



Parachute Training Boca Raton, Florida

Web Law: A Primer

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- Publisher liability for libelous user generated content
 - › Section 230 of the CDA
- Copyright basics
- Publisher liability for infringing user generated content
 - » DMCA
- Social Networking

Libel Basics

- Libel
 - › False statement of fact
 - › “Of and concerning” the plaintiff
 - › That injures the reputation of (that is, *de-fames*) the plaintiff
 - › Published by the defendant
 - › Published with fault

Libel vs. Slander

- Slander: Traditionally, a false and defamatory statement expressed orally
- Libel: Traditionally printed defamation. Spoken statements broadcast on radio or TV are generally regarded as libel

Defamatory

- Statements that tend to hold plaintiff up to hatred, contempt, ill-will, ridicule
 - › Accusations of (for example)
 - » Criminal activity
 - » Dishonestly
 - » Infidelity
 - » Incompetence in trade or profession

False Statement of Fact

- Only false statements of fact may form the basis of a libel claim
- Statements of pure opinion, based on disclosed fact, are not actionable
 - › But statements that imply that the speaker is in possession of undisclosed facts on which he bases his opinion may be actionable

Of and Concerning

- Plaintiff must establish that the challenged statements were made “of and concerning” the plaintiff
- Don’t need to name the plaintiff
 - › Identification through accumulation of facts

Publication

- Publication is broadly defined
 - › Rarely at issue in media libel cases
- Publication can be to 1 person
 - » Can't libel a person to himself

Falsity

- Plaintiff has burden of proving falsity
 - › Defendant doesn't have to prove truth
- Burden is important
 - › Some things can't be known, or at least proved.

Fault

- Libel is not a strict liability offense
- Plaintiff must prove “fault”
- Degree of fault depends on the nature of the plaintiff
 - › Private figures must prove negligence
 - › Public officials and public figures must prove “actual malice”
 - » Publication with knowledge of falsity or serious subjective doubt as to truth

Public Officials

- Elected officials and candidates
- Other public employees with discretionary authority

Public Figures

- General purpose public figures
 - › Pervasive fame or notoriety
- Limited purpose
 - › Voluntarily thrust themselves into pre-existing controversy
 - › Access to effective channels of communication
- Don't spend a lot of time assessing public figure status
 - › Nailing a jellyfish to the wall

Republication Fallacy


- Republication fallacy
 - › Tale bearers are as bad as tale makers
- Exception
 - › Fair report privilege
 - » Press as eyes and ears of the public


Practical Guidance

- Establish an atmosphere of professionalism in the newsroom
 - › Defend error as occurring in spite of systems, not because of them
 - › In court, appearances are as important as reality
 - » Avoid battle metaphors
 - » Don't say stupid things, especially in email
 - › Prepublication review works
 - » An aid, not an obstacle, to publication
 - Fair report privilege; opinion based on disclosed facts; etc.
 - › Insurance

Liability for User Generated Content

- October 1994
- Users postings to a Prodigy bulletin board accused Stratton Oakmont of criminal and fraudulent acts in connection with an IPO:
 - › "major criminal fraud"
 - › "cult of brokers who either lie for a living or get fired"

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- A large, stylized green leaf graphic is positioned on the left side of the slide, extending from the top to the bottom. It has a curved shape and visible veins.
- › Court found Prodigy could be held liable as the “publisher” of the postings
 - › Efforts to police created obligation to police effectively
 - › Lawyers recommended against policing

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- A large, stylized green leaf graphic is positioned on the left side of the slide, extending from the top to the bottom. It has a curved shape with visible veins.
- Stratton Oakmont wouldn't be decided the same way today
 - Congress intervened to protect nascent Internet; didn't like the advice lawyers were giving
 - Didn't want the law to discourage publishers from exercising responsible editorial judgment

- Communications Decency Act
 - › ACLU v. Reno
- Section 230
 - › “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”



You Can Edit If You Really Want

- Covered claims
 - › Libel
 - › Invasion of privacy
 - › Breach of contract
- Claims outside 230 immunity
 - › Intellectual Property
 - › Federal criminal violations

You Can Edit If You Really Want

- The sticky advice is wrong
- In the U.S., you can edit if you really want

You Can Edit If You Really Want

- Protected activity
 - › Move for relevance
 - › Remove
 - › Edit for indecency
 - › Edit for length

 - › Edit because you think it's appropriate

The Outer Limits

- Can't edit to insert the defamation or to change the defamatory gist and sting
- “My ex-husband is **not** an alcoholic.”

The Outer Limits

- Roommates.com (9th Cir. April 2008)
 - › Roommate matching service violated federal Fair Housing Act by encouraging users to express discriminatory preferences
 - › Fair Housing Laws

The Outer Limits

- Court: Roommates invited users to express unlawful preferences
- “By requiring users to provide [information about sex, family status, and sexual orientation] as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of the information.”

The Outer Limits

Contrast: Lawyers Committee v. Craigslist

UGC Liability

- Practical Advice
 - › UGC may not be the place to take litigation risk
 - › If you limit editing to removing indecency, correcting typos, run less risk of being accused of being publisher
 - » Avoid vulnerability for “tightening” prose to make the ambiguous unambiguously defamatory
 - » Trimming for length can lead to claims that you omitted the exonerating stuff
- Protection is statutory, not Constitutional

You Can Edit If You Really Want

- Congress got this right
- Without Section 230 (and the Safe Harbor provision of the DMCA), the UGC industry (as we know it) wouldn't exist in the litigious U.S.
- Facebook, YouTube

Copyright Liability

- Section 230 immunity specifically does not apply to claims of copyright or trademark infringement
- Service providers are protected in the U.S. from liability for copyright infringement based on content posted by users by the Safe Harbor provision of the DMCA (part of the Copyright Act)
- There's no similar immunity or safe harbor for claims of trademark infringement

Copyright Basics

- Copyright protection was considered so fundamental to fledgling republic that it was baked into the Constitution
- Copyright law tries to balance the rights of creators against the rights of users

Copyright

- A property right
- That protects works of authorship (to be defined)
- By giving the owner exclusive rights (subject to exceptions)
- To make or authorize several types of uses of the works

Copyright Rights – Creation

- A copyright is not something you apply for
- Springs into existence when work is fixed in any tangible medium of expression

Copyright Rights – Ownership

- Employees' works are owned by the employer
- Freelancers and independent contractors retain copyright in the absence of written agreement
- Magic words: “work for hire” and “assignment”
- No written agreement? Just an implied license
 - › Scope based on “custom and usage”
 - › “Print rights” probably don't yet include web rights

Copyright – Exclusive Rights

Exclusive Rights of the Copyright Owner

- Right to make copies of the work
- Right to distribute the work
- Right to make derivative works
- Right to display or perform the work publicly
- Make digital audio transmissions of sound recordings

What Does Copyright Protect?

Works of authorship, including:

- Literary works (including newspapers), photos, motion pictures and other audiovisual works, (e.g., TV and radio programs and ads) music, drama, choreography, computer programs, websites, artistic works and sound recordings
- Certain collective works and other compilations

What's *Not* Protected?

- Facts
- Ideas
- Procedures
- Discoveries

- Material in “the public domain”

What's the Public Domain?

- Copyright Misconception #1

“If a work doesn't have a copyright notice, it's in the public domain.”

Work not protected by copyright...may be freely used by everyone. Includes...

- Work created by U.S. Government
- Expired copyright term

When U.S. Works Pass Into The Public Domain

WHEN U.S. WORKS PASS INTO THE PUBLIC DOMAIN

By Lolly Gasaway University of North Carolina

Definition: A public domain work is a creative work that is not protected by copyright and which may be freely used by everyone. The reasons that the work is not protected include: (1) the term of copyright for the work has expired; (2) the author failed to satisfy statutory formalities to perfect the copyright or (3) the work is a work of the U.S. Government.

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years ¹ (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation ²)
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice ³	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2047 whichever is greater

1 Term of joint works is measured by life of the longest-lived author.
 2 Works for hire, anonymous and pseudonymous works also have this term. 17 U.S.C. § 302(c).
 3 Under the 1909 Act, works published without notice went into the public domain upon publication. Works published without notice between 1-1-78 and 3-1-89, effective date of the Berne Convention Implementation Act, retained copyright only if efforts to correct the accidental omission of notice was made within five years, such as by placing notice on unsold copies. 17 U.S.C. § 405. (Notes courtesy of Professor Tom Field, Franklin Pierce Law Center and Lolly Gasaway)

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Copyright Infringement vs. Plagiarism

- Copyright Misconception #2
“If it’s not plagiarism, it’s not copyright infringement.”

What's "Fair Use?"

- Allows use of copyrighted work without owner's authorization
- Gray area

The Fair Use Four-Factor Test

1. Purpose and character of use
2. Nature of work copied
3. How much used
4. Effect on value of work

Is the use of the work “transformative”

Fair Use

- **Fair use:** subjective, complex, highly fact-specific
- No bright lines
- If you're risk-averse, get permission or rely on a more specific copyright exception

Protecting Web Publishers From Copyright Liability for User Generated Content

DMCA (Digital Millennium Copyright Act)

- Safe harbor for “service providers”
- Protection against liability for third-party content
- 17 U.S.C. Sec. 512(c)

How Do Web Publishers Qualify for DMCA Safe Harbor?

- Designate an agent with Copyright Office
 - › Simple form
 - › \$105 fee
 - › <http://www.copyright.gov/onlinesp/>
 - › Identify designated agent on your website
 - » Typically in “terms of use”
 - Name, address, phone, email
- Notice and take-down

Practical Advice: Copyright

- Make it as easy as possible to reach you
- Give people a way to complain (click to email; phone number; mail address)
- Take complaints seriously
- Respond quickly
- Follow DMCA Safe Harbor take-down procedures 512(c)

Practical Advice: Copyright

- Obtain at Least a Very Broad License For the Use of Freelance or Other Third Party Content
 - › Include all media platforms you'll need (e.g., web, cell phone deck)
 - › Avoid geographic limitations

Unresolved Controversies

- Scraping/taking of factual information, lists and databases
- Sports leagues vs. new organizations

Borrowing Content from Social Networking Sites

- Taking Facebook photos
- Taking other third party content (e.g., poetry, photos, art) posted by newsmakers on social networking pages
- Other IP issues: impersonation on Twitter and elsewhere

Social Networking By Employees

- Blogging ethics panel at ONA Toronto
- Should websites prohibit contributors from personal vs. professional blogging?
 - › Cultural gap
 - » Facebook/MySpace/YouTube background
 - Some saw violation for free speech rights
 - » Traditional journalism background
 - 1st Amendment right to speak, not to work for this paper

Social Networking By Employees

- No consensus on “should”
- Two legal issues
 - › Can employer prohibit personal blogging?
 - » Not a lot of law
 - › Does employer have legal vs. journalistic/ethical reasons to prohibit?

Social Networking By Employees


- Little doubt you can prohibit employees from blogging personally on topics they cover professionally
 - › Check any union agreements re changes in workplace rules
 - › Check employment agreements
- Little doubt that you can prohibit bloggers from personal blogging activities that reflect poorly on employer or undercut appearance of objectivity

Social Networking By Employees

- CA law might be interpreted to prohibit a complete ban on personal blogging
- Be consistent in enforcement to avoid discrimination claims
- NLRA – Can't prohibit employees from speaking about terms and conditions of employment

Social Networking By Employees

- Everything an employee says – even on personal blog – bears on mental state
 - › “Actual malice” = publication with knowledge of falsity or serious subjective doubt as to truth
- Nothing new
 - › Newspaper reporter being interviewed on TV re blockbuster series
- Defending libel suit against employer could be made more difficult by statements made on personal blog

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- From the perspective of a U.S. media lawyer, all other media lawyers are practicing without a net
 - › No one else has Times v. Sullivan
 - › No one else has Section 230 and the DCMA Safe Harbor



It's a Small World After All

- If you publish anywhere, for all practical purposes, you publish everywhere
- But you can't look to Singapore law every time you make an editorial decision
- Some comfort in cases declining to enforce foreign judgments obtained under laws inconsistent with “fundamental” U.S. laws
 - › But you should look to the law of countries where your assets are located
 - › And be sure you have libel insurance

Additional Resources

- *Internet Law: A Field Guide* (BNA Books 2008)
- Government information
 - › Copyright: www.copyright.gov
 - Privacy, advertising: www.FTC.gov
- ONA partnership with Online Media Legal Network: under “Member Resources” on the ONA website, see “Legal Resources”



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