

3. Facebook, Freedom of Speech, Defamation, and Cyberbullying

In February 2009, Oceanside High School graduate Denise Finkel sued Facebook, four former classmates, and their parents for false and defamatory statements made against her.⁷³ The classmates, part of a private Facebook group called “90 Cents Short of a Dollar,” had posted comments to a password-protected page alleging that Finkel used intravenous drugs, had AIDS, and had engaged in inappropriate sexual behavior.⁷⁴

Many legal commentators found the case surprising. Why would an attorney sue Facebook, when the company is obviously protected by Section 230 of the Communications Decency Act (CDA)? The CDA protects Web site owners from liability for content posted by a third party. Thus, Facebook should be immune from defamation lawsuits that arise from user-posted content.⁷⁵ However, Finkel claimed that Facebook’s Terms of Use agreement established Facebook’s proprietary rights to the site’s content. In support of this argument, she pointed to the following clause in the agreement: “All content on the site ... [is] the proprietary property of the Company, its users or licensors with all rights reserved.”⁷⁶ As a result of this unique argument, the case attracted national attention because the consequences of the ruling could have serious implications for other social media sites. In September 2009, however, the Supreme Court of New York ruled that the Terms of Use did not disqualify Facebook from immunity under the CDA.⁷⁷

This ruling provoked commentary by legal professionals, but no one was very surprised. What was less predictable was whether or not the court would hold Finkel’s classmates liable. To what extent do students have the right to exercise their freedom of speech through social media outlets? What restrictions have been placed on this freedom?

In July 2010, the New York Supreme Court dismissed the case against Finkel’s former classmates. The court determined that teenage members of the “90 Cents Short of a Dollar” Facebook group had simply acted childishly and were not guilty of defamation.⁷⁸ Finkel did not have any recourse against her former classmates via an antibullying statute because although the state of New York has a law prohibiting bullying, it only prohibits bullying on school property. The law does not apply to cyberbullying. Furthermore, the law merely requires that the schools take disciplinary action, and it does not provide for criminal sanctions.⁷⁹

In a landmark 1969 case, *Tinker v. Des Moines School District*, the U.S. Supreme Court established that public schools cannot curtail students’ freedom of speech unless this speech would cause a substantial disruption to school activities or violate the rights of other students.⁸⁰ Hence, a federal judge overturned the suspension of a high school senior who created a fake MySpace profile of his principal; the profile said the principal took drugs and kept alcohol at his desk. However, in a similar case, a U.S. district court ruled against a Pennsylvania junior high student who had created a fake MySpace profile of her principal claiming that he was a sex addict and a pedophile. She had been suspended for 10 days, and her parents sued the school. Teachers at the school testified that the profile had caused a disruption in class because students were too busy talking about the profile to pay attention in class. The court determined that the talking had constituted a “substantial disruption.” Both of these decisions were upheld on appeal.⁸¹

Many states have recently enacted bullying laws that restrict written and symbolic speech on social media sites. In 2005, a Florida honors student committed suicide after three years of teasing at school and online bullying. As a result, in 2008, the state enacted a tough law called

the “Jeffrey Johnston Stand Up for All Students Act.”⁸² The law prohibits the teasing; social exclusion; threat; intimidation; stalking; sexual, religious, or racial harassment; or public humiliation of any public school student or employee on or offline. The law is limited in that it only applies to behavior during school, on a school bus, during any school-related or school-sponsored program or activity, or from computers that are part of a K-12 system.⁸³

In January 2011, two Florida teenagers, Taylor Wynn and McKenzie Barker, were arrested for allegedly setting up a false Facebook account for a classmate that included nude photos. The teenage girls are accused of doctoring photographs, placing the classmate’s face on the bodies of naked men and women, and posting them to the site. Although the victim told the school resource officer that the teasing would eventually “go away,” a parent of another student notified authorities. Investigators traced the IP addresses to Wynn and Barker and collected incriminating text messages and emails linking them to the false Facebook page. Wynn and Barker were charged with stalking a minor under the new Jeffrey Johnston Stand Up for All Students Act.⁸⁴

In another example of how serious online cyberbullying can get, 14-year-old Kameron Jacobsen, a freshman at Monroe-Woodbury High School in Orange County, New York, committed suicide after being taunted on Facebook for his presumed sexual orientation.⁸⁵

Although freedom of speech is a right guaranteed by the U.S. Constitution, it can be restricted where it violates the other rights of individuals—as established by state or federal laws. To date, thirty-one states have antibullying laws that include electronic forms of bullying.⁸⁶

Discussion Questions

1. Why is Facebook protected from liability for content posted by third parties? Do you think that Facebook and other social network providers should be protected from liability for what their members post? Why or why not?
2. How is a student’s freedom of speech restricted on social media sites such as Facebook?
3. Should Taylor Wynn and McKenzie Barker have been prosecuted despite the victim’s attitude that the teasing would pass? How should cyberbullying laws be implemented?

End Notes

- 1 “Best Reputation Management Company (ies) – March 2013,” TopSEOS, www.topseos.com/rankings-of-best-reputation-management-companies (accessed March 7, 2013).
- 2 Reputation Changer, “Case Studies,” www.reputationchanger.com/case_studies.html (accessed March 7, 2013).
- 3 Grant Schulte and Chet Brokaw, “‘Pink Slime’ Lawsuit: Defamation Case Against ABC News Tough to Prove, Experts Say,” *Huffington Post*, September 14, 2012, www.huffingtonpost.com/2012/09/14/pink-slime-lawsuit-abc-news_n_1883528.html.
- 4 Martha Graybow, “ABC News Seeks Dismissal of Beef Products’ Defamation Lawsuit,” Reuters, November 1, 2012, <http://uk.reuters.com/article/2012/11/01/usa-beef-pinkslime-abclawsuit-idUKL1E8LVHMI20121101>.