allowed a recovery of the costs incurred by the credit agency as a result of the misrepresentation.

Remember, the basic rule says that reporters must obey rules and regulations when they are gathering the news. While there are some exceptions, the First Amendment will not generally provide a defense to a reporter whose conduct while gathering the news violates the law.

LEGAL PRINCIPLES OF PUBLICATION

When a news report is published, the nature of its content poses three principal legal risks to a journalist: that the report contains incorrect information that harms someone's reputation, contains correct information that invades someone's privacy, or contains material that is subject to someone else's copyright. This section provides an overview of the law of libel, privacy and copyright infringement, by examining what a plaintiff is required to prove against news organizations to succeed on such claims and the defenses that are available.

Defamation

In 1967, shortly after *New York Times v. Sullivan* was handed down, Associate Justice John Harlan remarked that "the law of libel has changed substantially since the early days of the Republic." Unfortunately, the news stories that still generate the most claims of injury to reputation – the basis of libel – are still the run-of-the-mill.

Perhaps 95 of 100 libel suits result from the routine publication of charges of crime, immorality, incompetence or inefficiency. A Harvard Nieman report makes the point: "The gee-whiz, slam-bang stories usually aren't the ones that generate libel, but the innocent-appearing, potentially treacherous minor yarns from police courts and traffic cases, from routine meetings and from business reports."

Most lawsuits based on relatively minor stories result from factual error or inexact language – for example, getting the plea wrong or inaccurately making it appear that all defendants in a case face identical charges. Libel even lurks in such innocent-appearing stories as birth notices and wedding announcements. Turner Catledge, former managing editor of The New York Times, noted in his autobiography, "My Life and the Times," that people sometimes would "call in the engagement of two people who hate each other, as a practical joke." The fact that some New York newspapers have had to defend suits for such announcements illustrates the care and concern required in every editorial department.

In publishing, no matter what level of constitutional protection, there is just no substitute for accuracy.

• *What is libel?*

Libel is one side of the coin called "defamation," slander being the flip side. At its most basic, defamation means injury to reputation. Libel is generally distinguished from slander, in that a libel is written, or otherwise printed, whereas a slander is spoken. While defamation published in a newspaper universally is regarded as libel, it is perhaps not so self-evident that, in many states, defamation broadcast by television or radio also

is considered libel, rather than slander: Because broadcast defamation is often recorded on tape and carried to a wide audience, it is viewed as more dangerous to reputation than a fleeting, unrecorded conversation, and so is classed with printed defamation. In any case, the term defamation generally includes both libel and slander. Words, pictures, cartoons, photo captions and headlines can all give rise to a claim for defamation.

The various states define libel somewhat differently, but largely to the same effect. In Illinois, for example, libel is defined by the courts as "the publication of anything injurious to the good name or reputation of another, or which tends to bring him into disrepute." In New York, a libelous statement is one that tends to expose a person to hatred, contempt or aversion or to induce an evil or unsavory opinion of the person in the minds of a substantial number of people in the community.

In Texas, libel is defined by statute as anything that "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury."

• *Liability for republication: the 'conduit' fallacy*

A common misconception is that one who directly quotes a statement containing libelous allegations is immune from suit so long as the quoted statement was actually made, accurately transcribed and clearly attributed to the original speaker. This is not so. In fact, the common law principle is just the opposite — a republisher of a libel is generally considered just as responsible for the libel as the original speaker. That you were simply an accurate conduit for the statement of another is no defense to a libel claim.

In many circumstances, therefore, a newspaper can be called to task for republishing a libelous statement made by someone quoted in a story. This rule can lead to harsh results and therefore exceptions exist. For example, reporting the fact that a plaintiff has filed a libel suit against a defendant could, in certain circumstances, lead to a claim against a newspaper for repeating the libel alleged in the complaint. In most states, a "fair report privilege" shields the publisher of an accurate and impartial report of the contents of legal papers filed in court to avoid this result.

Many states also recognize that newspapers under the pressure of daily deadlines often rely on the research of other reputable news organizations in republishing news items originally appearing elsewhere. In such cases, reliance on a reputable newspaper or news agency often is recognized as a defense to a libel claim. Of course, this so-called "wire service defense" may not be available if the republisher had or should have had substantial reason to question the accuracy or good faith of the original story.

The fair report privilege and the wire service defense are exceptions to the basic rule. When the press reports that X has leveled accusations against Y, the press may be held to account not only for the truth of the fact that the accusations were made, but also for the steps taken to verify the truth of the accusations. Therefore, when accusations are made against a person, it generally is prudent to investigate their truth as well

as to obtain balancing comment with some relation to the original charges. Irrelevant countercharges can lead to problems with the person who made the first accusation.

In short, always bear in mind that a newspaper can be held responsible in defamation for republishing the libelous statement made by another, even when the quote is correct.

• *The five things a successful libel plaintiff must prove*

Although the terminology may differ from state to state, a libel plaintiff suing a reporter or a news organization will have to prove five things in order to prevail on a claim for defamation:

1. A defamatory statement was made.
2. The defamatory statement is a matter of fact, not opinion.
3. The defamatory statement is false.
4. The defamatory statement is about ("of and concerning") the plaintiff.
5. The defamatory statement was published with the requisite degree of "fault."

By developing an understanding of the legal elements of a claim for libel, reporters and editors can fashion guideposts that will assist them in practicing their craft in a way that avoids wrongfully injuring the reputation of the subjects of their stories – and thereby to reducing the legal risk to the publications for which they write.

1. A defamatory statement was made

It may seem self-evident that a libel claim cannot exist unless a defamatory statement was made, but subjects of news stories (and their lawyers) often bring claims for libel without being able to demonstrate that what was written about them is capable of conveying a defamatory meaning. Put differently, not every negative news report is defamatory.

Generally, statements accusing someone of being a criminal, an adulterer, insane or infected with a loathsome disease are considered automatically "capable of defamatory meaning," as are statements that injure someone's professional reputation (such as that they are corrupt or incompetent). However, to determine whether any particular statement is susceptible of defamatory meaning, reference must be made, first, to the definition of libel adopted in the relevant state, and second, to the full context in which the challenged statement appeared when it was published.

For example, a New York court found that a statement identifying an attorney as a "flashy entertainment lawyer" was not, without more, defamatory, although a statement that a lawyer was an "ambulance chaser" with an interest only in "slam dunk" cases would be. The reasoning is that the first statement would not necessarily damage a lawyer's reputation, while the latter would. Likewise, in New York, allegations of drunkenness, use of "political clout" to gain governmental benefit, membership in the "Mafia," communist affiliation or that someone has cancer may or may not be defamatory, depending on the circumstances of the case.

In Illinois, courts make determinations about defamatory meaning on a case-by-case basis, though in Illinois, most statements will not be considered defamatory unless they charge a person with commission of a crime, adultery/fornication, or incompetence or lack of integrity in their

business or profession. Under this approach, the statement that plaintiff left his children home at night and lost his job because of drinking was held to be defamatory as an accusation of child neglect and inability to discharge the duties of his job due to alcoholism. Similarly, reporting that an alderman had disclosed confidential information was held to be defamatory as indicating that the official lacked the integrity to properly discharge the duties of his office.

In Texas, a statement may be false, abusive and unpleasant without being defamatory. For example, a Texas court held that describing someone as resembling a "hard boiled egg," referring to baldness and pudginess, was not defamatory. Likewise, describing a political candidate as a "radical," "backed and financed by big-shot labor bosses" was not considered defamatory in Texas. On the other hand, an insinuation that a person is connected with gambling and prostitution was found to be defamatory. The assertion that a person who had made an allegation against another of child molestation had fabricated and since recanted the allegation was defamatory when no recantation had, in fact, been made.

While each potentially defamatory statement must be assessed in its own context, particular caution is in order where the statement involves allegations of crime or similar wrongdoing, incompetence or unprofessionalism, or infidelity.

2. The defamatory statement is a matter of fact, not opinion

To be actionable as libel, a defamatory statement must be provably false (or carry a provably false implication). Stated differently, only factual statements that are capable of being proven true or false can form the basis of a libel claim. "Opinions" that don't include or imply provably false facts cannot be the basis of a libel claim. Similarly, epithets, satire, parody and hyperbole that are incapable of being proven true or false are protected forms of expression.

The Supreme Court, in *Gertz v. Robert Welch Inc.* (1974), recognized a constitutional dimension to the prohibition of libel claims based on opinion, stating that "there is no such thing as a false idea." In a later case, *Milkovich v. Lorain Journal Co.* (1990), the Supreme Court denied that there is a distinct constitutional "opinion privilege," but held that any claim for libel must be based on a statement of fact that is provably false, thus shielding purely subjective opinions from liability. Under this approach, a statement is not protected "opinion" merely because it contains qualifying language such as "I think" or "I believe," if what follows contains an assertion of fact that can be proven true or false (e.g., "I believe he murdered his wife.").

Some examples of actual cases can provide a better sense of the distinction between an actionable false fact and a protected opinion:

In Virginia, "pure expressions of opinion" cannot be the basis of a claim for defamation. Under this standard, the statement "I wouldn't trust him as far as I could throw him" and the caption "Director of Butt-Licking" were held to be nonactionable opinion. The Virginia Supreme Court has found words charging that an architect lacked experience and charged excessive fees, or accusing a charitable foundation with failing to spend a "reasonable portion" of its income on program services, also to be protected opinions rather than to be verifiable facts.

In New York, the test for distinguishing a fact from an opinion asks whether: (1) the statement has a precise core of meaning on which a consensus of understanding exists; (2) the statement is verifiable; (3) the textual context of the statement would cause an average reader to infer a factual meaning; and (4) the broader social context signals usage as either fact or opinion. The first two factors focus on the meaning of the words used, the latter two factors consider whether the content, tone and apparent purpose of the statement should signal to the reader that the statement reflects the author's opinion.

Under these principles, calling a doctor a "rotten apple," for example, is incapable of being proved true or false and is therefore protected as an expression of opinion. Similarly, a statement that someone lacked "talent, ambition, initiative" is a nonactionable expression of opinion, since there is no provable, common understanding of what quantum of talent or ambition constitutes a "lack." In one New York case, a letter to the editor published in a scientific journal submitted by the International Primate Protection League and which warned that a multinational corporation's plans for establishing facilities to conduct hepatitis research using chimpanzees could spread hepatitis to the rest of the chimpanzee population was, given its overall context, protected as opinion.

Even when a fact is implicit in an opinion, the common law often protects the statement from liability. In many states, a statement of opinion based on true facts that are themselves accurately set forth is not actionable. Where the facts underlying the opinion are reported inaccurately, however, and would adversely affect the conclusion drawn by the average reader concerning the opinion expressed, the publication may give rise to a claim for libel. For example, the statement, "I believe he murdered his wife because he was found with a bottle of the same kind of poison that killed her," likely would not be actionable even if the plaintiff could prove he did not murder is wife *if* it is true that he was found with a bottle of the same kind of poison that killed her. The true facts on which the (erroneous) opinion was based were disclosed to the readers. If there was no bottle of poison, however, the suggestion that he was a murderer would certainly be actionable. If an opinion suggests or appears to rely on an undisclosed fact, however, a libel claim may still be brought upon the unstated, implied facts if they are both false and defamatory.

The statement that a sports commentator was a "liar" without reference to specific facts, under this approach, was considered to be protected opinion. Taken in the total context of an article, the statement that the plaintiff was "neo-Nazi" was protected as opinion. Likewise, a statement calling a plaintiff a "commie," suggesting that he does not understand the subject he teaches and that he is "not traveling with a full set of luggage," was also protected as opinion. Statements accusing doctors of being "cancer con-artists," of practicing "medical quackery," and of promoting "snake oil remedies," were also protected. A newspaper column and editorial characterizing a nudist pageant as "pornography" and as "immoral" were also protected.

A court in California held that three questions should be considered to distinguish opinion from fact: (1) does the statement use figurative or hyperbolic language that would negate the impression that the statement is serious? (2) does the general tenor of the statement negate the impression that the statement is serious? (3) can the statement be proved true or false?

Under this test, a commentator's statement that a product "didn't work" was not an opinion because, despite the humorous tenor of the comment, it did not use figurative or hyperbolic language, it could reasonably be understood as asserting an objective fact and the fact could be proven true or false. Likewise, a statement made in a newspaper interview that plaintiff was an "extortionist" was not protected as opinion.

The common thread to these variations is that opinions offered in a context presenting the facts on which they are based will generally not be actionable. On the other hand, opinions that imply the existence of undisclosed, defamatory facts (i.e., if you knew what I know) are more likely to be actionable. In addition, a statement that is capable of being proven true or false, regardless of whether it is expressed as an opinion, an exaggeration or hyperbole, may be actionable.

3. The defamatory statement is false

In almost all libel cases involving news organizations, the plaintiff has the burden of proving that the defamatory statement is false. (The states are divided on whether a purely private individual has to prove falsity when the defamatory statement does not involve a matter of public concern.) Nonetheless, as a practical matter, a libel defendant's best defense is often to prove that the statement is true. While this may sound like six-of-one-half-dozen-of-the-other, there is considerable significance to placing on the plaintiff the legal burden of proving falsity: Where a jury feels it cannot decide whether a statement is true or false because the evidence is mixed, it is required to rule against the plaintiff — ties go to the defendant.

In almost all states, the question is not whether the challenged statement is literally and absolutely true, in every jot and title, but whether the statement as published is "substantially true." That is, a court will consider whether the gist or sting of the defamatory statement is accurate, or whether the published statement would produce a different effect in the mind of a reader than would the absolutely true version.

For example, most courts will dismiss a libel claim brought by a person charged with second degree burglary, if a newspaper mistakenly reported that he had been charged with first degree burglary: The gist of the story (that the man is an accused burglar) is true, and most readers would not form a better opinion of the man had they been correctly informed that it was only second degree burglary with which he had been charged. But, where a newspaper mistakenly reports that the accused burglar has been charged with murder (or that a person thus far only accused of murder has been convicted of it), a court might well conclude that the "sting" of the statement is not substantially accurate, and that readers would think less of the person based on the false statement than they would have had the published report been accurate.

4. The defamatory statement is about the plaintiff

Since the law of libel protects the reputation of an individual or a business entity, only the individual or entity whose reputation has been injured is entitled to complain. Thus, a libel plaintiff must prove that the

defamatory statement was "of and concerning" the plaintiff. It often is obvious whether a statement is about a particular person (for example, because it gives his or her full name, place of residence and age). But even where no name is used, a libel claim may be brought if some readers would reasonably understand the statement to be about the plaintiff. For example, the statement referring to "the woman who cooks lunch at the diner," when there is only one woman who cooks at that diner, will be considered "of and concerning" the female cook.

In a recent Illinois case, a news report on the commencement of a murder trial referred to the defendant as "suburban car dealer John Doe." While "John Doe" was indeed on trial for murder, he was not a suburban car dealer. His brother, "Joe Doe," was a suburban car dealer, but was not on trial for murder. The court concluded that reasonable readers could have understood the report to be about Joe (despite the fact that Joe's name was never mentioned, while John's was correctly used), and that Joe therefore would have the opportunity to show the statement was understood to be "of and concerning" him.

A few words about "group libel." Where a statement impugns a group of persons, but no individual is specifically identified, no member of the group may sue for libel if the group is large. For example, the statement, in a large city, that "all cab drivers cheat their customers out of money," does not allow any cab driver to sue for libel as a result, no matter how many fares the plaintiff cab driver may have lost because of the published statement. But, beware of publishing the same statement in a newspaper in a town with only a handful of cab drivers, where a court might well conclude the readers would reasonably think the statement was specifically referring to each of the town's four cab drivers, despite the absence of their names in the statement. Some courts have questioned whether the First Amendment permits claims for group libel under any circumstances, because the Supreme Court has said that the requirement that the statement be "of and concerning" the plaintiff is constitutionally required.

Finally, a word about the dead: It is mostly correct that you cannot defame the dead. Again, because libel protects personal reputation, and one has no practical need for a good personal reputation in this world after one has departed it, most states do not permit a person's survivors to bring a claim for statements made after the person's death.

5. The defamatory statement was published with the requisite degree of fault

For almost 200 years, libel in this country was a tort of strict liability. It did not matter whether the defendant was at fault or had acted in some improper way. The mere fact that a libel was printed was sufficient to establish liability

New York Times v. Sullivan changed everything. In that case the Supreme Court first recognized the constitutional requirement that a public official must demonstrate not only that an error was made, but also a high degree of fault by the publisher in order to prevail on a libel claim. This additional burden was required under the First Amendment, the court said, in order to provide the "breathing room" for the exercise of free

speech that is essential to public discussion by citizens on matters concerning their self-government.

The court considered the *Sullivan* case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

The ruling in *Sullivan* with respect to libel claims by public officials was extended three years later to libel claims by public figures, in *The Associated Press v. Walker*. The court reversed a $500,000 libel judgment won by former Maj. Gen. Edwin A. Walker in a Texas state court against the AP, after it had reported that Walker "assumed command" of rioters at the University of Mississippi and "led a charge of students against federal marshals" when James H. Meredith was admitted to the university in September 1962. Walker alleged those statements to be false.

In ruling for the AP, the Supreme Court found: "Under any reasoning, Gen. Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest." It therefore held that Walker, too, was required to prove fault by the publisher even though he was not a public official.

The rulings in *Sullivan* and *Walker* cases were landmark decisions for freedom of the press and speech. They established safeguards not previously defined, but they did not provide news organizations with absolute immunity against libel suits by officials who are criticized. Rather, they stand for the principle that, to encourage public debate on matters of public concern, when a newspaper publishes information about a public official and publishes it without actual malice, it should be spared a damage suit even if some of the information turns out to be wrong.

The *Walker* decision made an additional important distinction concerning the context in which an article is prepared. In a companion case consolidated before the Supreme Court, Wallace Butts, former athletic director of the University of Georgia, had obtained a libel verdict against Curtis Publishing Co. His suit was based on an article in the Saturday Evening Post accusing Butts of giving his football team's strategy secrets to an opposing coach prior to a game between the two schools.

The Supreme Court found that Butts was a public figure, but said there was a substantial difference between the two cases. Unlike the AP report on the actions of Walker, "the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored."

Chief Justice Earl Warren, in a concurring opinion, referred to "slipshod and sketchy investigatory techniques employed to check the veracity of the source" in the Butts case. He said the evidence disclosed "reckless disregard for the truth."

The differing outcomes against The Associated Press and the Saturday Evening Post should be noted carefully. Although both involved public figures who were required to establish "actual malice," the evidence required to make this showing differed in the context of a "hot news" report from investigative reporting.

By 1974, in *Gertz v. Robert Welch, Inc.*, the Supreme Court had extended the requirement that a libel plaintiff show some fault on the part of the defendant to include all defamation claims against news organizations, although not all types of plaintiffs must show the highest degree of fault. The level of "fault" that a plaintiff must prove will vary depending on who the plaintiff is.

• Fault required for public officials and public figures

If the plaintiff is a public official or public figure, the plaintiff must establish by clear and convincing evidence that the publication was made with "actual malice," an unfortunate choice of phrase by the Supreme Court for a concept that might better have been called "constitutional fault," since the standard has little to do with whether a reporter harbored spite or ill will against the plaintiff.

The court has explained that "actual malice" means publication with knowledge that a statement is false, or in reckless disregard for whether it is true or false. The concept of "knowing falsity" is easy to understand. "Reckless disregard" has required further elaboration by the courts, which have described it as publication of a statement "with a high degree of awareness of its probable falsity." Put differently, a reporter may act with reckless disregard for truth if he or she publishes despite holding serious doubts about the truth of the published statement.

The test for actual malice thus looks to the subjective state of mind of the reporter/publisher at the time of publication. It inquires into whether the reporter or publisher believed the statement was false or whether they proceeded to publish despite recognizing that there was a good chance that the statement was false. Because most reporters and publishers are not in the business of publishing news reports unless they have good grounds to believe them to be true, generally speaking, it is difficult for a plaintiff to show that a newspaper published a story with actual malice.

As one Illinois court phrased it, actual malice is shown only when a reporter's investigation "has revealed either insufficient information to support the allegations in good faith or information which creates substantial doubt as to the truth of published allegations."

Thus, as interpreted by most states, "actual malice" cannot be proven simply by showing that a reporter made mistakes (either by getting facts wrong or by failing to talk to one or more key sources), or that the reporter disliked the plaintiff, or that the newspaper frequently published items critical of the plaintiff. Rather, the test focuses on whether the reporter in fact disbelieved, or strongly doubted the truth of, the published statement. In some cases, plaintiffs may establish actual malice if they can show that a reporter willfully turned a blind eye to the truth and, if acting in good faith, would have known that the statement was false.

• Fault required for private individuals

Under the First Amendment, even private individuals must show some degree of fault before they can recover for a libel by a news organization in a report on a matter of public concern. States are free to set the standard of care that must be met in reporting on private individuals, so long as they require at least a showing of negligence.

Most states have decided to adopt the minimum standard and require a private libel plaintiff to show only that a reporter was negligent. That means the plaintiff must show that the reporter's conduct was less careful than one would expect of a reasonable journalist in similar circumstances. In Texas and California, for example, the question in a private figure libel case is whether the defendant should have known, through the exercise of reasonable care, that a statement was false.

The courts have looked at a number of factors to evaluate whether "negligence" exists. The considerations include:

—Did the reporter follow the standards of investigation and reporting ordinarily adhered to by responsible publishers. In many libel cases plaintiffs will use "expert" witnesses to testify about what are the "acceptable journalistic practices."

—Did the reporter follow his or her own normal procedures? Any time that you do something differently from what you usually do in reporting a story — particularly if the change involves exercising less care, rather than more care — you'd better have a good explanation for why that was done.

—Did the reporter have any reason to doubt the accuracy of a source, or any advance warning that the story might not be right? Was it possible to find out the truth? This — like many of the factors the courts consider — is a matter of common sense. If you have received information that just doesn't ring true to you, and it is something that is easily checked, check it out before you run with the story!

—How *much* did the reporter do to check out the facts? Did the reporter take steps to confirm the information received, or simply run with the story without checking it out?

—Who are your sources of information? Are they reliable, and objective — or known "flakes" or people with a clear ax to grind? Are they anonymous sources? How many independent sources do you have (and how do they know the information they are giving you)?

Some courts set different fault levels for private figures depending on whether the publication at issue involved a matter of "public concern" or of "private concern." New York, for example, has held that if the plaintiff is a private individual involved in a matter of legitimate public concern, the plaintiff must establish by a preponderance of the evidence that the publication was made in a "grossly irresponsible" manner without due regard for the standards of information gathering and dissemination ordinarily followed by responsible parties involving similar matters. In cases involving matters of private concern, New York, too, applies a negligence standard, although New York courts typically defer to the press in determining what constitutes a matter of "public concern" (and thus the vast majority of New York private figure cases apply the "gross irresponsibility" standard).

Finally, a handful of states apply the actual malice standard to all libel cases, regardless of the plaintiff's status. These states include Alaska, Colorado, Indiana, and New Jersey.

• Who is who?

Being able to determine whether the subject of a news story is a public official or figure or a private figure bears directly on the amount of legal risk posed by the story.

While it is clear that not every government employee will be considered a public official for purposes of what they must prove in a libel case, the Supreme Court has yet to lay down definitive standards. Thus, the definition varies somewhat from state to state.

In New York, public officials are those who are elected or appointed to office and who appear to have substantial responsibility for control over public and governmental affairs. Judges, police officers, state troopers and corrections officers have all been held to be public officials under this standard. Similarly, in California, a public official is one who has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs. In California, people found to be public officers have included a police officer, an assistant public defender, and an assistant district attorney.

Texas, in contrast, looks to the following criteria are relevant to determine whether a libel plaintiff is a public official: (1) the public interest in the public position held by the plaintiff; (2) the authority possessed by the plaintiff to act on behalf of a government entity; (3) the amount of governmental funds controlled by the plaintiff; (4) the number of employees the official supervises; (5) the amount of contact between the plaintiff and the public, and (6) the extent to which the plaintiff acts in a representative capacity for the governmental entity or has any direct dealings with the government.

Under this standard, (1) a county sheriff, (2) a Child Protective Services specialist with authority to investigate charges of child abuse, remove children from their homes and place them in foster care, (3) an undercover narcotics agent employed by the state's law enforcement agency, (4) a ranking officer in charge of a narcotics squad of four men, (5) an individual who was a high school athletic director, head football coach and teacher, (6) an assistant regional administrator of a branch office of the Securities and Exchange Commission and (7) a part-time city attorney have all been found to be public officials.

But under the same Texas test, the following people were found not to be public officials: (1) a high school teacher; (2) a prominent member of two private organizations affiliated with a state university; (3) a former special counsel for a court of inquiry into county fund management; (4) a court reporter; and (5) an appointed justice of the peace (where the article appeared in a city where plaintiff was not justice of the peace and did not refer to plaintiff's official capacity).

While, at least at higher ranks, it is relatively easy to identify public officials, both reporters and the courts have confronted substantial difficulty in the area of public figures, particularly in separating those who are merely socially or professionally prominent from those who, because of their influence over public matters, are properly considered public figures for libel purposes.

For example, the 1976 case of *Time v. Firestone* stemmed from Time magazine's account of the divorce of Russell and Mary Alice Firestone. The magazine said she had been divorced on grounds of "extreme cruelty and adultery." The court made no finding of adultery. She sued. The former Mrs. Firestone was a prominent social figure in Palm Beach, Fla., and held press conferences in the course of the divorce proceedings. Yet, the Supreme Court said she was not a public figure because "she did not assume any role of special prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence resolution of the issues involved in it."

Similarly, Sen. William Proxmire of Wisconsin was sued for $8 million by Ronald Hutchinson, a research scientist who had received several public grants, including one for $50,000. Proxmire gave Hutchinson a "Golden Fleece" award, saying Hutchinson "has made a fortune from his monkeys and in the process made a monkey of the American taxpayer." Hutchinson sued. The Supreme Court held in 1979 that, despite the receipt of substantial public funds, Hutchinson was not a public figure because he held no particular sway over the resolution of matters of public concern.

Note also the case of Ilya Wolston, who pleaded guilty in 1957 to criminal contempt for failing to appear before a grand jury investigating espionage. A book published in 1974 referred to these events. Wolston alleged that he had been libeled. In ruling on *Wolston v. Reader's Digest*, the Supreme Court said that he was not a public figure. The court said people convicted of crimes do not automatically become public figures. Wolston, the court said, was thrust into the public spotlight unwillingly, long after the events of public concern had ended. (But, the Supreme Court also has said, in a different context, that allegations of criminal activity by public officials, no matter how far in the past the conduct may have occurred, is always relevant to their fitness for public office.)

At bottom, although the Supreme Court has yet to definitively resolve the issue, the point appears to be that public figures are those who seek the limelight, who inject themselves into public debate, and who seek to influence public opinion. A person who has widespread influence over public opinion on many matters may be deemed a "general purpose public figure" and required to prove actual malice no matter the subject of a particular allegedly defamatory statement. Oprah Winfrey is an example of someone who likely would be deemed a general purpose public figure.

A person who seeks to influence public opinion in only one area (such as, for example, by leading a campaign to enact animal rights legislation), however, may be deemed a "limited purpose public figure" and required to prove actual malice only with respect to allegedly defamatory statements about his or her animal rights activities. Limited purpose public figures have included: a prominent attorney; religious groups; a belly dancer; and a "stripper for God," among others.

Texas courts generally ask three questions in order to determine whether someone is a limited purpose public figure: (1) is the controversy truly a public controversy? (i.e., (a) are people talking about the controversy and (b) are people other than those immediately involved in the controversy likely to feel the impact of its resolution?); (2) does the plaintiff have more than a trivial or tangential role in the controversy?; (3) is the alleged defamation relevant to the plaintiff's participation in the controversy? Under this standard, an abortion protester on a public street in the vicin-

ity of an abortion clinic was considered a limited purpose public figure, as was a zoologist who appeared on television shows and gave interviews on his controversial work.

On the other hand, a public school teacher whose participation in public controversy did not exceed that which she was required to do by school district regulations (except that she responded to media inquiries), was not a public figure in California. Similarly, a corporation which conducted a closeout sale for a landmark department store was not a public figure simply because it was doing business with a party to a controversy.

A note on corporations: In many states, the same standards that determine whether an individual is a public figure apply to corporations. Some states, however, conclude that corporations are always public figures, while others apply a narrower standard. For example, a British corporation that did not deal in consumer goods and had not received significant past publicity was a private figure for the purposes of a Texas libel claim.

In addition, a few lower courts have embraced the concept of an "involuntary public figure," in which an otherwise private person becomes a public figure by virtue of his or her having become drawn into a significant public controversy.

While this area of the law is freighted with subtleties to which lawyers and judges devote considerable energy, the practical bottom line is that, while public officials and public figures always bear a high burden of proof in making out a libel claim, where a news story concerns a private individual, whether involved in a matter of public concern or not, his or her burden is likely to be lower, perhaps much lower, if the story is wrong. Accordingly, there are more legal risks to publishing reports about private individuals (especially where the matter is not of legitimate public concern).

• *Defenses commonly available to news organizations*

Where a news story is written in such a way that a plaintiff might be able to prove all five of the elements of a libel, the law nevertheless affords defenses to news organizations in certain circumstances. Among the most prominent are the "fair comment privilege," the "fair and accurate report privilege," and the "neutral report privilege." They are referred to as privileges because, where properly invoked, a news organization is "privileged" to print what otherwise would be an actionable libel.

1. Fair comment

The fair comment (sometimes, "fair criticism") privilege long predates the opinion doctrine and continues, in most states, to exist as an independent matter of state law. The right of fair comment has been summarized as follows: "Everyone has a right to comment on matters of public interest and concern, provided they do so fairly and with an honest purpose. Such comments or criticism are not libelous, however severe in their terms, unless they are written maliciously. Thus it has been held that books, prints, pictures and statuary publicly exhibited, and the architecture of public buildings, and actors and exhibitors are all the legitimate subjects of newspapers' criticism, and such criticism fairly and honestly made is not libelous, however strong the terms of censure may be." (*Hoeppner v. Dunkirk Pr. Co.*, 1930.)

Some states, such as Texas, have recognized the fair comment privilege as a matter of statutory law. The Texas statute protects reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern when published for general information.

Not all states recognize this privilege, and the specifics of its application vary among the states that do recognize it. But where an otherwise potentially libelous story is important to the public interest, careful consideration of whether this privilege might protect publication of the report may be appropriate.

2. Fair and accurate report

Under this privilege, a fair and accurate report of a public proceeding (such as a city council hearing) or document (such as a pleading filed in court) generally cannot be the basis of a libel suit.

Pursuant to the Texas fair report statute, for example, the privilege applies to "a fair, true and impartial account" of: (a) judicial proceedings; (b) an official proceeding to administer the law; (c) all executive and legislative proceedings; and (d) the proceedings of public meetings dealing with public purposes. New York and several other states likewise have created the privilege by statute along similar lines; in some states, the privilege is a product of judge-made law.

In order to qualify for the privilege in the states that recognize it, the account must be both substantially accurate and fair. This does not mean the newspaper is required to publish a verbatim account of an official proceeding or the full text of a government document, but any abridgement or synopsis must be substantially accurate and fairly portrayed. Where it applies, the privilege relieves a news organization of responsibility for determining the underlying truth of the statements made by the participants in these contexts, precisely because the very fact that the comments were made in an official proceeding is newsworthy regardless of whether the statements are actually true.

It bears emphasis, however, this privilege is limited to statements made in the contexts defined under state law, and it behooves practitioners to learn the particulars of the privilege in the states in which they practice journalism.

Statements made by government officials outside of official proceedings (e.g., statements by police or a prosecutor or an attorney on the courthouse steps), or in documents that have not been officially made part of the government record (e.g., a draft pleading provided by a lawyer that has not yet been filed with the court) may or may not qualify as privileged, depending on what state you are in and on the circumstances in which the statements are made. Some states only extend the privilege to such out of court statements if made by specified top officials. At least one New York trial court, however, has applied this fair report privilege to a news report based on information provided "off the record" by police sources.

In New York and some other states, court rules provide that the papers filed in matrimonial actions are sealed and thus not open to inspection by the general public. It is not clear whether the fair report privilege will attach to publication of the contents of such papers, which by court rule, or order of the judge, are to be kept confidential.

In one case where this very situation arose, the vice president of a company filed a libel suit in New York alleging that he was fired because a newspaper published his wife's charges of infidelity set forth in divorce proceedings. The newspaper responded that its report was a true and fair account of court proceedings. The New York Court of Appeals rejected that argument on grounds that the law makes details of marital cases secret because spatting spouses frequently make unfounded charges.

The lesson of this case is that information gleaned from "confidential" court documents might not be covered under the fair report privilege. In such a case, the paper will be put to the test of proving that it made a reasonable effort to determine the truth of the allegations before publishing them.

There are other "traps" to be aware of when relying on this privilege. For example, statements made on the floor of convention sessions or from speakers' platforms organized by private organizations may not be privileged under the fair report privilege. Strictly speaking, conventions of private organizations are not "public and official proceedings" even though they may be forums for discussions of public questions.

Similarly, while statements made by a governor in the course of executive proceedings have absolute privilege for the speaker (even if false or defamatory), the press' privilege to report all such statements is not always absolute. For example, after a civil rights march, George Wallace, then governor of Alabama, appeared on a television show and said some of the marchers were members of communist and communist-front organizations. He gave some names, which newspapers carried. Some libel suits resulted.

3. Neutral reportage

Once viewed as a promising development in the law likely to spread across most states, the advancement of the neutral report privilege has not proceeded as once anticipated. Many states have declined to consider whether the privilege should exist, while others have rejected it outright (most recently, in Pennsylvania in 2005). Where recognized, the neutral report privilege protects a fair, true and impartial account of newsworthy statements, regardless of whether the reporter knows or believes those statements to be true, if the statements have been made by prominent and typically responsible persons or organizations. The rationale is that some statements are newsworthy, and should receive public attention just because of who has made them.

Thus, for example, a news report concerning a statement by Michael Jordan concerning corruption in basketball, or by the NAACP regarding discrimination committed by a business, likely would be privileged as a neutral report, even if it should later turn out that Jordan or the NAACP was mistaken, since the mere leveling of charges by such prominent sources typically is of public concern.

Significantly, the privilege, where it exists, does not apply when the author of an article goes beyond reporting the fact the statements made and espouses or adopts the charges as the author's own.

California is one of the few states to recognize the neutral report privilege. There, the privilege is available when the plaintiff is a public figure, the defamatory statement is made by one who is a party to a public controversy and the publication is accurate and neutral. One California court applying the privilege found that a newspaper's account of an accusation that a police officer had improperly obtained a false confession to a crime from a person later released as innocent was not actionable where the newspaper also printed the officer's denial of the charge.

In some states, courts appear to have applied the principle without naming the privilege as such. In one 1997 case in Texas, the court held that a story that accurately reported that parents of school children had accused a school teacher of physically threatening and verbally abusing their children was substantially true regardless of whether the parents' allegations themselves were accurate. Similarly, in Illinois, a federal appeals court in 2004 held that several stories that accurately reported that a charitable organization was the target of a federal investigation into terrorism funding were not actionable because the fact that the organization was under investigation was true, regardless of whether it was actually guilty of funding terrorism.

New York state courts do not recognize a privilege for neutral reportage, though a federal court in New York has actually found a neutral reportage privilege grounded in the U.S. Constitution. As the federal court described the neutral report privilege in that case, "when a responsible, prominent organization ... makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity." (*Edwards v. National Audubon Society*, 1977.)

• *Summary of practical points*

Although every AP story is expected to be accurate and fair, stories that involve negative reports about individuals or companies warrant particular attention. When evaluating such a story, it usually is prudent to ask these questions:

1. Are any statements in the story capable of defamatory meaning? In this regard pay close attention to the use of certain "red flag" words that may sound more negative (and thereby more defamatory) than if a different, but similar, word had been chosen. Words such as "fraud," "crony," "linked," "suspicious," and "contaminated" may suggest or imply bad conduct or have criminal connotations (like: "connected" to the Mafia or organized crime). Careful editing can ensure that the facts get reported without the use of "buzz words" that may trigger a libel claim.

—Remember that the fact that police are questioning someone about a crime does not necessarily justify the label suspect. Witnesses are obviously also questioned about a crime.

2. Are those statements ones of fact (capable of being proven true or false), or protected as opinion, or simply rhetorical hyperbole that no reasonable reader would understand as a statement of fact?

3. Could someone reading the report reasonably understand it to be about a specific person, whether or not the person is actually named? Could readers understand it to be about more than one person – the person we intend, but also someone else?

—Remember to be careful of descriptive phrases that may give rise to cases of mistaken identity. A report that "an elderly janitor for a local

school" was arrested could lead to suits from every elderly janitor in the school district.

4. Could you prove that the statements in question are true (and do so without violating promises to any confidential sources)?

5. If it turns out that you have the facts wrong, would a jury think you did not do something that any reasonable journalist would have done to get it right?

6. Assuming there is some possibility that the first five questions could be answered in the plaintiff's favor, is there a privilege that nevertheless justifies proceeding to publish? For example, is the report a fair and accurate report of an official government proceeding or document?

—If a privilege applies, remember that the privilege does not remove the need for careful reporting and the use of editorial judgment. In many cases, courts have held that it is up to the jury to decide whether a particular publication was a fair and accurate report or whether there was "actual malice."

Headlines, photos and captions must be as accurate and objective as news stories. Remember that each of these elements of a story can also give rise to claims of libel.

• Corrections and retraction demands

A correction acknowledges an error in a story and sets the record straight. Published studies have shown that lawsuits against the press can sometimes be avoided if requests for corrections or clarifications are dealt with seriously, promptly and fairly. Anyone making a retraction demand should be dealt with courteously, and the request should be communicated promptly to the appropriate editor.

Do not be too hasty in drafting a correction, however. It is important to ensure that the correction is actually warranted, that it corrects all aspects of the story that may need correction, and that the correction itself is accurate. Some states have "retraction statutes" that limit the damages a plaintiff can recover or provide other benefits if an error is corrected when brought to the attention of the publisher. You should be aware of any legal requirement in your state setting a time within which a correction must appear.

Transmitting a corrective does not necessarily safeguard the AP against legal action. In fact, transmission of a corrective may itself have legal consequences because it formally acknowledges an error. Because of potential legal implications, a news manager or supervisor in New York needs to approve all correctives and clarifications, before they are transmitted.

Any time that a kill or corrective is filed, it is crucial to ensure that it is transmitted on all wires that transmitted that original report. In addition, the bureau chief or news editor must prepare and maintain a file containing:

1. Wire copy of the original story and of the kill or corrective that was sent.

2. Wire copy of the substitute story, corrective or clarification filed.

3. A copy of any source material used by the writer or editor in preparation of the story, including member clip, reporter's notes and the like.

In addition, a factual e-mail stating why the story was killed or corrected should be sent to the New York manager designated to handle correctives. This statement should be prepared either by the bureau chief or the news editor, in consultation with the staff members involved. If legal action is a possibility, this explanation should not be prepared without prior consultation with a deputy managing editor.

The statement should include relevant details, such as any contact with outsiders on the matter. The letter should be a factual report of what happened. It is not the place for extraneous comments about staff members or bureau procedures. Nor is it the place for apologies, nor any legal or factual speculation or conclusions.

Do not make any response to any letter or other communication in connection with any case where legal action seems possible, especially if a lawyer is involved, without first seeking advice from AP's lawyers in New York.

• Document preservation and discovery

A 1979 Supreme Court ruling, *Herbert v. Lando*, has had a significant impact on what materials a libel plaintiff can compel a news organization to disclose. The case ruled that retired Army Lt. Col. Anthony Herbert, a Vietnam veteran, had the right to inquire into the editing process of a CBS "60 Minutes" segment, produced by Barry Lando, which provoked his suit. Herbert had claimed the right to do this so that he could establish actual malice.

The decision formalized and called attention to something that was at least implicit in *New York Times v. Sullivan*: that a plaintiff had the right to try to prove the press was reckless or even knew that what it was printing was a lie. How else could this be done except through inquiry about a reporter's or editor's state of mind?

Despite an admonition in *Herbert v. Lando* that lower courts should carefully monitor (and, if necessary, reign in) discovery in libel cases, reporters and publications involved in libel suits are often forced to expend significant time and resources on discovery concerning their newsgathering, writing and editing activities.

Different reporters follow different practices about retaining their notes. There are potential litigation advantages and disadvantages from following a policy of either keeping notes for a number of years or disposing of notes as soon as they are no longer needed for reporting. The best practice is the one that best advances a reporter's journalistic goals. Whatever practice you follow, however, should be followed uniformly. A difficult issue is presented in litigation if a reporter generally keeps notes, but just doesn't happen to have the notes for a disputed story. Similarly, a reporter who never keeps notes, but happens to save them for a story that ends in litigation, can send a message that the story posed some unique concerns. Adopt a policy and follow it consistently.

Of course, once a lawsuit arrives, no documents should be destroyed, regardless of your usual practice. At that point any notes and drafts are potential evidence and their destruction, with knowledge of the lawsuit, may be illegal.

• Motions practice

If litigation arises, lawyers for a reporter will often seek to dispose of the claims without the necessity of a trial. A number of issues, such as whether a story is "of and concerning" the plaintiff or conveys the defamatory meaning alleged, can often be decided by a judge as a matter of law before any litigation discovery begins.

Courts also can impose "summary judgment" dismissing a case at any point when the evidence developed by the parties demonstrates that the plaintiff's claims are legally defective. A judge may not enter summary judgment if it rests on any facts in dispute. Only the jury may decide disputed issues of fact.

In a 1986 decision, *Anderson v. Liberty Lobby*, the Supreme Court held that summary judgment should be granted in libel actions against public officials and public figures unless the plaintiff can prove actual malice with "convincing clarity" or by "clear and convincing evidence." This rule further facilitates the dismissal of unmeritorious claims without the expense and burden of proceeding to trial.

• Trials and damages

The huge jury verdicts that often result in libel cases have caused much concern among legal commentators and the press. A number of remedies have been proposed, including statutory caps on both compensatory and punitive damages. A 1996 non-press Supreme Court case, holding that some excessive damage verdicts might violate the Constitution, holds out some possible promise of relief.

The Supreme Court addressed libel damages in *Gertz v. Robert Welch, Inc.* (1974), and held that in private figure cases, where "actual malice" has not been proven, any award of damages must be supported by competent evidence, represent compensation only for actual damages, must not be "presumed," and must not be punitive. "Actual damages," however, may include compensation for injury to reputation and standing in the community, personal humiliation, and mental anguish and suffering -- all items to which a jury assigns a dollar value. In cases where a plaintiff has proved "actual malice," he or she may also recover "presumed" and "punitive" damages.

While the First Amendment imposes severe restrictions on libel claims, and court rules encourage the dismissal of meritless cases at the earliest point, litigation can be a long, expensive, and disruptive process. The key to avoiding the distraction of litigation is always to remember AP's credo: Get it fast, but get it right.

• Invasion of privacy

The roots of the right of privacy are often traced to an article titled "The Right to Privacy" that appeared in the Harvard Law Review in 1890, and was co-authored by Louis D. Brandeis, who later became a Supreme Court justice. The article asserted that the press of the day was "overstepping in every direction the obvious bounds of propriety and decency," and urged courts to recognize a distinct cause of action that would protect the individual's "right of privacy." As a Supreme Court justice, Brandeis later wrote:

"The makers of our Constitution recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." (*Olmstead v. United States*, Brandeis, J. dissenting.)

Over the following decades, legal commentators have vigorously debated the scope and nature of a cause of action for privacy, and identified four distinct forms of the "right of privacy:" (1) misappropriation of someone's name or likeness for a commercial purpose; (2) public disclosure of private facts; (3) unreasonable intrusion upon seclusion; and (4) false light in the public eye. In recent times, these causes of action have taken on significance to the press as plaintiffs have attempted to avoid the heavy burdens of proof placed on the libel plaintiff by alleging an invasion of a form of the right of privacy, instead.

The four distinct "branches" of the privacy tort each seek to protect a different aspect on individual's privacy. The "intrusion" tort primarily seeks to protect against physical intrusions into a person's solitude or private affairs. The tort does not require publications of information for recovery, and it is discussed previously as a newsgathering tort. The other three branches of privacy all require publication of some information in order for the plaintiff to have a claim.

States vary widely both in terms of their acceptance of any of these right to privacy claims and in terms of the rules governing any such claims. Of the four forms of the "privacy" cause of action, New York only recognizes the claim for misappropriation of name or likeness for commercial purposes. Texas recognizes claims for intrusion upon seclusion, public disclosure of private facts and misappropriation of name or likeness for commercial purposes. The California state constitution expressly incorporates a right of privacy and California courts recognize all four forms of the right of privacy cause of action. Illinois courts also recognize all four privacy torts, except there is some disagreement among them regarding whether to recognize the tort of intrusion upon seclusion, with some districts recognizing the cause of action, and others rejecting it.

The right of privacy creates liability for the publication of facts that are true, and thus raises particular concerns under the First Amendment. In a number of contexts the Supreme Court has struck down rulings imposing liability for reporting information that was both true and newsworthy, but it has consistently declined to hold that the First Amendment always bars such liability altogether.

It can generally be said that when people become involved in a news event, voluntarily or involuntarily, they forfeit aspects of the right to privacy. A person somehow involved in a matter of legitimate public interest, even if not a bona fide spot news event, normally can be written about with safety. However, the same cannot be said about a story or picture that dredges up the sordid details of a person's past and has no current newsworthiness.

Paul P. Ashley, then president of the Washington State Bar Associa-

tion, summarized the privacy concern for reporters at a meeting of the Associated Press Managing Editors Association:

"The essence of the wrong will be found in crudity, in ruthless exploitation of the woes or other personal affairs of private individuals who have done nothing noteworthy and have not by design or misadventure been involved in an event which tosses them into an arena subject to public gaze."

• Publication of private facts

When most people speak of an "invasion of privacy," they have in mind the public disclosure of highly embarrassing private facts. In those states where such a claim is recognized, the elements of a cause of action generally include: (1) "publicity" given to private information, (2) that a reasonable person would find highly offensive, and (3) which is not of any legitimate public interest.

In some states the lack of "legitimate public interest" or lack of "newsworthiness" is an element of the tort, meaning it is a plaintiff's burden to prove. In others, this element is an affirmative defense and the defendant must show how the information was indeed a matter of legitimate public concern. In all cases, newsworthiness is a complete defense to the tort. The First Amendment bars a claim for the true and accurate disclosure of a private fact so long as the information is newsworthy.

The first element of the tort requires "publicity" given to private information. This requires some element of widespread disclosure to the general public, not simply a communication to a single person or small group of people. Conversely, facts that are already known to the general public can not be the basis of a public disclosure claim, while facts known only to a small group can be.

For example, a California court allowed a privacy claim to be based upon the publication of a photograph of a Little League team in a national magazine to illustrate a story about the team's coach who had sexually abused some of the athletes. Although the photograph had been given to all the members of the team, the identities of the minors shown in the photograph were not known to a broader national audience. The court said their identities could therefore be considered "private" in the context of the story about sex abuse. Some courts have similarly ruled that a person who is recognizable in a picture of a crowd in a public place is not entitled to the right of privacy, but if the camera singled him out for no news-connected reason, then his privacy might be invaded.

The second element of the tort requires that the disclosure be "highly offensive" to a reasonable person. This factor goes to the embarrassing nature of the information itself. Reporting someone's age, for example, would not be highly offensive to a reasonable person, even if that information were not widely known. Reporting, over their objection, that someone was a victim of sexual abuse or suffered from an incurable disease might be.

Finally, no claim will lie if the information is newsworthy, or of legitimate public concern. Courts generally will defer to reporters and editors to determine what is "newsworthy," but the line is not always clear. Even in the context of a report on a plainly newsworthy topic, the disclosure of a highly embarrassing private fact may give rise to a claim for invasion of privacy if the facts are not logically related to the matter of public concern. For example, disclosure of the intimate sexual practices of a celebrity might support a claim for invasion of privacy if it were unrelated to any newsworthy report and amounted to prying into someone's life for its own sake.

Some examples can help to demonstrate the nature of this branch of the privacy tort:

—In a case against a Chicago newspaper, an Illinois trial court held that a mother had stated a cause of action for invasion of privacy where she alleged that she told the newspaper reporter that she did not want to make any public statement about her son's death and where the reporter nevertheless remained in the private hospital room with the mother, recorded her grief-stricken last words to her son and subsequently published a picture of the son's dead body and the mother's "last words" to her son.

—The unsavory incidents of the past of a former prostitute, who had been tried for murder, acquitted, married and lived a respectable life, were featured in a motion picture. She sued for invasion of privacy by public disclosure of private facts. The court ruled that the use of her name in the picture and the statement in advertisements that the story was taken from true incidents in her life violated her right to pursue and obtain happiness.

—Another example of spot news interest: A child was injured in an auto accident in Alabama. A newspaper took a picture of the scene before the child was removed and ran it. That was spot news. Twenty months later a magazine used the picture to illustrate an article. The magazine was sued for public disclosure of private facts and lost the case, the court ruling that 20 months after the accident the child was no longer "in the news."

—In another case, a newspaper photographer in search of a picture to illustrate a hot weather story took a picture of a woman sitting on her front porch. She wore a house dress, her hair in curlers, her feet in thong sandals. The picture was taken from a car parked across the street from the woman's home. She sued, charging invasion of privacy by intrusion upon seclusion and public disclosure of private facts. A court, denying the newspaper's motion for dismissal of the suit, said the scene photographed "was not a particularly newsworthy incident," and the limits of decency were exceeded by "surreptitious" taking and publishing of pictures "in an embarrassing pose."

• False light invasion of privacy

A claim for false light basically complains about publicity that places the plaintiff in a false light in the public eye. In those states that recognize this tort, the publicity must be of a kind that would be highly offensive to a reasonable person, and the defendant generally must have acted with the same level of fault that would be required if the plaintiff had filed a libel claim.

One form in which a claim for false light occasionally arises occurs where an opinion or utterance is falsely attributed to the plaintiff. In another version of the claim, the plaintiff's picture is used to illustrate an article to which he has no reasonable connection, as where the picture

of an honest taxi driver is used to illustrate an article about the cheating propensities of cab drivers.

The Supreme Court of the United States ruled in 1967 that the constitutional guarantees of freedom of the press are applicable to claims for invasion-of-privacy by false light involving reports of newsworthy matters. *Time, Inc. v. Hill* (1967). The ruling arose out of a reversal by the Supreme Court of a decision of a New York court that an article with photos in Life magazine reviewing a play, "The Desperate Hours," violated the privacy of a couple who had been held hostage in a real-life incident. In illustrating the article, Life posed the actors in the house where the real family had been held captive.

The family alleged violation of privacy by false light in the public eye, saying the article gave readers the false impression that the play was a true account of their experiences. Life said the article was "basically truthful."

The court said:

"We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in a news article with a person's name, picture or portrait, particularly as related to non-defamatory matter."

The court added, however, that these constitutional guarantees do not extend to "knowing or reckless falsehood." A newspaper still may be liable for invasion of privacy if the facts of a story are changed deliberately or recklessly, or "fictionalized." As with The New York Times and The Associated Press decisions in the field of libel, "The Desperate Hours" case does not confer a license for defamatory statements or for reckless disregard of the truth.

An Illinois court allowed a "false light" claim to proceed where a news report allegedly broadcast the plaintiff's comments (which were covertly recorded) out of context. More recently, federal appeals court concluded that Gennifer Flowers could maintain a false light claim against James Carville for publishing facts suggesting she had lied about the nature of her relationship with President Clinton. The court said the false light claim could compensate for emotional injury that would not be covered by a claim for defamation.

• *Misappropriation*

The final form of invasion of privacy recognized by the courts is misappropriation of the name or likeness of a living person for purposes of trade or advertising without that person's consent. In recent years, some states have included voice as well as name or likeness. This tort is intended to allow people to control the commercial use and exploitation of their own identities. The First Amendment provides for at least some exceptions to such a right — as where a candidate for public office includes his opponent's name and likeness in campaign advertisements.

The misappropriation tort is not generally a concern to reporters because it applies to the *commercial* exploitation of a person's name and likeness. It does not bar editorial uses and provides no remedy when a person's name or image (questions of copyright aside) is used in a news report. This branch of privacy is of little concern outside of the advertising

department of a news organization.

Copyright infringement

Copyright is the right of an author to control the reproduction and use of any creative expression that has been fixed in tangible form, such as on paper or computer desk. The right of Congress to pass laws protecting copyright is itself protected in the Constitution, and the First Amendment is therefore no defense to a valid claim for copyright infringement under the Copyright Act.

The types of creative expression eligible for copyright protection include literary, graphic, photographic, audiovisual, electronic and musical works. In this context, "tangible forms" range from film to videotape to material posted on the Internet. Personal letters or diaries may be protected by copyright even though they may not have been published and may not contain a copyright notice. Probably of greatest concern to reporters and editors are the copyrights in photographs used to illustrate a news report.

A copyright comes into existence the moment an original work of expression is captured in a tangible form. No government approval or filing is required for a work to be protected by copyright. Upon creation of the work, ownership of the copyright in that work is vested in the "author" of a work — the person to whom the work owes its origin.

The owner will generally be the author of the work, or the photographer in the case of an image. Under certain circumstances, however, someone other than the person who actually created the work may be deemed to be the work's "author" and thereby own the copyright. Under the work made for hire doctrine, copyright ownership of a particular work vests with the employer of the author when the work is created by an employee who is acting within the scope of his or her employment.

The owner of a copyright is given the exclusive right to reproduce, distribute, display and prepare "derivative works" of the copyrighted material. These rights exist for the life of the author plus 70 years. In the case of a "work for hire" owned by a corporation, the right exists for 95 years from the first publication or 120 years from creation, whichever is shorter.

• *Limitations on copyright*

Not all uses of copyright material constitute infringement. The most important limitation on the reach of copyright law for journalists is that ideas and facts are never protected by a copyright. What is protected by the copyright law is the manner of expression. The copyright pertains only to the literary, musical, graphic or artistic form in which an author expresses intellectual concepts.

For example, an author's analysis or interpretation of events, the way the material is structured and the specific facts marshaled, the choice of particular words and the emphasis given to specific developments, may all be protected by copyright. The essence of a claim for copyright infringement lies not in taking a general theme or in covering specific events, but in appropriating particular expression through similarities of treatment, details, scenes, events and characterizations.

This printed page illustrates the distinction between protected expression and nonprotected ideas and facts. Despite the copyright protecting

this page, a subsequent author is free to report any of the facts it contains. The subsequent author may not, however, employ the same or essentially the same combination of words, structure, and tone, which constitute the expression of those facts.

A second limitation of the reach of copyright is the doctrine of "fair use." This doctrine permits, in certain circumstances, the use of copyright material without its author's permission. Courts will invoke "fair use" when a rigid application of the copyright law would stifle the very creativity the law is designed to foster.

To determine whether a particular use is "fair" and hence permitted, courts are required to evaluate and balance such factors as: (1) the purpose of the use; (2) the nature of the copyrighted work that is being used; (3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and (4) the effect of the use upon the potential value of the copyright work. In addition, courts generally consider how "transformative" the use is. Uses that can be said to have transformed the original work into something new by building upon it in some fashion are more likely to be considered fair uses. Uses that merely supplant the work by presenting it essentially as was in the original version tend not to be fair.

News reporting, criticism, and comment are favored purposes under the fair-use doctrine, but "scooping" a copyright holder's first use of previously unpublished material is not. Note, though, that "purpose" is only one of the fair-use factors. Thus, a use for a proper purpose may nevertheless constitute an infringement if other factors weigh against that use's being fair.

Here are some general guidelines to keep in mind when dealing with material written by others:

—Fair use is more likely to be found if the copyrighted work is informational rather than fictional.

—Documents written by the federal government are not protected by copyright, but documents written by state and local governments may be.

—The greater the amount of the copyrighted work used, the less likely that a court will characterize the use as fair. The use of an entire copyrighted work is almost never fair. Size alone, however, is not decisive; courts have found uses not to be fair when the portion used was small but so important that it went to the heart of the copyrighted work.

—Uses that decrease any potential market for the copyrighted work tend not to be fair. For instance, if a literary critic reproduces all five lines of a five-line poem, the potential market for the poem will be diminished because any reader of the critic's piece can also obtain a copy of the poem for free.

It is always possible to obtain permission from the copyright holder. Reporters and editors having questions about whether their use in a news story or column of copyright material is a fair use should review these factors. No mathematical formula can yield the answer.

It bears emphasis that the First Amendment provides no greater right to use copyrighted materials than those provided by the copyright law. If a use is not "fair" within the meaning of copyright law, it will be no defense to claim the use of the copyrighted material was newsworthy and therefore protected by the First Amendment. Moreover, proper attribution alone cannot transform an infringing use into a fair one.

In using copyright material in a news story or column, writers should make sure that no more of a copyrighted work than is necessary for a proper purpose is used, and that the work is not used in a way that impairs its value. Photographers in particular pose copyright issues. Any use of a photograph without permission of the owner of the copyright is likely to raise legal issues.