

3

LAW AND ETHICS

Online media has forced the law to move beyond traditionally accepted views on what the press is and who journalists are. Much of our press law is rooted in the 19th and 20th centuries and clings to norms set forth in newspapers and magazines. Because of this, the web and digital media have spawned numerous problems for journalists, legal scholars and the general public.

Certain rules transfer nicely from print products to the online realm, while other laws differ drastically between the two media. Some elements of the law provide more freedom to news organizations than they do to public relations firms or advertising agencies. As an editor, you need to know your legal rights and responsibilities.

In this chapter, we will review the aspects of law you will face as an editor. We will outline how the laws apply to various forms of media. In addition, we will explain the ways you can defend yourself and your organization against legal action. Better yet, we will show you how to avoid getting into trouble in the first place.

FREEDOM OF THE PRESS AND COMMON MISCONCEPTIONS OF IT

The **First Amendment** to the Constitution guarantees freedom of the press, along with freedom of speech, freedom of religion, freedom to petition the government and freedom to peaceably assemble. In singling out the freedom of the press, the Founding Fathers placed a high value on media and gave media outlets exceptional rights and responsibilities.

The law has grown and changed over time, applying the First Amendment to various forms of media in different ways. For example, in 1942's Supreme Court case *Valentine v. Chrestensen*, the court ruled that advertising was purely commercial and did not enjoy the same First Amendment protection as did newspapers or similar media outlets.¹ However, the *Central Hudson Gas & Electric Corp. v. Public Service Commission* ruling of 1980 found that banning advertising does represent a violation of the First and 14th Amendments.²

The underlying value of the First Amendment is that it outlines the right to publish content freely without fear of governmental intrusion. This right traditionally has been associated with

LEARNING OBJECTIVES

After completing this chapter, you should be able to:

- Understand the rules associated with the freedom of the press, including the ability to report and publish without governmental intrusion.
- Identify the basic standards of libel for published material and apply to that material the basic defenses against libel.
- Apply basic fact-checking techniques to material you are editing so as to avoid being burned by poor reporting.
- Understand the four tenets of the Ollman test, which distinguishes opinion from fact, and apply them to a piece of copy.
- Identify the primary ways in which a journalist can invade someone's privacy and outline ways in which you can prevent these situations from occurring as an editor.
- Understand the ways in which copyright protects intellectual property and ways to avoid violating other people's copyright while running your media operation.

newspapers and magazines. Television and radio broadcasts are regulated by the **Federal Communications Commission**, which puts the government in an oversight role for these media, because of the public's ownership of the airwaves and the scarcity of the frequencies available for broadcast. As these issues do not apply to the web, courts have viewed online media as being akin to print and have afforded publishers the protections outlined in the First Amendment.

Here are some common misconceptions related to the First Amendment:

No One Can Stop You From Publishing What You Want

The First Amendment only guarantees that government agents or agencies can't exercise prior restraint, which is to say they can't prevent you from publishing something. Even this guarantee comes with some exceptions, such as infringing on copyright or trademark, which we will discuss below. Issues involving national security and some court-imposed gag orders can also limit free press and free speech. If you ignore a court order, you will find yourself in a good deal of legal trouble. If your media outlet is privately owned, a publisher can prevent you from publishing something. Other higher ranking editors can also stop you. At the high school level, the case of *Hazelwood v. Kuhlmeier* determined that principals can censor school newspapers if they can demonstrate a legitimate educational interest in doing so.³ Private universities also can exercise censorship of student media because they are not governmental agencies and thus not subject to First Amendment freedoms. Just because the government can't stop you from publishing doesn't mean you can publish anything you want.

Freedom of the Press Protects You From Legal Ramifications

As an editor, you are given only **editorial discretion**. This does not mean that people will not be upset with whatever you publish. It also doesn't mean that if you are wrong, you will be free from legal repercussions. What it does mean is that government can't stop you from publishing something. After you publish the material, you are held to the same legal standards as anyone else. Just because you *can* publish things doesn't mean you *should* publish them.

The First Amendment Applies Only to Professional Media

The rise of blogging, Twitter and other forms of citizen journalism has rankled traditional media outlets. Newspapers, magazines, television stations and other "legacy" media have attempted to create a demarcation between themselves as professionals and others as being a second tier of writers and reporters. However, the First Amendment doesn't offer the media or media professionals any special rights. In this country, we do not license journalists, nor do we state that only professionals are protected. Instead, the law guarantees the right to a free press, regardless of who is running it. Even more, the First Amendment serves as the bedrock of our democratic system. It wasn't set up to establish a media hierarchy or offer media professionals special rights. It was meant to protect all of us from an overreaching government.

The Rights Established in the First Amendment Are Absolute

In theory, yes. In practice, no. Laws have been established and struck down over the years that have sought to prevent people from saying or publishing things that other people didn't like. In the World War I era, Congress passed the Espionage Act and the Sedition Act, which made it a crime to interfere with the war effort and to obstruct military recruiting efforts. These laws also put a damper on expression, as they made it a crime to publish or say anything that was viewed as

disloyal to the country. The Smith Act in the 1940s also made it a crime to advocate the violent overthrow of the government. Other laws and rules have limited the freedoms noted within the First Amendment. Time, place and manner restrictions have been imposed upon speech and assembly. The fighting words doctrine notes that speech can be curtailed when the words are meant to do nothing more than incite people to a “breach of the peace.” Some court cases, such as *ACLU v. Reno*, have also demonstrated that online obscenity can be unprotected. In short, while the First Amendment protects many things, it is always open to interpretation.

LIBEL

Anyone who publishes content can run the risk of defaming someone on a daily basis. People steal, lie, cheat and commit other illegal or immoral acts, and reporters are responsible for conveying that information to the public. Public relations practitioners must pair content with advocacy to draw attention to important issues, which leads to concerns regarding potential defamation risks. Even political advertising, which some courts have ruled to be almost bulletproof when it comes to **libel**, can include prejudicial and harmful commentary about candidates, political parties and organizations. The field is rife with risks that someone somewhere will not like what someone else published about him or her and thus threaten to sue. Editors in every area of the field must balance the risk associated with libeling someone against the public’s right to know something.

Libel is the primary form of defamation that you will need to understand as an online editor. A few key elements included in many definitions of libel are:

- The material must harm a party’s reputation.
- The material must be published (distributed to someone other than the offended party).
- The material exposes the party to hatred, contempt or ridicule.
- The party claiming libel must be identifiable.

It has also been said that you can’t libel the dead, as only living people are legally allowed to make a claim of libel. Yet courts have allowed a libel case to continue when the person making the claim dies in the middle of a trial. Some states have considered laws that allow the next of kin to sue for libel when they can demonstrate that their reputations were hurt through libelous claims levied against their dead relative. Given these changes as well as the fluidity of the law, it’s best to keep up to date on this issue.

The Student Press Law Center (SPLC) in Arlington, Virginia, has outlined a good checklist for determining libel. In order for someone to establish that he or she has been defamed, that person must prove each of these four elements:

Publication

The material must be disseminated to someone other than the person who is claiming to be libeled. You can call a classmate all sorts of names to her face without risking libel. It is mean, and it might be stupid, but it is not libel. However, if you post those thoughts on a blog, you could be in trouble. **Publication** can also include content in a press release, as was the case when an energy company sued an attorney in Georgia. Infinite Energy argued that David Pardue defamed the organization by stating that it “engaged in deliberate misinformation and scare tactics” in its dealings with his client, the Korean Cleaners Association of Atlanta.⁴ Although an appeals court in 2016 cleared Pardue, the saga dragged on for years, going through several levels of litigation.⁵

Publication includes the republication of libelous statements other people make. When you are quoting neighbors in a dispute, for example, and one neighbor libels another, you can find yourself in hot water for republishing those statements. The defense of “Well, I just accurately repeated what they said, so I’m not responsible” isn’t a defense at all.

Identification

The material must be “of and concerning” the person suing for libel. In many cases, the material names the person and thus establishes **identification**. For example, a story that says, “Mike Malinowitz, a junior at Smithville University, has been arrested on suspicion of stealing computers,” makes it clear who is being accused of theft.

If your media outlet does not include a name in a story, it does not mean you didn’t identify a person. Other identifying features within the material must disguise the identity of the person enough that he or she can’t be reasonably identified. In addition, the material must not libel an uninvolved third party. If you were editing a story about a school with 100 teachers, you could hide an identity fairly easily: “A teacher at Smithville High School has been suspended after the school received a complaint that she punched a student.” However, the more specific you get, the riskier it is: “A 35-year-old female music teacher, whose husband serves as the school’s principal, has been suspended. . . .”

Large groups cannot be defamed, but courts have ruled that smaller groups (often viewed as having fewer than 25 members) can claim libel. Corporations and other private entities can also assert a libel claim under this standard.

Harm

The person suing must demonstrate that the published material does serious damage to his or her reputation. The standard for establishing harm varies on the basis of the context, the person, the community and other issues. If you published that a 27-year-old woman had sexual relations with a 28-year-old man, that material could be benign or defamatory. If the woman and man are married, the likelihood of harm coming from that publication is pretty low. However, if the woman is a Catholic nun and the man is a Catholic priest, the likelihood of harm is pretty high.

Some areas in which harm can occur include:

- Accusing someone of committing a crime
- Making sexual references, including intimations regarding sexual activities, sexual proclivities and sexual orientation
- Producing claims of unethical or unscrupulous behavior
- Associating someone with a contagious disease or unsavory actions
- Using statements that allege racism or other forms of bigotry

Fault

The person alleging libel must demonstrate that the reporter created harm through an act of commission (did something wrong) or omission (failed to do something he or she should have). The standard for establishing fault differs on the basis of the plaintiff in the case. Private

individuals must only show that the defendant acted with **negligence**. Public figures must demonstrate that **actual malice** was present.

To establish negligence, courts use a reasonability standard, which questions whether the defendant was reasonably prudent or careful in reporting and publishing the material. In many cases, the courts will attempt to determine how much effort the defendant went through to avoid making a mistake.

For example, if your student paper publishes a story stating that a candidate for student body president was arrested on suspicion of stealing items from people in his residence hall, that candidate could sue for libel. If the reporter found a police report stating that charges were filed, talked to several students who noted that the candidate was around several rooms when the thefts occurred and found out from the school that the student was under investigation, this would put the paper on a strong footing. If the reporter talked to the candidate himself, and the candidate refused to comment on the situation, this would also help. However, if the

VIEW FROM A PRO FRANK LOMONTE



Courtesy of Frank LoMonte

As an attorney with a strong interest in media law, Frank LoMonte finds himself working to help young journalists better understand their rights and responsibilities. One of the biggest issues he has seen in recent years, he said, is the concerns journalists have shown regarding student privacy.

“The biggest single issue has been the resistance in many high schools to using names and faces on the web,” he said. “There is a powerful phobia that posting students’ identifying information on a news web site will lead to liability suits against schools in the event that some harm comes to a student. While it’s understandable to be conservative where student safety is involved, this really misconceives the level of information that is already in widespread public distribution.”

LoMonte serves as the director of the University of Florida’s Brechner Center for Freedom of Information. Prior to taking his position in Florida, he spent nine years as the executive director of the Student Press Law Center, where he worked to defend the rights of student journalists.

LoMonte said the Family Educational Rights and Privacy Act requires that schools safeguard confidential information that comes from student records. However, he noted, the information can be published, depending on how journalists get the information.

“The information in student news outlets does not come out of student records,” LoMonte said. “Typically, it

is volunteered by the students themselves, and people are always free to give out their own information.”

The wide reach of the web has made journalists more aware of issues concerning privacy and libel, but LoMonte said many of the traditional media norms remain an editor’s best guide.

“The best ‘libel insurance’ you can buy is simply to activate your internal fairness meter,” he said. “If someone is being accused of behavior that you would personally find hurtful to your reputation, ask yourself whether you’ve really provided them ample opportunity for rebuttal.”

Even with the advent of easily searchable archives and viral web stories, LoMonte said journalists still enjoy clear legal protections against libel claims.

“The courts are pretty protective of the media against stale libel claims, and the archiving of previously distributed content should be protected under the ‘single publication rule,’ which basically says that your time clock to file a defamation suit begins the first time that the material appears,” he said. “If you wait 10 years until the material starts showing up in Google searches of your name, you’ve waited too long.”

Conversely, he said, journalists shouldn’t view the web as the place to publish material they wouldn’t print in traditional media.

“As a general matter, it would be a very hazardous practice to relax one’s libel standards because material is ‘only’ going online,” LoMonte said. “There may be a false sense of comfort that errors are less permanent and more readily correctable online, but cached versions of erroneous material can live on, and even briefly publishing something false is still ‘publication.’”

reporter had only one source for the story, failed to check with additional people, didn't contact the police or the university and published the material without offering the candidate a chance to comment, the paper would be on shaky ground.

In this case, the courts would need to establish if this person were a public figure or a private individual. Public figures who allege libel must demonstrate actual malice. Public figures include public officials who have some semblance of responsibility over public affairs and celebrities or others who have gained public notoriety. People who have involuntarily entered the public lexicon through the commission of crimes and people who have voluntarily entered the public eye through leadership roles in issues of public interest are also viewed as public figures. People in that last group are called "limited purpose" public figures and thus are subject to actual malice standards only as they pertain to their public actions.

If a public figure sues for libel, that person must establish that the publication either knew the material was false and published it anyway or had a reckless disregard for the truth, and this standard is often difficult to demonstrate. For example, in 2014, an Iowa state senator lost his defamation suit upon appeal to the state's supreme court because of this issue.⁶ A lower court's decision stated that Rick Bertrand was libeled by a 2010 political advertisement that implied he sold deadly drugs to children while working for a pharmaceutical company. During that case, Bertrand demonstrated that he never sold the drug or owned the company, and he had presented evidence to that end to his opponent. However, Rick Mullin's campaign continued to run the ad. Despite this, Mullin's appeal to the Supreme Court was successful because the judges ruled that none of this rose to the level of "actual malice," the standard necessary for public figures.

SPLC recommends that you worry less about whether a person is a public figure and instead hold your work to the negligence standard. That more restrictive standard will help you avoid this distinction, and it will also lead to an overall stronger position in your defense.

TECHNIQUES TO AVOID LIBEL CONCERNS

Think of your editor's job as being similar to that of a hockey goalie: You are the last line of defense between what's coming at you and a negative outcome. While spelling and grammar errors can injure your organization's reputation, a libelous statement can do far worse things.

Here are some tips to help improve your libel-proofing skills:

Don't Buy the Brooklyn Bridge

If something seems too good to be true, chances are it is. If your weakest reporter returns from a mundane meeting with a fantastical story regarding corruption and money laundering, it is a pretty safe bet the story has a problem. However, situations are not always that clear cut. A source might tell a good reporter that a city official with a shady past is once again engaging in shady activity.

As a PR professional, a client might push you to use language in a press release that goes beyond what you feel accurately reflects the outcome of a lawsuit. If you feel pressured or uncertain about material that has the potential to libel someone, give it a second or third look. It is always better to be late on a story than it is to be wrong.

Remove Dangerous Modifiers

Adjectives and adverbs can add value, texture and richness to your copy. They can also put you into hot water if you are using them incorrectly. Some modifiers are vague and present few problems, such as referring to a child as "large" or "small." However, other terms can be problematic. When you include words like "fat" or "shrimpy" to modify your nouns, you are in trouble.

If your writers believe these words are accurate descriptors, have them provide information in their stories that supports these claims. Instead of having them write, “The corrupt senator testified at a hearing on Capitol Hill on bribery,” have them rework the sentence to support the claim. “The senator, who faces six counts of receiving bribes, testified at a hearing on Capitol Hill.” In short, don’t tell your readers how to feel or what to believe. Give them the information available to you and let the readers figure out how they feel or what they believe on their own.

Be Careful With Crime

Anyone who publishes information regarding criminal acts must take care with legal terms. A person who has admitted to killing someone is not necessarily a murderer. That term is reserved for people found guilty of that charge in a court of law, and it requires that the person acted with cool deliberation or depraved indifference to human life. “Murder,” “homicide,” “manslaughter,” “self-defense” and other terms can blur into one ridiculous mess. Make sure you know what the terms mean.

In addition, people in the United States are innocent until proven guilty. To that end, make sure writers don’t say that people are arrested “for” something. They can be arrested on suspicion of something, and the city, county or state can then charge them with a crime. However, saying someone was arrested for murder or for burglary includes an implicit notion of guilt.

“Allegedly” Isn’t Enough

Writers incorrectly believe the word “allegedly” will save them from libel suits. The word “allegedly” is a libel lawyer’s dream because it provides no legal protection to the person who uses it. A story that calls someone “an alleged thief” or “an alleged rapist” is no different than one that calls the person a thief or a rapist. All “allegedly” does is indicate that someone has made an accusation. At this very moment, with no proof and no rationale, your professor can accuse you of cheating in your editing class. Now, you are “the alleged cheater.” How does that feel?

Instead of relying on thinly veiled accusations, strengthen the writing and the reporting. Rely on attributions to help you here. Instead of writing, “Smith allegedly cheated on his taxes” or “Jones, the alleged killer, testified in court today,” attribute the information to an official source or rely on provable facts. “According to IRS documents, Smith cheated on his taxes” works well, as does “Jones, who is charged with two counts of murder, testified in court today.”

Don’t Assume Anything

An adage in reporting states, “If your mother says she loves you, check it out.” The same thing applies in editing when it comes to libel concerns. Make sure every fact is verified. Make sure every opinion is attributed. Make sure the story is strong, accurate and fair.

Edit Small Pieces of Copy Carefully

A grizzled veteran of many copy desks was fond of saying that you can drown just as easily in two inches of water as you can in the Pacific Ocean. His point was that a poorly written press release on a local pancake breakfast is just as likely to cause a problem as a giant story covering the seediest details of corruption.

Just because something is small, short or uncontroversial doesn’t mean it is immune to libeling someone. Look carefully at headlines, captions, briefs and other mundane pieces of copy for potential libel. Mistakes can slip by easily in these areas. In addition, media professionals often cut corners when trying to fit all the relevant information into a 280-character tweet, thus leading to potentially erroneous claims. Always edit every piece of copy with care.

Ask for Help

If you don't understand something or are concerned about something, ask for help. Ask coworkers for their thoughts regarding the risks associated with a piece of copy. If you can't reach a consensus or the risks are too great, seek legal counsel. Once the material is published, you can't get it back.

DEFENSES AGAINST LIBEL

Even the most careful and diligent media professional can be sued for libel. If you find yourself or your organization in the midst of a suit, here are the primary ways you can defend yourself:

Truth

Truth wasn't always a defense against libel. The 1735 jury verdict in the case of John Peter Zenger helped establish that while material can be damaging to a person's reputation, if it is factually accurate, the publisher cannot be held liable. Today, truth remains your best defense against libel suits.

Most courts review the material in question to determine if it is substantially true as opposed to absolutely true. In other words, if the plaintiff finds spelling or minor factual errors in the material, it doesn't mean that person will win a libel suit. The standard of substantial truth requires that the material's main elements were factually accurate.

To win a libel suit, a plaintiff must show not only that the material published harmed his reputation or exposed him or her to hatred, contempt or ridicule but also that the material is factually inaccurate. If you publish a story that says your mayor has stolen city funds and used them to buy a Corvette, you have obviously harmed the mayor's reputation. However, if the story is true, you have the best defense against a libel suit.

Privilege

This defense is usually divided into **absolute privilege** and **qualified privilege**. Absolute privilege allows judges and government officials to say whatever they want while acting in their official roles. Statements made during meetings of public bodies and public meetings in which information of public concern is discussed falls under this area of privilege as well. This privilege also applies to statements and documents that arise in the course of legal proceedings, such as witness statements, police reports and attorney summations.

Media practitioners operate under qualified privilege, meaning they are allowed to accurately report on these statements, events and documents even if the material defames someone. This standard has been applied successfully in news stories, press releases and other forms of published material.

Journalists can also quote without fear officials who are acting in their official capacity. In some states, this applies to police officers who are making statements regarding criminal cases. In other states, the law draws a distinction between private statements a police officer makes to a reporter that go beyond the scope of the official report. As long as the material was reported in a fair and balanced manner, reporters who operate under qualified privilege are protected against libel actions.

HELPFUL HINTS

HOW TO DETERMINE IF SOMETHING IS OPINION

Courts that deal with libel cases must parse the differences between opinion and fact. When a U.S. court of appeals examined the case of *Ollman v. Evans* in 1984, it created a four-part process to help consider this issue. The **Ollman test** provides a good set of guidelines for editors to determine if material is opinion or not. The four elements are:

Can the statement be proven true or false? In order for a libel suit to be successful, the plaintiff must demonstrate that the material in question is false. If the material is pure opinion, it cannot be proved true or false and thus cannot be libelous.

What is the common meaning of the words? If you call someone an idiot, did you mean that person has a profound level of mental retardation with an inability to guard against common physical dangers? A long-gone mental classification system once used these growth markers to denote someone as an “idiot,” but now this term is less specific. People understand that to call someone an “idiot” these days is to simply question how smart he or she is. If a column uses the term “idiot” to describe a coach or a politician, simply proving that the person knows enough not to run out into traffic won’t

demonstrate the statement to be factually false. The common meaning overrides the primary claim of factual distinctions.

What is the journalistic context of the remark? Stories that appear in the news section of a website, newspaper or magazine are expected to be factually based. Pieces marked as commentary or items run on blogs that specialize in commentary are expected to contain high levels of opinion. Press releases can be defended in either realm, depending on the source and the tone associated with the material. Comments a network anchor makes during the nightly newscast are different than comments a rock and roll DJ makes during the radio station’s morning show. How and when comments were made will play a role in how seriously the courts will take them.

What is the social context of the remark? Certain forms of speech are given more latitude on the basis of their social context. A professor’s lecture on quantum physics is expected to be primarily factual, while a debate between two politicians has the potential to be heated and opinionated. Statements made at political rallies are different than those made at a medical conference.

Fair Comment

The law has traditionally held that commentary should be shielded from libel suits. In providing this shield, the law allows media outlets to offer political criticism, perspectives on sports teams and reviews of restaurants. **Fair comment** also gives journalists protection as they write band, book and album reviews as well as editorials and opinion columns.

This defense does not allow unfettered libel under the guise of an opinion. Nor does it protect every defamatory statement that begins with the phrase, “In my opinion . . .” The material underlying the commentary must be rooted in fact. You can publish a review of a local band’s concert in which you state, “The drummer lacked focus and failed to keep up with the band.” However, if you add “because he was high on drugs during the concert,” you must have the facts to back that statement up.

Satire and Hyperbole

The courts have held that in some cases material is so farfetched that no reasonable person could assume it to be true. In those cases, courts have ruled that the publishers cannot be held liable for defamation. These types of material often fall into the area of satire and hyperbole.

Satire is a literary work that uses irony and wit to attack the human condition. *Mad Magazine* and *Saturday Night Live* often parody real life in an attempt to satirize everything from politicians to movies. While satire can offend some people, courts have consistently ruled that it is immune from libel laws.

For example, the 1988 Supreme Court decision in the case of *Hustler Magazine, Inc. v. Falwell*⁷ stated that public figures were not due compensation for emotional distress in the case of parody. The publisher of *Hustler* was appealing a lower court ruling that awarded the Rev. Jerry Falwell \$200,000 after a parody advertisement mocked him. The ad suggested that Falwell had intimate relations with his own mother while in an outhouse and that he often drank heavily before preaching. The Supreme Court held that reasonable people would not have viewed the ad as making statements of fact and thus vacated the lower court's ruling.

Rhetorical **hyperbole**, which includes the use of excessively outlandish statements, falls along the same lines. A restaurant review that says, "The service was so bad that it made me wish I had died as a child, never to have seen such horror" obviously has a level of outlandishness to it. In addition, no reasonable person could consider this to be true. However, statements of this nature can be libelous if they don't reach a high enough level of outrageousness. It is best to avoid reaching for this as a defense.

COMMUNICATIONS DECENCY ACT

Many websites have provided open forums for readers to discuss issues of importance. Some sites offer a comment function at the end of each story so readers can leave feedback for the writer or offer opinions on the story's topic. Anyone who has seen these comment boards knows that the material posted here can quickly devolve into name-calling and other behavior best reserved for ill-mannered first-graders. If the material posted here were published in a newspaper or broadcast over the airwaves, the media outlets would likely face serious legal repercussions. However, in an attempt to keep the web a free and open space for discussion, cybershield laws have emerged to protect publishers from harm arising from content like this.

Section 230 of the **Communications Decency Act** states that internet providers and other media platforms are not liable for content posted to their sites by people who are not directly connected with the organizations. Prior to the passage of this act, the law viewed providers who monitored message boards as making publication choices, which made them responsible for the content. They were held to the publisher's liability standard, which made them fully liable for all defamation claims because they were "creatively involved" in the process of publishing it. However, sites that allowed the comments to turn into a venomous free-for-all without acting were viewed as distributors, much like a bookstore or a newsstand owner, in that they were not expected to examine the material before distribution. The law held these sites to a lower standard and viewed them as not liable for the content.

This approach to the law meant several things, none of which was good for journalists or the furthering of democracy. The law was actively encouraging publishers to leave libelous comments online for fear of being held responsible for all of the comments if they touched one of them. Publishers were also likely to decide that these boards were more trouble than they were worth, thus eliminating them and limiting speech.

To fix this problem, Congress provided Section 230 as a shield for providers who wanted to monitor discussion forums and remove offensive content. While the earliest court cases involved internet service providers, such as America Online, courts have broadly applied the protections under this section. They have immunized social networking sites like Facebook and sales sites such as Amazon for comments users made on their sites. Site operators run a risk of losing that immunity if they actively encourage people to post illegal material. Beyond that exception, however, the courts have generally favored publishers.

As an editor, this gives you a valuable tool in monitoring material users post to your site. If you determine the comments to be defamatory or in other ways inappropriate, you have legal protection to screen and filter them.

However, the more you are actively involved in the process of creating or altering the content, the less protected you are. Courts have ruled that people who made minor edits to content did not lose immunity, but they have not determined at what specific point altering user-generated material changes the content's status. If you make substantive changes to this type of content, you run a risk of being liable for it.

INVASION OF PRIVACY

While privacy is not a right explicitly stated in the First Amendment or elsewhere in the Constitution, courts have ruled consistently that people have a right to be left alone. Balancing this right against the rights of journalists to publish newsworthy information has been a struggle. The law has delineated four areas of privacy, all of which are important to journalists: public disclosure, false light, intrusion and misappropriation.

Public Disclosure

Courts have held that certain facts about private citizens are off limits to the press because of their sensitive nature or potential for embarrassment. Medical records are viewed as private, as are educational records. Therefore, the student newspaper at your school can't get access to the transcripts of everyone on campus and run a story titled "Who's the DUMBEST Kid on Campus?" Other private details of private citizens that might be viewed as intimate and highly offensive to a reasonable person are not subject to **public disclosure**.

Individuals who wish to publish facts like these can offer a defense that the material is newsworthy and thus not private. Any information about celebrities and well-known public officials will likely meet this standard, as well as any coverage of criminal activity. Health and sexual issues remain difficult topics to cover unless the publishers can demonstrate that sharing this information is vital to the public.

False Light

A claim of **false light** means that a person is portrayed as something he or she is not. For a successful false-light claim, the plaintiff must demonstrate that the publisher's actions were reckless or done deliberately and that the material must be highly offensive to a reasonable person.

Attorney Larry Stecco filed a false-light suit against filmmaker Michael Moore for his portrayal in Moore's film "Roger & Me." According to Emily Schultz's biography on Moore, he interviewed Stecco at a high-society party where Stecco said that Flint, Michigan, is a "great place to live." Moore then juxtaposed this piece of film against one of a sheriff's deputy gutting an abandoned house. Stecco said these comments and this editing cast him in a false light as a fat-cat lawyer who was unaware of the poor conditions in the city. The jury agreed and awarded Stecco \$6,250.⁸

This also applies to photographs with "funny" captions. A photo of a large person on the street with the caption "Am I pregnant?" can lead to legal action. As was the case with Stecco's false-light claim, photo captions like this can be offensive and misleading.

Intrusion

This applies more to the reporting of material than editing, but as a manager, you need to be aware of this standard. **Intrusion** upon seclusion prevents journalists from entering a private area to gather material for a story. In addition, it prohibits journalists from gathering information about a person in a place where that person has an expectation of privacy.

Journalists generally are allowed to enter private spaces that are open to anyone, such as a mall or a business. However, they are also expected to leave when asked by those in charge of that area. Most often, this standard applies to the act of trespassing or entering private property without an owner's consent. If you hear a rumor that a local hog farmer is violating environmental protection standards, you can send a reporter out there to investigate. However, that reporter must get permission to enter the farm before doing so. Failure to do so can result in an arrested reporter and an embarrassed media outlet.

This standard also prohibits surveillance or the use of hidden cameras in areas where people would expect privacy. While a government-owned highway rest stop is a public area, people have a reasonable expectation of privacy in the bathrooms there. Using a recorder to gather sound or taking pictures of people in there would likely meet the intrusion standard.

Misappropriation

Courts have supported the notion that individuals have the right to determine when their likenesses, voices and other items associated with them can be used to promote something. In news, this is rarely an issue, as the claim to newsworthiness allows reporters to write, record and photograph individuals participating in actions of public interest. However, if that material is used for a commercial purpose, such as advertising or marketing, an individual can claim **misappropriation**.

If your website runs an image your photographer took of Tom Brady holding the Super Bowl trophy as part of your sports coverage, that's acceptable. If you repurpose that photo for an ad for your website, stating something like "SportsIcon.com: Where winners get their sports news!" you have misappropriated that image and could be liable for damages.

The best defense against any of these claims is consent. Make sure you get this permission from someone who is capable of giving it, such as the owner of a building you want to enter or the owner of the likeness you want to use. Also, try to get this permission in writing, especially in the case of promotional or advertising use.

COPYRIGHT

The purpose of copyright law is simple: If people could take your work and use it as their own without providing credit or compensation, why would you bother creating the work? If you feel like being altruistic and giving away your work, that's fine under **copyright** law. However, it should be up to you to give it away, sell it or do neither. To that end, copyright isn't always about making money, but it is about controlling how your work is used.

For example, let's say you created a cartoon for your website, and a group on campus put it on T-shirts to promote their cause. The underlying assumption is that your work is some way tied to this group or that you are providing support to this group. You might oppose everything this group stands for. You might never want to be associated with this group. Without copyright law, you would be unable to prevent the group from using your work.

People who violate copyright can face serious consequences. Because copyright attaches itself upon the creation of a creative work, the author has all the rights associated with that work. This includes the rights to sell, make copies, make derivative works and display the work publicly. Anyone else who does any of these things can be subject to statutory damages of between \$750 and \$30,000 per infringement, plus any other actual losses and attorney's fees. In some cases, courts can levy additional criminal punishment.

While copyright has always been a big issue for journalists, in the digital realm it becomes the primary legal concern for editors. The ability to easily copy images, use music or transfer text has left many people with the erroneous assumption that they aren't breaking any laws.

Fair use is a provision in copyright law that allows a balance between an individual's or organization's desire to control how material is used and the public's interest in having access to that material. This doctrine allows people to use copyrighted material to enhance news coverage, inform the public and provide commentary. Fair use is not an impenetrable shield against copyright suits, nor is it a clear-cut area of law. Below is a list of things courts consider when they look at whether an organization has overstepped the fair-use provisions in the law:

How Is It Being Used?

Noncommercial uses, such as efforts to further news coverage, tend to receive more protection than commercial uses, such as advertising or marketing. Thus, a small bit of a song or a movie star's marketing headshot could be used fairly within news coverage of that band or star. However, if you attempted to sell ads using those same pieces of material, fair use would likely not protect you.

How Much Did You Take?

The law has not defined a strict number of words, portion of a performance or percentage of the overall work as being fair use. However, a rule of thumb has emerged that you can copy 10 percent of a published work or use 30 seconds of a song without fear. The law does not consider this amount the exact breaking point between fair use and copyright infringement, but the more material you use, the bigger the risk that you are violating copyright. In addition, the doctrine offers protection for the "heart" of the work, which means that if you take what is essential to this work and use it for your own, you might be in violation, regardless of the quantity of the material you took.

Do You Create a Financial Detriment to the Owner?

The purpose of copyright is to allow the copyright holders to maintain control over their content and profit from it as they see fit. If your use of their material infringes upon these rights, courts will likely rule that you violated the law. When you decide to use material that isn't yours, ask yourself if your actions create a secondary market for the material. If you do a review of a movie and run a small image of the movie poster, you aren't undercutting the poster business. However, if you upload the whole movie to a website and tell your readers to watch it for themselves to see if they agree with your review, you are clearly in violation. The tipping point for this discussion isn't clearly outlined, so it is best to err on the side of caution.

ONLINE LIMITS TO LIABILITY

Just as the law has recognized that content providers cannot be held liable for every potentially libelous action its users take, it has also recognized this problem with regard to copyright infringement. In opening their sites to user-generated content, providers ran the risk of letting users post material that violated copyright.

To help address this issue, lawmakers struck a balance between protecting copyright and indemnifying websites against harm. The **Online Copyright Infringement Liability Limitation Act (OCILLA)** provides a process for all parties involved to work through issues associated with illegally posted material.

As an editor, you might need to participate in this process, so understanding the steps you must take will be important (see the Helpful Hints box for a step-by-step examination). If your organization designates you as the agent who is to receive these notices for copyright infringement, the organization should register you with the Register of Copyrights. This will establish you as the main conduit for these cases.

If your organization decides to use someone else, you still have responsibilities as the online editor. You need to post contact information for your organization's agent on the site in an obvious place so people know whom to contact. You also need to include a general explanation of OCILLA and how your organization will process claims of copyright infringement.

Beyond that, you will want to establish a policy for dealing with people who repeatedly break the law on your site. This should include ways in which you establish patterns of bad behavior and how you will contact these people regarding their actions. It should be clear and fair, with a listing of what users should not do and the consequences if they violate your rules. It would also be worth your time to discuss these issues with your technical support staff to see if anything can be done to limit copyright issues from a technology standpoint. This could include the creation of an online consent form that requires users to attest to their rights as copyright holders or filtering software that limits users from posting certain types of material.

The more proactive you are and the more closely you follow the steps outlined in OCILLA, the more protected you will be against legal action.

HELPFUL HINTS

THE STEPS UNDER OCILLA

If a user illegally posts a piece of copyrighted material, such as a photo or drawing, to your website, here is the process for working through this problem:

- If the copyright owner contacts your organization regarding the infringement, he is expected to provide the following information:
 - His contact information
 - Information that identifies the photo or drawing
 - The internet address of the photo or drawing
 - A statement that demonstrates a good-faith belief that copyright has been infringed upon
- A statement that, under penalty of perjury, he is the legal copyright holder or has been empowered to act on behalf of the copyright holder
- His signature
- After being made aware of the infringement (either via this contact or through an independent discovery), your organization is expected to "expeditiously" remove the content and notify the person who posted it of your actions.
- If that person believes the content was unfairly removed, she can send a counter-notice that

includes much of the same information noted in the first step, but argues that the organization was incorrect in removing the material. She should then state she would be willing to have the case heard in a court of law to determine the outcome of the posting.

- Your organization would then notify the person who asked that the material be removed, informing him of the counter-notice. At that point, he can file suit against the person who posted the content, and the

courts will sort things out. If he does not file suit, your organization can put the material back online between 10 and 14 business days from the time you notify the original complainant.

If either of these people files suit after that, OCILLA states that your organization should be immune from damages associated with those actions. However, these “take down” and “put back” provisions are general guidelines, and you need to be aware of more specific language within the law. When you are in doubt as to this process, seek advice from your boss and/or legal counsel.

CREATIVE COMMONS

In traditional copyright protection, the phrase “all rights reserved” has provided copyright owners full control over how their products will be used. When copyright expires, however, the protections disappear, and the material enters the public domain. Very little middle ground existed or needed to exist prior to the internet. However, many people want some level of control over their work but would prefer that others can use it and forward it in an attempt to broaden the overall reach of their messages.

Creative Commons licensing has attempted to find a way in which some rights can be reserved while still furthering the free exchange of material. CC licenses allow content to grow and flourish beyond the original owner’s intent through copying and distribution without the express written consent of the creator. The licenses are built on copyright principles but also allow the creators to set specific limits for their work and how it is to be used. Creators can determine if the work can be used for commercial and/or noncommercial uses, if the material can be altered or if it needs to be disseminated as it was created or a variety of other guidelines.

You can use material marked with a Creative Commons license provided you abide by the restrictions the creators set. This approach to sharing material can allow you to substantially augment your website without being bogged down in protracted problems trying to secure copyright. However, you should always make sure you are using the material properly. You should also make a strong effort to create the material yourself or have someone on your staff create it for you.

WAYS TO AVOID COPYRIGHT CONCERNS

The issues of law are sticky and difficult to wade through. Once you find yourself running afoul of the law, it takes a lot of time, effort and money to get things resolved. The best way to avoid problems with regard to copyright is often to avoid making the mistake in the first place. Here are some key things to do in order to make life easier on you and your website:

Ask Permission

The best way to avoid copyright infringement is to get the right to publish the material from the copyright’s owner. If you want to republish an article, post a photo or attach some video that you don’t own, ask the person who does own it if he or she would grant you reprint rights. Many

times, people are happy to share their material if they know it will be used for the betterment of others or in a way that is similar to their original vision for it. Some places have a universal policy that needs to be followed or a specific form that needs to be filled out, so keep that in mind when you are running against a deadline and you need to use something. However, usually a phone call or an email can get the job done. Keep a written record of that authorization, in the form of the email or letter you received. If you get approval over the phone, note the name of the person with whom you spoke, the time and date of the conversation and any other pertinent information. You might need that information later.

Use Your Own Previous Work

Many media organizations create content for their own uses, and much of that material is archived for historical purposes and later use. If the organization owns the copyright and it has the material, it can, in many cases, reuse the material as it sees fit. For example, if your PR agency created a logo for a campaign on physical fitness, and you now want to create a new “be healthy” campaign, you could reuse that logo if you saw fit. The same idea applies when an organization creates a “mascot” or standing figure that represents its organization. The visual representation is often transferred from campaign to campaign with a few aesthetic alterations.

Don't Be Lazy

It is always easier to use something you can find on Google than doing your own work. However, laziness is not an excuse for violating copyright. If you want a photo of an event to go with the story on that event, have someone go out and get it. If you need a logo or an icon or something to match up with some copy, don't take someone else's stuff. Have someone on your staff make it for you or make it yourself.

Look for Material That Lacks Copyright

Some things can't be copyrighted, such as color schemes or phrases. Others were placed into the public domain via Creative Commons licensing, mentioned above. Images in the Library of Congress can be used without fear, as can material for which copyright has expired. Works that were originally created after Jan. 1, 1978, have copyright protection that lasts for 70 years after the death of creator. Work created prior to this date has varying levels of protection, depending on how it was registered, if it was published or how old it is. Using material that has either no copyright or an expired copyright can keep you out of trouble.

Don't Steal

When stealing something tangible, such as a candy bar from a store or money from someone's purse, the morality and legality are pretty clear. However, the digital sharing phenomenon has made this concept seem more acceptable. It's not. If you don't own it and you can't get permission to use it, don't steal it. It makes people less likely to cooperate with you in the future, it casts your organization in a bad light and someone will likely sue you. In most cases, what you are taking isn't worth the hassle you will face for violating the copyright. Keep your hands off other people's things.

THE BIG THREE

Here are the three key things you should take away from this chapter:

1. **The law isn't simple:** In most cases, legal opinions do not provide an ironclad answer to every question. This means it's often hard to come up with a simple understanding of what you can and cannot do with content. You should take care and rely on the basic tenets outlined here with regard to libel, invasion of privacy and copyright infringement before you publish content. If you aren't sure, seek help from coworkers or legal experts before you disseminate material that could land you in hot water.
2. **Be skeptical:** Whether you are questioning a new reporter about a story that seems too good to be true or working with a staffer who is trying to "jazz up" a press release, use skepticism to keep both of you out of trouble. Editing is often about clarifying and improving content, but it is also about pushing back on fantastical claims. Be firm in your responses and make sure everyone who works with you can back up their claims before publication.
3. **Don't steal:** Copyright infringement is one of the more common concerns in media practices today. Digital content can appear to be free because it is so easy to take and repurpose. However, that doesn't mean you aren't violating the law. Contact copyright holders and get the rights to the material before you use it. Also, consider creating your own content or repurposing something you already own before you take the easy way out and grab something that doesn't belong to you.

KEY TERMS

absolute privilege 28	Federal Communications Commission 22	Ollman test 29
actual malice 25	First Amendment 21	Online Copyright Infringement Liability Limitation Act (OCILLA) 34
Communications Decency Act 30	hyperbole 30	publication 23
copyright 32	identification 24	public disclosure 31
Creative Commons 35	intrusion 32	qualified privilege 28
editorial discretion 22	libel 23	satire 29
fair comment 29	misappropriation 32	
fair use 33	negligence 25	
false light 31		

DISCUSSION QUESTIONS

1. Of the four misconceptions about the First Amendment, which one surprised you the most? Which one or ones did you already know? How confident are you in the freedoms afforded you under the First Amendment as a citizen and a journalist?
2. One of the key aspects of libel law is "publication," which means disseminating the content to people other than the person who was identified in the potentially libelous material. How often do you think about the issue of libel when you use social media like Twitter or Facebook to share information about people you know? Knowing what you now know about social media as "publication" as far as a libel suit goes, how concerned are you about things you have published in the past?
3. What are your feelings on the concept of copyright, especially in the digital age? Do you think it is too restrictive or that it doesn't go far enough to protect content? Or are you somewhere in the middle on this issue? Do you think your position would change if you were put in charge of a publication as an editor? Why or why not?

WRITE NOW!

1. Below is a list of scenarios in which there is potential to invade someone's privacy. First, note if you think each constitutes an invasion of privacy. Then, if you determine it to be invasion of privacy, list which of the four types of invasion best applies:
 - a. Carl is doing laundry next to the equipment manager for the university's cheerleading team. When the manager walks away, Carl sneaks a peek at the team's list of clothing, which includes all of the sizes of their underpants. He then publishes a column in the student paper about who has the biggest butt on the team, citing that list.
 - b. The president of the university and his wife are having a screaming fight in their home when the president runs outside, followed by his wife, who is chasing him with a shotgun, all in full view of a public street. Jamie takes several photos of this from her position on a public sidewalk and posts them to her blog.
 - c. The kicker on your football team is deeply religious, and he always gets down on one knee to pray after each game. Elsa takes a picture of him in the kneeling position and runs the photo with her column on how un-American it is that football players are taking a knee during the national anthem as a form of protest.
2. Review your social media feeds and examine them for potentially libelous statements you or your friends made. Select several posts you think could meet the definition of libel, and then walk through the standards required for a successful libel suit. Explain how each standard applies to the content you selected in a short written piece on each post.
3. Select a piece of content you feel has the potential for libel and apply the Ollman test to it. Walk through each of the four questions associated with the test and explain how it supports or does not support the concept that the material is opinion based.



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