Telling people's stories on film

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Introduction

Film makers sometimes choose to base their stories on real events and real people. Documentaries are one example of film makers telling the stories of real people. Fictional works may also tell the stories of real people even though the work may only be loosely based on their lives or on a particular life event. For instance, a story about a real convicted criminal may be told as a documentary film, or may be told as a fictionalised story on film involving other characters and events that did not actually happen in real life.

Arts Law regularly receives queries relating to people wanting to depict a person they know or do not know in a film. When film makers decide to tell people's stories, a range of legal issues arise governing their portrayal. This information sheet provides basic information on these issues, including **privacy, defamation**, **confidentiality**, **misrepresentation** and **copyright**.

These legal issues are often addressed by way of **releases and approvals**, which give film makers permission to use people's stories in their films.

Privacy

Are there privacy laws preventing me from depicting a real person?

In Australia, there is no general right of privacy, nor a right prohibiting one person from telling a story about another person. Existing privacy legislation at federal and state level is primarily concerned with the privacy of information held by the public and private sector and the impact of business conduct on the privacy of individuals, and is therefore of no relevance to the creation of films about real people.

Legal obligations arising

If there is no right to privacy, then what other legal obligations are relevant?

Although there is no general right prohibiting one person from telling a story about another person, legal obligations may nevertheless arise depending on the story and the reputation of the subject.

Legal obligations will arise if:

1. the work is **defamatory**;

1. the information in the story was secret and obtained on a **confidential** basis;
2. the use the work is put to is somehow **misleading**, for instance by suggesting an affiliation with, or endorsement by, the subject that is untrue; or
3. the work is based on, or uses parts of, **someone else's story.**

What if the person I want to depict is dead?

The legal issues outlined above may still be relevant even though the person the subject of the story has died. For example, while only a living person can be defamed, a film maker must be careful not to defame other people associated with the dead

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person such as their family or business partners.

I have changed the name of the real person and added fictional events. Do these obligations apply to me?

Changing a true story into a fictionalised account will not necessarily protect a film maker from the legal obligations above. For example, if the film maker changes the name of the real person, but nevertheless depicts the person in a way which makes their true identity recognisable (for example, in the choice of costume), then the film maker will be just as liable as if they had not changed the person's name. It is important that the film maker obtain legal advice even though they may be filming a fictionalised account.

My film is about a real corporation. Do these obligations apply to me?

Under the law, a corporation has standing as a legal person. A film maker depicting a real corporation is subject to the legal obligations above. Note, though, that a class or group of people generally cannot be defamed (though individual members of a group may be if they are identifiable).In addition, corporations that are 'public' bodies (such as a local government or public authority) or have more than 10 employees cannot sue for defamation. A corporation can still sue for defamation if it is a not-for-profit corporation or it employs less than 10 people.

Defamation

What is defamation?

Defamation is a communication from one person to another about an identifiable third person which lowers the reputation of the third person. If a film maker creates a film depicting a real person in a way that would lower the reputation of that person, and the film is released, then the film maker may be liable for defamation. The film maker may be sued for defamation by that person, or by their family or business partners.

For more information, see Arts Law's information sheets on Defamation law (for material published after January 2006) and Defamation law (For material published before January 2006)available for free online.

Elements of a defamation claim

For a defamation action to succeed, the person complaining of the defamation (the plaintiff) must prove that:

1. the communication has been published to a third person (eg. the film has been shown to an audience);
2. the communication identifies, or is about, the plaintiff (eg the film is based on the events of their life); and
3. the communication is defamatory, i.e. lowers or harms the plaintiff's reputation, holds the plaintiff up to ridicule, or leads others to shun and avoid the plaintiff.

How can I prevent an action for defamation?

A depiction of a real person will not be defamatory if a defence applies, in particular if:

- the film maker can show the depiction is true; or
- the film maker can show it was an expression of their honest opinion, and that this was made clear.

If possible, a simple way to minimise a risk of defamation is to obtain a **release** from the person you are telling the story about. Releases are considered further below in this information sheet.

Telling a story about a true crime

How can I avoid identifying a real person?

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When documenting a true crime, a film maker must be wary of defaming the people involved in the crime. Identification of the parties involved will often be difficult to avoid, especially if the film is about a high profile crime. It may also be difficult to avoid a depiction that lowers the reputation of the person or people due to the nature of the subject matter.

A film maker should bear in mind the following:

- A person doesn't need to be named to be defamed; It is enough if the person is identifiable;.
- A person may be identifiable because of a relationship (eg. the perpetrator's mother) or because they hold a unique position (eg. the principal police officer);
- Statements about a group may be actionable by one person within that group. If the size of the group is small, a film maker is at greater risk of a defamation action;
- Even though a person whose story is told may now be dead, the film maker must be careful not to defame other people associated with the dead person.

I can't avoid identifying the person. How can I avoid being sued for defamation?

For high profile crimes it will be almost impossible to avoid identifying a real person involved in the crime. To avoid being sued for defamation, a film maker will often rely on the defence that the depiction is true. In some States it is sufficient for a film maker to prove that the facts upon which they have relied are true. However, in other States (including NSW), the film maker must also show there is a public benefit or interest in showing that depiction.

A film maker should bear in mind that:

- in proving that a depiction is true, it is not sufficient to show that a witness believed a statement to be true; and
- there is normally no public benefit in resurrecting an old crime unless the past misconduct is relevant to the person's current position.

Confidentiality

What is confidentiality?

Confidentiality applies to information of a secret nature, which is not public knowledge. In assessing whether information is of a confidential nature, a court will look at:

- the value of the information to the plaintiff (i.e. the person who communicated the information);
- the extent to which the information is known or has been disclosed to others, and whether that disclosure was made on a confidential basis; and
- the ease or difficulty with which that information could be gathered independently by others.

Information already in the public domain is not protected by confidentiality.

For more information, see Arts Law's information sheet *Protecting your ideas*, available for free online. You can also download a **free Confidentiality Deed here.**

Confidential information and telling people's stories

If a film maker is telling a story about a real person, it is possible that some of the information about that person may be of a confidential nature. For example, the film maker may be privy to secrets or confidential information that a family member, patient or friend has confided in them. If a film maker then uses this information in their story telling, this may constitute an unlawful breach of confidence.

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When must a film maker keep information secret?

A film maker will come under an obligation to keep information secret when:

- The information is of a confidential nature; and
- The film maker was told or put on notice that the information was confidential or the film maker had reason to believe it was confidential based on the way they obtained it.

What happens if a film maker breaches confidentiality?

If a film maker makes unauthorised use of confidential information, they may be sued for breach of confidentiality. The "owner" of the confidence could ask a court for orders that the film maker destroy the information and not communicate it to anyone else and that they pay them damages.

How can I avoid breaching confidentiality?

To avoid a breach of confidentiality a film maker should bear in mind the following:

- It is advisable to obtain written authority, or a **release**, from the person whose information you are using to tell their story;
- If a film maker obtains a written authority from one source to use confidential information, they should also ask for a warranty that this information is not someone else's confidential information. A warranty is an assurance where one party promises that that a certain fact is true;
- If one person's story contains the confidential information of another person, a film maker may need to remove this confidential information or ask permission from the other party who is the owner of the confidence.

Misrepresentation

What is misrepresentation?

Misrepresentation refers to conduct suggesting that a product or service is (or does) something that it in truth is not (or does not). Conduct that suggests affiliation with, endorsement or approval of a product or service by, a person that is untrue is an example of a misrepresentation. Misrepresentation forms an element of the tort of passing off, and is also relevant to an action in misleading and deceptive conduct under section 18 of the Australian Consumer Law Act. Misrepresentation as to affiliation and endorsement often arises in cases involving celebrities or well-known public figures.

For more information, see Arts Law's information sheet *Unauthorised use of your image*, available for free online.

Misrepresentation and telling people's stories

Filmmakers should ensure that the person whose story is being told is not misrepresented as being affiliated with, or giving endorsement to, the film, if in truth they are not. For example, a film maker who asserts the documentary is authorised by the subject of the film when in fact this is not the case, will be liable for misrepresentation as to authorisation.

How can I avoid making a misrepresentation?

A simple way to avoid making a misrepresentation is to obtain a written approval from the person who is the subject of the film affirming their affiliation with, and endorsement, of the film.

Releases and other written approvals

What is a release?

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A release is a form of written agreement between the film maker and the person the subject of the story that includes warranties that the person will not later sue the film maker for defamation or breach of confidence. Releases operate as protections in favour of the film maker should they be sued by the person giving the release, as they express that person's acknowledgment that they agree to the film maker doing what is stated in the release. Before commencing work on a film about a real person or real people, a film maker is strongly advised to obtain such an agreement/s.

Many funding bodies insist that film makers must obtain releases as a pre-condition to the grant of funding.

Other written approvals

As well as a release, a film maker is strongly advised to enter agreements that ensure that:

- the person the subject of the story will deal with the film maker on an exclusive basis;
- the person the subject of the story will grant permission to the film maker to adapt the work for other media; and
- the film maker will be given access to additional personal information, historical records and interviews.

Checklist for other written approvals

When a film maker seeks a release and written approval from the person the subject of the story, the film maker should ask the following questions:

- Are the approvals granted exclusive or non-exclusive?
- Does any exclusivity last for a limited or unlimited time?
- Does the authority grant access to records, archives, personal memoirs and other interview subjects that are otherwise unavailable?
- Does the authority warrant that the material provided is not defamatory or confidential, and that it is true?
- Is there approval given for the fictionalisation of the story, to make the story more dramatic?
- Is the scope of the authority wide enough for what the film maker has in mind? For instance, does it cover the situation where someone else wants to make a film based on what the film maker has written?
- Does the person the subject of the film have a right to any income from the project, and how is payment structured?

Film makers are strongly advised to obtain legal advice on these issues.

What if I don't get a release or approvals?

Failure to obtain the approvals above is not necessarily fatal to production of the film. While it is strongly advisable to obtain a release and approvals granting access and exclusive dealing, a film maker may nevertheless decide to proceed with the film if they are careful that there will be no cause of action for defamation or breach of confidence.

Copyright clearance

Where film makers wish to tell a story about celebrities or well-known figures, it is often the case that they are not the first to do so and may rely on someone else's book, film, play, film or song as a basis for their own creation. If this is the case, a film maker may need to obtain copyright clearance for permission to rely on the other person's story. Film makers are likely to need a copyright clearance if:

- the other account is protected by copyright; and
- the film maker uses a "substantial part" of that account.

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For more information, see Arts Law's information sheet *Copyright*, available for free online.

International film release

Film makers planning an international release of their film should seek specialist legal advice about relevant laws in other countries.

Further information

You can find additional information about telling people's stories on the websites of the following organisations:

- Australian Copyright Council information sheets (www.copyright.org.au)
  - Film & Copyright
  - Assigning & Licensing Rights
- Screen Australia (www.screenaustralia.gov.au)

Other Arts Law publications on issues relating to telling people's stories include:

- Arts Law sample agreement Interviewees Release
- Arts Law case study Writing about real people
- Arts Law information sheets:
  - Defamation law
  - Protecting your ideas
  - Unauthorised use of your image
  - Copyright

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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