**A LEGAL GUIDE FOR ONLINE MEDIA ARCHIVITS**

**Presented by WGBH and the Boston Local TV News Project**

**in Collaboration with the Cyberlaw Clinic**

**at the Berkman Center for Internet & Society**

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**INTRODUCTION**

Millions of audiovisual records – news reports, interviews, television shows and uncategorized footage collected by media organizations – currently lie unwatched and underutilized in media archives throughout the country. Digitizing old films and works stored in other media that will otherwise eventually deteriorate would turn them into useful educational resources and preserve their contents for future generations. But, media archivists who dream of granting public access, especially digital access, to their collections must be mindful of potential legal concerns.

A given piece of footage might contain copyrighted words, performances, music, or pieces of art protected under copyright law or recognizable brands and logos protected as trademarks. An interview subject may have changed her point of view in the years since an interview first aired at a time when no one envisioned it might someday be available for perpetual on-demand access. Persons involved in the production of news may be members of unions, subject to collective bargaining agreements. And, licenses or other agreements may limit the ways in which still photographs, music, or other works embodied in the news may be used.

Digitizing media is an expensive and time-consuming process. Should archivists bother investing the resources to create digital archives in light of the legal risks involved in posting works online?

WGBH and the Boston Local TV News Project believe the answer is yes, and they are working to navigate a path through the legal maze that has kept so many archivists from making their collections available to the public online. Simultaneously, working with the Cyberlaw Clinic at the Berkman Center for Internet & Society at Harvard University, WGBH is endeavoring to create a set of resources that will help archivists identify potential legal issues associated with the footage in their archives.

This guide is meant to be a tool for archivists. It is not a replacement for specific legal advice, and it will not tell a reader whether or not any particular piece of footage is “safe” to post online. Rather, it will help readers, working in collaboration with their own attorneys, to make those decisions themselves.

The guide begins by providing a broad introduction to intellectual property law generally and copyright and trademark law in particular. It then examines, in a condensed form designed to be understandable to non-lawyers, the types of issues that archivists can expect to encounter when granting public access to digitized footage. It cites relevant, recent cases on each subject and offers a sense of the levels and varieties of risk involved in different types of video footage. The guide also offers suggestions on where one may begin looking for permission to post videos, if one determines that such permissions are necessary.

WGBH and the Boston Local TV News Project hopes to preserve valuable footage like the gems in their own collections and that this guide will give archivists the confidence to approach digitizing footage with a realistic sense of the legal risks involved, paving the way for archivists to save and make useful many more valuable pieces of our collective audiovisual record to students, historians, and journalists forever.

# I. **INTELLECTUAL PROPERTY**

## A. Introduction

 The term “intellectual property” law refers broadly to those bodies of law that govern intellectual creations and inventions. The three main legal regimes that come under the umbrella of intellectual property are laws governing copyrights, trademarks, and patents. The first two of these three are particularly relevant to media archivists, and this guide will address them in some detail.

## B. Copyright Law

### 1. Introduction

 Copyright law grants exclusive rights to those who create original, expressive works. Among the works covered by copyright law are literary works; musical works (i.e., compositions and accompanying words); dramatic works (including accompanying music); pantomimes and choreographic works; pictorial graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[[1]](#footnote-1) News media footage frequently embodies elements that may be subject to copyright law, including photographs and other still images; musical compositions and sound recordings; and audiovisual works.

### 2. Copyright Protection Requirements

Copyright applies to works of authorship that are original[[2]](#footnote-2) and fixed in any tangible medium of expression:[[3]](#footnote-3) copyright law protects the expression of an idea rather than the idea itself.

#### Originality

In the copyright sense, originality requires 1) independent creation (it was not copied) plus 2) some minimal "spark" of creativity (it is not, for instance, a rote list of facts). This is required both by the federal constitution and the Copyright Act. [[4]](#footnote-4) Generally, most creative works and videos will meet the originality requirement.[[5]](#footnote-5)

####  (b) Fixation

A work is “fixed” when its form is sufficiently permanent or stable to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.[[6]](#footnote-6) Examples could include a notation of a musical composition or a DVD of a movie.

#### (c) Authorship

Copyright only exists in “original works of authorship,” meaning works that have been created by an author. The author is “the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”[[7]](#footnote-7) A copyright vests initially and automatically with the author at the time of a work’s creation.[[8]](#footnote-8) Authors do not have to register with state or federal government to own a copyright, but registration is required to sue for copyright infringement.

##### Overview and authorship in motion pictures and TV news

A motion picture or particular piece TV news footage is often a work of joint authorship. Collections of news footage are instead collective works. A director is generally the principal author of a motion picture. A producer may be considered an author if he made a direct, creative contribution to the work. Executive producers who manage the business aspects of a film or video project are not authors.[[9]](#footnote-9)

In TV news, the principal author might be the person who supervises the entire interview or news report. Other individuals can be “authors” for the purpose of copyright law: the individuals filming the news reports, editing the footage or writing the interview questions or the speech can also be authors. The question of authorship in news footage is very fact-specific: the general rule is that news footage will generally be owned and authored by the news corporation that released it, they are “works made for hire.”

##### Works created by humans vs. natural phenomena

Copyright requires human authorship, precluding copyright in works created by natural forces, computer programs, or nonhuman animals. There may, however, be copyright in photographs, recordings, or other depictions of natural objects, where a human author has supplied creativity in capturing the natural object, such as by artistically setting up lighting and the viewing angle for a photograph.

##### Works for hire

Where an employee creates a work in the course of his employment, the employer is legally considered to be the author and copyright owner under the “work for hire” doctrine.[[10]](#footnote-10) The legal framework surrounding authorship and initial copyright ownership of works made for hire prior to the 1978 enactment of the Copyright Act may differ according to the law in effect at the time of the work’s creation. When no contracts are available that clarify whether a work was in fact made “for hire,” archivists should weigh the risk that someone else may own the copyright and object to unauthorized use of the copyrighted material.

##### Joint authorship

Works with more than one author can either be called “joint works of authorship,” compilations, or derivative works. A joint work “is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”[[11]](#footnote-11) The copyright in a work of joint authorship is co-owned by the authors. Each author can fully exercise any of the exclusive rights granted to a copyright owner without the consent of the other owner(s). The only requirement is that a copyright owner must share any profits derived from a use of the work with the other co-owner(s).[[12]](#footnote-12) When multiple heirs inherit a single copyright, any one of the heirs may license or transfer their exclusive rights to a third party without permission from the others, but any profits gained from the work must be shared among co-owners. An institution that receives a share in copyright from one of multiple owners may digitize the copyrighted work without any obligation to other co-owners, but must still account to co-owners for any profits gained through use of the work.

##### Collective works

A collective work is a compilation – such as a periodical issue, encyclopedia, or anthology – consisting of independent contributions from multiple authors. The contributions to collective works are gathered, but there is no sense of merger or unity to them. The compiler of a collective work owns copyright in the compilation, but the authors of each work included are the copyright owners of their distinct creation. If a news outlet compiled stories in which it did not own the copyright into a news program, that program would be a collective work.

##### Derivative works

When one copyrighted work serves as the basis for another work, the second work is called a derivative work. The copyright in any new expression that the author of the derivative work creates belongs solely to that author. Neither the original nor the follow-on author necessarily has rights to license the other’s copyrighted work. A collection of news reports arranged creatively may constitute a creative work of authorship in which copyright would attach, and constitute a derivative work relative to the component news reports.

#### (d) Idea/Expression dichotomy

 The idea/expression dichotomy is a statutory requirement that copyright protect the expression of an idea and not the idea itself.[[13]](#footnote-13) This is because ideas are considered to be too useful to other’s creations and in some ways too precious to be subject to a monopoly right such as copyright. Ideas are thus in the public domain. However, a news archive concerns the use of individual news reports and video; it will rarely implicate an idea/expression issue.

### 3. Copyright Infringement

#### (a) In general

The Copyright Act provides that certain acts, such as copying or public performance, are the exclusive privilege of the copyright holder. An unauthorized person who uses a copyrighted work in a prohibited way may be liable for copyright infringement. Under certain circumstances, people who contribute to or facilitate direct copyright infringement by another may themselves be held liable for the other party’s infringement, a phenomenon known as “secondary” or “indirect liability.”[[14]](#footnote-14)

There is no copyright infringement where: 1) any existing copyright has expired; 2) the use is authorized by the copyright holder; or 3) the activity falls under an exception to copyright control, such as fair use, the libraries and archives provisions, or a statutory licensing scheme.

News reports often incorporate independently copyrighted sound recordings, images, and audiovisual clips. It is likely that, if the inclusion of a copyrighted work was a fair use at the time the news was filmed and originally broadcast, archiving digital copies of the footage on the Internet will also constitute fair use. One exception might be the case where the subsequent display is commercial where the original was not.

#### (b) Digitization of Footage Physically Held

The archival digitization of physical materials such as videotapes is authorized under 17 U.S.C. §108(c) where “the existing format in which the work is stored has become obsolete”[[15]](#footnote-15) meaning that “the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”[[16]](#footnote-16) In the case of video footage, video tapes and other technologies may be seen as “obsolete” where the only way to read these tapes is through devices that are no longer commercially available or available only at a very high cost. However, §108(c) only protects digitization of news footage if it is possible through technical measures and restrictions to make available only three copies at a time and only to individuals physically located within the premises of the archive in question. Thus, while this provision is helpful to archivists, it is difficult to argue that it extends to an archive made generally available online.[[17]](#footnote-17)

####  (c) Specific protections for the recording and storing of audio-visual news programs

Section 108(f)(3) permits libraries and archives to reproduce and distribute by lending “audiovisual news programs.” It does not apply to documentaries, magazine-format broadcasts, or other public affairs broadcasts dealing with subjects of general interest to the viewing public.[[18]](#footnote-18) Copies can only be “lent” to users; what lending might mean in a digital space is uncertain. Performance of the broadcasts, either over the air or by streaming, is not necessarily going to fall under the provision’s protection. Section 108(i) stipulates that audiovisual news programs are eligible for all § 108 exemptions.[[19]](#footnote-19)

#### (d) Digital Millennium Copyright Act 1998

 The Digital Millennium Copyright Act (DMCA) contains a number of provisions of importance. Title I prohibits the circumvention of copy-prevention systems and contains an exemption for certain non-profit libraries, archives and research institutions holding copyrighted material for the sole purpose of making a good faith determination as to whether to acquire copyright in the material, and other research and reverse engineering exceptions. The exemption regarding libraries and archives is to be found in section 1201(c) of the DMCA.

 Title II provides a shield for internet service providers (ISPs) and other Internet intermediaries from direct copyright infringement liability as well as from secondary liability for infringement committed by others. The so-called “safe harbor” applies to entities “offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received” and includes more widely any “provider of online services or network access, or the operator of facilities.”[[20]](#footnote-20) However, this shield against liability does not apply when the intermediary itself is the infringer—in other words, YouTube (provided that they meet all the statutory requirements) may be shielded from liability for an infringing video uploaded by a user, but an online news archive that is itself uploading news content would not.

### 4. Protected works

#### (a) Overview: works of authorship

“Works of authorship” include the following categories:[[21]](#footnote-21) literary works; music – including any accompanying words; dramatic works – including any accompanying music; pantomimes[[22]](#footnote-22) and choreography; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings;[[23]](#footnote-23) and architectural works.[[24]](#footnote-24) These categories should be viewed broadly. Motion pictures are copyrightable as a separate category under 17 U.S.C. § 102 (a)(6) even when they capture non-copyrightable things such as natural phenomena or nonfictional events.

Works that are not protected under federal copyright laws may still be protected by what is often called “common law copyright.” Varying from state to state, common law copyright represents a combination of state-based law derived from formal state copyright statutes, laws in related substantive areas (e.g., anti-bootlegging legislation), and judicial decisions.

Copyright protection does not exist in works that are unfixed and in the intrinsic mechanical or utilitarian aspects of “useful articles,” such as clothing, furniture, machinery, dinnerware, and lighting fixtures (although such aspects may be protected by patents). Nor does copyright protection automatically exist for the shape or design of a utilitarian object, even if it is aesthetically pleasing. Thus, filming a designer’s chair should not constitute a breach of copyright. Also excluded from federal copyright protection are “works of the United States government.”[[25]](#footnote-25) This guide focuses on works of authorship that could be included in news footage and therefore present copyright issues.

#### (b) Pictorial, Graphic, and Sculptural Works

According to the Copyright Act, pictorial, graphic, and sculptural works include two dimensional or three-dimensional works of fine, graphic and applied art; photographs; prints and art reproductions; maps, globes, charts and other cartographic works; diagrams and models; and technical drawings, including architectural plans.[[26]](#footnote-26) Copyright can only protect pictorial, graphic, or sculptural elements in useful objects when those elements can be identified separately from the utilitarian aspects of the object. For example, the design of a chair may not be eligible for copyright protection, but an image carved on the chair’s back may be copyrighted. Thus if a video captures an object which is recognizably copyrighted, the images may need to be analyzed for compliance with copyright law. The protection, however, applies only to the distinct copyrighted element, and not to the underlying object (the chair) as a whole.[[27]](#footnote-27)

#### (c) Music

Copyright in the music industry is a complex bundle of rights frequently subject to contracts and license agreements. One should not confuse the copyright in a sound recording (the record on a CD, for instance) with the copyright in a musical composition (the notes and composition themselves). There is also a right of public performance, which is a right to physically perform the musical composition.[[28]](#footnote-28) Public performance royalties are usually collected and distributed by organizations such as the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) Archived news feed containing music in the background will generally be protected under fair use law. [link to section on fair use]

#### Movie and TV Clips

Audiovisual works are defined as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”[[29]](#footnote-29) “Intended to be shown,” means that audiovisual works are to be performed. Under the Copyright Act, the term “motion picture” extends beyond feature films to cover things like commercials, documentaries, raw footage, television programs, home movies, and multi-media works like computer games. An archived video footage that in the course of commentary, criticism, or a new report features a movie or TV clip may constitute a fair use, as it is unlikely that such a clip will portray a substantial or excessive portion of the original work. If the clip is the central focus or topic of archived video footage, and a substantial portion of the original is featured, then streaming such content online may be an infringement of a public performance right. [link to fair use]

#### Dance

News reports sometimes include video of a choreographed dance performance. Because choreography is most commonly fixed and preserved by means of a live performance, whether showing performance in its entirety or displaying only short segments, digital transmission or streaming of a video recording may infringe copyright holders’ rights to public performance or display.

#### Sporting Events

The professional league or association of the featured sport usually owns copyright in TV sports footage (e.g., Major League Baseball owns footage of professional baseball games, the National Basketball Association owns professional basketball game footage, and so on). Licensed broadcast stations are allowed to feature live games and/or replay highlights for a limited time period after the original airtime, after which any entity wishing to replay sports footage must obtain a license to do so. Most professional sport organizations do not have publicly accessible policies for the licensing of footage and instead negotiate private agreements for each separate entity requesting use.

#### (g) News Footage provided by a third party

A third party who donates footage to an archive may not be authorized to transfer or license all rights to the content. If an archivist is making a fair use of the footage, ownership of the copyright is irrelevant. If, however, the footage infringes another party’s copyright, an archivist should consider possible liability and safe harbors relating to third-party content. Section 108(i) stipulates that audiovisual news programs are eligible for all 108 exemptions.

### 5. Exclusive rights in Copyrighted Works

A copyright owner can exercise and/or authorize others to exercise six exclusive rights to a copyrighted work:[[30]](#footnote-30) reproduction; preparation of derivative works based on the original; distribution of copies to the public by sale or transfer of ownership, rental, lease, or lending; public performance of the work; public display of the work; and public performance of sound recordings by digital audio transmission.[[31]](#footnote-31)

Here are some of the issues an archivist will need to consider as potential copyright risks when offering digital access to audiovisual collections:

* Creating a digital copy of TV news footage can infringe a copyright holder’s exclusive right to reproduction in images, video, or sound recordings incorporated in that footage.
* Making digital copies of such news footage available to the public beyond the original broadcast may result in unauthorized distribution of copyrighted works encompassed within a news segment.
* If copyrighted content included within news footage can be viewed or heard via digital transmission/streaming, there may infringement of rights in public performance.

### 6. Duration of Copyright and the Public Domain

#### (a) Overview

Copyright exists for a fixed period time, usually the life of the copyrighted work’s author plus 70 years, after which it expires and anyone may use the work without obtaining rights from the owner of the expired copyright. Works whose copyrights expire fall into the public domain,[[32]](#footnote-32) a pool of creative works from which the public is free to draw. Works may also be dedicated to the public domain by the copyright-holder. There can be no copyright infringement if the archived news footage feature works that belong to the public domain.

Any analysis of ownership and duration must be performed on a case-by-case basis for each work. The duration of copyright varies according to factors including the type of work, its publication status, and the place of first publication. To understand whether a work is still copyrighted and who owns that copyright requires collecting information about the work, including:

* what type of work it is;
* when the work was created;
* who was the author of the work;
* whether and where it was first published or offered for sale;
* whether any required copyright formalities were complied with (ex. Registration with the US Copyright Office);[[33]](#footnote-33)
* the circumstances under which it was created; and
* whether copyright has been transferred (for instance, by written assignment or as a bequest under a will).

If there is no contract, license or proof of any change in copyright ownership, the presumption is in favor of the original owner. There is no adverse possession equivalent in copyright law. Attempts to pass orphan works legislation that would bring so-called “orphan works” – i.e., works of unknown origin or ownership – into the public domain or establish a statutory licensing scheme to permit their use without fear of copyright claims have failed to date.

#### (b) Resources on Duration

Cornell University provides an annually-updated resource regarding durations of copyright protection.[[34]](#footnote-34) The Copyrights Office also provides resources with respect to duration, including an FAQ covering basics and offering updates[[35]](#footnote-35) as well as a Circular dedicated to the issue.[[36]](#footnote-36)

### 7. Fair Use

The fair use doctrine protects speech that would otherwise be considered copyright infringement. Certain common categories of fair use include using copyrighted material for criticism, comment, or news reporting; to illustrate a point; in a case of incidental capture of copyrighted material when recording another subject; and for teaching, scholarship, or research.

Courts typically analyze four factors to assess whether or not an alleged copyright infringement may be “fair” and, thus, legally protected:[[37]](#footnote-37) (1) the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[[38]](#footnote-38)

The four statutory factors should not “be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”[[39]](#footnote-39) Reproducing even an entire work may be fair, depending on the nature of the work, the purpose of the use, and so forth. Commercial uses can be fair, and educational uses can be unfair. For a discussion of issues surrounding fair use in online video, see the Center for Social Media’s “Code of Best Practices in Fair Use for Online Video.”[[40]](#footnote-40)

For more specific applications of fair use law to different types of works of authorship see the section on works of authorship.

### 8. Assignment and Licensing of Copyrighted Works

A copyright owner may choose to transfer any or all of their rights in a work to another by means of a signed written instrument.[[41]](#footnote-41) An assignment transfers all exclusive rights in a work to a recipient, while a license grants the licensee only certain rights to the copyrighted work. The recipient of an assignment is the new owner of copyright and can enforce their rights even to the exclusion of the former copyright owner. Rights can be divided and assigned to different people, can be limited according to territory (“only US rights”)or according in time (such as an assignment “for five years”).

Rights in copyright are distinct from ownership of the physical underlying work,[[42]](#footnote-42) such as a purchased copy of a CD, book, or painting. A donor, seller, or depositor of an object may have no rights in relation to copyright, in which case, any purported license or assignment from them will be legally ineffective: the transferee acquires no rights to the transferred content in that case.

An archivist digitizing licensed TV news footage may require licenses for copyrighted content incorporated within that footage where exclusive rights are implicated in the creation or intended use of the digital copy. An individual who uses copyrighted content found in a digitized archive or collection is strongly advised to consult the archive’s Terms of Service to determine his contractual rights as regards subsequent use of the material. Common license provisions include restrictions on media, duration, restrictions on use, and territorial restrictions.[[43]](#footnote-43)

## C. Trademark Law

### 1. What is a trademark?

A trademark is a device used by a business to identify its goods or services and distinguish its brand from those of other businesses.[[44]](#footnote-44) Trademarks are intended to give businesses the benefit of a good reputation by ensuring that consumers are able to distinguish among different producers. Trademark protection may be granted for a word, short phrase, picture, symbol, logo, or a combination of these elements.[[45]](#footnote-45) The owner of a trademark holds the exclusive right to commercial use of his mark.[[46]](#footnote-46)

To be eligible for trademark protection a mark must be sufficiently distinctive such that there is an association of the mark with a single source of goods.[[47]](#footnote-47) Trademark rights are usually established by building a reputation in the mark through commercial use, but rights can also be established by registration of the mark prior to use.[[48]](#footnote-48) When first granted, trademarks are restricted to certain categories or lines of business such as food/beverage, surgical/medical, music, clothing, games/playthings, etc. However, if the trademark goes on to become sufficiently famous, it may be protected outside of the originally granted category or business.

Trademarks are protected by both state and federal law, and the specific eligibility requirements for trademark protection vary by jurisdiction.

### 2. What is trademark infringement?

Trademark infringement occurs when a person uses a trademark belonging to another in a way that is likely to confuse consumers about the source or sponsorship of the product.[[49]](#footnote-49) The most clear-cut example would be Defendant D manufacturing his own goods and selling them using Plaintiff P's trademark. In this case, D is confusing consumers who may take D's products to be P's products. Traditionally, this means that if D sells clothes and P sells fruit, there is less likelihood of confusion, so that the category/line-of-business of the mark may limit a trademark owner's claims.

In deciding whether consumers are likely to be confused, the courts will typically look to a number of factors, including: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; (7) the defendant's intent.[[50]](#footnote-50) However, the factors considered may vary slightly by jurisdiction.

### 3. What is trademark dilution?

Under federal law, trademark dilution is only actionable if the mark is sufficiently famous to have acquired wide recognition by the general consuming public. In determining whether a mark is famous, courts will look to a number of factors, including: (1) the degree of inherent or acquired distinctiveness; (2) the duration and extent of use; (3) the amount of advertising and publicity; (4) the geographic extent of the market; (5) the channels of trade; (6) the degree of recognition in trading areas; (7) any use of similar marks by third parties; (8) whether the mark is registered.[[51]](#footnote-51) Under some state law, however, a mark need not be famous to be protected by anti-dilution law.

Instead of confusing consumers, dilution is based on the theory that the famous mark is so singularly associated with its owner that any use of it by someone who is not the trademark owner will erode that association. Therefore, the owner of a famous mark may bring a dilution claim even when the alleged infringing use arises in a completely different category or line-of-business than the owner's goods or service. There are two types of dilution: blurring and tarnishment. Blurring occurs when the mark’s uniqueness is eroded by unauthorized use.[[52]](#footnote-52) Tarnishment occurs when a mark is cast in an unflattering light, often by linking the mark something considered inferior or unsavory.[[53]](#footnote-53)

There is an explicit exemption of liability for trademark dilution for "all forms of news reporting and news commentary".[[54]](#footnote-54) Whether this shield would apply to an archive that is uploading news online is unclear.

### 4. What is trademark fair use?

Fair use is a defense to both consumer confusion and and dilution.[[55]](#footnote-55) Descriptive fair use occurs when a trademarked term is used in its everyday sense to communicate information irrespective of an association with a trademark owner.[[56]](#footnote-56) For example, a baker would be entitled to use the phrase “oat-nut” in order to describe bread containing oats and nuts in spite of an existing trademark in the term OAT-NUT. Descriptive fair use reflects the notion that a trademark owner cannot acquire a monopoly in the use of a term in its ordinary meaning.

Nominative fair use occurs when it is necessary to use a trademark in order to describe a different good or service than that which is provided by the trademark owner.[[57]](#footnote-57) For example, nominative fair use shields an automobile repair shop owner from liability when he uses trademarks in order to describe the services that he offers ("We repair Car Brand X!").

Fair use may also provide protection for certain parodies of trademarks, especially when the use of the mark is primarily artistic rather than purely commercial.

As in the copyright context, trademark fair use claims will be very fact-specific.

### 5. What might be subject to trademark protection in news coverage?

 Trademarks may be intentionally used in the course of news reporting to refer to a particular product or business for the purpose of comparison, criticism, or point of reference. Additionally, unintentional use of trademarks may be made in the course of news reporting as the result of capturing a mark on camera.

# II. CONTRACTS

## A. Introduction

## B. Collective Bargaining Agreements

### 1. Introduction

### 2. The first step in addressing union issues is determining the union to which performers and other personnel involved in news broadcast belong

### 3. What types of clauses should the archivist look for in a union agreement?

### 4. Conclusion and Additional Resources

## C. License Agreements

# III. TORTS

## A. Introduction.

Torts are wrongs; if a private party feels he has been harmed by another party, he may bring a civil suit asserting any of a number of torts. In the context of archival footage, the most relevant torts will be those related to harms done to private parties’ reputation and privacy.

Defamation is harm to an individual’s reputation. The privacy torts involve the publication of false information about the individual (i.e., false light); the objectionable intrusion into private lives (i.e., intrusion upon seclusion); the offensive publication of private facts; and the misappropriation of an individual’s name or likeness.

At the heart of these torts is material that is false or that creates a false impression about a person, as well as private material that is true but which harms a person by its publication or revelation. In general, if archival news footage has been properly cleared of potential torts at the time of its original publication, republication will not create new torts. However, if an archivist cannot be certain that footage was properly vetted (or that it was vetted at all) careful consideration of these issues may be warranted before republication is advised.

Torts are mostly governed by state law, particularly the so-called “common law” developed by judges on a case-by-case basis. For this reason, if an archivist is concerned that republishing a piece of footage will do harm to a party’s reputation or privacy, he or she should consult an attorney versed in the relevant tort law. However, the contours of tort law are similar enough between jurisdictions that the key elements of each cause of action can be described in general terms.

Additional Resources:

* The Citizen Media Law Project’s Guide to Risks Associated with Publication [**link to http://www.citmedialaw.org/legal-guide/risks-associated-publication**] and Practical Tips for Avoiding Liability Associated with Harms to Reputation [**link to http://www.citmedialaw.org/legal-guide/practical-tips-avoiding-liability-associated-harms-reputation**]
* The Citizen Media Law Project’s State by State Legal Guide [**link to http://www.citmedialaw.org/legal-guide#state**]

## B. Defamation and False Light

### 1. Introduction to Defamation

Defamatory matter includes any communication that “harm[s] the reputation of another” or “deter[s] third parties from associating or dealing with him.”[[58]](#footnote-58) Claims of defamation are often highly fact-specific and can turn on the nature of the communication, the subject matter alleged to be defamatory, and the plaintiff’s status in the public eye.

Generally, defamatory statements include those that would: “subject one to hatred, ridicule, obloquy, or contempt”; “reflect negatively on one’s reputation for morality, integrity, or honesty;” or “negatively affect one’s financial status or standing in the community.”[[59]](#footnote-59) The defamed subject is whomever the recipient of a defamatory communication reasonably understands is implicated by the statement; it is not relevant whether speaker intended to refer to the defamed person.[[60]](#footnote-60)

To be defamatory, a communication does not have to prejudice the majority of the community against the subject;[[61]](#footnote-61) rather, it is enough that the communication would tend to prejudice him “in the eyes of a substantial and respectable minority.”[[62]](#footnote-62) The common law elements for a cause of action in defamation are: “(1) A false and defamatory statement concerning another, (2) An unprivileged publication to a third party, (3) Fault amounting at least to negligence on the part of the publisher, and (4) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”[[63]](#footnote-63)

The news archivist should be aware that defamation claims can recur from republishing defamatory material, because “each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication for which a separate cause of action arises.”[[64]](#footnote-64) This is usually true even for simply rebroadcasting the same material at a later time.[[65]](#footnote-65) Therefore, if an old broadcast contains defamatory material, republishing it could open up the news organization to defamation suits.

### 2. Test for Liability

The test for liability of a publisher depends on whether the allegedly defamed person is a **private individual or a public figure or official** and whether the subject of the communication is a purely private matter.

Public Figure or Public Official – For publications that allegedly defame a public figure or official “in regard to his conduct, fitness, or role in that capacity,” the plaintiff must prove that the defamatory statement was made with “actual malice,” that is with knowledge that it was false or with reckless disregard of whether it was false or not.[[66]](#footnote-66) This is a fairly high bar, and the standard was articulated by the Supreme Court as necessary to the protection of publishers’ First Amendment rights.[[67]](#footnote-67)

Private Matters – A private plaintiff can recover damages without showing actual malice.[[68]](#footnote-68) A public figure or official may also recover for an action in defamation without showing actual malice if the defamatory statement was directed to a “purely private matter.”[[69]](#footnote-69) In these instances, most jurisdictions require that in order to recover, a plaintiff need only prove that the defendant negligently failed to determine whether his statement was false and defamatory in order to recover.[[70]](#footnote-70) This negligence standard is a lower bar than the actual malice required to show defamation of a public figure.

### 3. Fault of a Republisher

The republication of defamatory archival matter raises the possibility of liability for the republisher. If the republisher was also the original publisher, the republication constitutes a new instance of defamation.[[71]](#footnote-71) Similarly, in the traditional context of print publications and speech, if the subsequent publisher republishes defamatory matter originally published by a third party, the subsequent publisher is subject to the same liability as the original publisher unless he merely “deliver[s] or transmit[s]” the defamatory matter[[72]](#footnote-72) and “he has no reason to know of its defamatory character.”[[73]](#footnote-73)

In the Internet context, however, a provision of federal law known as the Communications Decency Act (CDA) protects operators of websites, blogs and other “interactive computer service[s]” from defamation and privacy claims arising from material posted by third parties, so-called “information content providers.”[[74]](#footnote-74) An information content provider is one who “is responsible, in whole or in part, for the creation or development of information provided through the Internet.”[[75]](#footnote-75) The material need not necessarily be posted directly by the information content provider on a public forum, but it must be “provided” for online publication to the publisher by a third party.[[76]](#footnote-76) Furthermore, this material likely must be “provided” through an electronic medium.[[77]](#footnote-77) Operators of websites who publish third party material are not liable even if they engage in “traditional editorial functions,” like selectively publishing material, screening for offensive content, and minor editing that does not substantially change the overall meaning of the content.[[78]](#footnote-78) In addition, a publisher may not be liable for material created by a third party paid to create the content as long as the third party is not an employee of the publisher.[[79]](#footnote-79) Publishers who host defamatory third-party material online are usually not required to remove it.[[80]](#footnote-80)

However, there are some limited instances when an online publisher is liable for third-party defamatory material;[[81]](#footnote-81) these include when the publisher edits the material and causes it to become defamatory, when the publisher actively solicits content through the use of drop-down forms that include preselected, potentially illegal responses,[[82]](#footnote-82) and when the publisher promises to remove the content and fails to do so.[[83]](#footnote-83)

Above all, it should be remembered that CDA immunity applies only to third-party material, and not material in the development or creation of which the operator of the website plays a role.[[84]](#footnote-84) Thus an archivist who places defamatory archival matter online is likely also liable for defamation unless the defamatory matter was provided for publication online by a third party, and the archivist does not engage in any of the limited activities courts have found to cause publishers to waive CDA immunity.

### 4. Defamation Per Se and Special Harm

#### a. In General

For most defamation actions, the plaintiff must demonstrate that he has suffered special harm. Special harm is “the loss of something having economic or pecuniary value,”[[85]](#footnote-85) resulting from the conduct of a person other than the defamer or defamed. In other words, outside the limited context of defamation per se, the loss of reputation alone is not enough to make the defamer liable; the plaintiff must show that her lower social standing is reflected in some kind of economic loss such as the loss of employment.[[86]](#footnote-86) Once special harm has been proved, however, the plaintiff may recover for emotional distress and for any physical harm resulting from the distress.[[87]](#footnote-87)

However, many jurisdictions recognize a category of defamation know as defamation per se, for which a plaintiff need not demonstrate special harm in order to recover. Statements constitute defamation per se when they impute commission of a crime, infection with “loathsome disease,” inability to perform or want of integrity to discharge duties of office or occupation, or “sexual misconduct.”[[88]](#footnote-88)

#### b. Massachusetts Law

Massachusetts does not require special harm for defamatory statements to be actionable.[[89]](#footnote-89) This means plaintiffs do not have to show economic loss from statements that would not constitute defamation per se as described above.

### 5. Libel and Slander

Libel “consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.”[[90]](#footnote-90)

Slander by contrast includes defamatory matter “by spoken words, transitory gestures” or by any other communication that is not libelous.[[91]](#footnote-91) Factors that are used to distinguish slander from libel include “the area of dissemination, the deliberate and premeditated character” of the publication, and its permanence or persistence after publication.[[92]](#footnote-92)

In the context of radio and television, broadcasting defamatory matter is libel “whether or not it is read from a manuscript.”[[93]](#footnote-93) Likewise, some courts have recently held publication on the Internet constitutes libel.[[94]](#footnote-94)

### 6. False Light

#### a. In General

False light invasion of privacy involves publication of information that creates a false implication or impression concerning the plaintiff in the public’s eye.[[95]](#footnote-95) The publicity must misrepresent the plaintiff’s “character, history, activities, or beliefs,” casting him in a manner that would be highly offensive to a reasonable person.[[96]](#footnote-96) Additionally, it must be shown that the defendant “had knowledge of, or acted in reckless disregard as to, the falsity of the information” and the resulting false light.[[97]](#footnote-97)

An action for false light invasion of privacy is generally cognizable as a matter of common law,[[98]](#footnote-98) though in some jurisdictions there are statutes that provide protection against invasion of privacy.[[99]](#footnote-99) There are, however, some jurisdictions that refuse to recognize a cause of action for false light, viewing the tort as duplicative of defamation.[[100]](#footnote-100)

A claim for false light invasion of privacy cannot be based on information that is true or that involves trivial or unimportant falsities.[[101]](#footnote-101) Rather, the plaintiff must show that the statement is a sufficiently substantial misrepresentation of his character, beliefs, activities, etc, such that the plaintiff taking serious offense may be reasonably expected.[[102]](#footnote-102) For example, a favorable portrayal of a plaintiff containing minor inaccuracies about his career or the nature of his business is not an invasion of privacy because the plaintiff could not be reasonably expected to take offense at such inaccuracies.[[103]](#footnote-103) By contrast, the inclusion of a plaintiff’s photo in a police “Rogue’s Gallery” of criminals when the plaintiff has not been convicted of a crime would be an invasion of privacy because the plaintiff would be “reasonably justified” in feeling offended by this act.[[104]](#footnote-104)

However, false statements that are so “inherently incredible” that they would not cause a reasonable person to form a misconception of the plaintiff do not constitute false light.[[105]](#footnote-105) Therefore jokes and parodies that cannot be taken seriously do not give rise to liability for false light.[[106]](#footnote-106)

Additionally, a statement that expresses an opinion or criticism is not actionable as a false light invasion of privacy claim because it cannot be established as either true or false.[[107]](#footnote-107)

#### b. Massachusetts Law

Massachusetts does not recognize claims for false light invasion of privacy.[[108]](#footnote-108)

### 7. Sensitivity of Plaintiff is Irrelevant for Actions in Invasion of Privacy and Defamation

Because an invasion of privacy false light action seeks to protect an individual from “appear[ing] before the public otherwise than he is,”[[109]](#footnote-109) it is not sufficient that the publication offends the individual characterized.[[110]](#footnote-110) Rather, the information must strike a reasonable person or one of ordinary sensibilities as highly offensive.[[111]](#footnote-111) This standard also applies for finding invasion of privacy by intrusion upon seclusion.[[112]](#footnote-112) The standard is met when a defendant knows that a plaintiff, as a reasonable person, “would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.”[[113]](#footnote-113)

Likewise, a defamation action requires demonstrating that the plaintiff’s reputation was harmed, at minimum, “in the eyes of a substantial and respectable minority of the community.”[[114]](#footnote-114) The plaintiff’s understanding of the allegedly words, therefore, is not relevant; rather what matters is what meaning hearers of common and reasonable understanding would ascribe to the words, or when applicable, how a relevant minority community would understand the words.[[115]](#footnote-115)

As such, archivists can use their reasonable judgment as a starting point or rule of thumb for what might constitute actionable material for privacy or defamation claims, although such a determination is obviously not dispositive. Any questionable or borderline material should be discussed with an attorney.

### 8. Distinguishing False Light and Defamation

There is substantial overlap between actions for defamation and false light, and the same communication may generate causes of action in both. Although an individual may bring these claims together, he will be entitled to only one recovery for any particular communication.[[116]](#footnote-116)

Still, the causes of action of false light and defamation not identical. One prominent difference is that liability for false light is not limited to matters that are actually defamatory, i.e. the material does not necessarily have to tend to cause harm to a person’s reputation. Rather, a claim for false light may be brought for statements that would be highly offensive to a reasonable person.[[117]](#footnote-117) (link to false light examples) Additionally, the relevant injury in a defamation action differs from that in a false light privacy action. In the former, the injury is damage to the reputation or status of the subject of the communication, whereas in the latter, the injury is his embarrassment and mental distress.[[118]](#footnote-118)

Another difference is how widely a statement must be circulated in order for it to give rise to liability. In a defamation action, any communication to a third party is enough to give rise to liability; to be actionable as a false light privacy invasion, however, the communication usually must come to the notice of “a substantial portion of the general public.”[[119]](#footnote-119)

### 9. False Light and Defamation: Truth as a Defense

#### a. In general

Truth is a defense to actions in both defamation and false light.[[120]](#footnote-120)

In addition, minor inaccuracies in the content of the communication, the subjective belief of the defamer as to the truth or falsity of his statements, and whether or not the communication was intended to harm its subject are all immaterial.[[121]](#footnote-121) Thus, a defendant is entitled to this defense if the statements are “substantially true,” such that the “gist,” or “sting” of the statement is true.[[122]](#footnote-122) So long as the defamatory charge was true in substance at the time that it was made, recovery is barred. It should be noted in the case of republication, a statement that was true at the time of original publication may become defamatory after the passage of time.[[123]](#footnote-123)

Although falsity is a requirement for an action in false light invasion of privacy, the focus of the tort is not the truth or falsity of the statement, but instead whether what has been said will “lead others to believe something false about an individual.”[[124]](#footnote-124) Thus, some courts have argued that some technically true statements could still cause others to form a false, objectionable impression unless they are supplemented with other facts that mitigate this impression.[[125]](#footnote-125) Other courts, however, citing the First Amendment, have not allowed recovery for false impressions resulting from a lack of context provided with the statement.[[126]](#footnote-126)

#### b. Massachusetts Law

Massachusetts has a statute providing that truth is not a defense to defamation if “actual malice is proved” (link to test for liability).[[127]](#footnote-127) However, this law has been ruled unconstitutional under Supreme Court precedent as applied to public figures and officials as well as matters of public concern (link to matters of public concern).[[128]](#footnote-128)

### 10. Statements of Opinion

#### a. Defamation

Although the truth or falsity of an opinion cannot objectively be determined, there is no wholesale defamation exemption for expressions of opinion.[[129]](#footnote-129) However, a statement of opinion is only actionable if it suggests the opinion is based on “undisclosed defamatory facts.”[[130]](#footnote-130) If, for example, the defendant called the plaintiff a thief, it implies that the plaintiff has committed acts that constitute thievery.[[131]](#footnote-131) Such a statement may be defamatory. For expressions of opinion wherein the speaker relies on known facts or else discloses the alleged (nondefamatory) facts on which he bases his opinion, there is no liability for an action in defamation.[[132]](#footnote-132)

#### b. False Light

As with defamation, there is no blanket exception for opinion in false light claims, but “in general, expressions of opinion are not actionable as false light invasion of privacy claims,” particularly when clearly stated as an opinion. [[133]](#footnote-133)

### 11. Privacy Rights and Defamation: Privilege as a Defense

#### a. Absolute Privileges

Consent – When a person consents to publication of information about himself, that consent provides the news media with a defense to both actions in defamation and invasion of privacy. [[134]](#footnote-134) This defense is not available, however, when consent is “obtained by fraud or duress, or is given by one who lacks the capacity to consent” such as a minor; it is also unavailable if the information is republished in response to an honest inquiry about the existence, source, etc. of the original publication.[[135]](#footnote-135) In most jurisdictions, consent to publication can be “manifested by action or inaction” and need not be overt. [[136]](#footnote-136) So long as the conduct may be reasonably understood as consent, the privilege shields the publisher from liability.[[137]](#footnote-137) Additionally, consent may be limited to publication to specific contexts, purposes or times; in this case the privilege to publish defamatory matter is limited to those circumstances.[[138]](#footnote-138) Individuals depicted in archival footage, particularly those interviewed on camera, have likely consented to the original publication of any defamatory material if they knew or should have known they were being filmed for publication. Whether their consent extends to a later republication of the footage may depend on the context.[[139]](#footnote-139) On one hand, individuals depicted likely did not expect for the footage to be republished many years later (particularly in the new medium of the Internet), but on the other the republication of archival footage is likely contextually very similar to the original publication. Whether the privilege applies to new uses of the material (as with republication of archival material) depends on whether the individual’s consent could be reasonably interpreted as general or limited to the specific use for which it was originally obtained.[[140]](#footnote-140)

Acting in Official Capacity – Absolute privilege may also extend to judicial officers, attorneys at law, parties to judicial proceedings, witnesses in judicial proceedings, jurors, legislators, witnesses in legislative proceedings, and executive administrative officers, who, while acting in their official capacity, invade the privacy of another or publish defamatory information if the invasion of publication has some relation to the matter before them.[[141]](#footnote-141)

Legally Required Publication – If a defendant is legally required to publish defamatory matter, he is granted an absolute privilege and is immune from liability.[[142]](#footnote-142) In various contexts, broadcasters may be required by law to provide airtime to individuals or political candidates to respond to previous broadcasts, the “right of reply;” any defamatory published as a result of these requirements are likely entitled to an absolute privilege.[[143]](#footnote-143)

#### b. Conditional Privileges

Even if a publication is defamatory, the publisher may be eligible for one of a number of conditional privileges, which if they apply, protect the publisher from liability.[[144]](#footnote-144) Unlike absolute privileges, conditional privileges are situational, and a publisher’s conduct may affect whether they apply.

Fair Report - In the context of archival news, the most important conditional privilege is the “fair report privilege,” which covers reports about an official proceeding or meeting, so long as “the report is accurate and complete or a fair abridgement of the occurrence reported.”[[145]](#footnote-145) Reports on arrests, trials, and other judicial proceedings are covered by this privilege, but a publisher has a responsibility to provide a “fair” account of the proceedings, such that failure to report subsequent dismissal of criminal charges might cause the publisher to lose the privilege.[[146]](#footnote-146) For example, one court held that the fair report privilege did not apply when a defendant published a 21-year old report about a suit against the plaintiff without acknowledging that the suit had been subsequently dismissed.[[147]](#footnote-147) However, if a defendant does not have reason to know of the changed circumstances, he may still be entitled to the fair report privilege.[[148]](#footnote-148)

Neutral Reportage – Another privilege that has been recognized in limited instances covers neutral reports by press organizations regarding defamatory statements made by “a responsible, prominent organization individual” against a public figure or group.[[149]](#footnote-149) For example, when a prominent naturalist organization accused a group of scientists of being “paid liars,” a court held that a newspaper’s “accurate and disinterested reporting” of the story was privileged against charges of defamation.[[150]](#footnote-150) In particular, “accurate and disinterested reporting” may require that the reporter make a “good faith effort” to give the individual or organization defamed an opportunity to respond.[[151]](#footnote-151) Because the privilege has only been recognized in a few jurisdictions and because the contours of which individuals or groups are sufficiently prominent and responsible to be the subject of neutral reportage, this privilege may be of limited use to archivists. However, if recognized, the privilege applies most directly to matters of public interest**,** and as long as the news report is accurate and neutral, the news organization should be shielded from liability.

Wire Defense – If a person republishes a report from a “reputable news agency” that contains defamatory material, he is entitled to a defense if he has no reason to know that the information was false, the report does not on its face give reason to doubt its veracity, and he does not substantially alter it.[[152]](#footnote-152) If a state recognizes the wire defense, a person’s reasonable reliance on a report from a reputable news agency is usually sufficient to bar a claim for defamation as a matter of law.[[153]](#footnote-153) The defense covers verbatim reporting as well as restating the report as long as it is a “fair report.”[[154]](#footnote-154) (link to fair report) The core example of reputable news agencies whose republication can implicate the wire defense are the major wire news services,[[155]](#footnote-155) but it has been applied to republication of newspaper articles[[156]](#footnote-156) and a widely syndicated columnist.[[157]](#footnote-157) Thus, if an archive republishes a news report that relies on or repeats a report from a reputable news agency, it might be entitled to a wire defense.

In order for conditional privileges to apply, the matter must be published at a time that makes it conditionally privileged and the privilege must not be abused by publication for an improper purpose, excessive publication, etc.[[158]](#footnote-158)

## C. Other Privacy Torts

### 1. Intrusion Upon Seclusion

#### a. In General

Intrusion upon seclusion protects a plaintiff from prying by a defendant into his private affairs. The common law elements for invasion of privacy by intrusion upon a plaintiff’s seclusion are: “(1) an intentional intrusion by the defendant, (2) into a matter which the plaintiff has a right to keep private, (3) by the use of a method which is objectionable to the reasonable person.”[[159]](#footnote-159) Although most courts indicate that intrusion need not be a physical one (i.e., a search of his home),[[160]](#footnote-160) not all jurisdictions agree, and at least three states, require some form of encroachment into the physical space of the plaintiff.[[161]](#footnote-161) The intrusion must be “unauthorized” and, depending on the jurisdiction, “substantial” or “outrageous.”[[162]](#footnote-162)

In general, a plaintiff will not have a cause of action for intrusion upon seclusion if a defendant obtains information about him from third parties, “even if pursued using subterfuge and fraud,”[[163]](#footnote-163) or through public records or legal discovery.[[164]](#footnote-164) Nor is there liability for observing or photographing appearances that are open to the public eye or, more generally, for acquiring information that is public.[[165]](#footnote-165) Even in a public place, however, there may be some matters about the plaintiff, such as undergarments, that are not open to the “public gaze,” and there may be liability for invasion of privacy when there is intrusion upon these matters.[[166]](#footnote-166)

Finally, the essence of this invasion of privacy claim is the intrusion into the plaintiff’s solitude, so publication of the results of the invasion is not a required element.[[167]](#footnote-167) Upon a finding of liability, however, the fact that information improperly acquired was later published may be considered for the purposes of enhancing damages.[[168]](#footnote-168)

Because of the requirements that the intrusion be “unauthorized” and often substantial, as well as the exemption for capturing of matters in the public view (even surreptitiously) or obtained from third parties, it is unlikely that archival footage could constitute an intrusion upon seclusion of someone depicted in the footage. Nevertheless, archivists should be aware of any material that appears to pry into an individual’s private affairs in an unreasonable manner.

#### b. Massachusetts Law

Massachusetts has a statute protecting against “unreasonable, substantial or serious interference”[[169]](#footnote-169) with a person’s privacy, which may, depending on the facts of a case, include an intrusion upon seclusion.[[170]](#footnote-170)

### 2. Right against public disclosure of private facts

#### a. In general

In many states there is a common law a tort of “disclosure of [embarrassing] private facts.”[[171]](#footnote-171) This privacy right prohibits unauthorized “public disclosure of private facts in which the disclosure is highly offensive to a reasonable person,” even though “[t]he facts disclosed are true.”[[172]](#footnote-172)

Facts that are already well-known or “available in the public record” are not private facts, and subsequent disclosure of such facts is therefore not public disclosure of private facts.[[173]](#footnote-173) The public record includes official documents available to the public, but it likely does not extend far beyond public records (link to California law). Conversely, public disclosure of facts available in the public record does not infringe the right of disclosure privacy even if the facts are not well-known (e.g., because significant time has elapsed since the facts were publicly disclosed).[[174]](#footnote-174) Finally, public disclosure of private facts is permitted when the facts are newsworthy (i.e. reasonably related to a matter of public interest).[[175]](#footnote-175) Some jurisdictions construe what constitute facts that are well-known or in the public record narrowly

#### b. California law

California common law, for example, protects against unauthorized public disclosure of private facts.[[176]](#footnote-176) The elements of the ‘disclosure privacy’ claim are: “(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.”[[177]](#footnote-177) However, California law not only permits public disclosure of private facts that are newsworthy, but also places the “burden of proving [that the] published matter was not newsworthy” on the plaintiff, rather than requiring the defendant to affirmatively prove that the disclosed facts were newsworthy.[[178]](#footnote-178) California follows the general rule that well-known facts and facts in the public record are not private facts; however, California defines the scope of ‘well-known facts’ and ‘facts in the public record’ somewhat narrowly.[[179]](#footnote-179)

Although in California facts disclosed in the public record do remain non-private indefinitely, without regard to “the mere passage of time,” the disclosure of historical “non record facts” or “facts obtained from non public records” may violate the disclosure privacy right.[[180]](#footnote-180)

#### c. Massachusetts Law

In Massachusetts, unauthorized disclosure of public facts is based on the state’s general invasion of privacy statute,[[181]](#footnote-181) and the elements are similar to those discussed in the California law section. However, the disclosure need not be to a wide public; as few as two people may be sufficient.[[182]](#footnote-182)

### 3. Invasion of Privacy Defense: Matters of Public Interest or Concern / Newsworthiness

A large portion of archival news footage—particularly the top stories of any given news broadcast—likely pertains to matters of public interest and/or is inherently “newsworthy.” Although these legal categories are likely narrower than the common meanings of the terms suggest, the right of privacy does not apply to the publication of material that is of legitimate public or general interest. When a plaintiff is a public personage, for example, he is said to have waived some part of his right to privacy and thereby authorized publicity regarding the events or activities that gave rise to his notoriety and, to some reasonable extent, regarding himself as an individual.[[183]](#footnote-183) This authorization exists both for individuals who voluntarily placed themselves into the public eye and for those who did not.[[184]](#footnote-184)

 Additionally, if a subject is newsworthy or “within the sphere of public interest,” then facts relating to the matter that would otherwise by deemed private may be publishable.[[185]](#footnote-185) In general, subject matter is newsworthy “if some reasonable members of the community could entertain a legitimate interest in it.”[[186]](#footnote-186) Furthermore, in the interest of avoiding even the appearance of censoring the press, “many courts simply defer to the judgment of media writers and editors as to what legally qualifies as ‘newsworthy.’”[[187]](#footnote-187) Nevertheless, the scope of the newsworthiness exemption is not unlimited. “California courts have said that newsworthiness should be appraised by a balancing of three factors: (1) the social value of the facts disclosed; (2) the depth of intrusion into private affairs; and (3) the extent to which the person acceded voluntarily to a position of public notice.”[[188]](#footnote-188)

Finally, events that were newsworthy may still be considered newsworthy even after a lapse of time, especially for the “purposes of information and education,” unless the new publication goes to “unreasonable lengths” in disclosing private information about someone who was previously in the public eye.[[189]](#footnote-189) Thus, republication of archival footage that was newsworthy at the original time of publication is likely not subject to an action for invasion of privacy since it does not reveal newly private information about an individual. This is likely true even if the events are not now publicly well-known because of the passage of time.

### Some facts are not private

#### Facts Available in the Public Record

In general, facts that are “available in the public record” or otherwise well-known are not private facts, and subsequent disclosure of such facts is therefore not public disclosure of private facts.[[190]](#footnote-190) Unfortunately, the scope of the ‘public record’ is indeterminate, as is the composition of the body of information ‘well-known’ to the public.

The ‘public record’ clearly includes information contained in “official court records”[[191]](#footnote-191) or disseminated in court proceedings open to the public.[[192]](#footnote-192) How far the public record extends beyond court records and proceedings is debatable. The Supreme Court has articulated two related rationales for including public court records and proceedings in the public record. First, one of the media’s most important functions in society is “to report fully and accurately the proceedings of government” so that voters and elected officials can “vote intelligently” and “register opinions on the administration of government.”[[193]](#footnote-193) The media relies heavily on “official records and documents open to the public” to fulfill this function because these records “are the basic data of governmental operations.”[[194]](#footnote-194) Second, “[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”[[195]](#footnote-195)

While the Court’s second rationale provides little justification for extending the ‘public record’ beyond public court records and proceedings, the first rationale is more expansive. Consistent with the first rationale, the public record might include all government documents, records, and proceedings that are publicly available or open to the public.[[196]](#footnote-196) In practice, however, the public record does not include all publicly accessible government documents and proceedings. The media’s constitutional interest in providing access to government operations is sometimes in tension with individual rights of privacy, and courts have allowed for the possibility that an individual’s right of privacy may be protected at the expense of the First Amendment.[[197]](#footnote-197) Thus, states can prohibit the media from publishing “truthful information which it has lawfully obtained,” but “only when [the prohibition is] narrowly tailored to a state interest of the highest order.”[[198]](#footnote-198)

Unfortunately, judicial efforts to determine when the state can prohibit the media from publishing true facts – that is, judicial efforts to define the scope of the public record – are predictably unpredictable. For example, courts have concluded that state land records containing individuals’ names and Social Security Numbers, when posted by the state on a publicly accessible, secure website, are part of the public record.[[199]](#footnote-199) By contrast, a police report posted by the police department in its publicly accessible press room is not part of the public record.[[200]](#footnote-200) In short, whether a particular publicly accessible government document or proceeding contains private facts depends on the public and private interests at stake.

#### b. Well-Known Facts

In general, publicly known facts are not private facts.[[201]](#footnote-201) However, whether a fact is ‘well-known’ or ‘publicly known’ can be difficult to determine. Recent court rulings suggest that privacy law may be evolving to protect personal privacy more robustly as technology evolves to facilitate quicker and easier access to information. For example, the Supreme Court has stated that “[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”[[202]](#footnote-202) The Court has also written that “compilation of otherwise hard-to-obtain [but publicly available] information [may alter] the privacy interest implicated by disclosure of that information” because “there is a vast difference between the public records that might be found after a diligent search of courthouse files … throughout the country and a computerized summary located in a single clearinghouse of information.”[[203]](#footnote-203)

#### California Law

California also adheres to the principle that facts in the public record and well-known facts are not private facts.[[204]](#footnote-204) Regarding the scope of the public record, California case law is consistent with the Supreme Court jurisprudence discussed above.[[205]](#footnote-205) And like federal case law, California case law suggests that distinguishing ‘private facts’ from ‘well-known’ facts is an unpredictable and subjective exercise.

To prove public disclosure of private facts in California, the plaintiff must prove that “the facts disclosed [are] private facts, and not public ones,”[[206]](#footnote-206) because “there can be no privacy with respect to a matter which is already public.”[[207]](#footnote-207) Furthermore, “there is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public or when the further publicity relates to matters which the plaintiff leaves open to the public eye.”[[208]](#footnote-208) Applying these principles, California courts have held that a newspaper’s “disclosure that plaintiff was a homosexual was … not a disclosure of a ‘private’ fact because the fact was known to many people as a result of plaintiff's open participation in organized homosexual social and political groups, even though the fact was not known to plaintiff's parents and siblings.”[[209]](#footnote-209)

On the other hand, facts can be private without being secret.[[210]](#footnote-210) Thus, publication of a youth baseball team’s photo in connection with a report that the team’s coach had molested youth baseball players is public disclosure of a private fact, even though the children “played a public sport and the team photograph [was] taken on a public baseball field” because “the photograph was intended to be private, only for dissemination among family and friends.”[[211]](#footnote-211) The extent of this private/secret distinction is unclear, but the forgoing example may be a special case, given the strong privacy interests of minors and the sensitive nature of the publication.

### Appropriation of Name or Likeness

Under the common law of privacy, individuals are said to have a property interest[[212]](#footnote-212) in their own names and likenesses, such that someone who uses the individual’s name or likes “to his own use or benefit,” is liable for invasion of privacy.[[213]](#footnote-213)

Unwarranted publication of a person’s name or unauthorized use of his photograph are the most common means of committing of this kind of invasion of privacy.[[214]](#footnote-214) Often, this use occurs in the context of commercial activity when the plaintiff’s name or likeness is used to advertise the defendant’s business or product.[[215]](#footnote-215) Unlike violations of one’s right of publicity, however, this form of invasion of privacy is not limited to the context of commercial appropriation, and it applies equally when the use generates a non-pecuniary benefit to the defendant.[[216]](#footnote-216)

In order for there to be liability, the defendant must have appropriated for his benefit some value in the plaintiff’s name or likeliness including the plaintiff’s “reputation, prestige, social or commercial standing, [or] public interest.”[[217]](#footnote-217) Thus it is not an appropriation of a plaintiff’s name if the defendant uses the same name without intention to appropriate the “values” of the plaintiff’s name.[[218]](#footnote-218) Similarly, “incidental use” of a name or likeness, as in a newspaper article, is not an appropriation unless the newspaper directly seeks to profit by appropriating the name or likeness. For this reason, it is unlikely that archival footage would contain matter that appropriates a person’s name or likeness, unless it is in the context of an advertisement or endorsement. Archivists should still be aware of any material that appears to take advantage or benefit from the value of a person’s name or likeness as described above.

## D. Public Figures and Officials

### Defamation

Some public employees are public officials for the purposes of defamation law.[[219]](#footnote-219) This designation at least applies to government employees who have, or appear to have, “substantial responsibility for or control over governmental affairs” and whose “position [is] be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy”[[220]](#footnote-220) All elected officials, for example, are public officials, as are candidates running for office.[[221]](#footnote-221)

In the context of defamation suits, “an individual may be considered a public figure [in all purposes and contexts] when he chooses such pervasive fame or notoriety” that he becomes “a household name on a national scale.”[[222]](#footnote-222) Additionally, “an individual may voluntarily inject himself or be drawn into a particular public controversy” [[223]](#footnote-223) and thereby become a public figure for the limited purpose of the dispute. A private individual does not, however, become a public figure merely because his conduct allegedly influenced a public official.[[224]](#footnote-224)

### Invasion of Privacy

For invasion of privacy claims, any person who voluntarily “places himself in the public eye” through public activities, employment or by seeking public attention may lose some part of his right to privacy, at least with respect to his public actions or activities. [[225]](#footnote-225) Likewise, individuals who are the victims or witnesses to crimes may “become news” and be involuntary public figures.[[226]](#footnote-226)

## E. Right of publicity

### 1. Introduction.

The right of publicity is a person’s right “to control the commercial use of his or her identity” or persona.[[227]](#footnote-227) As a corollary, the right of publicity prohibits other people from “using without consent [a] person’s name, likeness, or other indicia of identity for purposes of trade.”[[228]](#footnote-228) Commercial use or use of identity for purposes of trade generally refers to “use in advertising, on merchandise or in connection with services;” it does not include use “in news reporting, commentary, entertainment or works of fiction or nonfiction.”[[229]](#footnote-229) Thus, neither **consensual use** (link to consent) of a person’s identity nor use of a person’s identity in connection with legitimate **news reporting** (link to exemption from right of publicity) infringes that person’s right of publicity.

The right of publicity is a matter of state law that exists at both the common law and statutory level.[[230]](#footnote-230) For example, the elements of the common law claim in California—a state that handles many such claims—are: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”[[231]](#footnote-231) The statutory claim provides a cause of action against “[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent,” if the use causes injury to such person.[[232]](#footnote-232)

Both the common law claim and the statutory claim permit unauthorized use of a person’s identity in connection with the reporting of a matter in the public interest.[[233]](#footnote-233)

### Exemption from right of publicity: News reporting / news story

Whether presented in audiovisual footage or in print, the use of a person’s likeness or identity in connection with legitimate news reporting is highly unlikely to violate that individual’s right of publicity. “Use of personal identity in media presentations of ‘news’ is constitutionally immune from liability for infringement of the right of publicity … so long as identity bears a reasonable relation to the ‘news.’”[[234]](#footnote-234) The scope of this exemption for unauthorized use of a person’s identity therefore depends on (1) whether the subject matter of the report qualifies as news, and (2) whether the nexus between the newsworthy subject matter and the person’s identity is sufficiently strong.[[235]](#footnote-235)

In this context, ‘news’ refers to “event[s] of interest to the public,” and the public’s interest is generally presumed to be expansive.[[236]](#footnote-236) Legitimate ‘news’ clearly includes reporting on “political expression or comment on public affairs,” and arguably includes coverage of “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”[[237]](#footnote-237)

Unauthorized use of a person’s identity in connection with legitimate news reporting is nevertheless prohibited if the person’s identity is not sufficiently connected with the subject of the news report, but rather is “inserted solely to attract attention to the [news segment].”[[238]](#footnote-238) In short, “there [must] be a reasonable relationship between the plaintiff’s identity and the subject matter of the news story.”[[239]](#footnote-239) When no such reasonable relationship exists, the unauthorized use of a person’s identity may yield “liability for invasion of … ‘disclosure’ privacy or for infringement of the right of publicity” or “for false light invasion of privacy if the context falsely implies that the person had some relationship to a story on a controversial social issue.”[[240]](#footnote-240)

California’s right of publicity laws include news reporting exceptions that typify the class of news reporting exceptions described above. Specifically, California common law provides an exception to the right of publicity for “[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell.”[[241]](#footnote-241) California’s statutory right of publicity likewise permits unauthorized use of a person’s identity in news reporting.[[242]](#footnote-242)

Events and stories that were once newsworthy generally remain newsworthy indefinitely. Therefore, the re-use of a newscast for archiving purposes likely will still be exempt from right of publicity claims.

### Exemption from the right of publicity: Faces in the crowd

The news story exemption permits only the unauthorized use of identities that are reasonably related to matters of public interest, not the unauthorized use of identities of bystanders, onlookers, and passers-by (collectively, “faces in the crowd”) who happen to be identifiable in photographs, sound recordings, or video recordings of newsworthy events. However, the “faces in the crowd” exemption permits the unauthorized use of a bystanders’ identity in connection with news reporting if (1) the bystander is “in a public place,”[[243]](#footnote-243) and (2) the news report depicts the bystander only as a member of the crowd, rather than singling out or focusing on the bystander,[[244]](#footnote-244) unless the bystander does something to make himself “part of the spectacle.”[[245]](#footnote-245)

For example, news footage of a crowd walking into a college football stadium on game day does not violate the rights of publicity of people pictured in that crowd, even if those people are identifiable in the footage. By contrast, footage that singles out or focuses on a particular member of the crowd may violate that person’s right of publicity, but not if the person, for example, has painted his face in the home team’s colors and is singing the home team’s fight song at the top of his lungs.

### 4. Using archive footage to advertise or promote the archive

While commercial advertisements featuring news clips are generally not immune from right of publicity claims, “the media are permitted to use personal identity from a previous … program of public interest in a general advertisement for that medium.”[[246]](#footnote-246) The justification for this news media exemption “is that a [news medium] is entitled to advertise by showing ‘a sample of its wares.’”[[247]](#footnote-247) Furthermore, the fact that the news contained in the archive is “old news” is probably irrelevant.[[248]](#footnote-248) Therefore, using news footage that was previously broadcast to advertise the news archive almost certainly does not violate the rights of publicity of anyone in the clip.

## Frequently encountered situations related to torts and archival footage

### Old reports on criminal accusations/preliminary legal proceedings

Often, archival news reports will contain coverage of preliminary legal proceedings, such as investigations, arrests and arraignments. Archivists may wonder if the republication of these reports could give rise to causes of action for defamation or invasion of privacy, especially if the subjects of the reports have been vindicated in court, had charges dismissed, or have moved on with their lives and become upstanding members of the community. This section discusses some of the considerations that may commonly arise in such cases.

Like any report to third parties (including the public), such a report will constitute a new instance of defamation if it was defamatory at the time of its original publication or broadcast. (link to liability). If the material was substantially true at the time of its original airing, (link to truth as a defense) or if it was a fair and accurate report of an official proceeding (link to fair report privilege), the original publication will not be defamatory. It should be noted that the fair report privilege does not extend to non-official statements made by officials in the course of official proceedings; thus an arrest report is an official proceeding, but statements made by the arresting officer are not.[[249]](#footnote-249) Some jurisdictions may offer further “neutral reportage” privilege (link to neutral reportage) for accurate and neutral reports of accusations made by reputable parties, in which case statements by the arresting officer might be privileged. Finally, it is not clear whether the fair report privilege extends to official proceedings that are not open to the public.[[250]](#footnote-250)

In addition, the archival republication of such a report raises the possibility that although the report was not defamatory at the time of its original publication, it becomes so through the passage of time and changed circumstances.[[251]](#footnote-251) Courts have not ruled extensively on this issue, but they have found that “dated” publications, i.e. those that only report intermediate steps in a matter, may be literally true but still defamatory.[[252]](#footnote-252) In one instance, a defendant’s republication of a substantially true report about a pending charges against another that were subsequently dismissed was held to be ineligible for the fair report privilege because the defendant knew the charges had been dismissed and did not amend the report to reflect the changed circumstances.[[253]](#footnote-253) However, the court in this case found that the fair report privilege did not apply because the defendant issued the misleading republication with actual malice,[[254]](#footnote-254) (link to actual malice) whereas an archivist who simply republishes a report about a preliminary proceeding that was subsequently dismissed likely does not do so with knowledge of or reckless disregard for the changed circumstances. In short, if the report is clearly identified as archival with no suggestion that it contains current information, it will like retain the fair report privilege if it was entitled to this privilege at the time of the original publication.

With regard to invasion of privacy, republication of the old report likely does not give rise to any new claims. If the original publication was based on publicly available information such as an arrest report, it cannot give rise to a claim for public disclosure of private facts. Likewise, if the matter was newsworthy at the time (link to newsworthiness) or the subject was a public figure or public official (link to public figures) the passage of time and the subject’s subsequent return to obscurity likely does not give rise to an action for intrusion upon seclusion.[[255]](#footnote-255) Claims for publicity rights are also unlikely given the newsworthiness of the subject at the time of the original broadcast.

Questions that should be asked when dealing with old reports on preliminary proceedings include:

* Does the information contained in the report come from official proceedings or does it also contain unofficial statements?
* Does the report appear to accurately and neutrally summarize the proceeding?
* Does the report cast an unfair light on an individual who is the subject of a proceeding? In particular, does the report as a whole harm the individual’s reputation more or in a different way than a simple, fair and accurate report of the official proceeding would?

### Reports on individuals under investigation

Archival reports containing information about or statements from individuals who are under investigation by the government raise similar questions to those raised by old reports on preliminary official proceedings. Insofar as the reports relate to official proceedings, they are saved from liability if they meet the neutrality and accuracy requirements for the fair report privilege (link to fair report privilege). However, this privilege does not necessarily extend to bare accusations made without official action (such as the filing of a legal complaint before any official action or proceeding). Individuals who reveal defamatory information about themselves are considered to have consented to this publication unless they were forced to do so (unlikely in a news context) or cannot legally consent (as with minors). However, defamatory statements made on camera about third parties may give rise to liability for the news organization as a republisher.

With regard to invasion of privacy claims, liability will turn on similar considerations to the defamation claim. If the statements contained in the report are false or give the viewer a false impression, a cause of action for false light may be exist. However, if the statements are opinions that are not based on defamatory falsehoods, there is no cause of action. Because the statements have been made to the press regarding matters considered newsworthy by the original news organization, there is likely no cause of action for revelation of private facts or intrusion upon seclusion.

In addition to the questions discussed in the section on old reports, questions that should be asked when dealing with reports on individuals under investigation include:

* Do the statements made in the report pertain only to the person making them or do they relate to third parties?
* Does the report appear to contribute to the investigation or accusation of the individual or merely report on the existing investigation?

# CONCLUSION

[**TO BE ADDED**]

1. 17 U.S.C. § 102(a). [↑](#footnote-ref-1)
2. Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 347 (1991). [↑](#footnote-ref-2)
3. 17 U.S.C. § 102(a). [↑](#footnote-ref-3)
4. 17 U.S.C. § 102(a). [↑](#footnote-ref-4)
5. For more on the leading case law see, Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, Bleinstein v Donaldson Lithographing Co., 188 U.S. 239 (1903) [↑](#footnote-ref-5)
6. 17 U.S.C. § 101. [↑](#footnote-ref-6)
7. Community For Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989). [↑](#footnote-ref-7)
8. 17 U.S.C. § 201(a). [↑](#footnote-ref-8)
9. See US Copyright Office website: “Help: Author” available at: <http://www.copyright.gov/eco/help-author.html> (visited 03/11/2012) [↑](#footnote-ref-9)
10. 17 U.S.C. § 201(b). In addition to fulfilling one of the categories stipulated by the definition of “work made for hire” under 17 U.S.C. § 101, the parties must expressly agree via a signed written instrument that the work is a work made for hire. [↑](#footnote-ref-10)
11. 17 U.S.C. § 101. [↑](#footnote-ref-11)
12. U.S. Congress. House. Copyright law revision. 94th Cong., 2nd sess., 1976. H. Rep. 94–1476. [↑](#footnote-ref-12)
13. 17 U.S.C. §102 (b). [↑](#footnote-ref-13)
14. For more see the PSW law blog at: <http://pswlaw.ca/2008/07/secondary-infringement/> or this post entitled “Secondary Liability for Copyright Infringement in the U.S.: Anticipating the Aprés-Grokster” on the Columbia Law School website by Professor Jane Ginsburg at: <http://www.law.columbia.edu/law_school/communications/reports/winter06/facforum1>. [↑](#footnote-ref-14)
15. 17 U.S.C. §108(c). [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. One commentator has argued that §108 should thus be reinterpreted in light of the growing need to digitize library materials. Michelle M. Wu, Law Library Journal, Vol. 103, p. 527-551, 2011, Georgetown Public Law Research Paper No. 11-47 [↑](#footnote-ref-17)
18. [www.aionline.edu/facultyform/documents/copyright\_guidelines.doc](http://www.aionline.edu/facultyform/documents/copyright_guidelines.doc) [↑](#footnote-ref-18)
19. 17 U.S.C. § 108(i), “…except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams or other similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).” [↑](#footnote-ref-19)
20. 17 U.S.C. § 512(k). [↑](#footnote-ref-20)
21. 17 U.S.C. §102. [↑](#footnote-ref-21)
22. A pantomime is any of various dramatic or dancing performances in which a story is told by expressive bodily or facial movements of the performers. [↑](#footnote-ref-22)
23. Sound recordings are covered by federal copyright law only if first fixed on or after February 15, 1972. [↑](#footnote-ref-23)
24. Architectural works are covered by federal copyright law only if created on or after December 1, 1990. Not covered are any architectural works that, on December 1, 1990, were unconstructed and embodied in unpublished plans or drawings, if construction was not completed by December 31, 2002. [↑](#footnote-ref-24)
25. 17 U.S.C. § 105. [↑](#footnote-ref-25)
26. 17 U.S.C. § 101. [↑](#footnote-ref-26)
27. See more about the issues involving copyrighted pictorial, graphical and sculptural works in news footage at this link: Link section on fair use. [↑](#footnote-ref-27)
28. Cf 17 U.S.C. §106 (6). [↑](#footnote-ref-28)
29. 17 U.S.C. §101. [↑](#footnote-ref-29)
30. 17 U.S.C. § 106. [↑](#footnote-ref-30)
31. The exclusive rights of an owner of a copyright in sound recording are limited to only the rights specified by clauses (1), (2), (3) and (6) of 17 U.S.C. §106 – i.e., reproduction, distribution, preparation of derivative works and performance by digital audio transmission – and does not include any right of public performance or display under § 106(4)-(5). [↑](#footnote-ref-31)
32. <http://copyright.cornell.edu/resources/publicdomain.cfm> [↑](#footnote-ref-32)
33. <http://www.copyright.gov/records/> [↑](#footnote-ref-33)
34. <http://copyright.cornell.edu/resources/publicdomain.cfm> [↑](#footnote-ref-34)
35. <http://www.copyright.gov/help/faq/faq-duration.html> [↑](#footnote-ref-35)
36. <http://www.copyright.gov/circs/circ15a.pdf> [↑](#footnote-ref-36)
37. Learn more: [Fair Use of Copyrighted Works](http://fairusenetwork.com/reference/c-fairuse.php) [↑](#footnote-ref-37)
38. 17 U.S.C. § 107(1) – (4). [↑](#footnote-ref-38)
39. Campbell v. Acuff-Rose 510 U.S. 569, 577-78 (1994) (finding the Court of Appeals erred in applying the presumption that the commercial nature of the parody rendered it unfair, as no such evidentiary presumption was available to address either the character and purpose of the use or the market harm.). [↑](#footnote-ref-39)
40. Available at: <http://www.centerforsocialmedia.org/sites/default/files/online_best_practices_in_fair_use.pdf> (visited on 03/12/2012 at 01.10 am) [↑](#footnote-ref-40)
41. 17 U.S.C. § 201(d). [↑](#footnote-ref-41)
42. 17 U.S.C. § 202. [↑](#footnote-ref-42)
43. **ADD SECTIONS ON: (1) CREATIVE COMMONS AND OTHER OPEN LICENSES; AND (2) INTERPLAY BETWEEN COPYRIGHTS AND WEBSITE TERMS OF USE?** [↑](#footnote-ref-43)
44. McCarthy’s on Trademark and Unfair Competition § 3:4 [↑](#footnote-ref-44)
45. Restatement (Third) of Unfair Competition § 9 (1995). [↑](#footnote-ref-45)
46. McCarthy’s on Trademark and Unfair Competition § 3:2 [↑](#footnote-ref-46)
47. McCarthy’s on Trademark and Unfair Competition § 3:1 [↑](#footnote-ref-47)
48. McCarthy’s on Trademark and Unfair Competition § 3:3 [↑](#footnote-ref-48)
49. 15 U.S.C. §§ 1114, 1125(a); Lanham Trade-Mark Act, §§ 32, 43(a); Karl Storz Endoscopy Am., Inc. v. Surgical Technologies, Inc., 285 F.3d 848 (9th Cir. 2002). [↑](#footnote-ref-49)
50. Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492, 495 (2d Cir. 1961). [↑](#footnote-ref-50)
51. http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm#8 [↑](#footnote-ref-51)
52. 15 U.S.C. § 1125(c)(2)(B) [↑](#footnote-ref-52)
53. 15 U.S.C. § 1125(c)(2)(C) [↑](#footnote-ref-53)
54. 15 U.S.C. § 1125(c)(3)(B) [↑](#footnote-ref-54)
55. [15 U.S.C. § 1125(c)(3)(A)](http://www.citmedialaw.org/sites/citmedialaw.org/files/15USC1125.pdf%22%20%5Ct%20%22_blank%22%20%5Co%20%22http%3A//www.citmedialaw.org/sites/citmedialaw.org/files/15USC1125.pdf) [↑](#footnote-ref-55)
56. Zatarain's, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786 (5th Cir. 1983) [↑](#footnote-ref-56)
57. McCarthy’s on Trademark and Unfair Competition § 31:156.50 [↑](#footnote-ref-57)
58. Restatement (Second) of Torts § 559 (1977). [↑](#footnote-ref-58)
59. David A. Elder, Defamation: A Lawyer’s Guide, § 1:7 (2010). [↑](#footnote-ref-59)
60. See [Peagler v. Phoenix Newspapers, Inc.](http://scholar.google.com/scholar_case?case=2988766416489645082), 114 Ariz. 309, 560 P.2d 1216 (1977) (plaintiff not referred to by name), Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922) (defamatory communication not intended but reasonably understood to refer to the plaintiff). [↑](#footnote-ref-60)
61. [Peck v. Tribune Co.](http://scholar.google.com/scholar_case?case=3834624895324083559), 214 U.S. 185, 29 S.Ct. 554, 53 L.Ed. 960 (1909). [↑](#footnote-ref-61)
62. Restatement (Second) of Torts § 559 cmt. e (1977). [↑](#footnote-ref-62)
63. Restatement (Second) of Torts § 558 (1977). [↑](#footnote-ref-63)
64. Restatement (Second) of Torts § 577A cmt. a (1977). [↑](#footnote-ref-64)
65. Restatement (Second) of Torts § 577A cmt. d (1977). [↑](#footnote-ref-65)
66. Restatement (Second) of Torts § 580A (1977). [↑](#footnote-ref-66)
67. See [New York Times v. Sullivan](http://scholar.google.com/scholar_case?case=10183527771703896207), 376 U.S. 254 (1964). [↑](#footnote-ref-67)
68. Am. Jur. 2d Libel and Slander § 98; see also [Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.](http://scholar.google.com/scholar_case?case=14343170427684392260), 472 U.S. 749 (1985). [↑](#footnote-ref-68)
69. Restatement (Second) of Torts § 580B (1977). [↑](#footnote-ref-69)
70. Am. Jur. 2d Libel and Slander § 101. [↑](#footnote-ref-70)
71. Restatement (Second) of Torts § 577A cmt. a (1977). [↑](#footnote-ref-71)
72. Restatement (Second) of Torts § 578 (1977). [↑](#footnote-ref-72)
73. Restatement (Second) of Torts § 581 (1977). [↑](#footnote-ref-73)
74. 47 U.S.C. § 230(c)(1) (2010). [↑](#footnote-ref-74)
75. 47 U.S.C. § 230(f)(3) (2010). [↑](#footnote-ref-75)
76. [Batzel v. Smith](http://scholar.google.com/scholar_case?case=16376502179767104974), 333 F.3d 1018, 1033 (9th Cir. 2003) (“The structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided for use on the Internet or another interactive computer service.”) (emphasis original); [↑](#footnote-ref-76)
77. [Batzel v. Smith](http://scholar.google.com/scholar_case?case=16376502179767104974), 333 F.3d 1018, 1033 (9th Cir. 2003) (“If, for example, an individual who happens to operate a website receives a defamatory “snail mail” letter from an old friend, the website operator cannot be said to have been “provided” the information in his capacity as a website service.”) [↑](#footnote-ref-77)
78. See Online Activities Covered by Section 230, Citizen Media Law Project, http://www.citmedialaw.org/legal-guide/online-activities-covered-section-230 (last updated Nov. 10, 2011) [↑](#footnote-ref-78)
79. [Blumenthal v. Drudge](http://scholar.google.com/scholar_case?case=1958442027646479582), 992 F. Supp. 44 (D.D.C. 1998). [↑](#footnote-ref-79)
80. [Zeran v. America Online, Inc.](http://scholar.google.com/scholar_case?case=3112726467460676187), 129 F.3d 327 (4th Cir. 1997); see also [Barnes v. Yahoo!](http://scholar.google.com/scholar_case?case=14909212640108844662), 570 F.3d 1096 (9th Cir. 2009). [↑](#footnote-ref-80)
81. See Online Activities Not Covered by Section 230, Citizen Media Law Project, http://www.citmedialaw.org/legal-guide/online-activities-not-covered-section-230 (last updated Nov. 10, 2011) [↑](#footnote-ref-81)
82. See [Fair Housing of Council of San Fernando Valley v. Roommates.com](http://scholar.google.com/scholar_case?case=12982314326945878032), 521 F.3d 1157 (9th Cir. 2008) (website requiring users to select dropdown preferences for roommate characteristics violated Fair Housing Act). [↑](#footnote-ref-82)
83. [Barnes v. Yahoo!](http://scholar.google.com/scholar_case?case=14909212640108844662), Inc., 570 F.3d 1096 (9th Cir. 2009). [↑](#footnote-ref-83)
84. See [F.T.C. v. Accusearch, Inc.](http://scholar.google.com/scholar_case?case=13009478837329750347), 570 F.3d. 1187, 1197 (10th Cir. 2009) (finding that business that placed address information online engaged in “development” and was therefore an information content provider); [Fair Housing of Council of San Fernando Valley v. Roommates.com](http://scholar.google.com/scholar_case?case=12982314326945878032), 521 F.3d 1157, 1168 (9th Cir. 2008) (finding a website to be a information content provider “if it contributes materially to the alleged illegality of the conduct”) [↑](#footnote-ref-84)
85. Restatement (Second) of Torts § 575 cmt. b (1977). [↑](#footnote-ref-85)
86. Restatement (Second) of Torts § 575 cmt. b (1977). [↑](#footnote-ref-86)
87. Restatement (Second) of Torts § 575 cmt. c (1977). [↑](#footnote-ref-87)
88. Am. Jur. 2d Libel and Slander § 137. [↑](#footnote-ref-88)
89. See [Sharratt v. Housing Innovations, Inc.](http://scholar.google.com/scholar_case?case=6010313290058963341), 365 Mass. 141 (1974). [↑](#footnote-ref-89)
90. Restatement (Second) of Torts § 568 (1977). [↑](#footnote-ref-90)
91. Restatement (Second) of Torts § 568 (1977). [↑](#footnote-ref-91)
92. Restatement (Second) of Torts § 568 (1977). [↑](#footnote-ref-92)
93. Restatement (Second) of Torts § 568A (1977). [↑](#footnote-ref-93)
94. See [Varian Medical Systems, Inc. v. Delfino](http://scholar.google.com/scholar_case?case=10127572324503354781), 113 Cal. App. 4th 273, 6 Cal. Rptr. 3d 325, 20 I.E.R. Cas. (BNA) 977 (6th Dist. 2003), rev’d on other grounds, [106 P.3d 958 (Cal. 2005)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW11.04&serialnum=2006302133&fn=_top&sv=Split&tc=-1&pbc=ABA6AB27&ordoc=0305125702&findtype=Y&db=0004645&utid=1&vr=2.0&rp=%2ffind%2fdefault.wl&mt=LawSchoolPractitioner), see also [Too Much Media, LLC v. Hale](http://scholar.google.com/scholar_case?case=17853680604736845768), 38 Media L. Rep. (BNA) 1673, 2010 WL 1609274, 18-19 (N.J. Super. Ct. App. Div. 2010). [↑](#footnote-ref-94)
95. Restatement (Second) of Torts § 652E, cmt. b (1977). [↑](#footnote-ref-95)
96. Restatement (Second) of Torts § 652E, cmt. c (1977). [↑](#footnote-ref-96)
97. [Wal-Mart Stores, Inc. v. Lee](http://scholar.google.com/scholar_case?case=7385015798851919090), 348 Ark. 707, 74 S.W.3d 634 (2002); Restatement of Torts (Second) § 652E (1977). [↑](#footnote-ref-97)
98. 57 A.L.R. 4th 22 § 3[a] (citing [Thompson v City of Arlington](http://scholar.google.com/scholar_case?case=5356992586069876815) (1993, ND Tex) 838 F Supp 1137, 4 ADD 296, 2 AD Cas 1756 (applying US and Tex law)). [↑](#footnote-ref-98)
99. 57 A.L.R. 4th 22 § 3[b]. [↑](#footnote-ref-99)
100. Am. Jur. 2d Privacy § 126. [↑](#footnote-ref-100)
101. 57 A.L.R. 4th 22 (citing [Time, Inc. v. Hill](http://scholar.google.com/scholar_case?case=13178370409068522665), 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967)). [↑](#footnote-ref-101)
102. Am. Jur. 2d Privacy § 134 (citing [Alves v. Hometown Newspapers, Inc.](http://scholar.google.com/scholar_case?case=13593630677362905790), 857 A.2d 743, 192 Ed. Law Rep. 215 (R.I. 2004)) j88. [↑](#footnote-ref-102)
103. See e.g. Swerdlick v. Koch, 721 A. 2d 849, 852 (R.I. 1998); Restatement (Second) of Torts § 652E illus. 6 (1977). [↑](#footnote-ref-103)
104. Restatement (Second) of Torts § 652E illus. 7 (1977). [↑](#footnote-ref-104)
105. Am. Jur. 2d Privacy § 135. [↑](#footnote-ref-105)
106. Am. Jur. 2d Privacy § 135. [↑](#footnote-ref-106)
107. [Veilleux v. National Broadcasting Co.](http://scholar.google.com/scholar_case?case=16314580346067045234), 206 F.3d 92 (1st Cir. 2000). [↑](#footnote-ref-107)
108. See [ELM Medical Lab, Inc. v. RKO Gen., Inc.](http://scholar.google.com/scholar_case?case=3570590342936393436), 532 N.E.2d 675, 681 (Mass. 1989); [Jones v. Taibbi](http://scholar.google.com/scholar_case?case=7926693817177094173), 512 N.E.2d 260, 270 (Mass. 1987); [Brown v. Hearst Corp.](http://scholar.google.com/scholar_case?case=6188812319574731209), 54 F.3d 21, 27 (1st Cir. 1995). [↑](#footnote-ref-108)
109. 77 C.J.S. Right of Privacy and Publicity § 28. [↑](#footnote-ref-109)
110. [Godbehere v. Phoenix Newspapers, Inc.](http://scholar.google.com/scholar_case?case=9309345021536831680), 162 Ariz. 335, 783 P.2d 781 (1989). [↑](#footnote-ref-110)
111. Restatement (Second) of Torts § 652E (1977). [↑](#footnote-ref-111)
112. Restatement (Second) of Torts § 652B (1977). [↑](#footnote-ref-112)
113. Restatement (Second) of Torts § 652E cmt. c (1977). [↑](#footnote-ref-113)
114. Restatement (Second) of Torts § 559 cmt. e (1977). [↑](#footnote-ref-114)
115. Restatement (Second) of Torts § 559 cmt. e (1977). [↑](#footnote-ref-115)
116. [Dodrill v. Arkansas Democrat Co.](http://scholar.google.com/scholar_case?case=1791306024782401521), 265 Ark. 628, 590 S.W.2d 840 (1979); [Brink v. Griffith](http://scholar.google.com/scholar_case?case=10438461688550661832), 65 Wash. 2d 253, 396 P.2d 793 (1964). [↑](#footnote-ref-116)
117. Restatement (Second) of Torts § 652E cmt. b (1977). [↑](#footnote-ref-117)
118. [Dominguez v. Davidson](http://scholar.google.com/scholar_case?case=17748325730807403135), 266 Kan. 926, 938 P.2d 112 (1999). [↑](#footnote-ref-118)
119. Am. Jur. 2d, Privacy § 128. [↑](#footnote-ref-119)
120. Am. Jur. 2d, Libel and Slander § 27, Restatement (Second) of Torts § 652E. [↑](#footnote-ref-120)
121. Restatement (Second) of Torts § 581A, cmts. a, h (1977). [↑](#footnote-ref-121)
122. See Substantial Truth, Citizen Media Law Project, http://www.citmedialaw.org/legal-guide/substantial-truth (last updated Jul. 22, 2008); see also Restatement (Second) of Torts § 581A cmt. f (1977). [↑](#footnote-ref-122)
123. See [Reilly v. Gillen,](http://scholar.google.com/scholar_case?case=9177148859315892464) A.2d 311, 314 (N.J. Super. 1980) (report on court proceeding that was accurate at time of publication not entitled to fair report privilege under changed circumstances 21 years later). [↑](#footnote-ref-123)
124. Am. Jur. 2d Privacy § 132. [↑](#footnote-ref-124)
125. Am. Jur. 2d Privacy § 132 (citing [Memphis Pub. Co. v. Nichols](http://scholar.google.com/scholar_case?case=6733192802247859812), 569 S.W.2d 412 (Tenn. 1978)). [↑](#footnote-ref-125)
126. [Goodrich v. Waterbury Republican-American, Inc](http://scholar.google.com/scholar_case?case=16998495075651376956)., 188 Conn. 107, 448 A.2d 1317 (1982). [↑](#footnote-ref-126)
127. [Mass. Gen. Laws ch. 231 § 92](http://www.mass.gov/legis/laws/mgl/231-92.htm) (201). [↑](#footnote-ref-127)
128. See [Shaari v. Harvard Student Agencies, Inc](http://scholar.google.com/scholar_case?case=15286113611963684459)., 427 Mass. 129 (1998); Massachusetts Defamation Law, Citizen Media Law Project, http://www.citmedialaw.org/legal-guide/massachusetts-defamation-law (last updated Aug. 13, 2008). Cf. [Noonan v. Staples, Inc.,](http://scholar.google.com/scholar_case?case=7352477566130127331) 556 F.3d 20 (1st Cir. 2009) (declining to consider whether M.G.L. c. 231 § 92 is unconstitutional under all circumstances). [↑](#footnote-ref-128)
129. Restatement (Second) of Torts § 566 (1977). [↑](#footnote-ref-129)
130. Restatement (Second) of Torts § 566 (1977). [↑](#footnote-ref-130)
131. Restatement (Second) of Torts § 566 (1977). [↑](#footnote-ref-131)
132. Restatement (Second) of Torts § 566 (1977). [↑](#footnote-ref-132)
133. Am. Jur. 2d Privacy § 136. [↑](#footnote-ref-133)
134. Restatement (Second) of Torts § 583, 652F (1977). [↑](#footnote-ref-134)
135. Restatement (Second) of Torts § 583, cmt. b, §584 (1977). [↑](#footnote-ref-135)
136. Restatement (Second) of Torts § 892 (1977). [↑](#footnote-ref-136)
137. Restatement (Second) of Torts § 892 (1977). [↑](#footnote-ref-137)
138. Restatement (Second) of Torts § 583 cmt. d (1977). [↑](#footnote-ref-138)
139. Restatement (Second) of Torts § 583 illus. 1 (1977). [↑](#footnote-ref-139)
140. Restatement (Second) of Torts § 583 cmt. d (1977). [↑](#footnote-ref-140)
141. Restatement (Second) of Torts § 585-91 (1977). [↑](#footnote-ref-141)
142. Restatement (Second) of Torts § 592A (1977). [↑](#footnote-ref-142)
143. Restatement (Second) of Torts § 592A (1977). [↑](#footnote-ref-143)
144. See Restatement (Second) of Torts §§ 594–598A (1977). [↑](#footnote-ref-144)
145. Restatement (Second) of Torts § 611 (1977). [↑](#footnote-ref-145)
146. Restatement (Second) of Torts § 611 cmts. f, h (1977). [↑](#footnote-ref-146)
147. [Reilly v. Gillen,](http://scholar.google.com/scholar_case?case=9177148859315892464) 423 A.2d 311, 314 (N.J. Super. 1980). [↑](#footnote-ref-147)
148. But see Diane Johnson, Note, When Truth and Accuracy Diverge: The Fair Report of a Dated Proceeding, 34 Stan L. Rev. 1041, 1054 (1980) (arguing that Reilly implies that even a dated report with no malice would subject the publisher to liability) [↑](#footnote-ref-148)
149. See Neutral Report Privilege, Citizen Media Law Project, http://www.citmedialaw.org/legal-guide/neutral-report-privilege (last updated Jul. 22, 2008). [↑](#footnote-ref-149)
150. [Edwards v. National Audubon Soc](http://scholar.google.com/scholar_case?case=515638952298472646)., 556 F.2d 113, 120 (2d Cir. 1977). [↑](#footnote-ref-150)
151. See [Cianci v. New Times Pub. Co](http://scholar.google.com/scholar_case?case=15742491952572175828)., 639 F.2d 54, 68 (2d Cir. 1980). [↑](#footnote-ref-151)
152. Wire Service Defense, Citizen Media Law Project, http://www.citmedialaw.org/legal-guide/wire-service-defense (last updated Jul. 22, 2008). [↑](#footnote-ref-152)
153. See e.g. [Appleby v. Daily Hampshire Gazette](http://scholar.google.com/scholar_case?case=3169257758656505211), 478 N.E.2d 721, 725 (1985) (listing jurisdictions that recognize wire defense as a matter of law). [↑](#footnote-ref-153)
154. David A. Elder, Defamation: A Lawyer’s Guide, § 6:8 (2010). [↑](#footnote-ref-154)
155. [Appleby v. Daily Hampshire Gazette](http://scholar.google.com/scholar_case?case=3169257758656505211), 478 N.E.2d 721, 725 (1985) (UPI and AP) [↑](#footnote-ref-155)
156. ##  See [Winn v. United Press Intern.](http://scholar.google.com/scholar_case?case=6234515711820150468), 938 F. Supp. 39, 44-45 (D.D.C. 1996), aff'd, 1997 WL 404959 (D.C. Cir. 1997).

 [↑](#footnote-ref-156)
157. See [Washington Post Co. v. Keogh](http://scholar.google.com/scholar_case?case=12777289675736657601), 365 F.2d 96520 (D.C. Cir. 1966). [↑](#footnote-ref-157)
158. Restatement (Second) of Torts § 594 (1977). [↑](#footnote-ref-158)
159. Am. Jur. 2d Privacy § 39. [↑](#footnote-ref-159)
160. Restatement (Second) of Torts § 652B cmt. b (1977). [↑](#footnote-ref-160)
161. Am. Jur. 2d Privacy § 40. [↑](#footnote-ref-161)
162. 77 C.J.S. Right of Privacy and Publicity § 24. [↑](#footnote-ref-162)
163. 77 C.J.S. Right of Privacy and Publicity § 24. [↑](#footnote-ref-163)
164. 77 C.J.S. Right of Privacy and Publicity § 24; Restatement (Second) of Torts § 652B cmt. c (1977). [↑](#footnote-ref-164)
165. Restatement (Second) of Torts § 652B cmt. c (1977). [↑](#footnote-ref-165)
166. Restatement (Second) of Torts § 652B cmt. c (1977). [↑](#footnote-ref-166)
167. Am. Jur. 2d Privacy § 41. [↑](#footnote-ref-167)
168. Am. Jur. 2d Privacy § 50. [↑](#footnote-ref-168)
169. [Mass. Gen. Laws ch. 214, § 1B](http://www.mass.gov/legis/laws/mgl/214-1b.htm%22%20%5Ct%20%22_blank) (2011). [↑](#footnote-ref-169)
170. See Schlesinger v. Merrill Lynch et al., 409 Mass. 514, 519 (1991) (asserting that §1B is broad enough that courts “can develop the law there under on a case-by-case basis, by balancing relevant factors ... and by considering prevailing societal values.”) [↑](#footnote-ref-170)
171. 1 J. Thomas McCarthy, Rights of Privacy and Publicity §§ 1:21, 5:70 (2d ed. 2011). [↑](#footnote-ref-171)
172. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:68 (2d ed. 2011). [↑](#footnote-ref-172)
173. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:79 (2d ed. 2011) (“[t]he general rule is that if the facts were already known to many people, then defendant's disclosure cannot be of ‘private’ facts,” and “disclosure of facts that are available in the public record cannot be a basis of a claim for invasion of privacy by the disclosure of private facts”). [↑](#footnote-ref-173)
174. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:72 (2d ed. 2011). [↑](#footnote-ref-174)
175. 1 J. Thomas McCarthy, Rights of Privacy and Publicity §§ 1:21, 5:68, 5:77 (2d ed. 2011). [↑](#footnote-ref-175)
176. See [Shulman v. Group W. Productions, Inc.](http://scholar.google.com/scholar_case?case=699835474797912872), 18 Cal. 4th 200, 214 (1998). [↑](#footnote-ref-176)
177. [Shulman v. Group W. Productions, Inc](http://scholar.google.com/scholar_case?case=699835474797912872)., 18 Cal. 4th 200, 214 (1998). [↑](#footnote-ref-177)
178. [Shulman v. Group W. Productions, Inc.,](http://scholar.google.com/scholar_case?case=699835474797912872) 18 Cal. 4th 200, 215 (1998). [↑](#footnote-ref-178)
179. See [Gates v. Discovery Communications, Inc](http://scholar.google.com/scholar_case?case=13774747403146355756)., 34 Cal. 4th 679, 687-89 (2004) (‘private facts’ do not include facts contained in publicly available government records or facts disseminated at government proceedings open to the public); [M.G. v. Time Warner, Inc](http://scholar.google.com/scholar_case?case=14146026746349435838)., 89 Cal. App. 4th 623, 632-33 (2001) (observing that facts can be private without being secret). [↑](#footnote-ref-179)
180. [Gates v. Discovery Communications, Inc.,](http://scholar.google.com/scholar_case?case=13774747403146355756) 34 Cal. 4th 679, 693-696 & n.8. [↑](#footnote-ref-180)
181. [Mass. Gen. Laws ch. 214, § 1B](http://www.mass.gov/legis/laws/mgl/214-1b.htm%22%20%5Ct%20%22_blank) (2011). [↑](#footnote-ref-181)
182. Publication of Private Facts in Massachusetts, Citizen Media Law Project, <http://www.citmedialaw.org/legal-guide/publication-private-facts-massachusetts> (last updated Jul. 22, 2008). [↑](#footnote-ref-182)
183. Restatement (Second) of Torts § 652D cmt. d (1977). [↑](#footnote-ref-183)
184. Restatement (Second) of Torts § 652D cmt. d (1977). [↑](#footnote-ref-184)
185. Am. Jur. 2d, Privacy § 189 [↑](#footnote-ref-185)
186. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:77 (2d ed. 2011) (citing [Shulman v. Group W Productions, Inc.](http://scholar.google.com/scholar_case?case=699835474797912872), 18 Cal. 4th 200, 224-25 (1998), as modified on denial of reh'g, (July 29, 1998)) (internal quotation marks omitted). [↑](#footnote-ref-186)
187. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:77 (2d ed. 2011) (citing [Shulman v. Group W Productions, Inc.](http://scholar.google.com/scholar_case?case=699835474797912872), 18 Cal. 4th 200, 229 (1998), as modified on denial of reh'g, (July 29, 1998)). [↑](#footnote-ref-187)
188. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:77 (2d ed. 2011) (citing [Diaz v. Oakland Tribune, Inc.](http://scholar.google.com/scholar_case?case=1805360241760750188), 139 Cal. App. 3d 118, 132 (1st Dist. 1983) and [M.G. v. Time Warner, Inc](http://scholar.google.com/scholar_case?case=14146026746349435838)., 89 Cal. App. 4th 623, 631 (4th Dist. 2001). [↑](#footnote-ref-188)
189. Restatement (Second) of Torts § 652D cmt. k (1977). [↑](#footnote-ref-189)
190. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:79 (2d ed. 2011) (“[t]he general rule is that if the facts were already known to many people, then defendant's disclosure cannot be of ‘private’ facts,” and “disclosure of facts that are available in the public record cannot be a basis of a claim for invasion of privacy by the disclosure of private facts”). [↑](#footnote-ref-190)
191. [Cox Broadcasting Corp. v. Cohn](http://scholar.google.com/scholar_case?case=7693360934058091897), 420 U.S. 469, 495 (1975). [↑](#footnote-ref-191)
192. [Oklahoma Publishing Co. v. Oklahoma County District Court](http://scholar.google.com/scholar_case?case=7719461183308362244), 430 U.S. 308 (1977). [↑](#footnote-ref-192)
193. [Cox Broadcasting Corp. v. Cohn](http://scholar.google.com/scholar_case?case=7693360934058091897), 420 U.S. 469, 491-92 (1975). [↑](#footnote-ref-193)
194. [Cox Broadcasting Corp. v. Cohn](http://scholar.google.com/scholar_case?case=7693360934058091897), 420 U.S. 469, 492 (1975). [↑](#footnote-ref-194)
195. [Cox Broadcasting Corp. v. Cohn](http://scholar.google.com/scholar_case?case=7693360934058091897), 420 U.S. 469, 492 (1975). [↑](#footnote-ref-195)
196. Even if the public record did include all publicly accessible government documents and proceedings, the Court’s reasoning arguably implies that information on the public record is a subset of the information that is the subject of the public’s interest. That is, the Court’s reasoning suggests that public disclosure of facts on the public record is permitted because facts on the public record are a species of facts subject to public interest, and **newsworthy** facts are exempt from the right against public disclosure of private facts. [↑](#footnote-ref-196)
197. [See The Florida Star v. B.J.F.](http://scholar.google.com/scholar_case?case=11083261902857685106), 491 U.S. 524 (1989). [↑](#footnote-ref-197)
198. [The Florida Star v. B.J.F.](http://scholar.google.com/scholar_case?case=11083261902857685106), 491 U.S. 524, 540 (1989). [↑](#footnote-ref-198)
199. See [Ostergren v. Cuccinelli](http://scholar.google.com/scholar_case?case=9162225790388158758), 615 F.3d 263, 266, 285-87 (CA4 2010). [↑](#footnote-ref-199)
200. [The Florida Star v. B.J.F](http://scholar.google.com/scholar_case?case=11083261902857685106)., 491 U.S. 524, 527 (1989). [↑](#footnote-ref-200)
201. Restatement (Second) of Torts § 652D, comment b; 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:82 (2d ed. 2011) (“[t]he general rule is that media republication of matter already made public by another is not the disclosure of ‘private’ facts”); see also [Machleder v. Diaz](http://scholar.google.com/scholar_case?case=15663556305306286980), 801 F.2d 46, 59 (CA2 1986) (finding no public disclosure of private facts where reporter ‘ambush interviewed’ plaintiff “‘in a semi-public area while plaintiff knew the cameras were rolling,’” and observing that “‘[d]efendant is subject to no liability for giving further publicity to that which plaintiff leaves open to the public eye’”); [Faloona by Fredrickson v. Hustler Magazine, Inc](http://scholar.google.com/scholar_case?case=1854748454172482731)., 799 F.2d 1000, 1006 (CA5 1986) (finding no public disclosure of private facts where Hustler published a nude photo of two young children in conjunction with a review of the human sexuality textbook The Sex Atlas, in which the photo was originally published, and observing that “the tortious disclosure of private facts applies only to private facts,” not to facts “widely published elsewhere”). [↑](#footnote-ref-201)
202. [U.S. Dep't of Def. v. Fed. Labor Relations Auth.](http://scholar.google.com/scholar_case?case=1664260529397036909), 510 U.S. 487, 500 (1994). [↑](#footnote-ref-202)
203. [U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989)](http://scholar.google.com/scholar_case?case=16773548679263905884). [↑](#footnote-ref-203)
204. See [Gates v. Discovery Communications, Inc.](http://scholar.google.com/scholar_case?case=13774747403146355756), 34 Cal. 4th 679, 687-89 (2004); [Sipple v. Chronicle Publishing Co., 154 Cal. App. 3d 1040, 1047 (1st Dist. 1984)](http://scholar.google.com/scholar_case?case=10690960626157422587#http://scholar.google.com/scholar_case?case=16773548679263905884). [↑](#footnote-ref-204)
205. See [Gates v. Discovery Communications, Inc.](http://scholar.google.com/scholar_case?case=13774747403146355756), 34 Cal. 4th 679, 687-89 (2004) (‘private facts’ do not include facts contained in publicly available government records or facts disseminated at government proceedings open to the public). [↑](#footnote-ref-205)
206. [Sipple v. Chronicle Publishing Co., 154 Cal. App. 3d 1040, 1045 (1st Dist. 1984)](http://scholar.google.com/scholar_case?case=10690960626157422587) (citing Kapellas v. Kofman, 1 Cal. 3d 20, 35 (1969)). [↑](#footnote-ref-206)
207. [Sipple v. Chronicle Publishing Co., 154 Cal. App. 3d 1040, 1047 (1st Dist. 1984)](http://scholar.google.com/scholar_case?case=10690960626157422587). [↑](#footnote-ref-207)
208. [Sipple v. Chronicle Publishing Co.](http://scholar.google.com/scholar_case?case=10690960626157422587), 154 Cal. App. 3d 1040, 1047 (1st Dist. 1984). [↑](#footnote-ref-208)
209. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 6:16 (2d ed. 2011) (characterizing the holding in Sipple) [↑](#footnote-ref-209)
210. [M.G. v. Time Warner, Inc.](http://scholar.google.com/scholar_case?case=14146026746349435838), 89 Cal. App. 4th 623, 632-33 (2001) (“the claim of a right of privacy is not so much one of total secrecy as it is of the right to define one’s circle of intimacy”) (internal quotation marks omitted). [↑](#footnote-ref-210)
211. [M.G. v. Time Warner, Inc](http://scholar.google.com/scholar_case?case=14146026746349435838)., 89 Cal. App. 4th 623, 632-33 (2001). [↑](#footnote-ref-211)
212. Restatement (Second) of Torts § 652C cmt. a (1977). [↑](#footnote-ref-212)
213. Restatement (Second) of Torts § 652C (1977). [↑](#footnote-ref-213)
214. Am. Jur. 2d Privacy § 68. [↑](#footnote-ref-214)
215. Am. Jur. 2d Privacy § 70. [↑](#footnote-ref-215)
216. Am. Jur. 2d Privacy § 70. [↑](#footnote-ref-216)
217. Restatement (Second) of Torts § 652C cmt. c (1977). [↑](#footnote-ref-217)
218. Am. Jur. 2d Privacy § 69. [↑](#footnote-ref-218)
219. [New York Times Co. v. Sullivan](http://scholar.google.com/scholar_case?case=10183527771703896207), 376 U.S. 254 (1964). [↑](#footnote-ref-219)
220. [Rosenblatt v. Baer](http://scholar.google.com/scholar_case?case=2913195248672040112), 383 U.S. 75, 86–7 (1966). [↑](#footnote-ref-220)
221. Am. Jur. 2d Libel and Slander § 46. [↑](#footnote-ref-221)
222. C.J.S. Const. Law § 877. [↑](#footnote-ref-222)
223. C.J.S. Const. Law § 877. [↑](#footnote-ref-223)
224. Am. Jur. 2d Libel and Slander § 46. [↑](#footnote-ref-224)
225. Am. Jur. 2d Privacy § 197. [↑](#footnote-ref-225)
226. Am. Jur. 2d Privacy § 197. [↑](#footnote-ref-226)
227. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 1:3 (2d ed. 2011). [↑](#footnote-ref-227)
228. Restatement (Third) of Unfair Competition § 46 (1995). [↑](#footnote-ref-228)
229. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 1:35 (2d ed. 2011) (citing Restatement (Third) Unfair Competition § 47). [↑](#footnote-ref-229)
230. See, e.g., [Cal. Civ. Code § 3344](http://codes.lp.findlaw.com/cacode/CIV/5/d4/1/2/2/3/s3344); [Montana v. San Jose Mercury News](http://scholar.google.com/scholar_case?case=1846049331826411737), 34 Cal. App. 4th 790 (1995). [↑](#footnote-ref-230)
231. [Montana v. San Jose Mercury News](http://scholar.google.com/scholar_case?case=1846049331826411737), 34 Cal. App. 4th 790, 793 (1995) (internal quotation marks and citations omitted). [↑](#footnote-ref-231)
232. [Cal. Civ. Code § 3344(a)](http://codes.lp.findlaw.com/cacode/CIV/5/d4/1/2/2/3/s3344). [↑](#footnote-ref-232)
233. [Montana v. San Jose Mercury News](http://scholar.google.com/scholar_case?case=1846049331826411737), 34 Cal. App. 4th 790, 794 (1995). [↑](#footnote-ref-233)
234. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 8:46 (2d ed. 2011). [↑](#footnote-ref-234)
235. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 8:47 (2d ed. 2011). [↑](#footnote-ref-235)
236. 1 J. Thomas McCarthy, Rights of Privacy and Publicity §§ 4:65, 8:46 (2d ed. 2011). [↑](#footnote-ref-236)
237. [Time, Inc. v. Hill](http://scholar.google.com/scholar_case?case=13178370409068522665), 385 U.S. 374, 388 (1967) (dictum) [↑](#footnote-ref-237)
238. See 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 1:35 (2d ed. 2011) (citing Restatement (Third) Unfair Competition § 47, comment c). [↑](#footnote-ref-238)
239. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 5:77 (2d ed. 2011). [↑](#footnote-ref-239)
240. 1 J. Thomas McCarthy, Rights of Privacy and Publicity §§ 8:46, 8:57 (2d ed. 2011). [↑](#footnote-ref-240)
241. [Dora v. Frontline Video, Inc](http://scholar.google.com/scholar_case?case=7412471317946100671)., 15 Cal. App. 4th 536, 542 (1993). [↑](#footnote-ref-241)
242. Cal. Civ. Code § 3344(d). [↑](#footnote-ref-242)
243. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 4:65 (2d ed. 2011). [↑](#footnote-ref-243)
244. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 4:66 (2d ed. 2011) (citing dictum in Gautier v. Pro-Football, Inc., 304 N.Y. 354 (1952)). [↑](#footnote-ref-244)
245. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 4:66 (2d ed. 2011) (citing [Murray v. New York Magazine Co](http://scholar.google.com/scholar_case?case=1759052781504319794)., 27 N.Y.2d 406 (1971) and [Gaeta v. Home Box Office](http://scholar.google.com/scholar_case?case=11650783098930535141), 645 N.Y.S.2d 707 (N.Y. City Civ. Ct. 1996)). [↑](#footnote-ref-245)
246. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 7:17 (2d ed. 2011); see Restatement (Third) of Unfair Competition § 47, comment a (1995). [↑](#footnote-ref-246)
247. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 7:16 (2d ed. 2011). [↑](#footnote-ref-247)
248. 1 J. Thomas McCarthy, Rights of Privacy and Publicity § 8:52 (2d ed. 2011). [↑](#footnote-ref-248)
249. Restatement (Second) of Torts § 611 cmt. h. [↑](#footnote-ref-249)
250. Restatement (Second) of Torts § 611 cmt. d [↑](#footnote-ref-250)
251. See Restatement (Second) of Torts § 611 cmt. f. [↑](#footnote-ref-251)
252. Diane Johnson, Note, [When Truth and Accuracy Diverge: The Fair Report of a Dated Proceeding](#http://www.jstor.org/stable/1228543), 34 Stan L. Rev. 1041 (1980) [↑](#footnote-ref-252)
253. [Reilly v. Gillen](http://scholar.google.com/scholar_case?case=9177148859315892464), 423 A.2d 311, 314 (N.J. Super. 1980). [↑](#footnote-ref-253)
254. [Reilly v. Gillen](http://scholar.google.com/scholar_case?case=9177148859315892464), 423 A.2d 311, 329 (N.J. Super. 1980). [↑](#footnote-ref-254)
255. [Gates v. Discovery Communications, Inc.](http://scholar.google.com/scholar_case?case=13774747403146355756), 34 Cal. 4th 679, 693-696 & n.8. (2004). [↑](#footnote-ref-255)