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Vetting Social Media Content: Getting Ahead of the Fast and Furious

Media and Publishing

CHEAT SHEET

- ***Who says what to whom.*** Conduct a publication audit of public-facing communications to determine who is speaking on behalf of the organization and what kind of information is being shared.
- ***Check your insurance.*** Verify if your existing insurance policies cover common content claims like defamation or misappropriation of publicity rights.
- ***Online content.*** The majority of online content is protected by copyright, including social media — which contributes to an increasing percentage of defamation claims.
- ***It isn't fair.*** Four factors determine whether work may be considered fair use: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the copyright owner's potential market.

Communicating with the public is nothing new for most organizations — and not just those that are media, public relations, or advocacy entities. As the channels of public engagement have multiplied in recent years, companies find themselves speaking to audiences with increasing frequency online and

through interactive and fast-moving social media platforms. It is hardly a stretch now to say that “everyone is a publisher.”

With publishing, though, comes publication risk: A retailer might triumphantly tweet a photograph of a famous actress shopping at one of its stores and promptly draw a publicity rights claim from the celebrity, plus a separate copyright demand from the paparazzi photographer. Activists for an advocacy organization snarkily criticize opponents on social media and then face a defamation claim when lawyers parse the legal distinctions between constitutionally protected rhetorical hyperbole and actionable statements that imply provably false and defamatory facts. Or, the corporate digital media team never sees the unnamed — but contextually identifiable — potential plaintiff lurking in an otherwise flattering profile until the correspondence arrives from a plaintiffs’ firm.

Worse, because legal exposure to a publication claim can increase exponentially based on how an initial complaint is handled in the first hours and days after it is received, corporate counsel might not learn of a potential problem promptly enough to steer the organization toward its strongest legal position.

In a world where reaching generalized audiences is easier than ever, even counsel at non-media companies need to recognize the most common legal risks for publishing liability, particularly on social media, as well as the key strategies both for heading off problems and for dealing with threats most effectively when they arise. This article examines these issues and recommends specific strategies.

Inventory public-facing communications

As an initial step in assessing and ultimately managing publication risk at non-media companies and nonprofit organizations, it is often prudent for in-house counsel to take an inventory of public-facing communications. Here, we are not talking about one-on-one customer interactions, but rather statements by the organization or its surrogates to a larger public. This could include advertising buys, websites, speaking engagements, press interviews, articles placed in third-party publications, and social media feeds on platforms like Facebook, Twitter, Instagram, and Snapchat. Although employee personal statements and social media accounts in many cases will fall outside company speech, the key question is whether the employee is — or reasonably appears to be — speaking on behalf of the organization or speaking as part of the employee’s duties. If so, under agency principles, the organization may have legal responsibility for that speech.

You may be surprised by the scope of what you find.

Once counsel has cataloged these outbound categories of communications, the second question of a publication audit is to identify what kind of information is being communicated. Are statements strictly confined to those about your organization, its products, and its services? Or is the organization engaging on a broader range of subjects? Are you using third-party photographs, videos, GIFs, music, or other content? And are you inviting public user comments or other user-generated content that is then shared publicly?

Next, what are the processes that lead to these communications? In a traditional newsroom, they are called editorial processes (i.e., the workflow from when a reporter interviews news sources to when the final report appears on air or in print). Who are your organization’s internal editors? Who reviews and signs off on public-facing communications, like that tweet responding to a public criticism about

the organization? Most importantly, are the review processes appropriate and do the key decisionmakers have the right training?

As part of a publication audit, it may also be worth checking whether existing insurance policies adequately cover common content claims, such as defamation or misappropriation of publicity rights, which are intentional torts or copyright infringement. This is important to know before a potentially meaningful claim is asserted. Media companies typically purchase specialty insurance policies for media errors and omissions, which are tailored to those in the business of publishing news and entertainment content. The extent to which similar legal risks are covered in non-specialty policies, such as general liability policies or nonprofit directors and officers liability policies, varies widely. Understanding the coverage, and any gaps in the coverage, requires studying the policy's fine print, exclusions, and endorsements.

In addition to a review of the organization's publication profile, it is also useful to understand some key publication risk areas for companies.

Beware celebrities (including dead ones)

It made national headlines in 2014 when actress Katherine Heigl filed (and later settled) a US$6 million lawsuit against a drugstore chain that tweeted a picture of her in one of their stores,[1] but celebrities have long brought claims to control the "commercial exploitation" of their names, images, voices, and other defining characteristics.

Most states recognize a "right of publicity," that permits celebrities or others to assert a cause of action for unauthorized commercial "misappropriation" of their identities.

The key is *commercial* exploitation. Purely editorial content, like a newspaper's description of a professional basketball game that references the celebrity players on the court, is protected by the First Amendment. But putting images of those players on a product, or in a commercial, may implicate publicity rights — and requires a license from the celebrity.

Sometimes the line between noncommercial speech and commercial exploitation can be blurry. In 2009, for example, two Chicago-area grocery store chains ran advertisements in a commemorative edition of *Sports Illustrated*, congratulating Michael Jordan on his election to the National Basketball Association Hall of Fame. Jordan sued both companies, claiming violation of his publicity rights and trademarks, and won a US$8.9 million jury verdict against one of them. The other lawsuit resulted in an interesting appeal. In that case, the chain's congratulatory advertisement showed a picture of basketball shoes marked with No. 23, along with the retailer's own logo, and included the following text:

> **A Shoe In!**
> *After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.*

On appeal to the US Court of Appeals for the Seventh Circuit, the issue was whether this advertisement was a commercial exploitation. The court found that it was.[2] In language that should give pause to companies developing a social media strategy that includes celebrity references, the

court found that “[a]n advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service,” and that “an ad congratulating a famous athlete can only be understood as a promotional device for the advertiser.”

This is a broad definition of “image advertising,” and raises unanswered questions about how — and when — companies can safely talk about celebrities or other public figures in their campaigns without risking an allegation that the companies are seeking commercially to exploit that celebrity’s fame for the brand’s benefit. The risk arises even for nonprofit organizations, to the extent they invoke celebrity names or images in fundraising letters or merchandise like T-shirts or posters.

Thus, careful review is typically appropriate whenever company speech, through social media channels or elsewhere, links celebrities to a brand. So, for example, **while it may be perfectly acceptable for a company to congratulate its own employees about industry awards, it might be worth legal review before similarly congratulating a celebrity.**

It bears note that about half of US states now extend publicity rights, either by statute or court ruling, beyond a celebrity’s death. (In California, publicity rights now extend 70 years past death.[3]) Agencies manage and license the intellectual property of celebrity estates — including copyrighted artistic expression as well as publicity rights and trademarks — which can be quite lucrative.[4] So, it is not just brand-related references to Michael Jordan and his contemporaries that companies need to scrutinize; yesteryear’s screen icons also raise the same concerns.

1 Eriq Gardner, “Katherine Heigl Ends Lawsuit Over Duane Reade Tweet (Exclusive),” Hollywood Reporter (Aug. 27, 2014).

2 *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

3 California Code, Civil Code - CIV § 3344.1.

4 Zack O’Malley Greenburg, “The Top-Earning Dead Celebrities Of 2017,” Forbes (Oct. 30, 2017).

Defamatory implications and lurking plaintiffs

Perhaps the most common content claim is for alleged harm to reputation. That is a lawsuit for defamation — also known as libel (defamation arising from written or recorded statements) or slander (defamation from oral statements). This is a somewhat nuanced area of law because the tort varies somewhat by state and is overlaid with constitutional First Amendment protections for speech. Generally stated, though, a defamation claim requires plaintiffs to allege, and ultimately prove, a statement of fact that is of a type harmful to reputation, false, and “of and concerning” them, published with fault and without a privilege, causing injury (see sidebar).

What is defamation?

In the United States, plaintiffs seeking damages for speech harmful to their reputation (i.e., defamation) must satisfy a number of elements that are required either by state law or the First Amendment. Recognizing these elements helps to identify risk:

- **A STATEMENT OR IMPLICATION OF FACT.** Only statements or implications capable of

being proven or disproven are actionable, so the law protects purely evaluative statements (e.g., “attractive”) and statements that are not reasonably understood as stating facts, such as rhetorical hyperboles. But the line between potentially defamatory fact and non-actionable opinion is not always clear.

- **FALSE.** A plaintiff may only recover if the challenged statement is substantially false. Minor inaccuracies are ultimately not sufficient if the central defamatory gist of a statement is accurate. In the United States, it is typically the plaintiff’s burden to demonstrate substantial falsity.
- **DEFAMATORY.** Not all false statements are actionable. Statements must also be defamatory, or harmful to a person’s or company’s reputation in the community or their ability to do business. Examples are statements alleging dishonesty, poor work or products, or immoral, unprofessional, or criminal conduct.
- **“OF AND CONCERNING” THE PLAINTIFF.** A report need not identify a plaintiff by name; it may be enough if a challenged report provides enough information for a plaintiff to be identifiable within a relevant community.
- **PUBLISHED (OR REPUBLISHED) TO THIRD PARTIES.** All that is required is that an allegedly defamatory statement be published, or shared, with a third party beyond the plaintiff and defendant.
- **FAULT.** To give speech “breathing room” under the First Amendment, a defamation plaintiff must show some level of fault by the publisher. The standard ranges from negligence for private figures to actual knowledge of the statement’s falsity or reckless disregard to the statement’s likely falsity — known as constitutional “actual malice”— for public figures and public officials.
- **WITHOUT A PRIVILEGE.** Even false, defamatory statements may be communicated without liability in situations where a privilege applies. Important privileges include the direct petitioning of the government (the Noerr-Pennington Doctrine) and accurately summarizing government actions or proceedings, including court proceedings (the fair report privilege).
- **CAUSING INJURY TO THE PLAINTIFF.** While certain kinds of statements may be presumptively harmful to reputation, such as those imputing immoral or criminal conduct, plaintiffs generally must prove harm arising from other categories of challenged statements.

All claims for reputational harm, even if styled as some other tort, typically must meet these defamation requirements.

In many cases, the derogatory nature of statements may be obvious. A couple of years ago, for example, the Alabama Supreme Court affirmed a US$7.5 million verdict in a slander case against a car dealership that said the owners of a competing dealership were “engaged in illegal activity, are terrorists, or otherwise support terrorist corganizations.”[5]

Where speech is clearly of a type that could cause reputational harm, it should be reviewed carefully before being disseminated by an organization, analogous to the legal “vetting” that happens in many newsrooms for investigative or sensitive reports. That review process should not exclude statements on social media channels, which can be particularly risky because of the sometimes informal tone, rapid pace, and hyperbolic nature of the medium. An increasing percentage of defamation claims arise from social media statements — including against the US sitting president[6] — and, although context is always important in construing a statement’s meaning, there is no automatic free pass for Twitter (or Instagram, Snapchat, or other platforms).

As a rule of thumb, think about how the statement would look pulled out of context and displayed to a jury on a poster board under fluorescent lighting.

It is not just the obvious criticisms that can pose risk. Many defamation plaintiffs claim that statements can be reasonably understood as communicating false and injurious *implications*, even if not expressly stated. While the very nature of these types of claims make them more difficult to foresee, bear in mind that risk can arise from what is reasonably implied as well as what is expressly stated. In many cases, the legal risks created by unintended implications can be dramatically reduced through using clearer language, avoiding unfortunate juxtapositions (e.g., using stock footage or photographs of recognizable people when discussing diseases or bad acts[7]), or by pausing and looking fresh at a draft with an eye toward how it might be interpreted by those referenced in it.

Similarly, it bears emphasis that a potential plaintiff need not be identified by name in a challenged statement — or be the focus of a publication. All that is required is that a particular defamatory statement or implication be reasonably understood by a relevant community as referring to the plaintiff. In other words, libel law protects not only who it was aimed at, but also who was hit. So organizations should also keep an eye out for the "lurking" or "hidden" plaintiff. The classic example is a positive profile that mentions deep within the text that the subject of the profile achieved great success despite having an abusive father. That parenthetical, and incidental, characterization of the father — an identifiable individual, even if not named — creates a potential plaintiff.

When undertaking a legal review of a draft publication for defamation risk, media lawyers typically identify all of the potentially defamatory statements and implications about reasonably identifiable people or companies, and then consider how defensible those statements would be if challenged in light of the legal standards for defamation (as identified in the sidebar on the opposite page). If you can recognize the hidden traps by identifying the potentially risky implications and the lurking potential plaintiffs, the review is off to a strong start.

5 *Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC*, 155 So.3d 930, 933 (Ala. 2013).

6 *Zervos v. Trump*, 59 Misc. 3d 790 (N.Y. Sup. Ct. 2018).

7 See, e.g., 1 Law of Defamation § 4:32 (2d ed.).

Who is driving social media content in your organization?

Social media is pumped out quickly. On a day-to-day basis, Facebook, Snapchat, Twitter, and Pinterest postings are most likely being driven by savvy digital natives, who are likely to be your company's younger staff. These folks know how to use the technology and engage the public in digital dialogue. But they also have grown up in a "cut and paste" online culture and often erroneously believe that anything published on the internet is freely available for use. Of course, the overwhelming majority of online content is, in fact, protected by copyright. This includes Facebook posts and other social media content. And, of course, where content incorporates other works — like memes — the same content may involve multiple rights-holders.

Another common myth is that nearly every online or social media use is justified as "fair use." In truth, each use requires analysis under the legal guideposts. Under Section 107 of the Copyright Act, use of someone else's work may be considered to be a fair use, and thus non-infringing, based on a balancing of four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the

copyright owner's potential market.

Photographs are often a particularly problematic case for a fair use defense, given that they are often viewed as creative (factor 2), they are often copied in their entirety (factor 3), and that there is a well-developed market for the licensing of photographs (factor 4). To the extent that fair use defense has been successfully asserted for the unauthorized copying of images, it is typically where the use is highly transformative (factor 1).[8]

This potential disconnect between law and practice comes at a time when rights agencies are increasingly enforcing copyrights in photographs and video copied or distributed online. Claims are being filed at a surprising pace against websites and those who post on social media. That uptick in enforcement is due in part to more sophisticated image search tools available to discover copying and in part to a specialized plaintiffs' bar that has developed over the past few years. For example, one "frequent flyer" has filed more than 500 copyright infringement lawsuits in the past two years in the US District Court for the Southern District of New York based on online reproductions of photographs.[9]

8 See, e.g., *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

9 *Rudkowski v. MIC Network, Inc.*, No. 17 CIV. 3647 (DAB), 2018 WL 1801307, at *3 n.3 (S.D.N.Y. Mar. 23, 2018); see also *Reynolds v. Hearst Commc'ns, Inc.*, No. 17CV6720(DLC), 2018 WL 1229840, at *4 (S.D.N.Y. Mar. 5, 2018) ("[Counsel] has filed over 500 cases in this district in the past twenty-four months. He has been labeled a copyright 'troll.'").

The fair use copyright defense

Fair use is an affirmative defense under the US Copyright Act, based on four factors:

- **THE PURPOSE AND CHARACTER OF THE USE.** Uses that are of a commercial nature weigh against fair use, as do uses that are merely a substitute for the original work. On the other hand, uses that are "transformative," or that build upon the original to create a new work, or which are for educational or informational purposes, are considered more fair.
- **THE NATURE OF THE COPYRIGHTED WORK.** Use of a published or informational work favors fair use, while use of unpublished or creative works weighs against fair use.
- **THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED.** Taking more of the original — or the taking of the "heart" or key aspects of the original — is less fair than copying smaller excerpts.
- **THE EFFECT OF THE USE UPON THE COPYRIGHT OWNER'S POTENTIAL MARKET.** The more that the unlicensed use acts as a substitute in the market for the original and will replace revenues, the more this factor weighs against fair use.

As a result, it is often prudent to secure licenses for the reproduction of still and video images, rather than relying on a fair use defense.

And, with licenses, the key becomes ensuring that uses fall within the negotiated scope of the license. Uses in excess of the license are typically actionable as copyright infringement.

Many organizations will benefit from an internal audit of their copyright practices. Typically, this is done by cataloging the types of copyrighted material created and used by the organization, including whether there are adequate procedures in place for acquiring sufficient permissions for uses of copyrighted material. Organizations may also want to establish appropriate policies and training programs.

Make sure the legal department gets content complaints

Experienced counsel know that, in a variety of contexts, how initial prelitigation complaints are handled can profoundly affect whether or not litigation ensues. For publication claims, there can also be a tremendous effect on potential damages.

For defamation claims, the fault element of the claim is typically determined at the time of publication. Online, however, plaintiffs regularly argue that revisions are republications and that the revised date both restarts the statute of limitations and is the relevant time to evaluate fault. So, publishers that treat a challenged publication as a living document and revise it despite legal threats can create additional risk for the company.

In copyright infringement actions where the underlying work was timely registered with the US Copyright Office, there is a wide range in statutory damages — from US$750 to US$30,000 per work, or up to US$150,000 where infringement is “willful.” Because infringement that continues after receipt of notice is more likely to be deemed “willful,” potential exposure to damages increases dramatically once an owner has objected to a use.

Thus, if the subject of a statement made by the organization formally demands a retraction or claims falsity and defamation, or if an owner of a copied image or other work objects, those concerns should be referred to the legal department for consideration.

Plan on training, again and again

In most companies, social media programs are driven by young professionals who are climbing the corporate ladder and highly mobile. You may think you have done an amazing job training the social media staff on the issues highlighted in this article, only to find a year and a half later that 50 percent of the staff has turned over. A “one and done” training mentality is not going to work. Try to think about ways to build in legal training to the social media work stream. Do you have the ability to attend program meetings? Can you get in department meetings on a quarterly basis? Will quick legal update emails to relevant staff help you remain top of mind?

Also, think about how you are going to foster a culture of engagement with the social media staff. What makes you easy or difficult to work with? Will you respond to inquiries at the speed of social media? Do you reward good questions even when the legality of a tactic is questionable? Staff have a daily, or even an hourly, choice about when to bring the legal department into a dialogue. Building bridges to the people who are the public voices of your organization is an essential element of your social media risk management program.

In the final analysis, there is no way to inoculate an organization engaged in publishing statements to the world from any legal risk arising from that content. However, by taking steps to know what communications are being made and to ensure that appropriate processes and training are in place — including training on what kinds of higher-risk practices require legal review — potential exposure can

significantly be reduced.

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Rob Falk is general counsel of Truth Initiative and a member of ACC’s board of directors. This article represents the personal views of the authors and is not attributable to their employers. He contributed the sidebars on individual diversity action plans and cultural agility growth charts.

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