



Privacy Law

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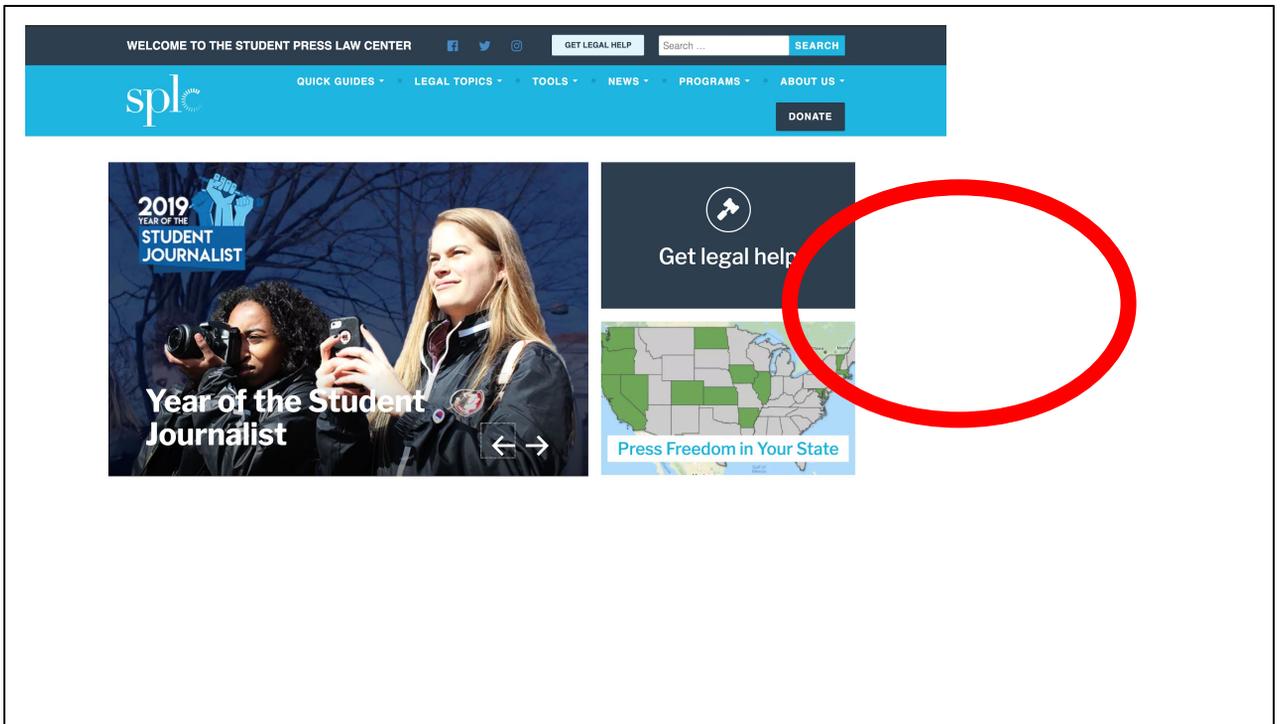


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Student Press Law Center

This presentation provides a brief and basic overview of privacy law. Allowing for a few questions or comments along the way, it should last no more than 45 minutes and is designed to help you identify and avoid some of the most common privacy law traps faced by student media.



This presentation will not make you a First Amendment expert. What it will do, I hope, is help you make more informed decisions and give you a better sense of when you might have a problem that requires outside help. For those situations, you may want to keep the contact information for the Student Press Law Center handy. The SPLC is a nonprofit organization, founded nearly 50 years ago, based in Washington, D.C.

The Center provides free legal help and information to student journalists and their advisers on a variety of media law issues. We're going to talk about privacy law today, but the Center is ready to help you answer questions on pretty much any media law issues, including things like censorship, access to public records and meetings, libel and privacy. More information is available on the SPLC Web site – splc.org — and in various resources produced by the Center.

You can also use their free Hotline Service to submit an email or schedule a telephone call with one of their lawyers.

Well, let's get started.

INVASION OF PRIVACY

How far is too far when covering the news?

The law recognizes that everyone has — under certain circumstances — a legal right to simply be left alone. It provides that there are certain subjects, certain places and certain actions that are nobody else's business. On the other side, however, the law also recognizes that at some point a person's right to privacy can give way to other important interests.

For example, many seemingly "private" things that people do can significantly affect others; and the public — often by way of the press — has a right or a need to know about them. In the parlance of journalism, such information is said to be "newsworthy." Invasion of privacy law is very often about balancing these two sometimes competing interests

Four Types of Invasion of Privacy Claims

- Public disclosure of private and embarrassing facts
- Intrusion
- False Light
- Misappropriation



While the law can vary by state, courts have generally recognized four different types of invasion of privacy. (1) Public disclosure of private and embarrassing facts, (2) intrusion, (3) false light and (4) misappropriation. We'll cover each in turn.

It is important to note that the kind of invasion or privacy claims journalists and media organizations have to be concerned about are distinct from invasion of privacy claims made against government agencies (including public schools). The right to privacy from government intrusion, which can be based on rights found in the U.S. Constitution the Supreme Court has said, require a different legal analysis which this presentation does not cover.



Public Disclosure of Private and Embarrassing Facts

Going too far when
publishing the news.

The first — and for student media probably most important and troublesome — type of invasion of privacy is the Public Disclosure of Private and Embarrassing Facts. Americans hold dear their constitutionally protected right to freely speak (or write) what is on their minds, including the right to talk about others. But they are also increasingly protective of their right to control access to and disclosure of information about their own their private lives.

It is when these two rights collide that a privacy lawsuit can result. Indeed, at their core, all public disclosure cases address one very important — and complicated — question: At what point does the right to publish truthful information about a person give way to that person's right to be left alone, free from embarrassment or unwanted publicity?

Reasonable Expectation of Privacy



The first step for courts in deciding whether or not there has been an unlawful disclosure of private and embarrassing facts is to determine whether the person claiming the violation had a “reasonable expectation of privacy.” In other words, is the information at issue the type that most people would think should be off-limits to public disclosure. Like our poor friend here in the bathtub, courts recognize that we all need to have a place we can go or keep things to ourselves that are nobody’s business but our own.

Look for facts that are:

- Sufficiently private
 - Not known outside of a small circle
- Sufficiently intimate
 - Something people don't ordinarily reveal about themselves
- Disclosure would be highly offensive to a reasonable person



To answer that question, courts have required the person bringing the claim to show three things. First, the person must show that the information published was sufficiently private. Information about a person that is already known by those outside of a person's small circle of family and friends or information that could easily and lawfully be discovered will generally not support a private facts privacy claim. For example, a student making a privacy claim will have a difficult time winning his case if he has already voluntarily revealed the alleged private information to dozens of his friends and teachers.

In addition, material that can be lawfully obtained from public records will rarely be considered private. For example, a person generally has no privacy right to keep recent details about their alleged or actual criminal conduct secret and information about that person found in arrest records, police reports and court documents — as long as it is fairly and accurately reported — will not result in a valid privacy claim.

Next, a person must show that the information is sufficiently

intimate. In other words, the information revealed must be of the type most people tend to keep to themselves. For example, while disclosing a person's date of birth or favorite color may reveal private details about that person, few would consider it "intimate" information. On the other hand, revealing facts about a person's personal grooming habits, mental health history or other private details that a person does not ordinarily reveal about themselves are at the center of a private facts complaint.

Finally, the revealed information must be highly offensive-- even shocking-- to a reasonable person.

Examples of Highly Offensive Information

- Sexual conduct
- Medical/mental condition
- Addiction recovery
- Educational records



The good news is that this is usually the type of information that should set off a thinking journalist's alarm bells prior to publication. For example, providing graphic details about a person's private sex life, disclosing that an otherwise private person has a medical condition or has obtained treatment for a problem that they've not publicly revealed before or publishing detailed information about a person's grades when there is no legitimate or "newsworthy" reason for doing so would be examples of this type of invasion of privacy.

Quarterback still wets his bed

Medical records found in school dumpster reveal startling facts about CHS students

Student medical records found in a school dumpster last week will probably have more than a few Central High School students blushing this week.

Among the discoveries was that this year's starting quarterback still occasionally wets his bed due to a chronic bladder condition for which he continues to receive treatment, his athletics physical records showed. It's not clear yet how the records ended up in the



For example, revealing that a classmate has an embarrassing medical condition that he has likely tried hard to keep private is something that would probably deeply offend and humiliate most people were the information published about them.

Guilty pleasures: English teacher reads dime store romance novels!



A peek into Ms. Miller's bookbag, left open on her desk, reveals that she would rather curl up with a racy page-turner like Jennie Adam's *Her Millionaire Boss* than Shakespeare's *Hamlet*.



On the other hand, information about a person that is just mildly embarrassing or troubling is generally insufficient to support a private facts claim. For example, even though an English teacher might be mildly bothered or peeved that you reveal she enjoys reading cheesy romance novels in her spare time, few would be humiliated or shocked by such a disclosure.

Public Disclosure of Private and Embarrassing Facts

TRUTH IS NOT A DEFENSE



One of the big problems for news media is that — unlike with libel — it is no defense to a private facts invasion of privacy claim that the information is true. Rather, it is simply that you crossed the line in publishing it. True details about a private matter can embarrass a person just as much, and sometimes more, than fictional details, which few readers or viewers might believe anyway

Defenses to Public Disclosure of Private and Embarrassing Facts

- Newsworthiness
- Consent



Rather than “truth,” two primary defenses to a private facts claim are newsworthiness and consent. First we’ll look at newsworthiness. In their attempt to balance the competing rights in an invasion of privacy case, courts have settled on one key question: Is the information newsworthy? If the information is a matter of public interest or concern, its publication cannot be a public disclosure of private facts invasion of privacy no matter how embarrassing it is. Almost any information about a well-known public figure or public official will be considered newsworthy.

On the other hand, a private person has a higher expectation of privacy and her life is less open to scrutiny. However, even an otherwise private person’s secrets may be newsworthy and reportable when they are closely connected to a significant public issue or event. Unfortunately, determining whether otherwise private information is newsworthy — and therefore safe to publish — is not always easy. The following examples should help.

Newsworthiness

24 students at Central High in danger of flunking out

Student transcripts obtained by Student Times reveal surprising news

The Student Times has learned that at least 24 students at Central High School are in danger of flunking out of school this year, according to academic transcripts anonymously provided to Times reporters last month.

The students, whose GPA's are all under 1.0, include: John Doe, Mary Smith, Warren Peace, Shirley U. Jest, Sarah Bellum, Peter

Suppose unknown sources slip two packages under your newsroom door. Each contains the transcripts of certain students at your school and you write two separate stories. As discussed earlier, revealing detailed information about students' grades or academic records without their consent could be considered an invasion of their privacy. But your reasons for publishing the stories could matter greatly. If your only reason for publishing is merely to satisfy your readers' curiosity or appetite for gossip, you could be in trouble. For example, in your first story, you report that 24 Average Joe (and Jane) students are having serious academic problems. There is no — or very little — legitimate public interest or concern that these specific students — who are neither public figures or officials and who are not involved in a significant public issue — are receiving failing grades. In fact, their academic problems are really nobody's business but theirs and publicly revealing such information could be highly offensive and embarrassing to the failing students. In this case, the newsworthiness of the information is low and is almost certainly outweighed by the privacy interests of the students.

Newsworthiness

Players may have been academically ineligible

Records show two starters on basketball team had GPA under 2.0; championship title in jeopardy

An investigation by the state's high school

athletic association has found that two starting players on this year's Central High School basketball team, Dwayne Pipe '09 and Chester Drawers '10, played while academi-

The second package, however, contains the transcripts of two starting players on your school's state championship basketball team. Assuming the transcripts are genuine, they reveal that the students played basketball while academically ineligible — something that could cost the team its state title. Even though you are publishing the same “private” information — in this case, academic information about named students whose disclosure will seriously embarrass them — the news value and public interest in knowing this information would almost certainly outweigh the privacy interest of the students and shield you from a successful invasion of privacy claim.

Consent

Who can provide it?

- In student media context, it's important to know that minors can provide valid consent



As I mentioned earlier, another defense to most invasion of privacy claims is consent. If you want to do a story that involves the private and intimate details of a person's life, such as story on sexual abuse, teenage pregnancy, substance abuse/ treatment, family problems, grades or sexual orientation, it is always a good idea to obtain the consent of your subject first. If a person consents to your publishing otherwise private information about him, he generally cannot later claim you have invaded his privacy. In asking for consent, be candid with your subject about what information you want to use and how you plan to use it.

Also, make sure you obtain consent from someone with the legal right to give it. For example, police do not have the authority to invite reporters onto private property, school officials cannot automatically give consent for students, parents for their children or employers for their employees (or vice versa). Finally, get the consent in writing. While verbal consent is legally valid, it can be much harder to prove.

A question of particular interest to student media is whether or not minors (typically persons under the age of 18) can validly consent — without a parent — to stories about themselves that could invade their privacy or libel them. While the issue is relatively new, courts have generally ruled — and legal commentators have argued — that minors can provide valid consent as long as they understand what they are doing and the probable consequences of providing such consent. Under this view, most high school students could provide valid consent. Most elementary-aged students, because of their immaturity, probably could not. When the consent of a minor is in question, it is important that the journalist seriously analyze whether the minor is mature enough to appreciate the risks involved.

Intrusion

Going too far when
gathering the news.

Publication not
required.

Intrusion is the next type of invasion of privacy claim. Unlike the other categories, intrusion claims are not based on what you publish, but rather on how you obtained or gathered the information in the first place. In fact, a journalist can be successfully sued for intrusion even when he does not publish the information he obtained. The illegal “news gathering act” is itself the basis for the claim.

Reasonable Expectation of Privacy



And don't forget about our guy in his bathtub. An intrusion privacy violation occurs when a reporter gathers information about a person in a place where that person has — you guessed it — a reasonable right to expect privacy. In fact, the idea in an intrusion case is fairly simple: when a person is in a place where he or she has a reasonable right to expect privacy, a reporter or photographer must respect that right. Reporters have no special privilege to invade another's zone of privacy to gather the news. Determining when a person has such a "reasonable expectation of privacy" is sometimes an easy call.

Intrusion



For example, a person cannot reasonably expect privacy while walking down a busy campus sidewalk, in a public park or at a football game. He or she is, in a legal sense, fair game for photographers or journalists who wish to report what is done and said in those public places.

Intrusion

General Rule: You have the right to photograph anything from a public spot that you can see with the naked eye.



PHOTO ESSAY

PDA's!



staff photo

John Doe and Mary Smith enjoy a public display of affection in the student parking lot during lunch.

In fact, journalists in a public space generally have the right to record and report on pretty much anything that they can see or hear on their own, without help from special audio or video gadgetry. Even those engaged in otherwise private activities generally lose their reasonable expectation of privacy — and hence their ability successfully sue — if they engage in those activities in a public setting.

Intrusion

Consent is generally required before newsgathering in a private space.



On the other hand, some places are clearly private. A person's home and bedroom, bathrooms, school locker rooms, hospital rooms or a private office would all be examples of private spaces.

Intrusion



A classroom, however, probably falls in the “grey” zone



In between the public sidewalk and a private bathroom, however, are situations that are not so clear-cut, leaving courts to decide how public or private the space is. For student journalists who do so much of their work on school property the question can get especially complicated. While school hallways and cafeterias would probably be considered public space, allowing a student journalist to report freely, it is less clear, for example, whether students in a classroom would be able to claim they have a reasonable expectation of privacy to be free from newsgathering activities. In such close cases, a photographer or reporter would probably be wise to obtain the permission of the teacher and make his or her presence known to the students — giving them an opportunity to excuse themselves — prior to shooting or collecting information.

Three Most Common Types of Intrusion

- Trespass
- Secret surveillance
- Misrepresentation



Generally, intrusion claims fall into three categories. Trespass, secret surveillance, and misrepresentation

Trespass



Newsgathering in a private place without valid consent



The first is trespass. Again, the idea here is that there are certain “private places” that should be off-limits to others, including reporters and photographers, unless a person has given you permission to be there. Examples of trespass include entering a crime scene on private property without valid permission, secretly peeking into or spying in a private place, climbing a high fence, picking a door lock or otherwise breaking into private property without consent of the owner. Intrusion invasion of privacy claims can also result from hacking into a private computer or voicemail system to gather information without authorization.

Trespass

Reporting in “public” spaces on privately owned property can present a special challenge to journalists



As a general rule, reporters have the right to enter privately owned public places (private school campuses and shopping malls, for example) without permission but must leave or stop gathering information if asked to do so. Note, however, that the reporter or photographer is entitled to retain any notes or photos they obtained prior to being asked to leave. Be careful, however. Determining what is a public space on private property can be tricky. For example, at least one court has ruled that the news media does not have the right to film inside a privately owned restaurant without prior permission of the owner.

Secret Surveillance

Using bugging equipment, hidden cameras, or other electronic aids



Misrepresentation

Invalid or exceeded consent (often in the context of undercover reporting)



The final type of intrusion invasion of privacy is misrepresentation. This kind of claim can occur when a journalist misrepresents himself to gain access to a private place or person — such as posing as a hospital worker to get an interview with a patient — or obtaining consent to enter a private place from someone not authorized to give that consent (for example, asking a school official to break into a student’s car trunk so that a photographer can take photos.)

Note that “undercover” reporting is not necessarily an invasion of privacy as long as the disguise is not used as a means to trespass or engage in activity you would not otherwise be allowed to do. For example, it probably would not be an intrusion for a minority student reporter to pose as an applicant to a fast food restaurant to investigate a story about employment discrimination. As long as she answers the application questions truthfully, the reporter has a right to apply whether she is serious about taking the job or not. For most reporting, however, good legal sense suggests and professional ethics demand that journalists identify themselves as

reporters and explain to their sources that the information they obtain may be used in a news story.

Another example is a student pretending to want to rush a fraternity or sorority in order to report on the rush/hazing process. Could likely pretend to want to be a member of this group and answer honestly about the things they ask but not reveal that you are a reporter.

Defenses to Intrusion

- Newsworthiness
- Consent



As with a public disclosure claim, newsworthiness and consent are also the primary defenses to an intrusion lawsuit. Again, in obtaining consent it is important to make sure the person giving consent has the authority to do so. It's also important not to lie or misrepresent oneself in order to obtain consent.

False Light

The unflattering, highly offensive portrayal-- in words or pictures-- of a person as something that he or she is not.

The third category of invasion of privacy claims is known as “False Light.” Simply stated, a false light claim can arise anytime you unflatteringly portray — in words or pictures — a person as something that he or she is not.

Not all states recognize a false light claim because, in many ways, it simply duplicates a libel claim in that the harm occurs when you publish words or images about an individual that portrays him falsely

False Light

School buys new security software to thwart would-be hackers

By John Smith, staff writer

Hackers beware. Central High School's computer system is waiting for you.

CHS principal Olive Branch this month announced the purchase of a new, state-of-the-art computer security system that not only protects the school's computers from hackers



staff photo

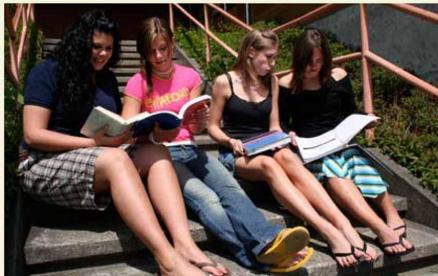
Jane Staltzman uses a school computer for classwork



A common example of false light would be publishing an extremely misleading photo caption. For instance, a photo caption that states or clearly implies that onlookers at a Ku Klux Klan rally are participants would certainly put them in a false light. Or, as here, using a photo of an “innocent” person using a computer to illustrate a story on computer hacking could also result in a false light claim. (It could also support a libel claim.)

False Light

Flip-floppers facing hard time



staff photo

Tough new dress code policy catches some CHS students off guard. School officials are handing down 1-day suspensions for repeated footwear violations.



Another common false light mistake is carelessly using an old file photo to illustrate a story in a way that falsely suggests a person is currently engaged in unflattering conduct. For example, illustrating a current story about violations of a newly adopted dress code with a file photo taken before the code was adopted — and at a time when the subjects' dress was permissible — would put the subjects in a false light.

False Light

Inaccurate attribution of a letter to the editor, senior quote, etc.



LETTER TO THE EDITOR

Central not a welcoming place for gay students

To the editor: I've found that CHS students and teachers have a long way to go in making gay students feel at home in this school. I'm tired of the whispering and the snickers in the hallway when I pass. I tolerated such immaturity in junior high because, well, 13-year-olds are immature. You're in high school now, people. Grow up!

Peter Smith
11th grade

Publishing a “fake” or forged letter to the editor that attributes opinions to an individual that he does not hold can also generate a false light claim. To avoid such problems, newsrooms are wise to adopt a policy requiring that the identity of outside contributors be verified before publication. This is especially important for e-mail submissions, which can be easily faked.



Misappropriation

Unauthorized use of a person's name, photograph, likeness, voice, or endorsement to promote the sale of a commercial product or service.

The final category of invasion of privacy claims is also the easiest to identify and avoid. You can get in trouble for misappropriation when you use another person's name, image, voice or other likeness to help sell something without their permission.

Misappropriation



The main hot spot here is, of course, advertising and commercial endorsements. It doesn't make any difference whether the person is famous or not. Everyone has the right to control how their image is used when it comes to advertising and endorsements. If you want to use a picture of someone — or their name, voice or anything else that is identified with them — in an ad to help sell something, you first have to get their permission. It's as simple as that.

Misappropriation Defenses

Consent:

Publications should routinely have subjects sign a model release form when using their name or likeness in a commercial context



It should be a standard practice to obtain a signed model release form before creating and publishing any ad that pictures identifiable people. If the subject is a minor and money is involved, you should also obtain permission from the minor's parent or guardian. If you publish an ad created and submitted by a third-party, you may want to first have them sign an agreement stating that valid permission has been obtained and that they will be responsible for reimbursing you for any claims that might result if a problems arises.

SPLC.org/LegalHelp

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Student Press Law Center

Of course, we haven't covered everything and you may have more questions.

As noted earlier, the SPLC Web site is packed full of resources and on student press law issues and you can talk one-on-one with their lawyers using their free legal hotline. On behalf of the Student Press Law Center, I thank you for taking the time to watch this presentation. We hope you have found it helpful.

Enjoy your time as a student journalist —say what you need to say — and best wishes.

Invasion of Privacy Law was originally written and produced by the Student Press Law Center in 2006 thanks to a grant from the Newspaper Association of America Foundation (now the News Media Alliance.) The presentation has been updated several times over the years.

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