Deleting comments on district social media sites could lead to First Amendment lawsuits

By the New York State
Association of School Attorneys

Although New York City Mayor Rudy Guiliani disdained these ads that appeared on city buses in 1997, a federal court ruled that it was improper for authorities to remove them because the advertising space was a public forum. The same legal principle could be applied to school districts that want to remove user comments for social media pages.

School districts have been increasing their use of electronic communications by creating websites and establishing a social media presence. When the public has the ability to interact through these vehicles, legal questions can arise. For instance, if a person posts a comment on a district Facebook page and the district deletes it, has the district violated the individual's First Amendment rights?

This is an emerging area of law. One key question is whether a district's social media page should be considered to be "government property" for purposes of the First Amendment. It is conceivable, depending on the circumstances, that deleting a citizen's comment could be viewed as unlawful "viewpoint discrimination." This assumes courts will address public access to cyberspace in the same way they answered questions about public access to physical space.

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This article will summarize the relevant law.

Protected public forums can take many forms

By creating an interactive website or social media page, school districts may be creating a "public forum" and may be restricted in the manner in which they regulate the public's speech on the Internet.

Two federal cases that illuminate First Amendment issues in governmental forums concerned advertisements on New York City's public transportation system.

In *New York Magazine v. Metropolitan Transp. Authority,* the Second Circuit U.S. Court of Appeals considered bus ads that contained a joke about Rudy Giuliani, then major of New York City. In the ads, New York magazine claimed to be "the only good thing in New York Rudy hasn't taken credit for."

The Metropolitan Transportation Authority (MTA) removed the ads in 1997 after Giuliani said that they violated a privacy law that prohibits the use for commercial purposes of a "name, portrait or picture of any living person" without that individual's written consent.

The magazine asserted it had a First Amendment right to say what it wanted in its ads, and the Second Circuit agreed. It ruled that "advertising space on the outside of MTA buses is a designated public forum, because the MTA accepts both political and commercial advertising." It affirmed a lower court's injunction against the MTA.

Another case called *Vaguely Qualified Productions LLC. v. MTA* involved ads in the New York City subway system. The ads promoted a film about Islamophobia called "The Muslims Are Coming!" featuring Lewis Black, Rachel Maddow and Jon Stewart. One line said "Those Terrorists Are All Muslims" with the word "Muslims" crossed out and replaced with "nutjobs."

The MTA refused to post the ads, asserting they violated a system ban on political ads. In 2015, a federal District Court ordered the MTA to run the ads.

These decisions hinged on whether the courts viewed the ad spaces as public forums. Courts have identified three types of forums for speech:

- **The traditional public forum.** The traditional public form is one that "by long tradition or by government fiat has been devoted to assembly and debate" according to the Second Circuit in the *New York Magazine* case.
- **The designated (limited) public forum.** This is a forum whereby the government decides to open the forum for use by the public for expressive activity on a specific topic or within another designated limitation. Courts have consistently found restrictions on speech that fall within the designated category for which a forum has been created to be presumptively unconstitutional.
- **The nonpublic forum.** Governments are free to regulate nonpublic forums. Generally, restrictions on speech in nonpublic forums "need only be viewpoint neutral and reasonable" to avoid running afoul of the First Amendment, according to the *Vaguely Qualified* decision. All forums that do not qualify as a traditional or designated public forum are considered to be a "non-public forum" and the government may limit speech if it is "reasonable and not based on the speaker's viewpoint," according to the *New York Magazine* decision.

First Amendment rights of individuals depend on the forum

The U.S. Supreme Court has long held that while the First Amendment's guarantee of free speech attaches to places within a public school, the First Amendment does not require "equivalent access to all parts of a school building in which some form of communicative activity occurs." In 1983 it ruled in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* that a school board could grant access to an internal mail system to representatives of the recognized teacher's union without extending the same courtesy to a rival union. Deeming the mail system to be a limited public forum, the court said, "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same

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Social media is no stairway to heaven if districts run afoul of copyright law

What do school districts have in common with the rock band Led Zeppelin? They both can be vulnerable to claims of copyright violation.

In a federal court in Los Angeles, the estate of guitarist Randy Wolfe is arguing that the opening passage of "Stairway to Heaven" originated with Wolfe's band Spirit, which shared concert billings with Led Zeppelin in the late 1960s.

School districts also can be subject to claims of copyright violation, particularly as they expand their use of electronic communications.

On the Internet and on social media websites, it is easy for an individual to post another's picture, video or other work of authorship without first obtaining consent from the creator, which can be a violation of federal copyright law. On the other hand, the Legislature and courts have sanctioned the use of copyrighted information for criticism, comment, news reporting, teaching, scholarship and research in what's known as the "fair use" exception to copyright protection.

A "copyright" is a form of legal ownership established by federal copyright law (17 U.S.C. 102), which 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."

Notably, a work does not need to be registered with the U.S. Copyright Office to be considered "copyrighted" – that is, the property of the creator. However, a creator of a work who seeks monetary damages for unauthorized use of that work generally will find courts much more receptive to the claim if he or she had registered the work with the Copyright Office prior to the use that the owner considers derivative.

Another factor in copyright cases involves whether the user of the copyrighted material obtained any profit or material benefit stemming from the work.

When courts determine whether the use of a copyrighted work violates federal copyright law, much depends on how the work is used and whether there was any other creative input. Simply repackaging or republishing an original of a copyrighted work may not suffice for purposes of the fair use exception to copyright protection. For instance, the U.S. Court of Appeals for the Second Circuit rejected the fair use defense by the operator of a service that retransmitted copyrighted radio broadcasts over telephone lines in *Infinity Broadcast Corp. v. Kirkwood,* (2d Cir., 1998).

While instances of schools being accused of copyright violations are not common, districts should play it safe. Refrain from posting any photographs or other works of authorship online or on social media unless the school district did one of the following:

- Created the work.
- Determined the work is not copyrighted.
- Received written consent from the copyright owner.
- Decided that the work may be used under the fair use doctrine.

To minimize the chance of litigation claiming a copyright infringement, school districts may wish to develop policies and procedures governing the manner in which information is selected and posted online. Be sure to consult your school attorney as appropriate.

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standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."

In *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission* (1976), the U.S. Supreme Court found that a teacher could not be constitutionally prohibited from speaking at a board meeting. The court explained: "Where the state has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings … Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."

In *Vargas v. City of Salinas* (2009), a California court applied these constitutional principles to a government-maintained website. The court explained that a city's official website did not constitute a "public forum" for constitutional purposes because the city did not open its website to permit others to post material of their choice. While the court did not find the city's website to be a public forum, the court's explanation suggests that a government-maintained webpage is considered "government property." It leaves open the possibility that if a governmental entity permits others to post material of their choice on its websites, it may be creating a "public forum" and the public may have a First Amendment right to post comments.

Recommendations

Based on the case law to date, how can schools protect themselves from lawsuits claiming First Amendment violations? One simple solution is to not allow comments. In *Vargas*, a website was found not to constitute a public forum because the website did not permit others to post material of their choice.

That, however, may be unrealistic. The very purpose of a social media presence is to enable others to post material and interact with the school. This will likely mean that members of the public will "friend" the district's page, "like" and/or comment on posts on the page, and/or post their own comments or photos to the page. School districts will be significantly limited in the extent to which, if at all, they may lawfully: (1) choose not to accept "friend" requests; (2) delete or remove "friends"; and/or (3) delete or remove posts to the school district's social media page or website.

What rules or terms of use apply to your district's website and social media pages, particularly with regard to the policy on deleting user postings? Are the terms of use or relevant district policies easily for users to find?

You may want to ask your school attorney to review your website and social media pages to determine if each is an open forum, a limited open forum or a closed forum, and what policies are appropriate on deleting of user comments.

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#ohwhatafeeling

AP Statistics students in Pelham Public Schools celebrate after finishing an exam. Superintendent Peter Giarrizzo posted the photo on Twitter, using the hashtag #ohwhatafeeling (a feed we recommend for anyone who needs a quick pick-me-up).