



Can I
Publish This 

*A Student Journalist's
Guide to Self-Directed
Pre-Publication Review*



This booklet is a companion to [CanIPublishThis.com](https://www.canipublishthis.com), an interactive, online tool for analyzing legal issues in student journalism, created by the Student Press Freedom Initiative (SPFI) at Foundation for Individual Rights and Expression (FIRE).



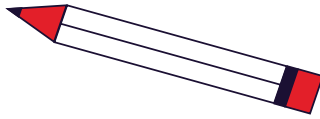
Pre-publication review is the process of looking over content — articles, images, audio, video, and more — before publication with a critical eye toward potential legal risk. It’s different from editing or copyediting, which are usually reader-focused and consider questions such as whether a reader will understand the content, whether the content will grab the audience’s attention, and so forth. Pre-publication review is not about the reader, but is instead about whether the content puts the journalist or publication at risk of legal liability.



Please note that although this document and [CanIPublishThis.com](https://www.canipublishthis.com) explain complicated legal concepts, neither constitutes legal advice. No document or online tool can substitute for advice from an attorney who can evaluate the nuances of your situation. Nothing contained in this document or [CanIPublishThis.com](https://www.canipublishthis.com) should be taken to constitute legal advice or to mean that you have formed an attorney-client relationship with FIRE. **If you believe you would benefit from speaking with an attorney, please contact FIRE by submitting a case online at thefire.org/submitacase or by calling 1-717-734-FIRE (7734). We can attempt to connect you with a lawyer in your jurisdiction.**

IS PRE-PUBLICATION REVIEW SELF-CENSORSHIP?

Pre-publication review is not about self-censorship. It should be the opposite! Learning about pre-publication review should not make you afraid to cover tough subjects. Instead, knowing how to reduce legal risk **should help you feel confident that you have the tools you need to cover tough subjects without worry.**



CONDUCTING A SELF-DIRECTED PRE-PUBLICATION REVIEW

In the professional world, some publications employ in-house media lawyers or retain outside counsel to conduct pre-publication review of content. Most student publications and many professional publications, however, do not have counsel to conduct pre-publication reviews. In these cases, it is up to the editors and the journalists themselves to take a critical look at content for potential legal risk.

The Student Press Freedom Initiative (SPFI) has developed a helpful guide to navigating common legal risks: CanIPublishThis.com. This website is intended to make it a little easier to conduct a self-directed pre-publication review.

To get the best use out of CanIPublishThis.com, use this booklet as your guide through the 5 steps of conducting a self-directed pre-publication review.

**WHO MIGHT WANT TO
TAKE LEGAL ACTION
AGAINST YOU OR
YOUR PUBLICATION?**

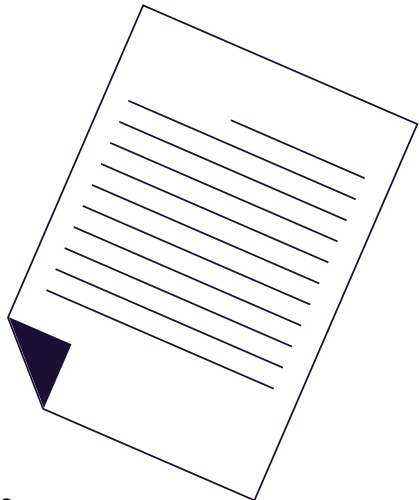


Look at the content and consider:

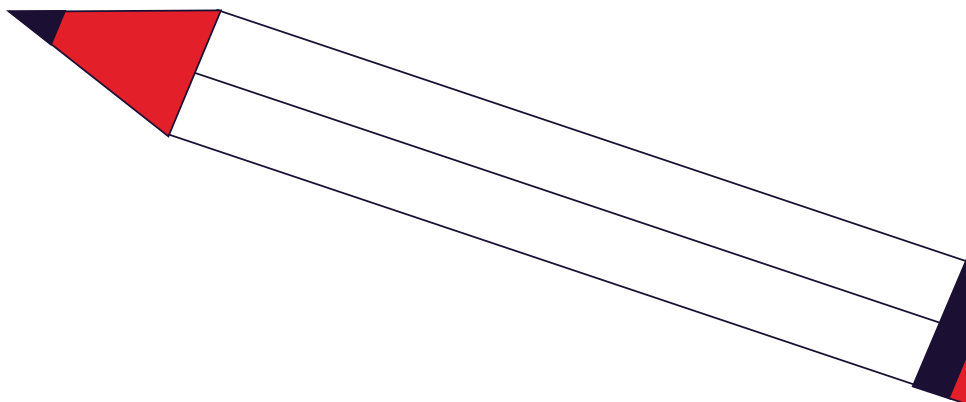
- Who is mentioned by name?
- Who is quoted or paraphrased?
- Who is photographed or illustrated (even in the background)?
- Who fits any descriptions given in the content? For example, is there anyone who is spoken *about*, even if not by name?
- Whose content (such as images, graphics, and music) is included?

Think not just about individuals, but entities (such as universities, companies, or groups).

These are the parties who might bring legal action against your publication because of the content.



**WHY MIGHT
THOSE PARTIES BE
UPSET ABOUT THE
CONTENT?**



Consider each person (or group) identified in step 1, and think about them in the context of the content. Consider:

- What might upset this person or entity about the content?
- Are quotations and paraphrased content accurate and appropriately contextualized?
- Could a source regret giving an interview, or a photo subject regret being photographed?
- Are any of these individuals cast in a negative light?

In some scenarios, you will not be able to think of a reason why any of the parties you identified in step 1 would be upset. These situations likely carry the least legal risk.

In other scenarios, you'll realize that something you wrote may anger someone. Angering people is often par for the course for journalists who are doing their job. **This alone does not mean that the content poses a legal risk.** It just means you need to continue this analysis in step 3.

**WHAT
MIGHT THEY
WANT TO
SUE ME FOR?**

Imagine all the means by which someone who is upset by your content *might* think they can sue you. Again, student publications rarely face legal action, so most of the ideas you think of at this step are unlikely to become reality. This is where a basic knowledge of media law comes in. (To learn more about this subject, check out the section of this document entitled “What potential legal risks do journalists face?”).

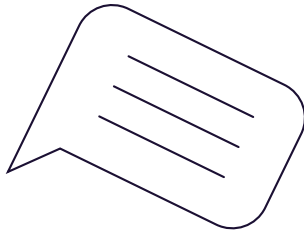
Consider the individuals and/or entities whom you’ve identified, their potential motivations, and the content itself. Then, think about what media law concepts they might use to assert that they have been harmed — even if far-fetched:

- Might they feel their reputation is damaged by the article?
 - If so, they might try to argue the content is **defamatory**.
- Could they feel their privacy was infringed? For example, did the reporter not clearly self-identify as a reporter when asking questions? Was recording done without permission? Were traditionally private issues (like sex or health history) discussed?
 - If so, they might try to argue that the content **infringes upon their privacy**.
- Are you using a logo, artwork, video, audio or slogan?
 - If so, they might try to argue that the content **infringes upon their intellectual property rights**.

It’s important to remember that just because someone might argue that you have done something wrong does not mean you actually have. People sometimes make unreasonable allegations about how they have been harmed. In this step, you must take on the perspective of the upset person, not considering any defenses you might have.

Even if you identify media law concepts that might fit the profile, this does not automatically mean you face legal risks. It simply means that you should continue to step 4.

**HOW LIKELY IS
THIS PERSON
TO SUE ME?**



In this step, think more deeply about the individual(s) identified in step 1. Consider:

- Are they litigious? Have they sued you or others in the past?
- What is their relationship with you and your publication? Have they traditionally been friendly or had a respectful relationship with you? Have they historically been hostile?

Individuals who have sued journalists or who have shown hostility toward you or your publication in the past may pose a greater risk of taking legal action against you or your publication. On the other hand, individuals with whom you've traditionally had a good relationship likely pose a lower risk.

Again, even if someone is likely to be quite upset with your publication, **this does not necessarily mean you should refrain from publishing about that person.** Instead, it simply means you should use your knowledge of journalistic norms and media law to reduce the potential pitfalls of your reporting. To that end, move on to step 5.



**WHAT IS
THE LIKELY
OUTCOME OF
A LAWSUIT?**

In this step, imagine the worst-case scenario: someone *actually sues*. **This does not happen very often.** Most of the time, people complain, but are unwilling to take the time or spend the money to sue a student journalist or student publication. However, in order to reduce your legal risk as much as possible, it's worth considering the worst case scenario.

Think about the legal risks you identified in step 3. Consider:

- Have you and others at your publication followed journalistic norms?
 - Have you fact checked, including vetting confidential sources?
 - Have you reached out to those on all sides of the issue for comment, particularly those who are being critiqued?
 - Have you reached out multiple times to individuals who are mentioned in the story, particularly if other people ascribe words or actions to them?
 - Is the content precise in language? Are you using quotations fairly?
 - Did your reporters clearly identify themselves as media when speaking with sources?
- Are you confident that the content is true?
- Have you received permission to use images? Are you using Creative Commons images with correct attribution?
- Have you taken steps to ensure that privacy rights have not been violated, such as by focusing on issues that are of public concern versus focusing on individuals' private lives?

You might notice that many of these steps are best practices in journalism. That's not an accident. Good journalism is legally defensible journalism, and the more likely a story is to generate legal threats, the more important it is for journalists to adhere to best practices. Another way to think about this is to ask yourself: "Did I do everything a reasonable journalist could possibly do? Is there anything else a journalist could do to test these allegations before going to press?"

WHAT POTENTIAL LEGAL RISKS DO JOURNALISTS FACE? WHAT PROTECTIONS DO JOURNALISTS HAVE?

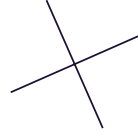
Journalists, including student journalists, face a number of legal risks. Some common ones are:

- Defamation/libel
- Privacy issues
- Intellectual property

Journalists can also face issues with source confidentiality, threats, obscenity, and other topics, but these are less common.

Though student journalists face these potential legal risks, they also enjoy **legal defenses and protections**. Generally, journalists who follow traditional journalistic ethics and norms are at the lowest risk for legal issues.

It's important to remember that lawsuits against student journalists are **incredibly rare** and that student journalists *losing* lawsuits is even more rare. However, student journalists should review every story as if it has the potential to become a lawsuit.



DEFAMATION

In simplified terms, defamation (called *libel* when written) occurs when a journalist makes (or sometimes repeats) a false statement that damages a person's reputation.

Legal protections for journalists related to defamation include:

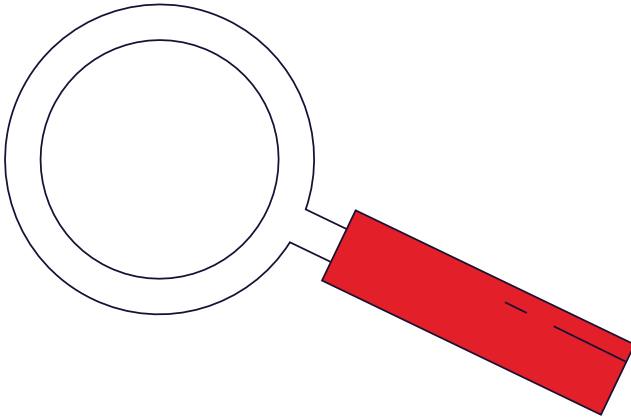
Truth. Truth is an absolute defense to a defamation action. If the content is true, it *cannot be libelous*.

Lack of actual malice. *Actual malice*, which is defined as “knowledge of falsity or reckless disregard for truth,” is a necessary element in a libel action brought by a public figure or public official. This means that if the person accusing a journalist of defamation is a public figure (or a public official, which many public college administrators are), they must show that the journalist either knew the content was false or acted recklessly. Recklessness is a tricky concept, but it can mean things like neglecting to pursue a lead or failing to fact-check. What does this concept mean for most journalists? When a journalist follows journalistic norms in seeking truth while developing content, the journalist is unlikely to have acted with actual malice.

Fair report. The *fair report privilege* provides a defense for journalists who simply repeat defamatory statements found in official government documents or meetings. While this privilege applies differently in each state, most states have some version of this rule. In other words, journalists who get information from credible government sources are generally not liable for repeating defamatory statements made by officials.

To learn more about defamation, check out the curated resources at canipublishthis.com/resources.





PRIVACY ISSUES

Privacy issues can take many forms. Some common privacy issues include: (1) recording an interview without consent in a state that requires consent of all parties; (2) publication of private fact; (3) trespass and intrusion upon seclusion.

Legal protections for journalists related to privacy issues include:

Newsworthiness. If private information is newsworthy, its publication is generally protected. This means even the private actions of public officials are generally fair game.

Single-party consent. Some states maintain rules for recording private conversations that require only single-party consent, meaning only one person in the conversation has to consent to its recording. This means that a journalist — who is party to the conversation during an interview — may legally record an interview in these states without permission from the interviewee. Check your state law!

To learn more about privacy, check out the curated resources at canipublishthis.com/resources.



INTELLECTUAL PROPERTY

Intellectual property technically includes copyright, trademark, trade secret, *and* patent protection, but student journalists will likely only encounter copyright and trademark concerns. For example, these issues are relevant when student journalists choose stock images for articles or when student podcasters choose music to accompany their episodes. Copyright protects any creative work that is fixed in a tangible medium — images, audio, and video are all examples of copyrighted works. Trademark protects commercial marks, like logos and slogans.

Legal protections for journalists related to copyright and trademark include:

Fair use. Fair use is a concept in both copyright law and trademark law. In copyright law, fair use analysis is complicated, but it can allow use of copyrighted works for commentary and educational purposes as well as in instances when the copyrighted work is used in a transformative way. In trademark law, fair use most often applies to journalists who use trademarks to refer to the goods or services identified by the mark (such as using the name, Kleenex, to refer to Kleenex brand tissues in an article).

Creative Commons license with proper attribution. Student journalists can take advantage of images and other assets with a creative commons license, so long as they remember to adhere to attribution requirements. Every creative commons asset will indicate what proper attribution will look like. Using this content with proper attribution constitutes a license, or permission, to use it, so copyright issues are no longer a concern. Make sure to follow the attribution instructions exactly, as journalists have had trouble with creative commons copyright owners taking advantage of slight deviations from the attribution instructions.

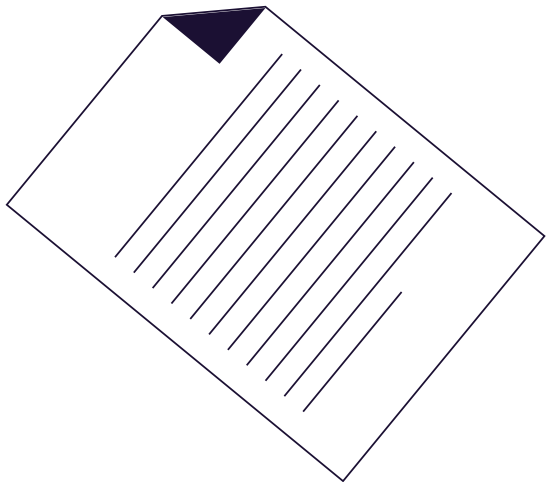
To learn more about copyright and trademark, check out the curated resources at canipublishthis.com/resources.

WHAT IF I NEED LEGAL HELP?

If you find yourself or your publication facing a legal threat, please contact Student Press Freedom Initiative (SPFI) right away at thefire.org/submitacase or 1-717-734-SPFI (7734). We will likely either be able to help you or will be able to point you to someone who can.

RESOURCES

Use the QR code below or visit canipublishthis.com/resources to learn more about the topic included in this book.





**The Student Press Freedom Initiative (SPFI) and
Can I Publish This? are brought to you by the
Foundation for Individual Rights and Expression (FIRE).**



The **Student Press Freedom Initiative (SPFI)** defends the rights of student journalists on college and university campuses across the country.

Learn more about what **SPFI** has to offer at studentpress.thefire.org.