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LEGAL ISSUES

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Legally Speaking — “Libel” What Publishers Need to Know to Avoid Defamation Lawsuits

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Since several of the last few columns have been about intellectual property issues, this month's issue will be a change of pace. This month I am going to discuss a topic that makes publishers cringe and hide. The topic is LIBEL.

Since many people confuse libel and slander, let me begin with a definition. Both libel and slander are forms of defamation. Libel is defamation in writing, while slander is spoken. (The way to remember it is that Slander and Spoken both begin with the letter S.) The basis of defamation is that “individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks.”¹

According to American Jurisprudence, defamation has been defined by the courts as:

— A false publication causing injury to a person's reputation, or exposing him (her) to public hatred, contempt, reticule, shame, or disgrace, or affecting him (her) adversely in . . . trade or business.

— The publication of anything injurious to the good name or reputation of another or which tends to bring him or her into disrepute.

— That which tends to injure reputation or to diminish the esteem, respect, good will, or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff.

— Communications made by a defendant to a third party that cause some injury to the plaintiff's reputation by exciting derogatory, adverse, or unpleasant feelings against the plaintiff or by diminishing the esteem or respect in which he (she) is held.

— Repeating the false statements of others.²

In order to constitute defamation, the statement must be false. However, it can not be something that is a matter of opinion. For example, “authors' description of plaintiff as

“drab and grey” and implication that she was “unpleasant” were mere statements of opinion, not actionable as defamatory.”³

One of the most important elements of libel is “publication.” Publication is defined as “the communication of defamatory matter to a third person. . . or persons.”⁴ In order to constitute a publication, “a plaintiff must show that the allegedly defamatory matter was published, by proof that the defamatory matter was communicated to someone other than himself. In other words, there must be a communication of a defamatory matter to a third person.”⁵ The publication can be written or spoken.⁶ The publication must be made “to some third person who understands both the defamatory meaning of the statement, and its application to the person to whom reference is made.”⁷

Sometimes defamation cases are confused with invasion of privacy. However, these two torts are different causes of action. “[A] cause of action for defamation differs from one for false light invasion of privacy, in that [the] former provides recovery for injury to reputation, while [the] latter provides recovery for plaintiff's mental distress.”⁸ Courts have decided that “Publicity that is actionable for false light invasion of privacy generally also would be defamatory and plaintiff is free to plead them in alternative, although she may recover only on one theory for single publication and false light invasion claim does not

avoid strictures of burdens of proof associated with defamation.”⁹

Publishers are often brought into court as being responsible for disseminating the defamatory statements of an author. There are two theories of publication that apply to books, magazines, etc. “Under the ‘multiple publication rule,’ each repetition of a libel, such as the sale of a book, creates a new cause of action. . . . Under the ‘single publication rule,’ where an issue of a newspaper or magazine, or an edition of a book, contains a libelous statement, plaintiff has a single cause of action and the number of copies distributed is considered as relevant for damages but not as a basis for a new cause of action.”¹⁰

Many states have adopted the single publication rule for mass media cases. “Under this rule, a libel or slander action accrues, for statute of limitations purposes, upon publication. Publication is complete on the last

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REMEMBER WHEN?

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day of the mass distribution of copies of the printed matter because that is the day when the publishers, editors, and authors have done all they can to relinquish all right of control, title, and interest in the printed matter."¹¹

The Statute of Limitations is the time period after the defamation occurs during which a lawsuit must be brought. The Statute of Limitations is often a matter of dispute; many cases succeed or fail based on the filing date and the Statute of Limitations. As a result, the date of publication is very important. However, there are many other factors that courts take into consideration. For example, "where publisher was entitled to summary judgment, on basis of one-year statute of limitations, against plaintiff who brought libel action against publisher and author, but where author had defaulted, so that it was possible that plaintiff would be able to obtain judgment against author based on finding that the book was libelous, dismissal of action against the publisher would be without prejudice to plaintiff's right to seek leave to amend the complaint for equitable relief against the publisher in the event that he was able to obtain a judgment against the author."¹²

Articles and books can be the subject of scrutiny. Newspapers are often sued for reporting the defamation of others. Even book reviewers are not exempt: "Assertions that would otherwise be actionable in defamation do not become nonactionable if they appear in (the) context of (a) book review."¹³

If the statement was false, the publisher is in trouble. However, there is a different standard that applies to public figures. The seminal case on this subject is *New York Times v. Sullivan*.¹⁴

Sullivan was the police commissioner of Montgomery, Alabama. He claimed to have been defamed by an advertisement that ran in the *New York Times*. According to the case, "The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department."¹⁵

If Sullivan were not a public figure, the case would have been decided according to the principle of *libel per se*. *Libel per se* is when "the words used are so obviously and materially harmful to the plaintiff that injury to his or her reputation may be presumed."¹⁶

There are only a small number of circumstances which constitute *libel per se*. "Words are slanderous or actionable per se only in cases where they are falsely spoken and (1) impute the commission of a crime involving moral turpitude, for which the party might be indicted and punished; or (2) impute an infectious disease likely to exclude him from society; or (3) impute unfitness to perform the duties of an office or employment; or (4) prejudice him in his profession or trade; or (5) tend to discredit him."¹⁷

In the Sullivan case, the *New York Times* advertisement made false statements that allegedly 1) implied that Sullivan had a crime, and 2) imputed unfitness in his duties as police commissioner. Under ordinary circumstances, *libel per se* would normally apply. However, the Supreme Court used a different reasoning.

The Supreme Court in the Sullivan case examined the constitutional free speech issues of the press. According to the Court, "The constitutional guarantees require... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁸ The idea is that public figures should have their records discussed, without fear of damages. "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office."¹⁹

As a result of the Sullivan decision, public figures can not sue for defamation just because a statement was false. The false statement must have also been made with actual malice, in order to damage the reputation of the public figure. If the statement was made without actual malice, then the constitutional protections of the First and Fourteenth Amendments prevent recovery of damages for defamation. "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer."²⁰

To illustrate some of the principles of defamation, let's take a look at a recent publishing case from Britain. **David Irving** claimed to have been libeled by **Penguin Books Ltd.** and **Deborah Lipstadt** through her book "*Denying the Holocaust - The Growing Assault on Truth and Memory*."²¹ Irving claimed

that Lipstadt committed libel by stating that he was a Nazi apologist, and that he "resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place."²² Irving claimed that this ruined his reputation as a historian. "The Defendants, whilst they do not accept the interpretation which Irving places on the passages complained of, assert that it is true that Irving is discredited as an historian by reason of his denial of the Holocaust and by reason of his persistent distortion of the historical record so as to depict Hitler in a favorable light."²³

Basically, Irving was claiming *libel per se*. Lipstadt and Penguin claimed truth as their defense. Since truth is an absolute defense,

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Endnotes

1. *Fairbanks Pub. Co. v. Francisco*, 390 P.2d 784 (Alaska 1964).
2. *American Jurisprudence* 2d "Libel and Slander" §6.
3. *Mitchell v. Random House, Inc.*, 703 F.Supp. 1250 (S.D.Miss., 1988).
4. *Corpus Juris Secundum* "Libel and Slander" §48.
5. *Hoover v. Tuttle*, 611 So.2d 290, 293 (Ala. 1992).
6. *Ringler Associates Inc. v. Maryland Cas. Co.*, 80 Cal.App.4th 1165, 1166, 96 Cal.Rptr.2d 136 (Cal.App. 1 Dist., 2000).
7. *Ringler* at 1166.
8. *Mitchell v. Random House, Inc.*, 703 F.Supp. 1250 (S.D.Miss., 1988).
9. *Moldea v. New York Times Co.*, 15 F.3d 1137 (C.A.D.C., 1994).
10. *Barres v. Holt, Rinehart & Winston, Inc.*, 330 A.2d 38 (N.J.Super.L. 1974).
11. *Williamson v. New Times, Inc.*, 980 S.W.2d 706, 710, 27 Media L. Rep. 1408 (Tex. App., 1998).
12. *Barres*.
13. *Moldea*.
14. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
15. *Sullivan*.
16. *American Jurisprudence* 2d "Libel and Slander" §136.
17. *Spears v. McCoy*, 159 S.W. 610, 611 (Ky. 1913). See Also, *Shields v. Booles*, 38 S.W.2d 677, 680 (Ky., 1931).
18. *Sullivan* at 280.
19. *Coleman v. MacLennan*, 78 Kan. 711, 723; 98 P. 281, 285 (1908).
20. *Sullivan*.
21. *Irving v. Lipstadt and Penguin Books LTD*, No. 1996 -I- 1113, <http://www.focal.org/judg.html> (High Court of Justice, Queen's Bench Division, 2000) (hereinafter "Denial case"). Interestingly enough, this opinion is on the Website for Focal Publications, David Irving's publishing company. For transcripts, pleadings, and summary of the trial, see *Rae West, Irving v. Lipstadt and Penguin Books LTD*, available at <http://www.homeusers.prestel.co.uk/littleton/irving-v-lipstadt.htm>, also a denial Website. The Penguin Website is at <http://www.penguin.co.uk/holocaust/index.html>.
22. Denial case.
23. Denial case.
24. Denial case.

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art and private letters where only one copy may exist.

There is a difference between the copy and the copyright that is often confused by ordinary folks and by libraries which hold manuscript collections. The author of the letter owns the copyright in the literary work, that is the letter; the recipient of the letter owns the only copy of the letter, or the recipient may have donated the original copy of the letter to a library or museum. The institution seldom actually holds the copyright, but it may still restrict access to the copy it holds. In exchange for the right of access, the institution may restrict the types of use to which the letter may be put. Often, the donors of the letter (who may be either the author or the recipient) may put restrictions on the availability or use of that letter to which the institution must agree at the time of transfer.

There may not be a clear public policy reason for treating letters as works of authorship rather than as gifts to the recipient, but clearly the law has considered them to be literary works for many years. Perhaps this is because even early works of biography included letters by the subject of the work and those biographical works are also literary works.

Issues such as invasion of privacy also must be considered with letters since letters were intended as private correspondence between two parties. One could argue that either party should have the right to make the letters public. Under copyright, however, the law protects the right of first publication so that the author or his or her heirs have the first right to publish the text of letters for the duration of the copyright. 🌿

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the case involved analysis of Irving's writings and statements. The final decision was that Lipstadt's statements were not defamation because they were true. According to the judge, "The charges which I have found to be substantially true include the charges that Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantedly favorable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associates with right wing extremists who promote neo-Nazism."²⁴

So what have we learned today? The implication for writers is that you are responsible for what you write. Publishers are responsible for determining whether their authors are making potentially defamatory statements. If false statements constitute *libel per se*, the plaintiff doesn't have to show actual damages. So publishers need to be aware of what authors are writing.

Of course, a public figure or elected official must show that not only was the statement false, but it was made with actual malice. Otherwise he or she will not win their defamation suit. However, publishers still need to be careful. Just remember that truth is always an absolute defense. And although libel makes publishers squirm, don't just sweep it under the table. By having a program to detect potentially defamatory statements early, publishers can head off lawsuits. Remember: an ounce of prevention is worth a pound of cure. 🌿

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to get together to talk. Just as it is difficult to imagine the concept of *family* independent of the home, it is near-impossible to imagine *community* independent of town square or the local pub. ... In the absence of walkable public places — streets, squares, and parks, the *public realm* — people of diverse ages, races, and beliefs are unlikely to meet and talk."

One story the authors tell captures the absurdity of designing without placing enough emphasis on the impact the community and on individuals. They describe a town in which the firefighters demanded job security in the form of large trucks, which require large numbers of staff to drive and maintain. Such trucks meant streets had to be wide to accommodate them, which in turn meant that the people in the town were dwarfed by the roads, cars moved too fast, and walking was discouraged. Apparently, designing roads to be excessively wide to accommodate the largest scale emergency vehicle is not unusual. The authors conclude that "one of the most important aspects of our new towns is being shaped around an extremely unlikely emergency, with the result that they function inadequately in nonemergency situations." Ironically, there are more accidents on these streets designed to accommodate emergency vehicles: "wide streets lead to an increased number of traffic accidents, since people drive faster on them."

And they don't simply drive faster. They drive *more*. The wider the street or highway becomes, the more people drive on it, in a phenomenon called 'induced traffic,' another of this book's surprising revelations. It appears that for years experts (but not the *right* experts) have known that widening a road solves a traffic problem only temporarily, since additional traffic inevitably arrives to fill the road to capacity again. But because engineers are in charge of roads, and their sole emphasis is on efficiency of traffic movement, the beat goes on. Once again, our lives are being organized — and our communities defined by — the needs of cars and trucks, not people.

The authors do provide ideas for how to change the trends, and some of them, I've noted in the mainstream press, are catching. Taming the automobile and creating a pedestrian-friendly environment is certainly near the top of their list. They also have creative ideas for attracting retail space back to towns and inner cities, away from malls. They have ideas for encouraging mixed use devel-

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among scholars, is not necessary to explain Jupiter to a general audience, and such detail is only tangentially related to the cult of Jupiter in Britain six centuries later. At the same time the author quotes lengthy passages in Latin without offering translations, making much of her work inaccessible to all but the expert. More troubling problems appear as Irby-Massie becomes too focused on Britain, and fails to consider larger trends throughout the Roman Empire. Thus she concludes that the large number of dedications to the emperor **Septimius Severus** found in Britain indicates that "the troops and officers in Britain felt obligated to demonstrate their loyalty to Severus after the civil wars of the 190's" (p.203). This would be a reasonable conclusion were the trend limited to Britain alone. However, the Severan period has furnished an extraordinary number of inscriptions empire-wide. Changes in epigraphic habit and chances of survival are better explanations for the British dedications.

The strength of the book, and an aspect that may warrant its purchase, is the annotated catalog of inscriptions

presented in the second part. The author has brought together epigraphic evidence for religious cults in Roman Britain from scattered sources that are available only at top research libraries (**Corpus Inscriptionum Latinarum**, **Roman Inscriptions of Britain**, and **Corpus Signorum Imperii Romani**). Furthermore, she has incorporated other evidence published in the *Journal of Roman Studies and Britannia*. The result is a useful reference work for scholars researching a particular cult in Britain. It will reduce the time and frustration of any future study. The collection is easy to use with a table of contents summarizing the entries. References to Irby-Massie's catalog numbers are included in the general index to the book. Scholars will likely skip the first part of the book and use the evidence contained in the second section to draw their own conclusions. Catalogs and indices of this type are much needed in many areas of Classical Studies. Some researchers are certain to thank Irby-Massie for her contribution. 🌿