

Be Careful When You Express Yourself Online

By Dan Trevas, Law You Can Use, September 30, 2019

No matter how well intended, not everything we post online comes across as we hope for. In fact, more than half (57 percent says yougov.com) of Americans who use social media have posted or texted something that they regret afterward, most because they worry it will harm their reputation in the workplace.

Reputational harm might be the least of a social commenter's problem. A social media user should be aware of some of the most prominent legal issues that may arise from posting content.

#Uhh: Media, Celebrities Not Only Ones Who Can Be Sued

In a landmark 1972 U.S. Supreme Court decision, Justice Byron White explained that the freedom of the press is a "fundamental personal right" not confined to traditional media like newspapers and magazines.

Now that a studio or printing press is no longer needed to reach mass audiences, bloggers, tweeters and other online posters whose takes generate controversy also may become targets of lawsuits. As a blogger/poster, you should remember that the protection of your speech has limits. Just as the law does not protect a person who yells "fire" in a crowded theater when there is none, your right to free speech is not absolute.

Major Legal Risks of Posting

Defamation

- You can be found liable of defamation for something you post online, and a jury can award hundreds or even millions of dollars to the person whose reputation you harmed.
- "Defamation" is damage to someone's reputation caused by a public, intentionally false statement that is presented as a fact, either through speech or the written word.
- In general, a private citizen claiming defamation must prove your comments were false and that you acted negligently in failing to discover the truth.
- A public figure claiming defamation must prove "actual malice," meaning that you published the comment even though you knew it was false, or you showed reckless disregard for the truth.

Invasion of privacy

- Invasion of privacy generally means you've intruded into someone's private secluded area or private affairs and published information without his or her consent.
- If you publish personal details that have not been made public, such as a person's sexual orientation or a private romantic encounter, that can be invasion of privacy.

Copyright and trademark infringement

- Copyright infringement occurs when you post someone else's creative work, like a photo or a song, without his or her permission. Trademark infringement involves improperly using someone else's business logo or material.
- Generally, you may not use a business logo or material for commercial purposes that might lead consumers to believe that you are affiliated with a company or product that is not yours.
- A helpful exception called "fair use" allows you, in certain circumstances, to post copyrighted material. It's not a clear-cut rule, but a balancing test. It asks:
 - What is purpose of the use? Is it commercial, educational, just for fun?
 - What was the original work? It is primarily factual, which is more open to reuse, or is it fictional/creative?
 - How much was used, a little bit or a lot? However, in some cases even using a little bit of a creative original can be infringement.
 - How does it affect the value of the original work? Are you interfering with the copyright holder's ability to profit?

Social Sites Aren't Usually Responsible for What You Post

It is unlikely that someone can sue Facebook or Twitter for the inappropriate content you posted, because they are protected by the federal Communications Decency Act, Section 230. Section 230 protects any "user" of an interactive computer service who did not create the defamatory statement. So internet service providers who host forums online have immunity from defamation claims regarding statements made in posts, tweets or by someone commenting on the website.

Due to this same act, you as the blogger/poster likely have some protection by the federal law if you are simply passing on information provided by others that you have not altered. Beware: this immunity is not guaranteed. If you edit and knowingly change and post someone else's statement, then Section 230 may not shield you.

Can I Get Fired for This? Posting and Employment

Many employers are allowing and even encouraging their employees to blog and post, but they are also taking steps to limit employee activities to protect the business interest. What happens in workplaces:

- Employers are setting social media policies. An employer is wise to share policies concerning blogging and social network conduct with their employees.
- Discipline workers with caution. Some employee communications are protected by law, so employers should be careful about attempting to discipline an employee for work-related comments made on an employee's personal blog or page.
- What workers' comments are protected? Federal law protects communications include those that have to do with protected activities such as whistle-blowing or conducting union activities, and communications about a protected status (such as discrimination by gender or race).

Who Are You? Can I Use a Fake Name?

The United States has a long-standing tradition and appreciation for anonymous speech, which is alive today. You can choose to let the readers know your identity, make up an online persona, or you can remain anonymous. Supreme Court rulings have equally protected the rights of both known and anonymous authors. Recent defamation lawsuits brought by individuals and businesses have had varying degrees of success in forcing internet service providers to provide the true identity of an anonymous blogger or comment poster.

How an Attorney Could Help

Determining whether what you said, or what is said about you, rises to the level of defamation often requires an analysis of both the facts and the law. That's the same for assessing whether your actions constitute the invasion of one's privacy or if you fairly used someone's copyrighted protected work. An attorney can help you sort through the facts and legal issues if you are threatened with a lawsuit for something you posted online or are seeking a remedy if you've been harmed.

About the Author

Dan Trevas is a former journalist turned lawyer with extensive public relations experience in the public and private sector. He is a member and past chair of the Ohio State Bar Association's Media Law Committee, and also is an adjunct faculty member at Franklin University-Urbana teaching Business Law and Marketing and occasionally teaches Communications Law for Ohio University. A native of Athens, Ohio, he has both a bachelor's and master's degree in Journalism from Ohio University. He graduated from Capital University Law School in 2006.

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