Introduction to the November 2018 Update

This second update of 2018 of Rights and Liabilities in Media Content, by noted First Amendment and media law authority Rodney Smolla, Dean of Widener University Delaware Law School and past President of Furman University, covers the latest developments affecting modern media content. Highlights of this latest update to the Second Edition include Dean Smolla’s discussion of the following recent developments.

This release explores a significant element of modern digital communication, especially on social media, involving the use of “emojis” or other symbols, such as “smiley faces,” or “likes.” Specialized symbols may be used to communicate offensive or derogatory views. Racist and ant-Semitic supremacist groups have their own home-grown set of symbols that function as digital icons to express prejudice and hate. This release explores when the use of such “emojis” may or may not give rise to defamation liability.

In Boulger v. Woods, Portia Boulger, an active volunteer and pledged convention delegate working on behalf of Senator Bernie Sanders for the Democratic Party’s nomination for President, sued James Woods, the well-known movie actor and producer, for a Twitter post by Woods. The tweet read: “So-called #Trump ‘Nazi’ is a #BernieSanders agitator/operative?” Directly above the tweet were two photographs: one of Birgitt Peterson wearing a Trump t-shirt and giving the Nazi salute while at a rally for Trump in Chicago, and one of Portia Boulger, accompanied by a caption identifying her as an Organizer for Women for Bernie Sanders. The court held that because Woods had ended his tweet with a question mark, the tweet was non-actionable opinion.

In Hassell v. Ava Bird, the California Supreme Court, in a three-justice plurality opinion, held that the Internet review site Yelp could not be forced to abide by a court order emanating from a defamation case in which Yelp was not a
party. The trial court had ordered a defendant to take down a defamatory review following a default judgment entered in a defamation suit arising from an adverse review of a lawyer. The lower court also ordered Yelp to remove the review. Invoking the expansive immunity other courts had conferred under Zeran and its progeny, the plurality held that Section 230 of the Communications Decency Act immunized Yelp from the take-down order.

In Petro-Lubricant Testing Laboratories, Inc. v. Adelman, the Supreme Court of New Jersey ruled that when a material and substantive change is made to an online article’s content, that change will constitute a new publication, restarting the statute of limitations. The opinion defined “material change” as “one that relates to the defamatory content of the article at issue.” A material change must have “some logical connection with the facts of consequence or the issues.” It would not be a material change, for example, to effectuate “a technical website modification or the posting on the website of another article with no connection to the original defamatory article.” The Court defined a “substantive change” as “one that alters the meaning of the original defamatory article or is essentially a new defamatory statement incorporated into the original article.”

Dean Smolla discusses the nuances and implications of these cases and more, in this release of Rights and Liabilities in Media Content.

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