

# LIBEL TIPS FOR COPY EDITORS

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## LIBEL TIPS FOR COPY EDITORS

What exactly is libel? It's a false statement about a person or a company that harms that person or company. It's what the legal system calls a tort no different than, say, a truck crash. If a newspaper delivery truck hit your car, you would have to prove that someone else was at fault and the law calls it negligent and that you were hurt. Someone suing for libel has to prove that the statement was false, and prove damages. Lost income is an obvious damage, if that was the consequence. But damage to reputation, which is more amorphous, can also count.

The plaintiff doesn't even have to be named in the article, if it's reasonably clear to whom the report referred.

Libel can crop up anywhere in a report of a confession, in a restaurant review, in a headline over a photo caption or because of misplaced or muddy attribution.

For our purposes, we can forget the damage part. We don't want to have to defend cases where the defense is Ayeah, we were wrong, but the victim wasn't hurt. The goal is to prevent false statements from being printed.

What about the *New York Times v. Sullivan* case and the defense of *actual malice*?

The Supreme Court ruled more than 40 years ago in *New York Times v. Sullivan* that a public official had to show more than that a statement was false in order to win a libel case. He or she had to show what the court called *actual malice*. That's a misnomer, because the court wasn't using the word malice in the sense that we do in spite or ill will. It said there was malice and hence libel against a public official only if the defendant knew that what it was publishing was false, or published it in reckless disregard of whether or not it was false. The doctrine applied to public officials, but was later extended in another case to all public figures. But it does not apply to private citizens, who do not have to show malice.

Now that you know about *Sullivan*, forget about it. Actual malice is a wonderful concept for libel lawyers and publishers, but not for reporters and editors, who need to make sure that false statements don't get into print, so they will never need to rely on the actual malice defense.

The best defense in a libel case, of course, is that the statement that prompted the suit is *true*. There is no libel, no matter how harmful the statement is, if it's true.

(What if the truth can't be proved, because the statement is based on sources who are not identified and have been promised confidentiality? This is a murky area of law. Some courts have told juries in such circumstances that they are free to assume that the source does not exist, or ruled that the defendant cannot refer to sources it will not produce in court. All a copy editor can do in such a case is make sure that everyone is

aware of the risk of anonymous sources who offer information that could be challenged as false.

There are other defenses that are more relevant to journalists than actual malice is.

One is *fair comment*, and it's tricky. An opinion can't be libelous. The tricky part is that the courts don't always divide fact and opinion the way many journalists do. A statement, in a restaurant review, that the food is barely edible, is opinion. No libel. A statement in that same column that the kitchen is riddled with roaches is libelous if there are no roaches. That's a statement of fact, even though it's in a column.

The reverse is also true. Look at this lede, in a main news section: AA man was convicted yesterday of raping a 6-year-old girl at knifepoint under a roller coaster in a busy amusement park. The despicable defendant faces life in jail when he is sentenced next month.@

Most editors would delete the unattributed despicable. That's good journalism. But if it stays in, it's not libelous. Despicable is opinion, not fact. Our profession doesn't allow that in the news columns. But the courts often don't care where opinion appears. (On the other hand, if the lede said that the man A was arrested yesterday on charges of raping a 6-year-old girl,@ despicable would be a problem.) Some courts have held that context B whether a statement is in the news columns or in an opinion piece B does matter, at least when there's an argument about whether a statement is fact or opinion (as there was in a book review statement that the book contained Asloppy journalism.

Another defense worth mentioning, which is available in most states, is that the libelous statement is within *an accurate report of official proceedings* B a trial, a Congressional hearing, a local legislature's debate, even a sewer board meeting. But that's also tricky. If A testifies in court that B is a murderer, a report to that effect is not libelous. If A makes the same statement only on the courthouse steps, neither A nor anyone who repeats it, is absolutely protected B though there may well be an actual-malice defense.

B may well choose to sue A, and not the newspaper, but might sue the newspaper as well. It seems to me that in a high-profile trial, there's no way not to print a newsworthy statement made out of court. But even then B and certainly in a low-profile trial B it's worth running the statement past a libel lawyer.

If there is no protection based on a fair and accurate report of an official proceeding, a newspaper can be liable for reporting a libelous statement made by someone else, unless the actual malice rule applies. In a high-profile story, reporting such statements may be unavoidable. Again: ask a lawyer.

Virtually every journalist has access to a libel lawyer, either directly or through someone in the newsroom. Almost all newspapers have either in-house lawyers or outsider lawyers who are on call. Even if a paper is so thrifty that you have to use the

back side of old press releases for fax paper, there's probably a libel lawyer. The libel insurance policy usually requires that the insured & your employer & have someone to consult about potentially libelous copy.

One of the issues libel lawyers are confronting is liability for publication of outsiders' comments on a Web page. A federal law, the Communications Decency Act, appears to protect Web sites & including newspapers' Web sites & from libelous comments made by third parties. But it's not inconceivable that a creative plaintiff's lawyer will argue some day that giving out that kind of immunity is an unconstitutional taking of the plaintiff's reputation, and that the law is void because it violates the Constitution. Stay tuned.

The last defenses are others worth forgetting. You may have heard that you can't *libel the dead*. That's true. So the descendants can't successfully sue over the statement *ALincoln was a philanderer.* But journalists' obligation is to the truth. You still want to ask *Who says?* and *Are we sure?* and *Is there a historian who might dispute this?*

And there's no such thing as *group libel*. Neither an individual nor a group can successfully sue for the statement *Used-car salesmen are thieves,* because the statement doesn't affect a specific person. But editors' vigilance should still have either kept it out, or attributed it and then provided an appropriate response.

The bottom line is that if we do our jobs, our lawyers won't have to raise these other defenses, because what our papers print will be true.

The real-life examples that follow do not focus on the battleground common to so many Supreme Court libel cases & who is a public figure. If you have to make that argument, you may not have done your job well enough. Rather, the focus is on garden-variety libel & the kind you may well come across and be able to prevent. A lot of it comes out of crime reporting, where the lapses often involve lack of attribution. But there are also examples from profiles, surveys of business practices, civil lawsuits, government investigations, consumer-affairs reporting, landlord-tenant disputes and even terrorism cases.

The examples are divided into seven broad categories: possibly false statements, allegations stated as facts, missing or attenuated attribution, hidden libel (libel unrelated to the major subject), tone, implication, opinions masquerading as fact and headlines.

## False Statements

& [This was deep in a profile of the chief executive of a no-frills airline.] Mr. O=Leary runs a tight ship in his office, too. Post-it notes and highlighters are banned. Executives bring in their own pens. To illustrate his commitment To that principle, Mr. O>Leary produced two pens from his pocket, both stolen from hotel rooms.

*Stolen? Ouch! One could argue that hotels put pens emblazoned with their names in guests= rooms as amenities to be taken, and as a form of free advertising. Would this CEO sue? Maybe, just for the publicity value.*

& An independent watchdog is investigating a hospital and two neurosurgeons who abandoned an unconscious patient in the operating room, the Daily News has learned.

The patient had been scheduled to have a procedure done by brain surgeon Paolo Bolognese. She was prepped, her head was shaved and she was put under anesthesia. But Bolognese was a no-show. When the hospital=s chief of neurosurgery, Dr. Thomas Milhorat, refused to cover for his protégé, the patient was awakened and told that Bolognese had a Afamily emergency.@ He was actually in Florida, sources said.

*There are two problems here. The first is that the lede states as a fact that two neurosurgeons abandoned an unconscious patient in the operating room, because it appears that what The News has learned is that there=s an investigation. The second is that there doesn=t appear to be any abandonment. One doctor was never there, and the other, who was, declined to take over a colleague=s surgery.*

& A convicted killer could be freed soon, after using a 2000 Supreme Court decision to force a new trial that excludes most of the evidence against himCincluding the fact that he was carrying the murder weapon when he was arrested.

Terry Brazil, who committed the crime near the Farragut Houses in Brooklyn, was serving time in prison when he read about a Supreme Court case that made it illegal for officers to stop and frisk someone based only on an anonymous 911 call B which is what happened to him. He used that decision to win a retrial B and this one will not include the gun or ballistics evidence.

*What did Mr. Brazil get? His conviction reversed and a new trial. Which means that he=s no longer a convicted killer. And it=s no longer established that Ahe committed the crime near the Farragut Houses B or anywhere else. If he=s acquitted at the retrial (as the reporter seems to fear) he hasn=t committed any crime, anywhere.*

& The body of the girl, Nixzmary Brown, was found Wednesday at her mother=s home. Investigators are trying to determine if the girl=s stepfather, Cesar Rodriques, killed her when he banged her head against a faucet in the bathtub.

*There are two ways to read this B neither one good. One is that the stepfather may not have killed the girl when he banged her head against the faucet. The other is that banging her head against the bathtub was not the cause of death. In the first reading, the killing is assumed to be true, because there=s no attribution for it; in the second, the banging is the unattributed assumption.*

& Prostitutes are lining up to tell tabloid television shows what they know about busty reputed madam Kristin Davis=s call-girl operation, producers said yesterday.

*It=s not a foregone conclusion that Davis had a call-girl operation (hence the reputed), and if she didn=t, she=s not a madam, either, and those assertions are as naked as a hooker hard at work.*

& Two men face several motor vehicle and criminal charges after their car crashed into a police cruiser early Sunday. Luis Martin, who police say was driving, and Clever Sanchez, tried to flee on foot but were soon captured. Both face drunken driving and related motor vehicle charges, while Martin was charged with theft and Sanchez with eluding.

*Maybe there=s no libel here, but I=m a skeptic. Both were charged with drunken driving of one car? Maybe. But the fact that that seems improbable, and the fact that the charges against the two are not identical, should raise a red flag. Moral: Do your job, ask questions, and you may avert a libel problem, too.*

### **Allegations Stated as Facts**

& The long-serving pastor of a Catholic parish is under investigation for using church money to feed a gambling habit and has been permanently removed, the chancellor of the Archdiocese of New York said Sunday.

*This is debatable. AFor using@ might be construed as a statement of fact. AOn charges of,@ instead of Afor@ would solve any lingering problem.*

& A cleaning-crew supervisor tried to frighten his employee, a witness to a shooting, and pressure him not to talk because he didn=t want detectives rooting around his business, court papers show.

The 47-page complaint filed by the former officer described how Chief Hesse and other officers repeatedly doctored police reports to cover up instances of police brutality, and the officers drinking in the police station while on duty.

*The problem here is that most court papers, including complaints, don=t show anything g, and only describe one side=s claims, and the wording should be hedged to reflect that. Writing that the complaint claimed that the defendants doctored and drank would be accurate.*

& The court papers make clear that Ms. De La Cruz did not participate in robbing drug dens. Rather, her role was to hook up with Mr. German, who, in turn, pointed her uncle and his helper in the right direction. Mr. German told the uncle that several of his drug associates could be robbed as they dropped off 10 kilos of cocaine.

*The court papers B in this case an indictment B don=t Amake clear@ anything expect what the prosecution claims. De la Cruz is accused of doing these things. If she=s acquitted, she=s been libeled.*

& DNA from a cigarette butt confirms that Thomas, who was arrested last week, is the rapist wanted for attacks in four states.

*Not quite. A prosecution expert will testify to that effect eventually. A defense expert may well rebut that. Then the jury will decide whether the DNA confirms anything. It=s called the judicial system.*

& A woman and her companion have been charged by prosecutors with endangering the welfare of a child after leaving her 5-year-old son alone in a motel room for seven hours while they went to an adventure park, the police said yesterday.

*This is probably defensible, but that=s not the best test. A literal reading is that the police said the couple was charged with child endangerment B and all the other stuff is left as alone as the kid was, with no support. The right attribution is Aafter, the police said, they left her son Y@*

& A jail inmate commanded a nationwide cyberscam from behind bars, prosecutors say. The inmate, Shaheed Bilal, ran it all from a prison phone for eight months in calls to his girlfriend, the Manhattan district attorney revealed yesterday.

*So we don=t need trials anymore? The prosecutor just reveals something, and it=s a fact? Or he claims or charges or alleges it, none of which state the claim as a fact the way reveals does. (The attribution in the lede might carry the day. That shouldn=t be your standard.)*

& [This is a caption that ran with a photo of a man, handcuffed, surrounded by police officers.] Police officers set up a drunker-driver checkpoint in Jersey City yesterday. The officers check every fifth car passes through the checkpoint, handing out pamphlets and asking drivers if they have been drinking. Officers give a man a sobriety test in the background. The man was found to be impaired and taken into custody.

*Photos may not lie, but their captions can. This man wasn=t found, in any legal sense, to be impaired. He was accused of that, and will, if he desires, have his day in court.*

### **Missing or Attenuated Attribution**

& A Brooklyn rabbi and his three sons are accused of preying on four female relatives and the sexual abuse may have started as long as 15 years ago.

*What sexual abuse? The abuse that=s alleged in the first clause, or the sexual abuse that=s stated as a fact B without attribution B in the second clause?*

& A police sergeant in the Bronx shot and wounded a 27-year-old man who ran a stop sign and then tried to drive away after he was pulled over, the police said. The car had drugs in it, but the man did not appear to have a weapon.

*Where=s the attribution for the drugs?*

& Mike Kennedy, a real estate appraiser in Monroe, N.Y. was examining a house a few years ago when he discovered five feet of water in the basement. The mortgage broker arranging a refinancing asked him to pretend that it wasn=t there.

*Who said the mortgage broker told the appraiser to lie? Look around. It=s not the appraiser. It=s not anyone. So it must be the newspaper, stating this as fact. No problem, you say, because the broker isn=t named. But this is a small town. Let=s say the broker was able to prove that he was the only one who handled refinancings who worked with this appraiser, and that the small-town real estate community knew it. The law is that if someone is identifiable in a libelous account, he or she does not have to be named in order to have a case. Now the defense here might well be truthCthat the appraiser said that broker did indeed make the request. But a good plaintiff=s lawyer might argue to the jury that if that were the case, how come the reporter didn=t say so? Moral: bulletproof is better.*

& An upscale version of Thelma and Louise has been sued by a real estate broker for posing as wealthy apartment buyers to pilfer diamonds and other luxury items from Manhattan pads.

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While touring the multimillion dollar apartments, the team would take turns distracting the brokers, swiping everything they could get their sticky little fingers on.

*How do we know what they did while visiting? Were we there? If not, that second graf needs attribution. The real estate broker=s claim in the lede won=t do B especially if Thelma and Louise are never convicted.*

& Spirited out of Guantanamo Bay in the dead of night, an al Qaeda henchman fidgeted and smiled in a Manhattan courtroom yesterday as he was charged in a pair of deadly U.S. Embassy bombings.

*Put your politics aside for a minute. Even the United States government has admitted that after investigations, it determined that some of the detainees held at Guantanamo were not terrorists, and sent them home. So the mere fact that this defendant was at Guantanamo does not prove that he is an al Qaeda henchman B a claim never addressed anywhere else in the copy. (Of course, truth might emerge as a defense, but that=s not an excuse for reporting what you can=t prove at the time.)*

& A driver was charged with drug possession after police found 51 bags of cocaine in his underpants.

The Staten Island district attorney's office said Anthony Maniscalco was arrested after police pulled him over for several traffic violations. After patting him down, they discovered the drugs.

*Who said there were 51 bags of coke in his skivvies? The newspaper said, because when you look around, there's no one else speaking in the lede. If the charges collapse, how many zeros will there be on the settlement check?*

& A 25-year-old graduate student was struck and killed by a drunken driver early yesterday in a hit-and-run accident that occurred as she was crossing a street with friends in Lower Manhattan, the police said.

*What does @ police said @ refer to? Struck and killed? Crossing the street? Drunken driver? All of the above? Ask yourself what's most controversial element of a string like this, and bulletproof that first. It's unlikely that the killed part is wrong. If she was crossing with people she just met, not friends, that's not critical. But the driver's alleged intoxication is. So make sure that that element is precisely attributed.*

& Two accountants, David E. Cohen, and his partner, Jeffrey C. Rosner, ran what tax officials described as a tax-return factory out of their office in the Empire State Building. Clients waited hours in the waiting room, then spent 15 or 20 minutes filling out forms that often used the same boilerplate numbers, like contributions to charity and unreimbursed business expenses, on every tax return, regardless of income.

*A tax officials described @ may be placed too far away from A used the same boilerplate numbers @ which would make that an unattributed statement of fact, rather than part of an accusation. Since that appears to be the heart of the charge and since the reporter presumably wasn't in the waiting room to observe what the article describes C that has to be attributed.*

& AI'm sorry, I'm sorry. I didn't mean to shoot him, @ the alleged gunman, Kingsley Newlan, told cops.

*[Separate article]; He plays a chef on the Sopranos. but John Ventimiglia cooked himself a recipe for disaster when he was busted for drunken driving yesterday. The actor admitted to cops he drank four glasses of wine before getting behind the wheel of his 2004 Jetta and driving home.*

*These are as much reporting problems as libel ones. A Yeah? @ I ask reporters who (all too frequently) turn in such copy. A How do you know he confessed? Were you in the stationhouse? @ What's needed is: A cops said the confessor said. @ The libel issue arises because if a confession is successfully refuted (not so uncommon), the newspaper has said flatly that's what the suspect said, and that turns out not to be true*

& A cruise ship passenger will testify in a civil suit against the cruise line this week that she was raped by a bartender who slipped her a Mickey, but prosecutors were stymied by cruise management.

*If the passenger is going to testify that cruise management stymied prosecutors, all is fine. But if she=s just testifying about being raped, who=s saying that management stymied prosecutors? No one, which means the newspaper is stating it as fact. (And yes, a corporation can be libeled, just as an individual can be.)*

### **Hidden Libel**

& Mr. D=Angelo was arrested in the Sliwa case in July 2004. He pleaded guilty to kidnapping, murder and other crimes before turning state=s witness, hoping for leniency. He said he made about \$600,000 from loan sharking over his life as a mobster, spending it on Aclothes, cars, dinner, drinks.@ After his arrest, he said, he, his girlfriend and his mother paid \$212,000 to a lawyer who refused to represent him when he began cooperating with the government. He was left with \$259 to his name, he said.

*This is a pretty high-profile defendant, so it would not be hard to figure out who the lawyer who supposedly stopped representing him was. (The fact that a person is not named is not a defense to libel if that person is identifiable from the context.) That lawyer should have been asked to comment on allegations that he a) dropped a client who squealed and b) kept the client=s fee. If the statement is false, the mere fact that it was attributed may not be enough to avoid libel. The lawyer is probably a public figure, and there=s probably no malice here, but one phone call might establish lack of reckless disregard and avoid years of litigation. (Of course, if the lawyer=s comment is Aif you print that, I=ll sue,@ it=s time to get a libel lawyer involved.)*

& *This was buried in an article about whether property owned by celebrities sells at a premium:*

*The celebrities get into a mode where they're making a lot of money and they just don't have any conception about the fact that if they're making \$10 million on a movie, \$5 million goes to taxes and \$2 million to managers or whoever,* said Joseph A. Babajian, chairman of the estates division of Prudential California Realty, who has worked with Nicolas Cage, Ryan Seacrest, Harrison Ford, and Ozzy Osbourne, among others. *They end up with \$3 million and a lifestyle of \$200,000 a month and think they can afford a second or third house for \$5 million.*

*Is Babajian saying that Cage, Seacrest and Osbourne behave that way, or are their names just being used as his credentials? I don't know, you don't know and neither of us knows what a jury would decide.*

## **Tone**

& *Head: Woman, 93, With Strokes and Broken Leg, Gets Eviction Notice*

*Lede: Hannah Sadak enjoys living in the apartment where she has been for more than 20 years.*

*But Sadak, who raised five children while working at a bakery, and later helped take care of her grandchildren and great-grandchildren, is on the verge of being evicted.*

*Violins, please. There's no doubt whose side the reporter and head-writer are on. They might as well have written: Big Bad Landlord Goes After Helpless Granny. As the rest of the article makes clear, however, Granny has violated her lease by having a grandchild live with her. She doesn't dispute that. There's no libel in the head or the lede, but whoever handles this copy better make damn sure that there isn't any hint of libel anywhere else in the piece, because this treatment could go a long way toward proving actual malice.*

& *A Brooklyn religious school is under fire for planning to boot two dozen family members, including many elderly and disabled Russian immigrants, from an apartment building in Brighton Beach.*

*The school purchased the building in January. It is relying on a loophole in state housing law that allows nonprofit groups to kick out tenants in rent-regulated apartments if they will use the apartments for educational purposes.*

*There's nothing overtly libelous in these two grafs. But let's say that another part was libelous. Three words here might be used to prove that the reporter didn't like, and had it in for, the school. The school is preparing to evict the families, not boot them. It is relying on a provision of state law, not a loophole, that allows it to remove tenants, not kick out anybody.*

& *A&P corporate spokesman Richard DeSantana refused for the second day in a row to return calls seeking comment.*

*Refused is a loaded word. No one knows whether DeSantana refused to answer them, or maybe just had other priorities on those days. If there were errors in the article, the tone here might suggest actual malice.*

## Libel by Implication

& The chief of one of the police departments involved in the wrongful fatal shooting of a college football player is retiring.

*Something=s missing here, either a >who was@ or Athat was@ in the lede. The right answer is Athat was@ B the department, not the chief, was involved in the shooting. Could have fooled me.*

& The Target store in the City Center could be looking for a few new honest cashiers after four employees were arrested Monday on theft charges.

*An attempt at cuteness gone bad. This implies that the four employees are not honest cashiers, something that hasn=t yet been established.*

& County inspectors have found more dangerous counterfeit extension cords for sale at local discount stores a week after a fire inspector found cords with fake safety certification labels.

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Shopping at a Dollar Store on Friday, Mindy Scher said she had heard about the counterfeit cords, and said she wouldn=t buy extension cords from such a store anyway.

*You wouldn=t go to a store that didn=t sell the cords in question to interview shoppers about them B or would you? That=s what this reporter did. Fortunately, the store manager was quoted lower down saying the store doesn=t carry extension cords, moving this from libelous journalism by implication over to the bad-journalism basket.*

## Headlines

& An Oscar-winning songwriter played up his Hollywood connections to sexually prey on starry-eyed young beauties at his Manhattan apartment, one of those women charged yesterday. [The head was APervert=s Sour Note.@]

*There=s nothing wrong with the lede. But headlines can be libelous, too. And this one goes too far, unless the charges are eventually proven. He=s a pervert only if the claim that he lured young women to his apartment under false pretenses and forced them to have sex are true. And that determination is a long way off.*

& An 81-year-old lawyer was found not guilty yesterday of helping a client extort \$11 million from his son-in-law. [The hed was A Lawyer in Extort Case Beats Rap.@]

*ABeat the rap@ is a euphemism for being acquitted even though one is guilty. Want to take on a lawyer who=s just been acquitted and you say he=s really guilty? (And as an aside, was the client every found guilty of extortion/ That=s what the lede says.)*

## Fact Masquerading as Opinion

& Many in Buffalo lustily cheered for someone who delivered blunt tirades about taking out the trash in Albany. But then another side of Carl Paladino came to the fore: someone who had forwarded racist and pornographic e-mails, who got into a violent argument with a reporter and who called gay pride parades Adisgusting.@

AAbsolutely, I was thinking of voting for him,@ said Jackie DeMarco, 46, who works for the federal Home Energy Assistance Program in Buffalo. ABut then he=s making gay slurs, he=s threatening to beat up that guy on camera, and people see all that. You don=t want a mobster as governor.@

*Mobster? What Mobster? People called Carl Paladino, the losing 2010 New York gubernatorial candidate a lot of things, but no one ever called him a mobster, and there=s no evidence that he is or was one. The speaker may think he is. Thinking it doesn=t make it so. (The fact that the statement is part of a quote is no defense.) This is why computers have delete keys / End the quote after Aall that.@*



Libelphoenix (in J drive) (3/8/11)