68] *See* notes 47-49 & 51 and accompanying text *supra*.

[69] *See* note 50 and accompanying text *supra*. *See, e.g.*, Toscani v. Hersey, 271 A.D. 445, 65 N.Y.S.2d 814 (1946) (change in name of locale helped writer avoid liability).

[70] *See* notes 53-54 and accompanying text *supra*.

Whether or not the plaintiff's alleged counterpart plays a major or memorable role—the fourth factor—is also important.[71] Since Dr. Cole had only a minor role, as one of several therapists briefly described in the novel, a reasonable reader would not be likely to remember the character nor connect her with the plaintiff.[72]

The trier of fact's application of these four factors may be influenced by the harsh treatment of Peters' fictional counterpart.[73] This unflattering representation may have grown out of the author's need to create a dramatic situation. Dalton may have felt that portraying Peters as a quack practitioner was necessary to provide tension in the plot. But where, as here, the depiction is potentially harmful, the author should take care to distinguish the fictional from the real character by eliminating extraneous similarities.

A second underlying consideration—the extent to which the work informs the public—will not assist Dalton. While Dalton's documentation of the medical profession may be informative and thus protected under the first amendment,[74] his sensationalized depiction of Peters is not. Dalton knew the truth about Peters, yet deliberately falsified facts about her—such as her drug use and sexual relations—without adequately disguising her. This knowing deviation from the truth provides the requisite fault for Dalton's liability for libel or a false light privacy invasion,[75] regardless of whether or not Peters was a public figure.[76] Disclosures of Peters' private life—such as her drinking incident—are not of legitimate public concern, since they do not further the public's understanding of arthritis treatments. Creating a fictitious character is not actionable. However, if the character can be identified with a real person, the author may be liable for false and unflattering representations. Because he based a fictional character on a real person, Dalton should have taken greater care to disguise the inspiration for Marina Cole, as constitutional protections will not apply to knowingly false rep-

---

[71] *See* notes 55-56 and accompanying text *supra.*

[72] *See* note 55 and accompanying text *supra.*

[73] *See* note 57 and accompanying text *supra.*

[74] *See* notes 58-59 and accompanying text *supra.*

[75] *See* note 60 and accompanying text *supra.*

[76] Since knowledge of falsity is sufficient to prove liability when the plaintiff is a public or private figure, Peters' status is irrelevant in this case. *See* note 19 *supra* for description of public figures.

resentations or disclosures which are not of public concern or a matter of public record.[77]

In sum, Dalton's work probably would result in liability for libel, public disclosure of private facts, or false light privacy invasion. Applying the four factors—presentation of the work as fiction, physical resemblance, factual similarities, and prominence of the character's role in the fiction—the trier of fact could reasonably find that Peters was believably represented in the novel. To avoid this finding, Dalton could have changed a number of characteristics and events without compromising the essential story.

Conclusion

Writers who witness a unique event or a person engaging in unusual behavior may be inspired to write about the distinctive qualities of the event or person. Writers should realize that, by drawing attention to such distinctive qualities, they furnish the very means for a reasonable reader to connect fiction and fact. By understanding the factors influential in libel and invasion of privacy decisions, a writer may assess the legal risks that a given work poses. If the factors combine to indicate that a fictional character is identifiable with a real person, the author may consider appropriate changes. Unfortunately, such precautionary changes may compromise the work's integrity. Accordingly, in response to the demand for entertaining works based on fact, the prudent author must balance artistic license against potential liability for libel or invasion of privacy.

RobertaAnn Sueda Hayashi
Christina Bemko Littlefield

---

[77] *See* notes 58-61 and accompanying text *supra*.