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Defamation, Privacy, and Publicity

by
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Advertising agencies, publishers, and broadcast companies produce a steady stream of messages for the general public. The content of these messages often includes information about, or images of, specific individuals—whether they are models, celebrities, employees, or people on the street. In preparing this content, publishers, broadcasters, and agencies have always been aware of potential liability for claims of defamation of character or violation of an individual’s rights of privacy and publicity. However, the rapid expansion of digital communications means that any company distributing information via e-mail or the Web now faces many of the same legal risks.

Someone may file a claim against you seeking to impose liability for economic loss or personal injury allegedly caused by some error or negligence in the content of the work that you produce. Personal injury can be either physical or emotional, including a damaged reputation. This article explains the key legal issues that communications professionals must be aware of.

Defamation

Defamation is intentional communication of a false statement about someone to a third party—a statement that injures the subject’s good name and reputation, damages the subject’s standing in the community, or deters others from associating with him or her. Defamation is a civil wrong (also referred to as a “tort”). In this context, civil means that the matter is a dispute between two private parties rather than a criminal proceeding by the government against a party. Defamation has its roots in common law (decisions made by judges over the years) but many states have also passed statutes on the topic, which is to say that defamation is regulated at the state level, not the federal level. The statutes also include time limitations (for example: in California, any claim must be filed within one year after the false statement was made, but in Massachusetts a claim can be made within three years).

The injured person can seek remedy by bringing a lawsuit against the person or company that made the false statement. The remedy will usually be in the form of damages (there are several types of damages—more information about this in a moment). When an injured party takes legal action, he or she is the plaintiff in the matter, and the individual or company that made the untrue statement is the defendant.

There are two different categories of defamation: slander and libel.

Slander

Slander is oral defamation—spoken assertion about someone that is not true. It happens when an individual tells one or more persons something false about someone else, usually in direct conversation. Other forms of communication are covered by libel.

Libel

Libel includes untruthful statements expressed in a fixed or permanent medium. For example, they could be in writing, on a sign, in a picture, or broadcast on radio, television, or the Internet. This means that the statement has the potential to reach a very wide audience. The false statement must hold the subject up to ridicule, hatred, scorn, or contempt; cause the subject to be shunned or ostracized; or cause the subject to suffer mental anguish and humiliation. The individual or company responsible for printing or broadcasting the statement (for example, a newspaper, a magazine, a political organization, or a broadcaster) is open to a lawsuit by the person the statement was about.

In the U.S., most states demand a published retraction for libelous statements. A printed retraction serves as an admission of error and a public correction. Usually, the injured party does not have the right to file a lawsuit if a correction is made. Very minor mistakes in reporting, however, are not considered to be libelous. This would include such simple errors as misstating someone's age. (Incorrect information can also present someone in a false light — more about this in a moment.) In addition, it's generally the case that government bodies and public records are exempt from libel actions.

Defamation per se

In all states except Arizona, Arkansas, Missouri, and Tennessee, certain types of untrue statements are considered to be so serious that they will always qualify as defamation. They are grouped together under the term “defamation per se” (in Latin, “per se” means “by itself” or “essentially”). Each of them is considered incapable of having an innocent meaning. Such accusations include:

- Imputing that the subject has committed a crime or engaged in criminal conduct
- Claiming that the subject has a feared illness or loathsome disease
- Imputing personal conduct or characteristics that render the person unable to perform his or her occupation, such as stating that the person is incompetent or unreliable as a businessperson

If spoken, such statements are “slander per se.” If printed or broadcast, they are “libel per se.” The statement is action-able in itself without the plaintiff introducing additional facts because the harmful intent is considered to be obvious.

Claims

In American courts, the burden of proof rests with the plaintiff. When a claim of defamation is made, the following aspects will be examined very carefully:

Identification

A plaintiff must establish that the alleged defamation refers to him or her specifically, either directly or indirectly. A statement is not defamation unless it identifies in some way the person being attacked.

Publication

The statement must be shown or communicated to at least one other person before it is actionable by law.

Statement of fact

The statement must be reasonably understood by third parties to purport fact. If it is presented as a fact rather than as an opinion, it will be actionable. In general, opinions, satire, and works of fiction—if they are clearly identified as such—are not defamatory.

Falsehood

The statement must be false. If it's true and can be proven, it's not defamation.

Actual injury

In a lawsuit, no one can recover damages unless he or she has suffered injury. The plaintiff will be asked to provide proof of damaged reputation, mental anguish, suffering, or economic loss.

Liability

In many instances, whether or not the person who made the statement is found to be liable will depend on whether the injured party is a public figure or a private person. If a public figure is involved, the matter may be of public concern. Although libel is defined under state law, the U.S. Supreme Court has consistently ruled that First Amendment protection of free speech applies to matters of public concern. Free speech is the fundamental right of individuals and media companies in a democracy to criticize public figures and speak candidly on matters that are of interest to the community as a whole, whether for social, political, or other reasons.

Because of this, a public figure must prove that the libelous statement was made with malicious intent. Otherwise, the statement will be protected as a form of fair commentary. Everyone has a constitutional right to express opinions or make fair comment on public figures. To recover damages, a well-known plaintiff (such as a politician, government official, celebrity, famous athlete, or other prominent person) who alleges libel (by a newspaper, a radio station, et cetera) must prove that the defendant made the statement with reckless disregard for the truth—perhaps even knowing that it was false. Proving malicious intent in court is difficult, which is why many public figures refrain from responding to lies made about them. Another good reason not to file a

lawsuit is that the ensuing publicity would only make more people aware of the false statement.

In contrast, there is greater protection for a private person. A private person does not need to prove malice on the part of the defendant, merely that some degree of negligence was involved in not checking for truthfulness before publishing the false statement.

Commercial defamation

So far, we've been talking about defamation of a person (often called defamation of character), but it's also possible to commit commercial defamation (sometimes called trade defamation). This involves damaging a business by making false statements that tend to diminish its public reputation. If spoken, the false statement is trade slander or slander of goods. If published or broadcast, it's trade libel. Some businesses are very aggressive about defending their character and protecting the reputation of their products in the marketplace. For example, the toy company Mattel has filed many lawsuits over the years to protect their most famous product, the fashion doll Barbie.

Legal fees

In many instances, a defendant in a defamation lawsuit who is found to be liable will be ordered by the court to pay the plaintiff's attorney's fees.

Damages

If the defendant is found liable for defamation, the plaintiff will be awarded damages in the form of monetary compensation. The amount of money that the defendant is ordered to pay might be determined in several different ways.

Actual damages / consequential damages

Depending on the details of the case, the amount paid to the plaintiff might be limited to actual damages and consequential damages. Actual damages are out-of-pocket costs that resulted directly from the defamation, such as medical bills. Consequential damages (also called "special damages") are for other types of harm such as a measurable loss of business. They are awarded in an amount deemed to compensate for the specific losses named. Actual damages and consequential damages are not speculative or subjective. They can be easily calculated in monetary terms. They are different from general damages, which do not have evidence of a specific monetary amount.

General damages

These are subjective, both in nature and in monetary value. They include such things as pain and suffering. General damages serve as compensation for losses that will continue into the future and for which no exact value can be calculated. In most cases, malice must be proved before a plaintiff can receive general damages for harm done to his or her reputation. However, in cases of

defamation per se, there is no need to prove malice because such claims involve vicious statements that are considered to be obviously harmful.

Punitive damages

These are also referred to as “exemplary damages” because, in addition to serving as a punishment of the defendant, they set an example for the public. They may be awarded if the defendant acted in a particularly egregious way—willfully committing acts that were oppressive, violent, wanton, or fraudulent. Punitive damages are often requested by plaintiffs in lawsuits, but they are seldom awarded by the court.

Nominal damages

At the other end of the scale, the court may order the defendant to pay only a small (nominal) amount of money. Nominal damages may be awarded if a wrong occurred but the actual harm was minor. This sometimes happens in cases where the plaintiff is a public figure. A small amount of money may be awarded to acknowledge that the plaintiff was right but did not suffer any substantial injury.

Privacy

The next issue that communications professionals need to be aware of is the right of privacy. U.S. law recognizes each person’s right to live without being subjected to unwarranted and undesired public scrutiny. Essentially, this is the right to be let alone, free from intrusion into matters of a personal nature. Violation of this right constitutes an invasion of privacy, which is a civil wrong. There are state laws on this topic, as well as the Fourteenth Amendment, which was added to the U.S Constitution in 1868. It addresses many aspects of citizenship and the rights of citizens. It does not explicitly mention privacy, but since 1965 courts have consistently ruled that privacy rights are included in general protections for life, liberty, and property.

In general, there are four different categories of invasion of privacy:

1. Intrusion: *This refers to an aggressive and shocking intrusion on reasonably expected solitude. It sometimes occurs in newsgathering, such as when paparazzi invade someone’s privacy by trespassing on private property to photograph the person, thereby unreasonably interfering with his or her seclusion. Intrusion can also include such things as wiretapping or reading someone else’s mail.*

2. Public disclosure of private facts: *Everyone has the right to keep personal matters to oneself and to keep others from disclosing private facts that are not of legitimate concern to the public. It is an invasion of privacy if someone causes a person embarrassment and humiliation by publicizing information about that person’s private affairs that reasonable individuals would find objectionable.*

3. False light: *This means publicizing information about a person that unreasonably creates an untrue or misleading portrayal. It can include such things as falsely attributed acts or beliefs. False light claims are not recognized in all states. In jurisdictions where they are recognized, the misrepresentation does not need to be defamatory, but it must be made with knowledge of its inaccuracy, and it must be offensive or objectionable in some way to a reasonable person.*

4. Appropriation and exploitation: *This means the use of a person's name, likeness, voice, or other aspects of personal identity without permission for commercial purposes. Protection against this category of invasion is usually called the "right of publicity."*

Publicity

Each person has the exclusive legal right to control and profit from the use of his or her identity (name, image, silhouette, personality, mannerisms, voice, signature, et cetera) to promote and sell goods or services. Appropriation of someone's identity without consent violates that person's right of publicity. However, the extent of legal protection varies from state to state. The issue is further complicated by the fact that many cases bump up against federally protected free speech—the right to express one's thoughts and opinions in a free society. In each case, the challenge for the court is to find an appropriate balance between the plaintiff's right of publicity according to that state's laws and the defendant's right of free speech as guaranteed by the First Amendment to the U.S. Constitution.

In order to do this, distinctions are made between three different categories of use:

1. Creative use: *If the defendant has created a work of pure fiction such as a novel, any alleged resemblance between an actual person and a character in the work will not usually be regarded as a violation. When aspects of someone's personal identity are used in fine art such as a painting, drawing, or sculpture, the use will not usually be regarded as a violation. The original artwork may be displayed and sold without a problem.*

2. Matters of public interest: *If someone is a public figure or becomes involved in newsworthy events, his or her right of publicity is not violated by media coverage. The law allows exceptions to the right of publicity when someone's identity is used for educational or editorial purposes, such as in coverage of news, public affairs, sports, or political campaigns. This makes it possible to produce such things as magazine articles, books, and documentaries about individuals.*

In these first two categories, free speech is the starting point. The use of someone's identity is generally allowed because prohibiting such use would be an unconstitutional restraint on free speech. However, the third general

category of use is not considered to be a form of free speech because it is done primarily with the intention of producing a profit:

3. Commercial use: *Permission must be obtained before aspects of someone’s identity may be used in connection with the advertising or sale of goods and services. This includes such things as a name or likeness (even a look-alike or sound-alike) in an advertisement or on a T-shirt, coffee mug, postcard, or any other merchandise. Appropriation of identity and exploitation of it for commercial gain may result in a lawsuit. The burden will be on the plaintiff to prove that there was unauthorized commercial use that violated his or her right of publicity. For example, unauthorized use of a celebrity’s name in connection with a product might appear to be an endorsement, which would have the effect of increasing sales.*

FIGURE 1:

Many cases are not clear-cut. A judgment must be made about the precise nature of the use.



Confusion arises when a particular use doesn’t fit neatly into just one category. Some uses are hybrids—for example, when a depiction from a work of fine art is subsequently applied to a commercial product. In an attempt to sort out these issues, a 2001 decision by the California Supreme Court (*Comedy III Productions, Inc. v. Gary Saderup, Inc.*) applied the concept of “transformative” use. This is an idea that has been borrowed from copyright law, where it refers to fair use of material that would otherwise be protected, provided that it’s used in a way or for a purpose that’s different from the original to such an extent that the expression or meaning becomes essentially new.

In the context of publicity rights, a “transformative” commercial work might be interpreted as primarily an expression of the artist’s or designer’s own ideas rather than a mere likeness of a particular individual. By adding significant creative elements, the artist is creating a new meaning for the image. On a case-by-case basis, this exception to publicity rights might also extend to other types of stylization or distortion such as parody and caricature. From a legal standpoint, this concept is rather vague and open to interpretation. For this reason, the California precedent might not be followed by other states.

This is in contrast to products, services, and advertisements that use more conventional images, particularly of celebrities. A literal depiction is a reproduction or imitation of a person’s likeness. Such an image is not protected

when it's used for commercial purposes, such as a photo of a rock musician used on a poster.

Depending on the state, the exact details of the right of publicity may vary between celebrities and non-celebrities, and between living or deceased persons. For example, in the state of California, the heirs of a personality who has died can continue to protect his or her right of publicity. California makes liable anyone who, without consent, uses a dead celebrity's name or likeness to promote products or services within seventy years after death. (There are even legal firms and talent agencies that specialize in managing the licensing rights of dead celebrities such as James Dean and they generate significant licensing income for the celebrities' estates.)

For creative professionals, the bottom line is that you must obtain permission before using aspects of anyone's personal identity for commercial purposes. The rights of privacy and publicity make it necessary to obtain informed consent in the form of signed releases when working with models, even if they are employees of your firm. This document is usually referred to as a "model release," but it might also be called a "consent form." The release should include:

- The model's name and date of birth
- The name of the studio or agency
- A description of the scope of use that the model is approving
- The payment or other consideration the model will receive
- The date of the release
- The model's signature
- A signature from a witness (such as another model) who does not work for the studio or agency

There is no need for anyone from the studio or agency to sign the form because it's simply a grant of permission by the model. A release for a minor must be signed by a parent or legal guardian. Depending on the duration of use, you may need permission again when the minor reaches the legal age of majority (in many jurisdictions, the threshold for making legal decisions is 18, although in other places it may be 19 or 21).

Proceed with caution

"Whenever you are creating and distributing content that includes references to, or images of, real people and those individuals are recognizable in any way, you must be cautious about issues of defamation, privacy, and publicity. If you have questions about a specific project that you're working on and you're wondering what risks might be involved, you should ask your attorney for guidance.

Disclaimer

This article provides information about the law to help designers safely cope with their own legal needs. However, legal information is not the same as legal advice — the application of law to an individual’s specific circumstances. Although care has been taken to make sure that this information is accurate, it is recommended that you consult a lawyer if you want professional assurance that this information, and your interpretation of it, is appropriate to your particular situation.

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