Legal tips to know before you post

A guide to maintaining an off-campus Web site

More than a decade after the Supreme Court's *Hazelwood* decision gave high school officials broader leeway to censor many school newspapers and yearbooks,[1] an increasing number of young people are choosing to express themselves in cyberspace — a free-speech zone that they hope will be far removed from the reach of school officials' red pens. Personal blogs and other topical Web sites unaffiliated with school are the 21st-century equivalent to the "underground" newspapers often started by students seeking to escape school editorial control. And it was assumed — perhaps prematurely — that courts would treat off-campus Web sites just as they treated unofficial newspapers produced off-campus.

Off-campus student speech traditionally has been

considered censorship-proof.[2] Unfortunately, school officials, often citing concerns about school safety in the wake of incidents of school violence such as the Columbine shootings, increasingly are punishing students for outside-school expression, both on the Internet and otherwise.[3] While courts generally have ruled in favor of students' First Amendment rights on the Internet, the sad fact remains that no matter how careful students are, or how much the law is on their side, some school officials refuse to accept the idea that they cannot always control or punish off-campus student behavior.

Students who understand their legal rights and responsibilities on the Internet are better prepared to head off potential run-ins with school officials and defend themselves and their Web sites against unconstitutional censorship and punishment.

How the First Amendment applies to students

For the past two decades, the First Amendment scale in high school censorship battles has been decidedly tipped in favor of school administrators. But courts have long recognized the distinction between school-sponsored speech that occurs on campus and independent student speech that occurs off campus, which has typically been accorded greater legal protection.[4] There is no agreement, however, on which First Amendment standard does apply to off-campus, private student speech. Specifically, once students leave school, do they enjoy the same First Amendment protections as any other citizen engaged in private speech activities? Or are they, simply because of their student status, always subject to at least some oversight by school authorities?

The wide accessibility of the Internet blurs the lines between on- and off- campus speech, throwing traditional First Amendment analysis of student speech for a loop. Not surprisingly, the subject recently has become the focus of much debate and uncertainty in school board meetings, principals' offices, classrooms and the courts.[5]

Student Speech Litigation

Most incidents involving student speech are resolved short of litigation, and the resolutions generally favor the student. However, a few courts have suggested that school officials may have the authority to punish students for their expression regardless of the context in which it occurs, at least when the effects of that expression can be felt within the school. There are no fixed legal formulas by which courts decide Internet speech cases. As such, courts look to the Supreme Court's rulings in traditional student speech cases.

The Supreme Court concluded in the seminal *Tinker* case that otherwise-legal student speech may be abridged only where it materially and substantially interferes with the operation and discipline of the school.[6] The Court modified the rule in the context of sexually oriented student speech at a mandatory school assembly, and found in *Bethel Sch. Dist. v. Fraser* that "the First Amendment does not prevent ... school officials from determining that ... [permitting] a vulgar and lewd speech … would undermine the school's basic educational mission."[7] And the Court held in *Hazelwood* that, in curricular student publications or performances in which students are not the final arbiters of content, "educators…[may] exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[8] Finally, in its latest ruling on student speech, the Court held in *Morse v. Frederick* that school officials could ban or punish school-sponsored or student-sanctioned student speech that advocated illegal drug use.[9] It is from these cases that the lower courts discern the tests to use in ruling on Internet speech issues.

Rulings favoring student speech rights

Courts generally have ruled in favor of students who challenge schools' authority to punish purely off-campus Internet speech.

In *Beussink v. Woodland Sch. Dist.*, a high school junior created, entirely off campus using a personal computer and private Internet account, a site criticizing the school, teachers and administrators. He was suspended, and as a result flunked all of his classes. The federal district court in Missouri determined that the "material disruption" standard of *Tinker* was the appropriate standard for review, and found that the site had not caused any disruption at school.[10] The court did suggest in a footnote that, by virtue of Beussink's classmate viewing his site at school, his speech was considered to have taken place on school grounds.[11] The significance is that while on the surface *Beussink* is a victory for student free-speech rights, its application of *Tinker* to off-campus speech implies that off-campus speech, while entitled to significant First Amendment protection, may not be completely outside the reach of school authorities when other students bring the expression on campus.

In *Emmett v. Kent Sch. Dist.*, the court also found that the school had crossed constitutional lines by punishing a high school student for material on his private Web site.[12] An 18-year-old honor student at Kentlake High School in Kent, Wash., Emmett created a site

Student speech cases to know

Tinker v. Des Moines Indep. Sch. Dist.

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Bethel Sch. Dist. v. Fraser

"The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech...would undermine he school's basic educational mission."

Hazelwood sch. Dist. v. Kuhlmeir

"Educators... [may] exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonbly related to legitimate pedagogical concerns."

Morse v. Frederick

School officials can ban or punish school-sponsored or student-sanctioned student speech that advocated illegal drug use.

he titled the "Unofficial Kentlake High Home Page." The site, which included a disclaimer pointing out that it was for entertainment purposes only, included tongue-in-cheek "mock obituaries" of at least two of Emmett's friends. The obituaries were apparently the result of a creative writing assignment in which students were asked to write their own obituaries. Emmett allowed Web site visitors to vote on who should be the subject of the next obituary. When school officials learned of the site, they put Emmett on emergency expulsion for intimidation, harassment, disruption to the educational process and violation of Kent School District's copyright. The expulsion was later changed to a five-day suspension.

In finding that the school officials had violated Emmett's First Amendment rights, the court discussed *Hazelwood*, *Fraser* and *Tinker*, but did not apply any of those decisions to the case.[13] Rather, the court explicitly distinguished between an underground newspaper distributed on school grounds and the private Web site at issue, stating "although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control".[14] Finding that the school presented no evidence that Emmett's site posed any genuine threat or that it "manifested any violent tendencies whatsoever," the court ordered the school to lift the suspension immediately.[15] Later, the school also agreed to pay Emmett $1 in damages plus $6,000 in legal costs.[16]

In *Killion v. Franklin Regional Sch. Dist.*, the court held that a high school student could not be suspended for an e-mail written and sent off campus.[17] The student, a track team member, wrote the e-mail after becoming frustrated by a denial of a student parking permit and imposition of various rules and regulations for members of the track team.[18] The satirical e-mail contained a "Top Ten List" that lampooned the school's athletic director and made disparaging remarks about his sex life. Another unknown student distributed the e-mail message at school. The court followed the reasoning of *Tinker* because the e-mails were distributed on campus, albeit by others, and held that they did not create a disruption at the school, and so the suspension violated Paul's First Amendment rights.[19]

> **"Courts are more likely to find in favor of the school and its use of authority where online speech puportedly involves a threat of violence."**

The court in *Coy ex rel. Coy v. Board of Educ. of North Canton City Schools* faced an even more unusual situation: a student who had been punished for accessing his own off-campus Web site at school without showing it to anyone else.[20] A teacher saw the student toggling between windows in the computer lab and reported this to the principal, who checked the computer's history and discovered that Coy had been accessing his own site from the lab.[21] (Previously, another student told a teacher about the site, who told the principal, but the school took no action at that time.)[22]

Coy was initially given a four-day suspension for alleged violations of school code provisions prohibiting "obscenity," "disobedience" and "inappropriate action or behavior."[23] Subsequently, school officials modified the decision, and Coy was expelled for eighty days.[24] Coy and his family sued, alleging that the school's actions violated his First Amendment rights. At trial, the school claimed its decision to expel Coy was strictly based on Coy's accessing an unauthorized Web site on school property and that the material accessed was lewd and obscene.[25]

Despite the fact that Coy had not *distributed* or *published* the site at school, but had merely *accessed* the site at school for his own personal viewing, the court found that the *Tinker* standard was applicable.[26] The court, however, did not explain what potential disruption might take place by a student silently reading his own words in a computer lab, such that a school would need *Tinker* authority to punish such activity. Because the school's justification changed between the time it sent the expulsion letter and the lawsuit, the court held that the school's motivation in the punishment was a disputed fact to be decided by a jury at trial.[27] The court did note, however, that if the content of the Web site was the motivation for the punishment, Coy's rights had been violated, as the content was not obscene.[28] If the school's motivation was strictly the fact of Coy's accessing the site, the *Tinker* standard would apply, and "no evidence suggests that Coy's acts in accessing the Web site had any effect upon the school district's ability to maintain discipline in the school."[29]

In *Mahaffey ex rel. Mahaffey v. Aldrich*, a court found that a student's First Amendment rights were violated when he was suspended for contributing material to another student's Web site.[30] Among the items on the site were several lists, including "people I wish would die," "people that are cool," "movies that rock," "music that I hate," and "music that is cool."[31] At the bottom, it asked the reader to "[s]tab someone for no reason then set them on fire throw them off of a cliff," but also warned, "PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?"[32] Another student's parent discovered the site and called the police, who called the school.[33] When interviewed by police, the student said that school computers "may" have been used to create some of the site's content. The school suspended the student.[34]

The court recognized that the speech in question very likely did not take place on campus.[35] In response to the school's argument that a student could be punished for off-campus speech where that speech materially and substantially interfered with the school's operation, the court responded that there was no evidence of disruption in Mahaffey's case.[36] The court found that statements on the Web site did not constitute "true threats" and were therefore entitled to First Amendment protection.[37] Accordingly, the student prevailed on his First Amendment claim and the court found the school had violated his rights.[38]

Rulings favoring school disciplinary authority

Courts are more likely to find in favor of the school and its use of authority where online speech purportedly involves a threat of violence.

In *J.S. v. Bethlehem Area Sch. Dist.*, the court sided with school officials who pun-

Avery Doninger lost her officer position at school after posting a rant on her blog at LiveJournal, above, from a home computer.
Justin Layshock was suspended for his mock profile of his high school principal on MySpace, left.

ished a student for off-campus expression. A Pennsylvania middle school expelled an eighth-grader after he created a Web site on his home computer titled "Teacher Sux." The site, which the student claimed was a joke, included derogatory comments about the student's algebra teacher and principal, including an image of the teacher's face morphing into Adolph Hitler's, a depiction of her severed head dripping with blood, and a request that visitors to the site contribute $20 to cover the cost of a hit man.[39] After discovering it, school officials contacted local police and the FBI, who investigated the case and found no reason to pursue the matter. The school district nevertheless concluded that the site threatened the teacher, harassed both the teacher and principal, and endangered the health, safety and welfare of the school community. At trial, evidence was introduced showing that the teacher had suffered psychological harm because of her reaction to the site and was unable to return to school.[40] The court found that because school officials allowed the student to continue attending classes — and even go on a school-sponsored band trip — they could not have perceived him as a true threat.[41]

The case ultimately reached the state's highest court, which explicitly recognized the distinction between on-campus and off-campus student speech.[42] It held, however, that the speech in question took place on campus because "it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property."[43] The Court then opined that it would not decide whether the *Tinker* standard or the *Fraser* standard was applicable to these facts because they would uphold the school district's punishment under either standard.[44] It went on to hold that the site was punishable under *Fraser*, noting that "it is for school districts to determine what is vulgar, lewd or plainly offensive… [g]reat deference should be given to their determination."[45] Then, the court found — without reference to anything in the factual record, or even circumstances described in that record — that J.S. had been the one to bring the site onto school grounds.[46] In fact, the entire basis for the court's declaration was that the site was aimed at the school audience.[47] Relying on this fact and the emotional harm to the teacher, the court found *Tinker*'s disruption requirement fulfilled and held that the punishment was valid under *Tinker*.[48]

The holding in *J.S.* should not be read as a statement of the law as it exists outside of Pennsylvania; in fact, it is likely an inaccurate statement of the law even as it exists within Pennsylvania. The decision suggests the court failed to fully understand the distinctions between *Tinker* and *Fraser*, leading both to the court's inability to choose an applicable standard and to correctly apply either standard once chosen. It is highly unlikely another court would follow this rationale, and one federal court in Pennsylvania has already taken the unusual step of declaring *J.S.* to be wrongly decided and refusing to follow it.[49]

In *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, a student created and used an IM buddy icon depicting violence against his teacher.[50] He was suspended for five days, though the administration and a psychological evaluation found him not to be a true threat.[51] At an administrative hearing, he was found to have violated a school conduct code, suspended for the semester and enrolled in an alternative school.[52] The court applied the *Tinker* test and found that the school did have the authority to punish the student for his Internet speech.[53]

Courts have yet to reach a universal consensus about school authority over speech on social networking or blogging sites, such as the popular MySpace and Facebook Web platforms that allow users to create personality profiles, post editorial content for visitors to see, and trade messages with others. Although treating off-campus activity on social networking sites as non-school speech beyond school authority appears to be the soundest approach under existing law, at least a few courts have stretched to find a sufficient connection with school affairs to uphold schools' punishment of social networking content.

In *Layshock v. Hermitage Sch. Dist.*, a high school senior created a parody MySpace profile about a principal that purported to describe, in wildly exaggerated terms, the principal's interests and hobbies.[54] As a result, the student was suspended from school and extracurricular activities, enrolled in "alternative" curriculum, and banned from participating in the graduation ceremony (the latter two punishments were withdrawn after his parents interceded).[55] The district court applied both the tests found in *Fraser* and *Tinker* and determined that the school could not discipline the student for his Internet speech, as it was neither materially disruptive nor lewd and vulgar speech.[56]

In *Doninger v. Niehoff*, the school administration barred a student from holding class office after posting criticisms of the school on her blog using the Web feature LiveJournal.[57] The student had raised concerns with her principal over the schedule and location of a school concert, and the student used the Internet to voice her opinions and encourage the community to do the same, resulting in a wave of calls and e-mails to school administrators.[58] The court first found that, because there is no constitutional right to hold a student government office, the school was with-

in its discretion to bar Doninger's participation.[59] Alternatively, the court also applied the *Fraser* test and found that the school had the authority to punish the student because she used two vulgar terms in her blog post.[60] This result was affirmed on appeal, though the appeals court did not go so far as to say that *Fraser* was the legally correct test to apply when speech occurs off-campus and outside of a school function.[61]

Even taken together, these cases provide limited guidance in predicting the scope of First Amendment protection for independent student speech on the Internet. Certainly, courts can still reasonably conclude that school officials simply cannot control a student's off-campus speech and that a student enjoys the same constitutional protections when off-campus as any other citizen. Nonetheless, two ideas have arguably begun to take root in the lower courts: (1) *Tinker's* "material disruption" standard seems to be, for now, the standard of choice for courts in applying the First Amendment to independent student speech on the Internet where at least some parts of it trickle on campus; and (2) even in situations where Internet speech takes place entirely outside of school, administrators may — in extreme cases — persuade a court to extend their *Tinker*-based authority to reach beyond the schoolhouse gate.

While it is significant that the authority of school officials might reach to some private student speech on the Internet, it is important to keep in mind that the *Tinker* standard is still a very difficult standard for school officials to meet. Because *Tinker* recognizes the importance of independent thought and political speech, online underground newspapers with otherwise lawful stories that criticize school policies or teachers — stories that could be censored under *Hazelwood* but that would not satisfy the "material disruption" standard of *Tinker* — would be protected.

Rights and responsibilities of student publishers

Students have the right to publish on the Internet. However, it is important to be aware of the kinds of material that can and cannot, or should not, be published online.

Many students want to create the electronic equivalent to an underground newspaper to air grievances about their school and issues of concern to them. Others are simply looking for a creative and fun outlet to show off literary or artistic talents or Web expertise. Whether Web sites contain comments about a school board's controversial decision or movie reviews, a Web site publisher need not avoid all topics that administrators might deem too "sensitive" for a newspaper affiliated with a school. While students are strongly urged to exercise common sense and good judgment in their selection of content — as well as avoiding some of the legal problems discussed below — public school officials are forbidden from punishing students solely because of the viewpoint expressed on a subject.[62] In fact, courts have come to respect frank, opinionated discussion of serious topics in underground papers.[63] Thus, some of the school-related topics discussed on private Web sites have included dress codes, student elections, political correctness, flag salutes, athletic programs and administrative searches of students. Online underground newspapers have included commentary on nuclear war, the American economy, curfews and drug abuse.

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Material that disrupts school

The case most relied upon in the existing student Internet speech cases is *Tinker*.[64] While the application of the case to off-campus, private student speech is subject to debate, *Tinker's* "material disruption" standard has nonetheless turned into something of a First Amendment workhorse for off-campus student speech. Some lower courts have been anxious to find on-campus excuses to extend school authorities' reach to speech posted on students' private Internet accounts.[65] But "material disruption" is still a difficult burden for school officials to meet. In the Internet context, "material disruption" has been found not to include harsh criticisms of school, teachers, and administrators or the posting of mock obituaries as a joke between a group of friends.[66] Nevertheless, there are some categories of speech that online publishers should avoid.

First, student Web sites should not cause or incite illegal conduct. Actually leading readers through a lesson on how to hack the school's computers or how to manufacture methamphetamine may cross the line between mere advocacy speech into outright incitement, which makes it easier for school officials to argue that students are disrupting school. Even incitement to violate school rules not involving criminal conduct could cause problems for student Web sites.

Calls to stage walkouts or protests also can lead to problems when school officials can point to recent events making it likely that students will respond to the plea. The courts' recent willingness to apply *Tinker* to off-campus speech is significant to students who are considering posting such a plea on their personal site.[67] False announcements of class cancellations could also fall into the category of substantial disruptions. Pointed ridicule or statements aimed at humiliating particular groups of students or individuals without a legitimate news justification can play into the hands of school officials as well, who may argue that such insults may lead to disruptions at school.

Editors of online underground newspapers should always keep their audience in mind. "Substantial disruption" is much more likely to occur in the confined atmosphere of

a high school than on a college campus.

Online publishers whose Web sites are labeled potentially disruptive may be helped if, as the facts play out, no disruption actually occurs; this defense has helped students in a number of cases.[68] And school officials will have a difficult time arguing that a substantial disruption occurred if the only disruption was a result of the reaction of school officials — for example, to keep students from reading a raunchy joke on a Web site, the principal cancels classes and sends everyone home — and not the Web site itself.

Libelous material

Just like all journalists, publishers of underground newspapers must be careful not to damage people's reputations through the publication of inaccurate information. The size of an online paper's audience or the informality of the publication's appearance or tone do not insulate students from potential legal liability for libel. Libel is defined as any published communication that falsely harms a person's reputation.[69] Statements that can be proven true cannot be libelous. Likewise, statements that are purely opinion cannot be libelous, although the distinction between fact and opinion can often be hard to define and does not turn solely on phrases such as "in my opinion." Statements that no reasonable person would believe, such as satire, spoofs or rhetorical hyperbole are not libelous. Finally, fair and accurate reports of official records and proceedings, such as a school board meeting or a police report, can generally be published safely, even if the official reports later turn out to be inaccurate.

In an online underground newspaper, potential libel problems may arise when students are tempted to include personal attacks (whether in words or pictures) against school officials or classmates. If such representations falsely state or infer a fact damaging to someone personally or professionally — for example, stating that the person committed a crime, falsified his academic credentials, or had a terminal disease — the speech is unprotected under the First Amendment and the person making the statement can be sued.

An independent Internet publication can live a longer life if it steers clear of potential libel problems, as school officials will often cite fear of libel as a reason for penalizing off-campus student speech.[70] A careful and reasoned analysis of any potential libel issues will enable independent journalists to rebut any later accusations intelligently. Such care, however, should not prevent off-campus Web sites from tackling tough subjects. It only argues for some thought before publishing.

Obscene material

Some underground newspapers have attempted to attract attention and make pointed statements by using profanity or crass references in their pages. The law protects most cases of poor taste, vulgarity and offensiveness that take place off campus, but the careless, wanton use of such language will inevitably create more problems — legal and otherwise — and drain online media of time and resources that could be better spent elsewhere. Moreover, true obscenity is not protected by the First Amendment and represents another danger zone.

The Supreme Court allows for regulations restricting obscene speech so long as the regulation covers only works that depict or describe sexual conduct and so long as that conduct is specifically defined in the regulation.[71] The test for obscenity further involves three elements: (1) whether a reasonable person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient (lustful) interest, (2) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined as obscene by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[72] Mere offensive content, such as profane language or ideas, is not obscene under the Supreme Court standard.[73]

However, a similar but slightly broader definition of obscenity has been applied to cases involving minors. In 1968, the Court in *Ginsberg v. New York* defined obscenity involving minors as any description or representation of nudity or sexual conduct that (1) predominantly appeals to the prurient, shameful, or morbid interest of minors, (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and (3) is utterly without redeeming social importance for minors.[74] Thus, a high school student's underground Web site or other Internet-based speech, especially if viewed on campus, could run into obscenity problems even if the same material would not be considered obscene outside of school or on a college campus. These standards are obviously vague, but underground journalists wishing to avoid trouble should think twice before including such things as graphic nudity or other sexually explicit material in their publication that does not have some important journalistic or social importance.

In addition, it is important to note again that the Supreme Court in *Bethel School District v. Fraser* upheld school officials' punishment of a student for giving a "lewd" campaign speech at a school assembly.[75] Thus, courts have come to allow restrictions on high school students' on-campus speech that is lewd and vulgar, but not legally obscene. Courts may disagree about the reach of *Fraser* when applying it to independent student media, but some courts have allowed censorship of such publications based on language.[76] Other courts, however, have held that students may safely use earthy language and crass references as a part of unofficial publications.[77] These courts note that such content may offend some people, but, for better or worse, it is a part of our society and can be found in mainstream literary works.

Thus, although underground student journalists are not likely to run into problems with obscenity as narrowly defined by the Supreme Court, they should keep in mind the audience of the speech, the pervasiveness of any offensive material (that is, whether every other word or phrase is crude) and if there might be other methods of communicating ideas that would avoid potential problems, legal and otherwise.

True threats

True physical threats are not protected by the First Amendment.[78] Courts have struggled with which test to use to determine whether speech constitutes a true threat. One test is whether a reasonable person *receiving* the threat would perceive the statement as a serious threat of injury.[79] Another test is whether

the person *making* the statement should have foreseen that the person receiving the threat would perceive it as real.[80] Student journalists need to realize that in the post-Columbine High School era, school officials are extremely sensitive when it comes to threats to teachers, students or administrators posted on students' personal Web sites, even if the "threats" are really only meant to be jokes. Even joking threats can have negative effects on people, and students who make such threats risk facing academic and possibly legal consequences. Student journalists who want to be taken seriously and avoid trouble are best advised to stay away from all forms of threats.

Copyrighted material

Copyright law generally treats producers of online news sites no different from other journalists and publishers.

Copyright protects creators of written matter, photographs, artwork and graphics against unauthorized use of their work. For example, a student Web site would clearly violate copyright laws if it included, without permission, the entire text of a new short story by Stephen King, or if the site was decorated with panels "borrowed" from the comic strip "The Boondocks" or with background music "borrowed" from a Mariah Carey CD (and this is true even if minor alterations are made, so long as the material is recognizable). And, popular misperception to the contrary, a work created since 1989 need not display the familiar "©" symbol to receive copyright protection — it is protected automatically from the time it is created.

Federal copyright laws should not, however, prevent a student-run Web site from ever using copyrighted material. Copyrighted material can always be used with the copyright owner's consent, such as permission to reprint a photograph published in the local newspaper. "Fair use" of a copyrighted work also allows journalists to use limited portions of copyrighted materials in such items as book reviews, news reporting or commentary about those works. (Note that fair use must be in connection with the work itself, not with the underlying subject of the work; for instance, a student reviewing Barack Obama's book, *The Audacity of Hope*, could use an image of the book cover, but a student writing a story about Obama visiting the community could not simply cut-and-paste Obama's photo off the book publisher's Web site.) Parodies or caricatures of cartoons necessarily use copyrighted materials as their source, and are permitted as long as they are not used merely for their recognition value or to usurp opportunities for the original author to make money off the same idea.[81] Student journalists should pause to consider any copyright implications before publication.

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Material that constitutes an invasion of privacy

Online media can also get into trouble for invading a person's privacy. One way to do this is to disclose, with no newsworthy purpose, exceptionally private or embarrassing facts that would humiliate the target.[82] This might happen if a student's confidential school transcript or medical history were posted or discussed on a Web site, or where a gossip column revealed the intimate details of a teacher's romantic life. Although newsworthiness can protect some uses of personal information, truth is not a defense in a privacy case as it is with libel. And while the subject of a news story can consent to an invasion of their privacy and thereby shield the publisher from liability (for example, speaking with a reporter about their battle with AIDS), such consent must be provided by someone capable of giving it (which may rule out younger students). The defendant must prove consent in court.

In addition, editors can cause themselves headaches when they portray someone unflatteringly in words or pictures as something he or she is not.[83] The most common example of a "false light" claim is when a photograph is placed next to a caption, story, or headline that creates the wrong idea, such as an image of a man outside a mosque beside a story about the links between terrorism and the muslim religion. Even if someone's picture or likeness is used in a flattering or non-controversial way, newspapers then have to guard against claims of using someone's name, likeness, or endorsement without authorization for commercial purposes, such as in an advertisement.

Another type of privacy problem can arise when one physically intrudes on someone's privacy. This can happen when reporters trespass where they are not supposed to be, use surveillance equipment to observe or record people without their permission, or misrepresent themselves to gain access to somewhere they would not otherwise be entitled to go. In each of these privacy situations, common sense is undoubtedly the most valuable tool a student journalist can have.

Additional issues

Before posting their Web site, blog or other material online, there are a few other things student publishers should consider.

Immunity for content posted by non-staff members

The federal Communications Decency Act, passed in 1996, states that interactive computer service providers are not liable for information provided by other sources.[84] For the student online media, this could mean broad immunity for libelous comments posted by others to bulletin boards or other areas where public postings are allowed. It is may even be possible to argue that the immunity applies to other "outside" content, such as advertisements, letters to the editor, syndicated columns and even articles from freelancers.

But there are some pitfalls to avoid. While the law does allow for the deletion of all or part of third-party submissions, where students add content to material provided by others or rewrite portions of the work as part of the editorial process, for example, a court could conclude that the student Web site publishers helped to "create" the information. In that case, the publication could be liable. While the application

of this federal law to student media has not yet been defined by the courts, student journalists and school administrators should be aware of the protection it may offer — as well as the limits — when they venture into cyberspace.

Anonymous publications

Many underground journalists seek to expose their ideas to their classmates, but not necessarily their identities. They may justifiably fear retribution from teachers and administrators or scorn from their community. The important thing to remember is that anonymous speech is constitutionally protected. In *McIntyre,* the Court found that an "honorable tradition" of anonymous speech has existed throughout American history.[85] Indeed, as one court has said, prohibition against anonymous literature is not desirable because "without anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies."[86] While students cannot legally be punished simply because they do not put their name on published material, keep in mind that school officials often go to extreme lengths to attempt to learn the writers' identities on their own. Moreover, hiding behind the cloak of anonymity is not always a sure bet. If you use your personal computer or a family Internet account to post your "anonymous" publication or message, you have left clear electronic "tracks" that can fairly easily be traced by your Internet service provider.[87]

Disclaimers of school sponsorship

It is strongly suggested that Web site publishers include a statement that the school is not involved with the site. This protects against arguments by school officials that readers will be confused by the site's perceived relation with the school.

An easy way to avoid this problem is to include a simple, one-sentence statement in the flag or masthead of your site along the lines of: "This site is not affiliated with Anytown High School, and the site's contents are in no way endorsed or funded by the school." Also, choose a name for your publication that is distinct from existing school publications so as not to mislead readers. This may not prevent all legal problems, but at least it shows responsible steps to prevent confusion.

Conclusion

For many high school students today, the opportunity to express themselves in a school-sponsored medium without administrative censorship has been all but eliminated. The Internet has created a meaningful alternative, but it has also created a potential legal battleground. While the law, at least for now, continues to limit censorship or punishment of independent student speech, the first few cases make clear that some courts are reluctant to completely tie the hands of school officials, even when the expression at issue exists entirely outside of school. Courts may — where they find the facts particularly unpalatable — go out of their way to "stretch" the law and allow school officials to take the place of parents when it comes to regulating student expression at home.

As always, the best defense that writers and editors of online underground papers can have is a sense of journalistic responsibility coupled with an understanding of their specific legal rights and responsibilities. The Internet is a wonderful educational tool for budding journalists, communications and especially if they can avoid problems before they surface. Students who do know their rights and responsibilities are in a strong position to defend themselves, their newspapers, and their personal Web sites against interference from school officials and others.

Further reading

- The Student Media Guide to Copyright Law
- Law of the Student Press
- Know your Cybershield Laws
- The Hazelwood Guide
- The First Amendment Handbook

Endnotes

1 *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns").
2 *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503 (1969) (stating students do not "shed their constitutional right to freedom of speech or expression at the schoolhouse gate," implying a distinction between on- and off-campus speech and that student speech has greater protection while away from school).
3 Nadine Strossen, *Keeping The Constitution Inside The Schoolhouse Gate — Students' Rights Thirty Years After Tinker v. Des Moines Independent Community School District,* 48 Drake L. Rev. 445, 457, 462-65 (2000).
4 *The Other Side of the Schoolhouse Gate*, Student Press Law Center *Report* (Fall 1997) at 20-21.
5 *See* Strossen, at 462, 463.
6 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 513 (1969).
7 *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).
8 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).
9 *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007).
10 *Beussink v. Woodland Sch. Dist.*, 30 F. Supp.2d. 1175, 1182 (E.D. Mo. 1998).
11 *See id.* at 1180, n.4.
12 *Emmett v. Kent Sch. Dist.,* 92 F. Supp.2d 1088, 1090 (W.D. Wash. 2000).
13 *See Emmett,* 92 F. Supp. 2d. at 1090.
14 *See Emmett,* 92 F. Supp. 2d. at 1090.
15 *Id.*
16 *Judge Prevents School From Suspending Student For Web Site*, Student Press Law Center News Flash, February 28, 2000.
17 *Killion v. Franklin Regional Sch. Dist.,* 136 F. Supp. 2d 446 (W.D. Pa. 2001).
18 *Id.* at 448.
19 *Id.* at 455.
20 *Coy ex rel. Coy v. Board of Educ. of North Canton City Schools*, 205 F. Supp. 2d 791 (N.D. Ohio 2002).
21 *Coy,* 205 F. Supp. 2d at 796.
22 *Id*. at 795.
23 *Id*. at 796.
24 *Coy,* 205 F. Supp. 2d at 796.
25 *Id.* at 795.

26 *Coy*, 205 F. Supp. 2d at 800.
27 *Id.* at 800-01.
28 *Id.* at 795.
29 *Id.* at 801.
30 *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).
31 *Id.* at 782.
32 *Id.* at 782.
33 *Id*.
34 *Mahaffey.* 236 F. Supp. 2d. at 782.
35 *Id.* at 784.
36 *Id.* at 784-85.
37 *Id*. at 786.
38 *Id.*
39 *J.S. v. Bethlehem Area Sch. Dist.,* 807 A.2d 847 (Pa. 2001).
40 *See id.* at 852.
41 *See id.* at 858-59.
42 *See id.* at 864-65.
43 *Id.* at 865.
44 *Id.* at 867.
45 *Id.* at 868 n.13.
46 *Id.* at 869 n.14.
47 *Id.*
48 *Id*. at 868.
49 *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007).
50 *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).
51 *Id.* at 36.
52 *Id.* at 37.
53 *Id.* at 38.
54 *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).
55 *Id.* at 593.
56 *Id.* at 600.
57 *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 207-08 (D. Conn. 2007).
58 *Id.* at 203, 205.
59 *Id.* at 213-14.
60 *Doninger*, 514 F. Supp. 2d. at 218.
61 *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).
62 *See, e.g., Planned Parenthood of Southern Nevada v. Clark County Sch. Dist.,* 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (federal appellate court upheld the right of school officials to limit pregnancy-related advertising in school publications, but only after it had determined restrictions were viewpoint-neutral).
63 *See, e.g., Burch v. Barker,* 861 F.2d 1149, 1159 (9th Cir. 1988) (finding that student commentaries in underground newspapers actually enrich the school environment).
64 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969).
65 *See, e.g., Beussink v. Woodland Sch. Dist.,* 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (suggesting that school authorities have the power to punish students for speech that materially and substantially disrupts school, even if the speech occurred on a student's private Internet account).
66 *See id.; see also Emmett v. Kent Sch. Dist. No. 415,* 92 F. Supp. 2d 1988 (W.D. Wash. 2000).
67 *See Dodd v. Rambis,* 535 F. Supp. 23 (S.D. Ind. 1981).
68 *See Scoville v. Board of Educ.,* 425 F.2d 10 (7th Cir. 1970); *see also Shanley v. Northeast Indep. Sch. Dist.,* 462 F.2d 960 (5th Cir. 1972).
69 *See Beauharnais v. Illinois,* 343 U.S. 250 (1952); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch*, 418 U.S. 323 (1974).
70 *Libel Lessons: What Do Students Learn About Free Speech From Teachers Who Sue Them For Defamation?* Student Press Law Center *Report* (Winter 2000-2001) at 16. The student and teacher reportedly negotiated a settlement in the case.
71 *See Miller v. California,* 413 U.S. 15, 24 (1973).
72 *Miller,* 413 U.S. at 24.
73 *See, e.g., Papish v. Board of Curators of Univ. of Mo.,* 410 U.S. 667, 670 (1973) (finding cartoon and attached caption expressing offensive ideas were not obscene).
74 *Ginsberg v. New York*, 390 U.S. 629 (1968).
75 *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).
76 *Bystrom v. Fridley H.S., Ind. Sch. Dist. No. 14,* 686 F. Supp. 1387, 1393 (D. Minn. 1987), *aff'd,* 855 F.2d 855 (8th Cir. 1988); *J.S. v. Bethlehem Area Sch. Dist.,* 807 A.2d 847 (Pa. 2001).
77 *See Scoville v. Board of Educ.,* 425 F.2d 10 (7th Cir. 1970); *see also Baughman v. Freienmuth,* 478 F.2d 1345 (4th Cir. 1973).
78 *See Watts v. United States,* 394 U.S. 705 (1969) (finding that a true threat must be distinguished from constitutionally protected speech). *See also Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,* 244 F.3d 1007 (9th Cir. 2001) (finding that anti-abortion Web site that included names and addresses of doctors who performed abortions did not constitute a "true threat" and was protected by First Amendment).
79 *See United States v. Malik,* 16 F.3d 45 (2d Cir. 1994).
80 *See United States v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir. 1990).
81 *See, e.g.*, *Walt Disney Productions v. Air Pirates,* 581 F.2d 751 (9th Cir. 1978) (finding that parodies may use copyrighted cartoons as their sources as long as they do not usurp the original author's money-making opportunities).
82 *See Florida Star v. B.J.F.,* 491 U.S. 524 (1989) (holding that a newspaper can print the name of a rape victim when the name was indicated in a police report).
83 *See Time, Inc. v. Hill,* 385 U.S. 374 (1967).
84 *Communications Decency Act,* 47 U.S.C.A. § 230 (West Supp. 1999).
85 *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995) (state ban on the distribution of anonymous campaign literature violates First Amendment) (*citing Buckley v. American Constitutional Law Found. Inc.,* 525 U.S. 182 (1999)); *Talley v. California,* 362 U.S. 60 (1960). *See also In re 2themart.com, Inc. Sec. Litig.,* NO. MS01-016 (W.D. Wash, April 19, 2001) (order quashing subpoena seeking to force Internet service provider to disclose identity of persons who spoke anonymously on Internet message board); *America Online, Inc. v. Anonymous Publicly Traded Co. v. John Does 1-5,* 542 S.E.2d 377 (Va. 2001) (trial court recognized a First Amendment privilege protecting Internet service provider AOL's right to protect confidentiality of subscribers but held that the circumstances of the case justified overcoming subscribers' right to speak anonymously).
86 *Jacobs v. Board of Sch. Commissioners,* 490 F.2d 601, 607 (7th Cir. 1973) (*citing Talley v. California,* 362 U.S. 60 (1960)).
87 *See, e.g.*, *America Online,* 542 S.E.2d at 377 (Internet service provider AOL required by trial court to disclose names of AOL subscribers whose posting on Yahoo! Message board allegedly defamed company and violated employment confidentiality agreements).