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Safe and Responsible Use of the Internet: A Guide for Educators

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Part III. Legal Issues – Internet Use in School

2. District Liability for Material Placed on Web Site or Transmitted Through System

Dissemination of Harmful Speech

Legal Standards

When district staff or students use the district's Internet system for the publication or dissemination of material, such publication or dissemination may pose concerns regarding potential liability. Civil liability for harmful speech may arise in cases of libel (defamation) and invasion of privacy.

Libel (Defamation)

There are four elements for a successful claim of libel:

- The statement must be published.
- The person claiming libel must be able to prove he or she was identified by the statement.
- The libel victim must prove that the statement harmed his or her reputation in the community.
- The libel victim must prove fault -- that the person committing the libel did something they should not have done or failed to do something that they should have done.

If the libel victim is a public official or public figure, the victim must prove that the person committing the libel did so with actual malice. Actual malice means that the person either knew the statement was false or was reckless in verifying its accuracy.

Material that Constitutes an Invasion of Privacy

There are actually four related legal claims that fall under the "invasion of privacy" concept. Two legal claims are most relevant to the issues that could arise related to dissemination of materials through or publication of materials on the Internet. These are:

- **Public Disclosure of Private Facts.** Public disclosure of private facts occurs when a person publicly discloses a non-public detail of another person's private life when the effect would be highly offensive to a reasonable person.
- **False Light in the Public Eye.** False light in the public eye occurs when a person is placed before the public in a false light and this false light would be highly offensive to a reasonable person.

Defenses to actions based on invasion of privacy are that the facts are "newsworthy" (First Amendment) or that the victim gave consent. However, consent must be provided by someone capable of giving it. Minors are generally not considered capable of giving legal consent.

The Question of Statutory Immunity

There are two U.S. laws that relate to issues of statutory immunity of Internet service providers and Internet information providers. School districts may in certain aspects of its operations be considered an Internet service provider, but in other aspects of its operations be considered an Internet information provider. As will become apparent, this is an important distinction.

As discussed in the chapter on "District Liability Related to Access to Inappropriate Material or People" 47 U.S.C. § 230 of the Computer Decency Act provides:

- (1) Treatment of publisher or speaker.-- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

The following definitions are relevant to an analysis of this provision:

- (2) Interactive computer service.-- The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provide access to the Internet and such systems operated or services offered by libraries or educational institutions.
- (3) Information content provider.-- The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

It is important to note, the statutory immunity provided by (1) to "interactive service providers" is not provided to "information content providers." Here are the provisions of the statute addressing

- (c) Information Residing on Systems or Networks At Direction of Users. -
 - (1) In general. - A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -
 - (A)
 - (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
 - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
 - (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
 - (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
 - ...
 - k) Definitions. - (1) Service provider. - (A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or

providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

It is important to recognize that the CDA provides immunity for “interactive service providers” for material that is transmitted *through* their system, but not for “information content providers” that are posting information *on* a web site.

Education institutions are included in the definition of interactive service provider, but this designation only addresses situations where the district has no control or supervisory responsibilities related to the material transmitted through the system. If the district establishes a district web site, the district is also an "information content provider" and can be held to publisher standards for any defamatory or other harmful material posted on the site.

It is possible that districts could be held liable for harm caused by material transmitted through the system by students due to the failure to adequately supervise. But it is also arguable that the immunity provided by 47 U.S.C.A. § 230 would apply in such a case. The district can be held liable for harm caused by material transmitted by staff.

Copyright Infringement

The district may be held liable for the presence of any material that is posted on the district web site in violation of copyright laws. Under copyright law, there are limitations of financial liability for Internet service providers who host material placed by others on their web site.

- (c) Information Residing on Systems or Networks at Direction of Users.-
 - (1) In General.-- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider-
 - (A)
 - (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent ...¹.

There are also limitations of liability granted to institutions of higher education.

- e) Limitation on Liability of Nonprofit Educational Institutions.-
 - (1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research ...².

¹ 17 U.S.C § 512 (c).

² 17 U.S.C. § 512 (e). This statute unfortunately applies only to institutions of higher education.

These provision *do not* provide immunity for school districts for material placed on district, school, or class web sites because school personnel can and should maintain the ultimate responsibility for the material placed on such sites. No school district should operate a district, school, or class web site to operate without district staff having actual knowledge of what material is being placed on the site. School districts are not Internet "service providers" when they are presenting information on a district web site³.

The statute providing immunity for institutions of higher education does not refer to other institutions of education. Unfortunately, advocacy groups that support K-12 educational legislation were not paying enough attention to this copyright law, because clearly there are strong arguments for the enactment of provisions providing limitations of liability for k-12 institutions similar to those provided for institutional of higher education

Strategies to Address the Concerns

One of the requirements for Internet service providers under 17 U.S.C § 512 is that the service provider has designated an agent to receive complaints of copyright infringement and provides contact information on its web site for those concerned about material placed on the site. While such a designation and notice would not provide statutory limitation of liability for a school district under copyright law, this approach presents is an excellent preventative strategy to seek to limit the potential of liability for unintentional copyright infringement and other web site publication concerns.

To limit the potential of district liability for defamation, invasion of privacy, and copyright infringement, the following actions are recommended:

- Have provisions in the District Internet Use Policy that address these issues.
- Place on the district web site and each school web site a "Web Site Concerns" link. This link will take the reader to a page where the district states:

"XYZ District seeks to ensure that all materials placed on the district or school web sites are placed in accord with copyright law and do not infringe on the rights of or harm others in any way. To accomplish this we are taking three steps:

- We have provisions in our Internet Use Policy that address copyright, defamation, invasion of privacy, and other harmful speech. <link to policy>
- We have established web site management procedures to review materials prior to their placement on the web site. <link to procedures>

³ I have had some disagreement on this interpretation with other school attorneys, who believe that schools fall under the provisions of §512. But it is clear from the legislative history of these provisions, that Congress intended to provide immunity for Internet service providers who were not in a position to know what material was being placed on their site, not Internet content providers. School officials must be in a position of knowing what is being put on their site. Schools should not be in a position of offering "free student web pages." If a school district does not maintain such control, the district will lose the right to limit student speech for educational reasons.

- We will promptly respond to any issues of concern. If you have a concern about material placed on our web site, please contact us. <link to e-mail to an administrator who has the responsibility of promptly responding to any complaint>"
- Establish web site management procedures that require review by a knowledgeable staff person prior to the posting of material.

It is important that this web site management process not become a bottleneck that unnecessarily restricts the effective educational use of the Internet with students. The best way to address this concern is through staff professional development related to web site liability concerns and the granting of authority to those staff members who have completed such professional development to approve the posting of material on a district, school, or class web site. (More information on a copyright management plan is included in "Copyright.")