SPLC WHITEPAPER

Responding to takedown demands

It's a call editors have come to dread: "Pull that down from your website or I'll sue you." Must you? Should you?

Student journalists would like to believe their efforts in creating news articles or columns end when the article or column is published in their publication or on its Web site. Once their items are published, writers and editors need not worry about any fact-checking, rewrites or new layouts - or should they? More and more student journalists are learning publication of an article or column begins a new phase of the publishing process – responding to takedown demands.

Publications with an online presence are regularly facing demands to pull down articles or columns from the publication's Web site.

Just as the Internet has made it easier to distribute information, it also has made what was once unthinkable – cutting articles out of back issues – a relatively simple process, technologically. But just because you can easily remove an electronically archived article, should you?

Takedown demands come in all shapes and sizes. Some may come from subjects of recent or archived news articles or columns. Others may come from former staff members who no longer wish to see their entire body of work listed when an Internet search of their name is conducted. Some takedown demands may come from people who claim they are being libeled by comments on bulletin boards or in comment sections of articles or columns. Copyright owners may also send takedown demands if they believe their copyright is being infringed by the publication.

Responding to these demands can be confusing, but – with a well-thought-out policy that is enforced fairly and consistently – student publications can reduce their risk of a takedown breakdown.

A comprehensive guide to the legal theories most frequently cited when handling requests to remove content

Photos by Erin Prah

Subjects of recent or archived content

Takedown demands from subjects of recent or archived content typically fall into two categories. First, the subject may demand removal of an entire article or column. In such cases, the subject may claim the entire piece constitutes an invasion of privacy, is defamatory or is simply embarrassing. On the other hand, a subject may only have a problem with one or two sentences. In these instances, the subject may demand only a partial takedown, retraction, correction or update. If the story is being revised and not entirely withdrawn, there can be risk of legal liability based on republication of libelous material.

At the outset, it's important to remember that material that was lawful to publish when it was first posted does not somehow become improper just because the passage of time – perhaps campus beer-guzzling champ Theresa is now Sister Theresa – has made it embarrassing. So the first question to ask will always be: Was there something wrong with the material from the start?

Note also that the online venue does not change the basic legal ground rules of publishing.

Content that is lawful when printed on paper does not become unlawful just because it is potentially accessible to more readers by being posted online.

Let's say you receive a letter from Joe Reader, claiming he can't get a job because of an archived news story that quotes a police report stating he was cited for possession of whiskey at a party in his dorm when he was a student. Joe claims the story invades his privacy because his drinking in his own dorm room is his personal business. He also claims that the story is libelous because it suggests he's an alcoholic, because it is factually wrong – he was drinking beer, not whiskey – and because there was no mention that the charges were later dropped.

Again, remember that a story that was lawful when originally published does not become unlawful just because the person mentioned in the story later decides it is problematic. And the fact that a person believes a story is preventing him from obtaining a job – a questionable assumption, since employers rarely tell applicants why they weren't hired – does not make for the basis of a lawsuit. So your first legal question should be: was there anything defective about the story from the start?

Legally, there is no invasion of privacy here. A student publication could be liable to a subject of an article if the publication publicizes private facts in a way "that would be highly offensive to a reasonable person and is not of legitimate concern to the public."[1] In *Cox Broadcasting Co. v. Cohn*,[2] the U.S. Supreme Court held that a party cannot be liable for invasion of privacy for disclosing facts that are a matter of public record, no matter how intimate those facts may be.[3] Therefore, a citizen who was mentioned in a police report but ultimately cleared of any wrongdoing has no legal recourse against a student publication that published his name in conjunction with accurately reporting on the incident.

Even if a news article disclosed a private fact about someone that was highly offensive, the publication would not be liable for invasion of privacy if the disclosure was newsworthy. Courts will often defer to the editorial judgments of news outlets to determine what is "news" and what is of legitimate concern to the public.[4] News articles about crimes and violations of student conduct codes (as likely occurred here) are newsworthy to the campus and local community and will almost certainly not be the basis for an invasion of privacy claim.

Now, consider the claim of libel. Your publication would not likely be liable for libel with respect to Joe's belief that he has been falsely labeled an alcoholic.

A statement is legally defamatory only if it is reasonably understood by the recipient to be defamatory.[5] In reviewing allegedly defamatory statements, courts will construe words according to their common meaning and in the way the recipients of the statement would normally interpret them.[6] A reasonable reader would not interpret an article about a student receiving a citation for alcohol possession in the dorms as a suggestion that the student is a problem drinker. The article is about a one-time citation and does not provide any further details about Joe's drinking habits. There is no reasonable inference from this article about a citation for alcohol possession that would lead a reader to jump to the conclusion that Joe is an alcoholic.

Your publication would not likely be liable for libel with respect to the beer/whiskey factual mistake (assuming that it is a mistake, which you'll of course want to verify) for two reasons. First, many (but not all) states recognize a "fair report privilege." This privilege states that a publication cannot be held liable if it fairly and accurately restates the information in a government record, proceeding or meeting that is open to the public and that deals with a matter of public concern, even if some of the information turns out to be hurtfully false.[7]

The idea behind this privilege is that a publication should be able to inform its readers about government activity without having to independently verify every factual statement. Police reports are considered reports of an official action subject to the fair report privilege.[8] Therefore, as long as your publication accurately quoted the police report, it could not be liable for libel if the law of your state recognizes a "fair report" privilege.

Even if no police report was involved, your publication would probably be in the clear because publications will not typically be held liable for libel for minor factual inaccuracies in their articles if these errors do not significantly alter the essence or gist of the larger message.

This is known as the "substantial truth" doctrine.[9] Courts have held allegedly libelous articles as substantially true despite such factual inaccuracies as mistaking marijuana for cocaine.[10] The gist of the story about Joe is that he was cited for unlawful possession of alcohol. It is unlikely that a court would hold a publication liable for libel based on mistaking beer for whiskey.

Your publication would not be liable for libel with respect to not reporting the charges being dropped. A publication cannot be held legally liable for its failure to update a past news article when the facts surrounding the subject of that article change. Of course, basic journalism ethics require you to correct factual inaccuracies when you become aware of them.

If, however, your publication decides to update the body of the article, proceed carefully. Changing and then re-posting the article's text could constitute republication of the material and reset the statute of limitations (a law that requires an injured party to bring any legal claim within a specified period of time) to sue for libel.

Most states follow the "single publication" rule,[11] which states the statute of limitations for libel begins when the defamatory content is first published no matter how often the exact same content is subsequently published in the same medium.[12]

Many courts have ruled a modification to a Web site that does not change the defamatory content does not constitute a republication of that content.[13] But, if changes are made to the work containing the problematic content, there is a chance a court would treat the changes as a new publication of the material, causing the statute of limitations to begin anew.

To avoid the threat of liability for republication of libel, when updating past news articles, student media should post clarifications or corrections at the top or bottom of the web page where the defamatory material appears, and steer clear of tweaking the language of the original news article. Also, consider asking for a signed release from the agitated reader making clear that, if the publication publishes a specified correction, that correction will fully satisfy all complaints. And of course, make sure that Joe provides verifiable documentation to support the changes he is demanding.

Former staff members or contributors

While student journalists graduate and move on to the next phases of their lives after completing high school or college, the work they have created in their student publications is frozen in time.

For many former student journalists, these works provide a sense of nostalgia and a glimpse into their thoughts and attitudes while they were students. Some student journalists may get a different sensation from reviewing these works: stress. Student journalists who made provocative or controversial statements in their journalistic work – or just wrote a piece or drew a cartoon that doesn't meet their current quality standards – sometimes ask the publications to take down these pieces so they are not found when prospective employers conduct Internet searches. The determination of who can control the posting of the article or column – the publication or the former student – depends on copyright law.

Suppose you get a letter from a former columnist at your newspaper demanding the paper take down a series of columns she wrote that can be found in the newspaper's online archive. Her columns contained her bluntly stated views on same-sex marriage, which could come back to haunt her as she pursues a political career. You have also received a letter from a former student whose letter-to-the-editor was published two years ago and is among the first five results when his name is typed into an Internet search engine. He asks it be taken down because he fears his comments advocating legalization of marijuana could affect his graduate school applications.

Understanding who has the right to control the use of a piece of creative work – a story, a photo, a cartoon – requires a little knowledge of copyright law.

In the United States, copyright ownership "vests initially in the author or authors of the work."[14] An "author" is the person who creates the work by "translat[ing] an idea into a fixed, tangible expression entitled to copyright protection."[15] Therefore, as a starting point, authors own the copyright interest in their works and have the right to dictate how their work is used, including how it may *not be used*.

An exception to copyright rule — known as the "work made for hire" doctrine — says that when an employee prepares a copyrightable work in the scope of employment, the *employer* is the copyright holder.[16]

To determine if this doctrine applied to the columnist (it obviously would not apply to a one-time letter-to-the-editor author), your publication would have to take a close look at the relationship between the columnist and the publication. Did the columnist receive compensation for her work? Did she receive any benefits in exchange for her work? If the columnist appeared to be a "real" employee, your publication would most likely have full copyright control of her columns and would not have to comply with her takedown request – the right to initially publish the work implies the right to archive the work. But the "work made for hire" doctrine almost never will apply in the unpaid high-school setting, and relatively rarely in the college setting, unless the writers are salaried.

To avoid copyright conflicts with columnists, letter-writers and other contributors, your publication could require all contributors to sign an agreement stating that upon submission of their work, the publication assumes ownership of the contributor's copyright interest and the contributor relinquishes control of that interest.

This agreement will provide your publication with control over how the contributed work is used and remove any concern about a contributor's attempts to restrict the availability of his or her work after it was published.

Reader-posted comments or discussion threads

More and more student publications are permitting their readers to post online comments to articles and columns. Though it is debatable whether these comments contribute to the exchange of ideas and intellectual debate, there is no debating the fact that readers' comments are often lacking in proper grammar and spelling, and may sometimes border on defamation. In addition, online comments — and online media as a whole — have created new opportunities for copyright infringement.

Again, remember that online publishing does not alter the fundamental legal rules – libel is libel no matter where it appears, and all of the same legal defenses apply. And also remember that your publication's liability for online content will depend on whether the content is internally generated, or is deposited on your website by an outside third party.

Let's say your publication recently wrote a news story about an off-campus party where a fight broke out that involved popular student athletes. You included a photo taken at the party that was posted by the photographer to her Facebook account, without asking the photographer for permission. In the online comments section, a

A model copyright agreement drafted by the Student Press Law Center is available online at https://www.splc.org/copyright-agreement.

commenter named a prominent athlete and alleged that he raped a woman at the party. Another commenter posted a photo that shows a crowd of people congregating on the lawn outside of the party at the time the police arrived. You receive three takedown notices: (1) from the photographer of the Facebook photo, (2) from the student athlete who was accused of rape but can document that he was out of town that weekend, and (3) from the photographer of the crowd photo, who claims his photo was posted without his permission.

Start with the copyright status of the first photo. Copyright laws apply equally online and in print. If your publication wants to use a copyrighted work, it must obtain permission from the copyright owner.

Explicit permission (preferably in writing) is necessary to avoid potential liability for copyright infringement. The need to obtain permission from a copyright holder applies to almost any creative work published online that would be attractive to a student publication, including art, photos, music, written work, videos and similar items.[17]

While it is always best to attempt to obtain consent, whether you must pull down the "borrowed" photo will depend on how the copyright-law doctrine of "fair use" applies to your use of the image.[18]

The SPLC has an extensive copyright-law guide (available online at https://www.splc.org/legalresearch.asp?id=32) that can help you evaluate whether your use falls within an exception to copyright protection as a fair use (though consulting that guide does not substitute for consultation with licensed counsel in your state).

But to simplify, a nonprofit student media outlet's use of the image in connection with news coverage – especially if the image is itself newsworthy – may well qualify as a fair use. For instance, if the Facebook photo is a key piece of evidence in the college's investigation of the fight, then the photo is part of the story and has independent news value, which increases the likelihood that its use is "fair."

Your publication should not be liable for libel if it removes the online comment about the alleged rape, leaves it untouched, or removes only the defamatory statement and leaves the rest of the comment alone.

In 1996, Congress passed the Communications Decency Act.[19] Section 230 of the Act states that no Web site "shall be treated as the publisher or speaker of any information provided by another information content provider."[20] In addition, the law states no Web site will be held accountable for good faith actions taken to restrict access to material the Web site operator "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. . . ."[21]

No published court opinions have applied Section 230 to student media Web sites, but they would likely be covered because the law has been interpreted to apply to a wide range of Web sites.[22]

Under Section 230, Web site operators qualify for immunity if they are not the "publisher or speaker" of any information provided by "another information content provider," meaning the person who actually writes the posting. As a result, any libelous comment should be attributable only to its writer. (The publication may, however, face a demand to turn over any identifying information that would help trace down an anonymous third-party commenter.) The editors should adopt, maintain and enforce a policy for responding to such demands that is consistent with the terms and conditions of use of the Web site's comment features.

Student publications are likely to receive Section 230 immunity as long as they are not deemed to be a "co-creator" of a comment written by an outsider. When a student publication encounters a potentially problematic online comment it has three options: remove the comment from the Web site entirely, remove the offensive or illegal portion, or allow the comment to remain in its original form. If a publication's staff members rewrite a comment in a way that can be perceived as adding content or substance to it, the student publication risks losing its Section 230 immunity.

Your publication should not be liable for copyright infringement of the second photo as long as it follows the "notice and takedown" process created by the federal Digital Millennium Copyright Act (DMCA).

Similar to the Section 230 provisions of the Communications Decency Act, discussed above, the DMCA creates a "safe harbor" that will prevent Web sites from being held liable for copyright infringement by a third party.[23]

Under the DMCA, a website can obtain immunity from copyright infringement only if does not have knowledge of the infringement or responds quickly to take the infringing material down or block access to it as soon as it knows or becomes aware of the infringement.[24] To be eligible to obtain immunity, a Web site must register with the United States Copyright Office in advance and clearly post information on the site about how a copyright owner can give notice of possible infringement.[25] The person claiming copyright infringement must notify the Web site and provide detailed information about the alleged infringement.[26]

The SPLC's Mike Hiestand has provided a detailed analysis of the workings of the DMCA's "notice and takedown" process as it might apply to a student media outlet, available online at http://www.studentpress.org/nspa/trends/~law0505hs.html.

Takedown demands involve many considerations

Legal considerations are, logically, the most obvious factor influencing the decisions student media make regarding takedown demands. If a publication will be civilly liable for online content, it may feel compelled to comply with the takedown demand. But what about instances where the law is on the publication's side?

In anticipation of these situations, a student publication should consider the mission of its online presence and develop a consistent takedown policy that suits the mission. If a publication's purpose is to serve as an electronic historical record, the staff will want to avoid discretionarily pulling down content for which there is no legal liability.

If the purpose is to serve as an outlet for news and comments that is constantly changing with content often being rotated out, the staff may be more willing to take down material when requested to do so, because of the publication's desire to be fluid with its online content.

Ethically, the publication will want to establish and consistently enforce a takedown policy to avoid a perception of favoritism (for instance, that recently graduated writers with friends on the newspaper staff can get embarrassing old columns pulled down from the site, while those without "inside connections" cannot).

Student publications should have a basic familiarity with the areas of law that will be the basis for most takedown requests. A takedown policy – created to guide these decisions when the law does not provide a definitive answer – can be helpful in maintaining a consistent approach to takedowns that is in accord with the publication's editorial mission. ■