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TECHNOLOGY MAY-RATHON

LEGAL CONSIDERATIONS OF DIGITAL PUBLISHING

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Copyright Basics

What does a Copyright do?

- Copyright gives the owner the exclusive right to:
 - Reproduce
 - Prepare derivative works
 - Distribute copies
 - Perform/Display the work publicly
- Term:
 - Author's lifetime plus 70 years, but...
 - For works made for hire - 95 years after publication or 120 years from creation, whichever is shorter
- Since 1989, copyright symbol © is optional

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Copyright Basics

How does one obtain a copyright?

- AUTOMATICALLY by creating an expression

How does one protect a copyrighted work?

- REGISTER with the U.S. Copyright Office in order to:
 - Put others on notice that you own the copyright
 - Have the right to sue for copyright infringement
 - If within three months after publication of the work or prior to an infringement of the work, statutory damages will be available

Defenses to Copyright Infringement

How Does One Defend Against a Copyright Claim?

- Defendant will want to prove that:
 - Defendant did not do what plaintiff alleges;
 - Defendant did what is claimed, but doing so was not a violation of plaintiff's rights (e.g., defendant had a license); or
 - Defendant did what is claimed and it would be a violation of plaintiff's rights, except for the fact that defendant was making "fair use" of the copyrighted work

Fair Use Defense

Section 107:

- Notwithstanding the provisions of sections 106 and 106A, **the fair use of a copyrighted work**, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, **news reporting**, teaching (including multiple copies for classroom use), scholarship, or research, **is not an infringement of copyright.** ...

Fair Use Defense

“Fair Use” has a specific legal meaning

- It is not just what seems fair to you
- “News reporting” does not get absolute protection, even though mentioned in the statute
- “Fair Use” is decided on a case-by-case basis

Four factors are balanced against one another

- The purpose and character of the use
- The nature of the work being infringed
- The amount that was taken from the work
- The effect of the use on the market for, or the value of, the work

Fair Use Defense

What is the purpose and character of the use?

- Fair use favors:
 - Transformative uses (news reporting, criticism, commentary, parody)
 - Non-commercial uses
 - Teaching
 - Personal use
 - Research
- Fair use disfavors:
 - Commercial uses
 - Derivative works

Fair Use Defense

What is the nature of the copyrighted work?

- Fair use favors:
 - Published works
 - Fact-based works
- Fair use disfavors:
 - Unpublished works
 - Creative or fictional works

Fair Use Defense

What is the amount and substantiality of the copyrighted work used?

- Fair use favors:
 - Small amount used
 - Portion used is not central to the work
- Fair use disfavors:
 - Large amount/whole work is used
 - Portion used is central to the work

Fair Use Defense

What is the effect of the use on the market for, or the value of, the work? Will the defendant's actions, if widespread, reduce the value of the copyrighted work?

- Fair use favors:
 - Few copies reproduced
 - No market for permission/licensing
 - Limited time use
- Fair use disfavors:
 - Competes with original copyrighted work
 - Many copies produced
 - Long term or repeated use
 - Affordable permission/licensing exists

Fair Use Defense – Case Examples

Los Angeles News Service v. KCAL-TV Channel 9, 108 F. 3d 1119 (9th Cir. 1997)



Not Fair Use

Fair Use Defense – Case Examples

***Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998)**



Fair Use

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Fair Use Defense – Case Examples

***Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)**



Not Fair Use

Fair Use Defense – Case Examples

Cariou v. Prince, 714 F. 3d 694 (2d. Cir. 2013)



Fair Use



Not Fair Use

Fair Use In Practice

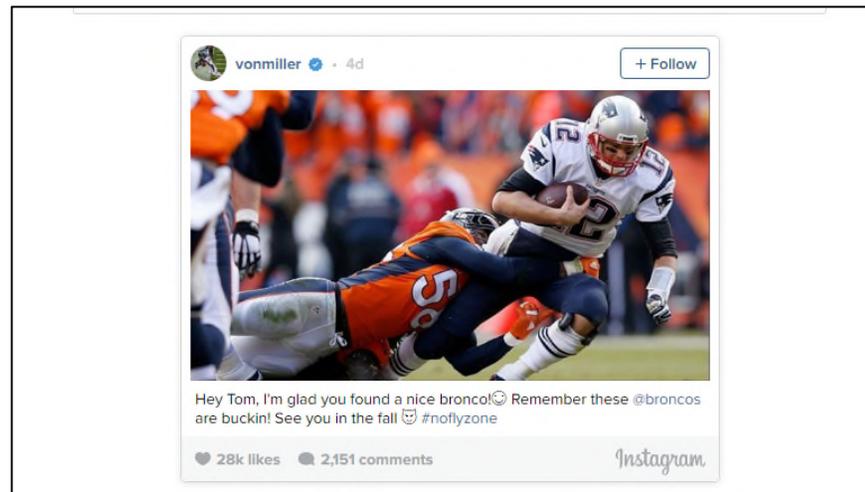
May I use publicly available pictures from Twitter, Instagram, Facebook, etc.?

- Review the terms of service on the website
 - Twitter: “By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).”
 - “Tip: This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same.”
 - Embedding is typically allowed under TOS
 - If not embedding, run through fair use factors

Fair Use In Practice

May I use publicly available pictures from Twitter, Instagram, Facebook, etc.?

- Embedded Post



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Fair Use In Practice

Scenario

- A 23-year-old teacher in Fitchburg posed semi-clad in modeling photos and was suspended when copies of the photos were sent anonymously to the school.
- The teacher had posted the photos on her publicly-accessible Instagram account.
- A reporter grabs one of the photos and uses it in a column about the episode.

What is the effect of Instagram's Terms of Service?

Is it fair use?

What if used for "15 hottest teachers" list?

Buzzfeed – From 30 to 29 Faces

The 29 Funniest Header Faces

Header faces are right up there with [figure skating faces](#). Both are unfortunately hilarious.

posted on June 14, 2010 at 8:49am EDT



Matt Stopera
BuzzFeed Staff



1.



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Buzzfeed – Lifting Flickr Photo

18 Everyday Products You've Been Using Wrong

Your life has been a lie.

posted on August 23, 2013 at 2:03pm EDT



Gabby Noone
BuzzFeed Staff



14. You've been serving juice boxes the wrong way.



themommyhood.com

Pull the sides out so you child has something to grasp onto, stopping them from spilling.

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Getty – Lifting TwitPic Photo



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DEFAMATION

Defamation

What is Defamation?

A State law tort that has been heavily constitutionalized

- **Elements:**
- **False** Statement of **Fact**
- Published **About** the Plaintiff
- Fact Asserted is **Defamatory**
- Published Either **Negligently** (**Private Figure** Case) or with **Actual Malice** (**Public Official/Figure** Case)
- Caused Either **Actual or Presumed Damages**

Falsity

Accurately quoting someone else does not prove the truth of the quoted statement: “Talebearers are as bad as talemakers.”

The standard is **Substantial Truth**

Only the “**Substance, Gist, or Sting**” of the Statement Must be True

- For example
 - A report that the plaintiff **pled guilty** was substantially true even though he actually had **pled nolo** because the latter meant he did not contest the charges

There are limits:

- As Justice Scalia said: “It is shameful that Benedict Arnold was a traitor; but he was not a shop-lifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity.”

Fact v. Opinion

- Some States say there is no liability for statements of “opinion”
- The Supreme Court uses different terminology with similar effect: Liability requires a **provably false assertion of fact**
- “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,” is protected, says the Supreme Court

Fact v. Opinion

Other Examples:

- Calling a theater production “**a rip-off, a fraud, a scandal, a snake oil job**” has been held non-verifiable opinion
- A professor’s criticism of the **safety and effectiveness of dietary supplement** was protected opinion, but stating whether the ingredients had been tested in humans was a statement of fact

Opinion Based on Disclosed Fact

Many states protect **opinions based on facts** that either are **disclosed** to or already known to the audience on the theory that the audience has sufficient information to discount the opinion for what it is worth

- The disclosed facts stated must not be actionable and must not imply other, defamatory facts
 - Calling someone an alcoholic can be an assertion of fact, but saying that you saw someone have a martini at lunch and therefore believe he or she is an alcoholic is an opinion based on a disclosed, nondefamatory fact

Federal law may be less protective.

- The Supreme Court has said that the First Amendment does not have a separate protection of statements of “opinion” and that the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar,” **even if** the speaker states the facts upon which he or she bases his opinion



Publication

“Publication” requires communication to some person other than the plaintiff, in a language the audience understands

Acts can communicate a message and satisfy the publication requirement

- Publicly escorting an employee under guard to be interviewed for potential wrongdoing can be done in a way that conveys a clear and unambiguous false statement

“Of and Concerning”

The publication must be “about” the plaintiff

- Defaming a husband does not defame a wife
- Defaming a corporation does not defame its officers or shareholders unless the report directly imputes wrongdoing to them

The plaintiff need not be identified by name, so long as enough clues are given that a reasonable person would consider the statement to refer to the plaintiff

- News Report: “Unnamed Owner of Brookline Deli Part of Drug Ring.” Held: One of several Brookline deli owners had standing to sue, even though he was not mentioned by name and defendant did not intend to refer to him.
- But the deli could not sue, because the report accused the owner of wrongdoing, not the company

“Of and Concerning”

- The manufacturer of a hip protector product could not sue based on an article critical of hip protectors where twenty-two other companies manufactured similar products and article did not mention any manufacturer by name

Group Libel

- Defaming a large enough group of people will not give any of its individual members a cause of action
- New Report: Company X run “by paranoids for paranoids.” Held: Not specific enough to allow 24 of 325 total employees to sue for defamation
- But saying that an officer of a corporation has embezzled corporate funds is actionable if the corporation only has four officers

Defamatory Content

A statement is defamatory if it discredits the plaintiff or holds the plaintiff up to scorn, hatred, ridicule, or contempt in the minds of any considerable and respectable segment of the community

It is not enough that the plaintiff sincerely is offended

- Courts have held that it is not defamatory to falsely report that a Democrat is a Republican; say that a plaintiff resigned from his or her job, or that a heterosexual is gay.

Defamatory Content

- Examples of statements that have been considered defamatory include
 - accusations of the commission of a crime;
 - statements that one has a loathsome disease (e.g., syphilis, leprosy);
 - allegations of adultery or sexual misconduct;
 - allegations of insanity or mental illness;
 - allegations of drug abuse or alcoholism;
 - allegations of dishonesty; and
 - allegations of insolvency.

Defamatory Content

In some cases, the statement does not seem defamatory on its face, but is when you consider other facts known to the audience

- A false report that ABC Corp. was awarded a contract does not appear defamatory of anyone. But if the contract in fact was awarded to XYZ Corp., then the report might be defamatory by accusing either company of dishonestly claiming the award.

Corporate Defamation

Corporate Defamation

- Although “stereotypically bloodless and soulless,” corporations and partnerships can be defamed.
 - Examples are reports of insolvency, deceptive business practices, gross mismanagement, or criminal use of its property.
 - Damages include reputational harm and financial losses, but not hurt feelings.

Trade Libel (more on that later) defames a company’s **products**, not the company itself

Negligence v. Actual Malice

The First Amendment prohibits **strict liability** for defamation

Private figures must prove that the defendant was **negligent**, i.e., published the statement without exercising reasonable care as to whether the statement was true

Public officials and public figures must prove **actual malice**

- Actual malice does not mean hatred or ill will.
- Requires proof by clear and convincing evidence of “knowledge of falsity or reckless disregard for the truth”
- “Reckless disregard” has a special meaning:
- The defendant had “serious, subjective doubts” about the truth of the statement, or published with a “high degree of awareness of probable falsity”
- Proof of negligence is not enough

Who Is A Public Official?

A public official must have some substantial government responsibility.

Not all public employees meet the test, e.g., the nightwatchman accused of stealing state secrets

Examples of public officials include:

- Governor, mayor, city councilors, selectpersons
- Police officers
- Assistant State Attorney
- High school principal
- School district's director of maintenance and transportation

Who Is A Public Official?

Examples of plaintiffs who were not public officials include:

- A City Water Department employee
- A State Senate court officer
- A clinical psychologist at a veterans' administration hospital
- Lawyers, despite being "officers of the court"

Who Is A Public Figure?

- “All Purpose” Public Figures have “roles of special prominence in the affairs of society,” have achieved “pervasive fame or notoriety” or occupy positions of “persuasive power and influence”
- “Limited-Purpose” public figures “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved”
- “Involuntary” public figures are “drawn into a particular public controversy,” and may “become a public figure through no purposeful action of their own”

Who Is A Public Figure?

Examples of public figures:

- Candidates for public office
- Celebrities
- Public employee union
- Public company executive accused of sexual harassment and who acted publicly to influence the pre-existing controversy about sexual harassment in the workplace

Who Is A Public Figure?

Persons held not to be public figures:

- Behavioral scientist funded by federal grant funds
- Prominent socialite embroiled in a celebrated divorce proceeding
- Person with a 16-year old criminal record
- Man arrested and released on suspicion of murder
- Secretary working at the Democratic National Committee at the time of the Watergate break-in

Who Is A Public Figure?

Corporations, including public companies, are not automatically public figures.

- Pharmaceutical company that manufactured, advertised, and sold dietary supplements, held not a public figure
- Some corporations may be public figures because of their prominence and influence, e.g., FaceBook
- Other corporations might be public figures because of the role they play in public controversies, e.g., by lobbying, environmental advocacy

Damages

- Loss of reputation – Presumed and Actual
- Emotional distress
- Loss of consortium
- Economic loss

Presumed and Punitive Damages:

- Public Figure/Officials – Must prove actual malice
- Private Figure/Speech on Matter of Public Concern – Must prove actual malice
- Private Figure/Speech on Matter of Private Concern – Varies from State to State

Damages

Common Law Defenses under State Law

Absolute Privileges

- Some statements related to government proceedings are absolutely privileged, even if known to be false when made
- Trial Testimony
- Court pleadings
- Statements to the police, as long as made in the context of a proposed or contemplated judicial proceeding
- Letters written by lawyers threatening legal action if preliminary to a proposed judicial proceeding that is contemplated in good faith and under serious consideration.
- Many states also recognize an absolute privilege for communications between spouses and for publications required by law.

Common Law Defenses under State Law

Conditional Privileges

- The “common interest” privilege applies to communications when the information “is reasonably related to the employer’s legitimate business interest,” . . . or if the publisher and the recipient share a common interest “and the communication is of a kind “reasonably calculated to protect or further it.”
- The plaintiff must prove that the privilege has been lost or “abused.”

The conditional privilege is lost if the defendant

- knew the information was false;
- had no reason to believe it to be true; or
- recklessly published the information unnecessarily, unreasonably, or excessively (e.g., copying people who don’t have a need to know)

Common Law Defenses under State Law

Negligence is not enough to lose the conditional privilege

In some jurisdictions, the privilege is lost if the defendant was motivated by “common law malice” a bad faith ulterior purpose or ill will.

- For example: an accusation of theft motivated by a desire to rid the company of an injury claimant, or attacks motivated by a desire for revenge, are abuses of the privilege.

Trade Libel

Trade Libel, a/k/a commercial disparagement, injurious falsehood, disparagement of property, slander of goods

A plaintiff must prove that the defendant

- (1) published a false statement to a person other than the plaintiff;
- (2) “of and concerning” the **plaintiff’s products or services**;
- (3) with knowledge of the statement’s falsity or with reckless disregard of its truth or falsity;
- (4) where pecuniary harm to the plaintiff’s interests was intended or foreseeable; and
- (5) such publication resulted in **special damages** in the form of pecuniary loss.

Communications Decency Act

CDA Section 230

- Section 230 immunity requires that:
 - the defendant be a provider or user of an interactive computer service,
 - includes ISPs, social networks, etc.
 - the cause of action treats the defendant as a publisher or speaker of information, and
 - the information be provided by another information content provider.
- Protects wide range of claims but Section 230 does not apply to federal criminal claims, intellectual property claims (at least federal), or electronic communications privacy laws.
- You can select, withdraw, or edit user content, but immunity may not apply if you significantly change the meaning of the content.
- There is no requirement to police.

PRIVACY

Privacy

Four Privacy Torts:

- Publication of Private Facts
- Intrusion upon Seclusion
- False Light
- Right to Publicity

Publication of Private Facts

Publication of Private, Intimate Facts of No Legitimate Public Concern

- Private Facts: e.g., diaries, medical records, personnel records
- Legitimate Public Concern= Newsworthiness Test

Constitutional Defenses:

- Information legally obtained from public government records

Intrusion upon Seclusion

Intentional invasion of the private affairs of the plaintiff;

Offensive to a reasonable person;

Causing mental anguish or suffering to the plaintiff

Examples:

- Peeping Toms
- Reading a diary
- Secret video or audio recordings in private places

Some states have statutory claims for wiretapping and videorecordings

Constitutional Defenses exist for “legally obtained” information

QUESTIONS?

Biography



Jonathan Albano

Boston

Jonathan M. Albano focuses his practice primarily on commercial, media, and appellate litigation. He has tried to completion jury trials, bench trials, and arbitrations and has argued over 40 appeals. Jon's commercial litigation work includes representation of private and public companies and financial institutions in multimillion-dollar litigation claims. He has tried and obtained favorable results for clients in contract disputes, libel, purchase price adjustment, and complex construction claims.

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Biography



Lawrence Stanley, Jr.
Boston

Lawrence (Larry) Stanley counsels on intellectual property litigation, including specifically patent, copyright, trademark, trade dress, false advertising, and trade secret matters. Larry has represented a wide variety of clients with matters in state and federal courts as well as the Trademark Trial and Appeals Board and the International Trade Commission. He is registered to prosecute patents before the United States Patent and Trademark Office (Registration No. 59671) and has been involved in client counseling and providing infringement, validity, patentability, and freedom-to-operate opinions.

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Our Global Reach

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