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MASS MEDIA LAW

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2007–2008 Edition

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PREFACE

Many people view the law as something that is stationary, something that rarely changes. But that is not necessarily true—especially as it relates to mass media law. Certainly some areas of this kind of law haven't changed much in decades, even centuries. The definition of what is libelous is about the same now as it was 100 years ago. But in many other areas of the law changes have occurred rapidly, subject to the whims of government officials, the winds of public opinion and the growth of legal theory. This edition of Mass Media Law contains numerous examples of this kind of change.

Chapter Two includes new material on the recent spate of laws targeting video games such as "Grand Theft Auto: San Andreas." Government agencies at both the state and local levels proposed a slew of laws in 2004 and 2005 designed to restrict the access of minors to games that they argued fostered violent behavior. Such legislation, of course, does little to reduce real-world violence, but gives the politicians the opportunity to stake out the moral high ground (giving short shrift to freedom of speech in the process) and take popular and self-righteous stands against both virtual and actual violence. In addition to video-game legislation, many public officials and members of the Federal Communications Commission called for cleaning what they called indecent content off the public airwaves to ostensibly protect children from the impact of such matter. Chapter 16 includes substantial new material on these battles.

There were calls for greater media responsibility in the past two years as some elements of the press and the "infotainment industry" demonstrated a new: aggressiveness. California cracked down on the gadfly photographers called paparazzi with several new laws. And the press was pushed by some to pay more attention to what is ethically or morally correct, not simply what is legally possible. There is new material on privacy and ethics in Chapter Eight.

Access to government information in a post 9/11 nation waging a war on terrorism continued to be a major problem for journalists and the public. "[In] the four years since September 11, an astonishing amount of information has been taken away from the American people," wrote Lucy Dalglish, head of the Reporter's Committee on Freedom of the Press in 2005. About the only good news on the access front occurred in December 2005 when President Bush signed an executive order designed to improve and expedite requests for information under the federal Freedom of Information Act. Chapter Nine contains new material on access to information matters.

There were several major battles in the past two years over reporters' efforts to keep the identity of their sources confidential in the face of subpoenas from special prosecutors and others. In one case, journalist Judith Miller spent much of the summer of 2005 in a Virginia detention facility after she chose not to reveal the name of a source who leaked to her the name of a covert CIA agent. And veteran Rhode Island television reporter Jim Taricani was sentenced to home confinement after he refused to reveal the identity of the person who gave him a copy of a secret government surveillance videotape showing an FBI informant handing

an envelope, that law enforcement officials said contained a cash bribe, to a Providence, R.I., city official. These incidents and others raised a new call in 2005 for a federal law to shield journalists who are called upon to reveal the identity of their confidential sources, but Congress had taken no action on such proposals as this book went to press. These stories and others are recounted in Chapter 10.

Finally, the legal skirmishing over music file sharing reached at least tentative closure with a unanimous Supreme Court ruling that said the music industry could successfully sue software manufacturers like Grokster if it could show that a company induced copyright infringement in the marketing of its software, even of the product also had lawful uses. While the legal battles diminished and lawful downloading of recorded music increased, illegal file sharing continued as well. This ruling is detailed in Chapter 14.

As in previous editions, a full list of new material contained in this edition follows this short preface. But we have added something new. There is also a list that indicates the location of major segments of the book that relate directly to particular problems of how the law applies to the Internet.

The authors want to thank the following reviewers for their help in putting together this 2007–2008 edition.

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Don Pember
Seattle, Washington
February 1, 2006

Clay Calvert
University Park, Pennsylvania
February 1, 2006

IMPORTANT NEW, EXPANDED AND UPDATED MATERIAL

Expanded section on community censorship, including "heckler's veto;" pages 39–41
Expanded discussion of First Amendment theories; pages 45–50
New material on regulation of minor's access to violent video games; pages 64–66
New discussion of prior restraint and Kobe Bryant trial; pages 80–84
Updated discussion of coverage of the war in Iraq; pages 94–100
Revised and updated discussion of First Amendment in public schools; pages 101–100
Revised and expanded discussion of censorship of college press; pages 114–121
Updated information on hate speech; pages 143–147
New introduction to libel chapters; pages 158–163
New material on defamatory opinions; pages 179–180
Updated discussion on defamation by implication; pages 188–189
New material on who is a public official; pages 198–202
Updated material on criminal libel; pages 271–273
New introduction to right to privacy chapters; pages 276–277
New material on intrusion and the Internet; pages 309–312
Expanded discussion on ethics and privacy; pages 330–332
New section on the journalist's right to interview; pages 351–353
Updated and new material on battles over FOIA document requests; pages 365–368
Expanded discussion of *National Archives and Records Admin. v. Favish;* pages 387–389
New section on HIPPA and access to medical records; pages 404–406
New material on reporter/source battles involving Judith Miller and Matthew Cooper; pages 415–418, and Jim Taricani; pages 439–441
New material on breach of promise and source confidentiality; page 427
New material on whether bloggers are journalists; pages 445–447
New material on calls for new federal and state shield laws; pages 418–419 and 448–449
New introduction to free press/fair trial chapters; pages 467–470
Revised material on gag orders aimed at trial participants; pages 486–488
Revised material on access to military tribunals; pages 502–503
New material on access to juror records and deliberations; page 510
Updated material on cameras in the courtroom; pages 516–517
New material on media self-censorship of indecency; pages 527–528
Discussion of *Extreme Associates* case; page 535
New material on Child Online Protection Act; pages 554–555
New material on trademark protection; pages 563–568
Updated and revised section on file sharing; pages 605–609
New material on free-lancing and copyright protection; page 611
New cases on defining what is commercial speech; pages 621–623

New section on compelled advertising subsidies and government speech; pages 628–629

New and revised material on the federal Do-Not-Call Registry; pages 638–640

New section on regulating junk mail and spam; pages 640–643

New section on federal appellate court ruling striking down some new media ownership rules; pages 673–677

Expanded and revised material on regulation of broadcast indecency and profanity; pages 686–697

New sections on payola and government payments to broadcasters; pages 710–712, and satellite radio, pages 715–716

INTERNET AND WORLD WIDE WEB-RELATED MATERIAL

Discussion of Internet and access theory of First Amendment; page 49

Discussion of the anti-abortion website/Planned Parenthood incitement case; page 66

Discussion of student websites and school censorship; pages 111–112

The First Amendment and the Information Superhighway; pages 150–153

Libel on the Internet; pages 170–172

Discussion of jurisdiction and statute of limitation issues; pages 243–246

Intrusion and the Internet; pages 301–302 and pages 309–312

Private facts and the Internet; pages 332–333

FOIA and electronic communication; pages 371–372

Anonymity and the Internet; pages 441–442

Are bloggers journalists under the law? Pages 445–447

Obscenity, indecency and the Internet; pages 533–534 and pages 552–557

The Internet and copyright law; pages 571–572

The Internet, file sharing and copyright law; pages 603–609

Regulating junk e-mail and spam; pages 640–643

Consumer fraud complaints and the Internet; page 645

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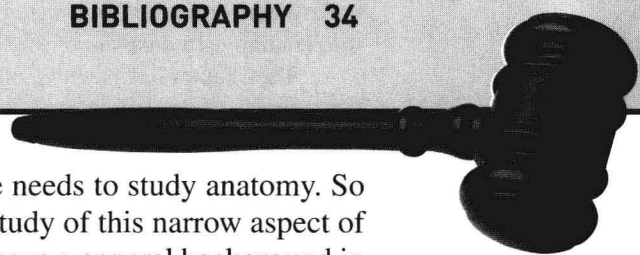
Chapter 1

THE AMERICAN LEGAL SYSTEM



Before a physician can study surgery, he or she needs to study anatomy. So it is with the study of mass media law. Before a study of this narrow aspect of American law is undertaken, a student must first have a general background in the law and in the operation of the judicial system. That is the purpose of this short chapter.

Probably no nation is more closely tied to the law than is the American Republic. From the 1770s, when at the beginning of a war of revolution we attempted to legally justify our separation from the motherland, to the 21st century, when citizens of the nation attempt to resolve weighty moral, political, social and environmental problems through the judicial process, and during the more than 200 years between, the American people have showed a remarkable faith in the law. One could write a surprisingly accurate history of this nation using reports of court decisions as the only source. Not that what happens in the courts reflects everything that happens in the nation; but as has been observed by 19th-century French political scientist and historian Alexis de Tocqueville and others, political and sometimes moral issues in the United States often end up as legal disputes. Beginning with the sedition cases in the late

1790s, which reflected the political turmoil of that era, one could chart the history of the United States from adolescence to maturity. As the frontier expanded in the 19th century, citizens used the courts to argue land claims and boundary problems. Civil rights litigation in both the mid-19th and mid-20th centuries reflects a people attempting to cope with racial and ethnic diversity. Industrialization brought labor unions, workers' compensation laws and child labor laws, all of which resulted in controversies that found their way into the courts. As mass production developed and large manufacturers began to create most of the consumer goods used, judges and juries had to cope with new laws on product safety, honesty in advertising and consumer complaints. In recent years Americans have gone to court to try to resolve disputes over abortion, gay rights, press coverage of wars and other military operations, university admission policies, the legal rights of persons suspected of terrorism, and even state and national elections.

Americans have protested every war the nation has fought—from the Revolutionary War to the invasion of Iraq. The record of these protests is contained in scores of court decisions. The prohibition and crime of the 1920s and the economic woes of the 1930s both left residue in the law. In the United States, as in most other societies, law is a basic part of existence, as necessary for the survival of civilization as are economic systems, political systems, mass communication systems, cultural achievement and the family.

This chapter has two purposes: to acquaint readers with the law and to present a brief outline of the legal system in the United States. While this is not designed to be a comprehensive course in law and the judicial system—such material can better be studied in depth in an undergraduate political science course—it does provide sufficient introduction to understand the remaining 15 chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the most important sources of the law in the United States, and moves on to the judicial system, including both the federal and state court systems. A summary of judicial review and a brief outline of how both criminal and civil lawsuits are started and proceed through the courts are included in the discussion of the judicial system.

SOURCES OF THE LAW

There are almost as many definitions of law as there are people who study the law. Some people say that law is any social norm or any organized or ritualized method of settling disputes. Most writers on the subject insist that it is a bit more complex, that some system of sanctions is required for a genuine legal system. John Austin, a 19th-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added that both the rules and the sanctions must be prescribed by duly constituted human authority.[1] Roscoe Pound, an American legal scholar, has suggested that law is really social engineering—the attempt to order the way people behave. For the purposes of this book, it is probably more helpful to consider the law to be a set of rules that attempt to guide human conduct and a set of formal, governmental sanctions that are applied when those rules are violated.

1. Abraham, *Judicial Process.*