

# Emerging Free Speech and Legal Issues for the Media Industry

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# Overview

- **Key Free Speech & Legal Issues for the Media Industry**

- Licensing and the Use of Social Media Content on Your Website

- Navigating Defamation Issues

- Freedom of Information Requests & Limitations

# Licensing & Use of Social Media Content

- Copyright Infringement

- What is it?

- **Copyright infringement** is the use of works protected by copyright law without permission, infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works. The copyright holder is typically the work's creator, or a publisher or other business to whom copyright has been assigned.

- What does it protect?

- Copyright protects **original works of authorship** fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

# Licensing & Use of Social Media Content

- The legal penalties for copyright infringement are:
  - Infringer pays the actual dollar amount of damages and profits.
  - The law provides a range from \$200 to \$150,000 for each work infringed.
  - Infringer pays for all attorneys fees and court costs.
  - The Court can issue an injunction to stop the infringing acts.
  - The Court can impound the illegal works.
  - The infringer can go to jail.

# The Exceptions

- Authorized Use
  - Permission from copyright owner—typically a license
- Independently Created
- Fair Use
  - Fair use is one of the exceptions in copyright which allows use of copyrighted materials without obtaining permission as long as the use can be considered fair. There is a four-factor analysis which must be applied to each use to determine whether the use is fair. Each factor is given equal weight. The goal is to achieve a balance between the rights of the copyright holder with the rights of the public. Fair use is also technologically neutral so the same analysis may be applied to any medium.

# The Four-Factor Fair Use Test

- Purpose and Character of the Use of the Work
  - Nonprofit, Educational, Personal—less likely to need permission
  - Commercial, Entertainment, For-Profit—more likely to need permission
- Nature of the Work
  - The more creative the work, the more likely you need permission
- Amount
  - How much of the work you are using. The less you use, the less likely you need permission
- Market Effect
  - The more your use is likely to impact the market, the more likely you need permission

# Terms of Service / Licensing

## Terms of Service

- Facebook
- Instagram
- Twitter
- Pinterest

# When Terms of Service Collide with Copyright Infringement

- *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007)
- *Goldman v. Breitbart News Network, LLC*, 302 F.Supp.3d 585 (S.D.N.Y. 2018)
- *Philpot v. Media Research Center Inc.*, 279 F.Supp.3d 708 (E.D. Va. 2018)
- *Philpot v. WOS, Inc.*, 2019 WL 1767208 (W.D. Tex. Apr. 22, 2019)
- *Stross v. Redfin Corporation*, 730 Fed.Appx. 198 (5th Cir. 2018)
- *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723 (9th Cir. 2019)



# Navigating Defamation Issues

## Los Angeles Times

Headline on March 22, 2019: ***“Devin Nunes sues a sassy cow on Twitter, and she gains a herd of followers”***

- U.S. Rep. Devin Nunes (R-CA) is heckled by 2 Twitter accounts, Devin Nunes’ Cow and Devin Nunes’ Mom.
- He sues Twitter and one of its users.
- The lawsuit is widely mocked, and several legal analysts predict it will fail.
- Why?

# Navigating Defamation Issues

## ▪ Devin Nunes' Lawsuit against Twitter and Its Users

- Issue 1: There are certain legal protections for social media platforms like Twitter for comments posted by its users.
  - Interactive online media platforms (*i.e.*, Twitter, Facebook, and other media) are typically not liable for comments posted by their users under Section 230 of the Communications Decency Act, which generally does not treat the website as a traditional “publisher.”
  - Rep. Nunes is arguing that Twitter has a duty to police the comments.
  - He is also suing one of the account holders for defamation, which you can do.
- Issue 2: The Twitter accounts seem to be parodies, especially Devin Nunes' Cow.

# Navigating Defamation Issues

## ▪ Parody & the First Amendment

- The U.S. Supreme Court, and other appeals courts from several states, have issued rulings that offer protection for certain types of parody in defamation cases:
- Major Case: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) – “The Hustler ad parody (of Rev. Falwell) could not ‘reasonably be understood as describing actual facts’ about [his] or actual events in which [he] participated.”
- U.S. Appeals Court Decision: *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982) – “The test is not whether the story is or is not characterized as ‘fiction,’ ‘humor,’ or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally.”
- Similar State Court Ruling: *Frank v. Nat'l Broad. Co.*, 119 A.D.2d 252, 261-62 (2d Dep't 1986) – “. . . in certain situations and under some circumstances, the authors of humorous language will be insulated from liability in defamation cases even where the comic attempt pokes fun at an identifiable individual. The line will be crossed, however, when humor is used in an attempt to disguise an intent to injure; at that point a jest no longer merits protection, because it ceases to be a jest.”

# Navigating Defamation Issues

- 1<sup>st</sup> Amendment:

“**Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech, or of the press**; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

- Exceptions:

- (1) Inciting lawlessness and “fighting words”;
- (2) Defamation;
- (3) Obscenity and child pornography;
- (4) Intellectual property of others (*i.e.*, speech owned by others);
- (5) Commercial speech; and
- (6) Speech involving the government (as speaker, employer, regulator, etc.)

# Navigating Defamation Issues

## Understanding Defamation Claims

- The First Amendment prohibits states from adopting defamation laws that improperly restrict speech or penalize an individual for speech.
- But the speaker is subject to liability for certain false statements.
- Start with the checklist of the “elements” of defamation (*i.e.*, all of the necessary ingredients for a successful defamation case).
  - If any of these elements is lacking, it is not defamation (although that doesn’t mean someone will not try to sue you). BE CAREFUL!

# Navigating Defamation Issues

## ▪ Elements of Defamation

- 1) Defamatory statement (*i.e.*, tendency to expose plaintiff to public hatred, contempt, ridicule or disgrace)
- 2) Statement would be “reasonably understood” to be about plaintiff
- 3) Statement was communicated (*i.e.*, published or broadcasted) to someone other than plaintiff
- 4) Statement was false \*(*Parody Exception – is the statement reasonably understood to be describing actual facts*)
- 5) Statement was a substantial factor in causing plaintiff to suffer financial loss
- 6) Intent: Is plaintiff a public official or figure? Or is it a matter of public concern, or a matter of private concern?

# Navigating Defamation Issues

## ▪ Intent in Media Cases

- Public Official: Actual malice = (1) knowledge of falsity; or (2) reckless disregard for truth \*(*Rep. Nunes' burden*)
- Public Figure: Same
- Private Figure *But* Matter of Public Concern: Published statement “*in grossly irresponsible manner without consideration for the standards of information gathering and dissemination followed by responsible parties*”
- Private Figure *And* Private Matter: Published statement “*negligently*, meaning that defendant failed to exercise reasonable care to verify its accuracy”

# Facebook Parody Case

- *Novak v. The City of Parma, et al., 17-CV-2148 (N.D. Ohio 2017)*
  - The “Police Facebook Freak-out” Case
  - Critic of the Parma PD sets up parody Facebook page for the department
  - Includes phony press releases and statements
  - PD launches a criminal probe; locates the critic and arrests him for “disrupting police operations”
  - He’s acquitted. He then sues the police.





# Facebook Parody Case

- *Novak v. The City of Parma, et al., 17-CV-2148 (N.D. Ohio 2017)*

- Critic alleges the PD violated his First Amendment rights by chilling his ability to speak without retribution from the government.
- PD moved to dismiss the suit; the court denied the motion. Why?
  - 1) Parody is a form of protected speech and no reasonable person would believe that the page was anything other than a parody.
  - 2) PD's response was such that even "a person of extraordinary firmness—let alone ordinary firmness—[would be chilled] from exercising his First Amendment rights" if they thought the police could arrest them.
  - 3) The facts showed the PD's actions were motivated by the critic exercising his constitutionally protected free speech rights.

# Navigating Defamation Issues

CNN Headline on Nov. 30, 2011: ***Feds charge 20 with luring illegal immigrants to work in NY-area strip clubs***

- In 2011, every NYC television station covered a major raid by federal agents.
- It led to a major lawsuit against WCBS.
- Case was finally resolved in late 2016.

# Navigating Defamation Issues

- *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*,  
28 N.Y.3d 82 (2016)

Reporter:



“Cheetahs advertises exotic women and the federals—federal authorities say it is run by the mafia. . . .”

“They say. . . The ringleaders would then pay young men living here in the U.S. and upstate New York to marry these women on paper, then force the women to work as dancers in strip clubs. . . .”

# Navigating Defamation Issues

- *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82 (2016)
  - Owners of Cheetahs sued WCBS for defamation regarding the allegation that it was “was run by the mob”
  - Involves private figures *but* matter of public concern; reporting must be “grossly irresponsible” to be actionable.
  - Cheetahs was managed by a private company that also provided the dancers.
  - The management company and dancers also sued, claiming the mafia allegations subjected them “to scorn and ridicule and adversely affected their ability to earn income.”

# Navigating Defamation Issues

- *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82 (2016)
  - After more than four years, and two appeals, the portion of the case brought by the manager and dancers was dismissed.
  - Ultimately, WCBS probably could have argued that the statements it reported were not false; federal authorities did, in fact, say that the club was run by the mob, etc.
  - But the truth or falsity of those statements may have required a trial or at least discovery, which is expensive. So how did WCBS win more quickly?

# Navigating Defamation Issues

- *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82 (2016)
  - Remember, to make a valid claim for defamation, plaintiff must show the false statement would be “reasonably understood” to be about plaintiff.
    - Test: whether the matter published is “of and concerning” the plaintiff.
    - Typically, this was a question for a jury.
  - In this case, N.Y. Court of Appeals issued a ruling likely to benefit media companies and their reporters, editors, and producers.
    - Such a case can be immediately dismissed using the “of and concerning” test, if the description “fail[s] to include sufficient particulars of identification in order to be actionable by an individual”
    - Here, the Court held that reporter was clearly talking about the club, not the dancers. And the club managers dropped their appeal before it went to the state’s highest court.

# Freedom of Information Overview

**Federal Government:** F.O.I.A. – Freedom of Information Act

**State Governments:** Sometimes called Freedom of Information Law  
(e.g., F.O.I.L. in NY)

## **Basic Fundamentals of FOIA/FOIL**

- There is a strong presumption that records in the possession of government should be available for public inspection, unless the records are exempted from disclosure.
- As a general rule, portions of certain records should be redacted where possible, instead of being withheld.
- As the New York Court of Appeals famously held, “FOIL itself is to be read liberally and its exemptions read narrowly.”

*Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of New York at Farmingdale*, 87 N.Y.2d 410, 417 (1995).

# Freedom of Information Overview

## F.O.I.A. / F.O.I.L.

- FOIA applies only to the executive branch of the U.S. Government—including departments and agencies—not the Judicial or Legislative Branch (although they do have their own policies).
- The term “agency record” is not defined under FOIA. The U.S. Supreme Court has defined it as records in the agency’s possession that pertain to agency business.
- FOIL (in NY) defines “record” as:
  - “information kept, held, filed, produced or reproduced by, with or for an agency. . . in any physical form whatsoever. . . .”
  - Applies only if the communication involves government business or the performance of government duties.
  - Portions of the communication that do not pertain to government business can be withheld.



# Freedom of Information Overview

## F.O.I.A. / F.O.I.L. Exceptions

- (1) record that is required to be kept secret or is exempted by an executive order or other statute;
- (2) related solely to the internal personnel rules and practices of an agency
- (3) if disclosed would constitute an unwarranted invasion of personal privacy (employment and medical histories);
- (4) (FOIL only) would impair present or imminent contract awards or collective bargaining negotiations;
- (5) trade secrets or submitted to agency by a commercial enterprise... which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
- (6) inter-agency or intra-agency memoranda or letters
- (7) compiled for law enforcement purposes and which, if disclosed, would:
  - a. interfere with investigations or judicial proceedings;
  - b. deprive a person of a right to a fair trial or impartial adjudication;
  - c. identify a confidential source or disclose confidential information relating to a criminal investigation;
  - d. reveal criminal investigative techniques or procedures, except routine techniques and procedures; or
- (8) could endanger the life or safety of any person;
- (9) (FOIL only) would jeopardize... the security of its information technology assets;
- (10) (FOIA only) certain reports used by an agency responsible for the regulation or supervision of financial institutions (*i.e.*, regarding the examination, operation, or condition of companies); and
- (11) (FOIA only) geological and geophysical information and data, including maps, concerning wells.

# Freedom of Information Overview

## Freedom of Information Law (F.O.I.L.)

- New Exception in NY in 2019: MUGSHOTS
- Legislature expanded the definition of “an unwarranted invasion of personal privacy” to include:
  - . . . disclosure of law enforcement booking information about an individual, including booking photographs, unless public release of such information will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

2019 Sess. Law News of N.Y. Ch. 55 (S. 1505-C).

# Police Body Cameras Case

- ***In re Patrolmen's Benevolent Ass'n of the City of New York v. Bill De Blasio, et al*, No. 150181/18, 2019 WL 1905872 (1st Dep't Apr. 30, 2019)**
  - Issue: Is the footage recorded on police body cameras available under FOIL?
  - Court: Maybe.
  - Background: The City of New York planned to release certain footage to the public. The union filed a lawsuit to stop the city, arguing the footage was a “personnel record” protected from disclosure under NY Civil Rights Law 50-a.

# Police Body Cameras Case

- ***In re Patrolmen's Benevolent Ass'n of the City of New York v. Bill De Blasio, et al*, No. 150181/18, 2019 WL 1905872 (1st Dep't Apr. 30, 2019)**

- Ruling: The appeals court held that the footage at issue was not a “personnel record” and, therefore, not protected from public release:

“The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building.

“Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with, any pending disciplinary charges or promotional processes.”

# Police Body Cameras Case

- ***In re Patrolmen's Benevolent Ass'n of the City of New York v. Bill De Blasio, et al*, No. 150181/18, 2019 WL 1905872 (1st Dep't Apr. 30, 2019)**

- Takeaways:

- Although this is not a FOIL case, this is a noteworthy ruling with respect to FOIL. In the First Department in NY, police body-camera footage, depending on the nature of the tape, may no longer fall under the FOIL exception for “unwarranted invasions of personal privacy,” including a personnel record. Also, it is no longer exempt from FOIL under NY Civil Rights Law 50-a.
- But, this does not mean all police body-camera footage must be released under FOIL. Rather, it means that, if a government entity seeks to withhold it, must have a separate basis to do so. The most likely basis: the law enforcement exception.

# Freedom of Information Update

- ***Abdur-Rashid v. New York City Police Dep't, 31 N.Y.3d 217 (2018)***
  - Law Enforcement Records Case under FOIL
  - Issue: When responding to a FOIL request, must law enforcement agency claiming an exemption acknowledge that it possesses the responsive documents?
  - Answer: Under certain circumstances, no.

# Freedom of Information Update

## ▪ *Abdur-Rashid v. New York City Police Dep't, 31 N.Y.3d 217 (2018)*

- Two men requested records from the NYPD related to any “surveillance” and “investigation” of them from the previous six years.
- NYPD has every right to deny the request because the records, if released, could jeopardize their investigation.
- But, the burden is on the agency denying the request to demonstrate whether the withheld government records are exempt from disclosure.
- NYPD responded by denying the request and stating that the information, “***if possessed*** by the NYPD,” would jeopardize their investigation if released.
- Was this sufficient? The Court of Appeals said yes.
  - New rule: When there is a pending criminal investigation, a law enforcement agency is not required to make a “specific evidentiary showing.” Instead, it may identify “generic kinds of documents” and “generic risks.”
  - Court: “FOIL was not designed to assist wrongdoers in evading detection or, put another way, to furnish the safecracker with the combination to the safe.”

# Freedom of Information Update

## Freedom of Information Procedures

Both FOIA and FOIL require the government and the party requesting the records to following certain procedures and meet certain deadlines. Follow them carefully.

- For example, FOIA requires a response/determination within 20 days (but not the records themselves), although agencies do not always follow this rule.
- In NY, a municipality has five business days to either make the record available, deny the request in writing, or acknowledge receipt of the request and provide an approximate date by which it will be granted or denied.
- If your request is denied, check to see if there is a process for an appeal the denial to the agency (sometimes the deadlines are short, e.g., 30 days)
- Some states will require this internal appeal before you can sue; otherwise, you have not “exhausted all administrative remedies,” and the lawsuit will be dismissed.



# Free Speech & Legal Issues for the Media

*Questions?*

*submitted via chat*

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