When the historical record and takedown requests collide

In just two months, there has been enough activity about the subject of the March 2021 column ("take-down requests") that it's clear we need to broaden that discussion a little, giving it some additional space and thought.

A few days ago, during a meeting, the issue of such requests came up in the discussion. It was just a passing reference and didn't generate substantial time and conversation, but it was extremely surprising for me to hear one of our Missouri Supreme Court judges indicate in a brief comment, not meant to be of great significance, that the issue of public access to past convictions in regard to minor offenses was a subject the judiciary is beginning to consider.

That thought was not fleshed out, but it is of note that some judges in the state are troubled by how easily information can be found about past indiscretions of persons who are attempting to turn their lives around. Of course, all of us are familiar with the fact that juvenile court records have been closed for many years, under much the same kind of theory — the idea that everyone deserves the opportunity for a "fresh start."

At the same time, across the street from the Supreme Court, Missouri legislators were considering several proposed bills relating to expungement of criminal records. For example (and in the time between this writing and publication, a lot may have happened with this bill), House Bill 902 would eliminate the requirement that a person seeking to expunge a record have no prior or subsequent misdemeanor or felony convictions. In addition, all courts having copies of prior records that the party is seeking to have expunged must not just close those records but must physically destroy those records. The first change will substantially enlarge the universe of persons seeking to take advantage of this ability to wipe their past history clean.

Of course, once a person with a criminal history has made the effort to remove it from court records, there is going to be greater frustration that it still exists online and a search of the Internet can locate articles about this past blot on a person's record.

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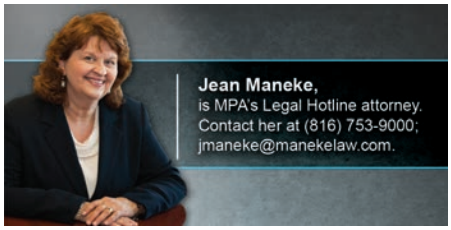
The March 2021 legal column talked about ways some publishers have attempted to work around these issues. No use rehashing that discussion here. But there are a couple of additional points that should be made. The most important point is that there is a two-year statute of limitations for libel claims. A plaintiff cannot sue a publisher for a story that was first published prior to today's date in 2019. But if a publisher goes in and tampers with that story, changes facts in it or otherwise changes what was published, does that re-start the "first publication" rule? Courts have had different opinions on that issue, sometimes focusing on the substantiality of the change. Regardless, it is a valid concern. The wise choice is not to change a story where the change might start that clock running again.

Another thought along these lines is that you are only responsible for what is within your control. In the wild world of aggregators, there are going to be copies of your story out on the web that are totally outside of your control. Third-party efforts to control what might be on the Internet must take this factor into consideration and, given that even we sometimes cannot block those folks from reproducing our original content, it is going to be difficult for any state to deal with this issue, too.

Let me bring this additional discussion to a close by reminding you that this is an ethical decision, not a legal one (except for the statute of limitations concern cited above). It's more than just what is in your archives on the web. It also involves what stories you choose to publish today, what booking photos you choose to run and what focus is paid to everyday court dockets and reports. It also includes to what extent your paper makes a commitment to cover, to the final sentencing, any court stories that are published. It is bubbling up into one of the biggest issues of 2021 for publishers, without a doubt.



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