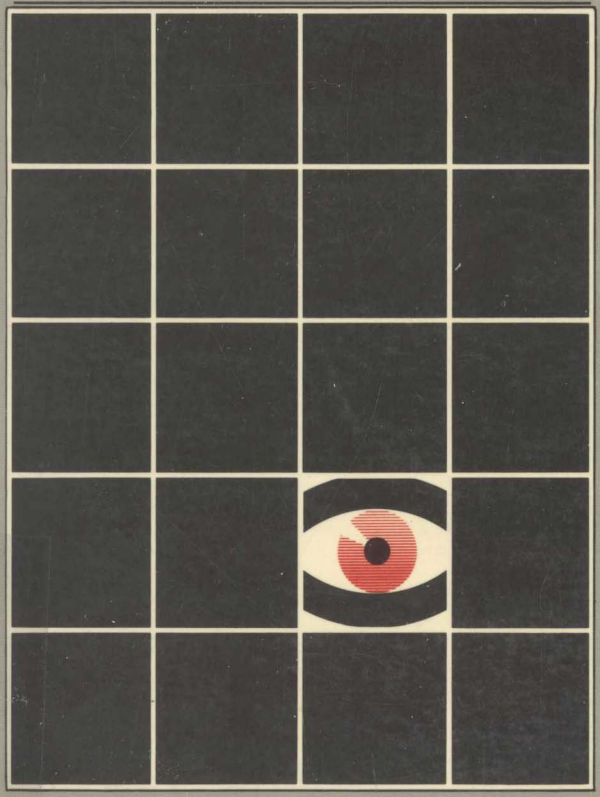
AN AUTHORITATIVE GUIDE TO MEDIA LAW IN BRITAIN

MEDIA LAW

The Rights of Journalists, Broadcasters and Publishers



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The Rights of Journalists, Broadcasters and Publishers

First Edition

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Preface

This is a book about the legal rights of journalists, broadcasters, authors, editors, dramatists, film makers, photographers, producers and anyone else who publishes news or views through the communications media. The introductory chapter examines the procedural pillars of freedom of expression in Britain: the generalised rights which may be claimed by all who venture into print or picture. The next section states the basic laws which apply to all publishing enterprises – libel, contempt, confidence, copyright and obscenity. There follows an examination of the laws applicable to particular areas of reporting: the ground rules which open or close the doors of the courts, Whitehall, Parliament, local government and commercial enterprises. Finally, there is an account of the practices and procedures of regulatory bodies – the BBC and IBA, the British Board of Film Censors, the Press Council and the Broadcasting Complaints Commission.

Journalism is not just a profession. It is the exercise by occupation of the right to free expression available to every citizen. That right, being available to all, cannot in principle be withdrawn from a few by any system of licensing or professional registration, but it can be restricted and confined by rules of law which apply to all who take or are afforded the opportunity to exercise the right by speaking or writing in public. There are, as the length of this book attests, a myriad of rules which impinge upon the right to present facts and opinions and pictures to the public: we have made an attempt to state and to analyse them as a comprehensive and inter-related body of doctrine.

The purpose of the work is not simply to bridge an existing gap between the elementary primers for trainee journalists, and the complex tomes which separately cover the general laws of libel, contempt, copyright, obscenity and so forth. 'Media Law' may comprise a collection of those strands of general law of particular relevance to journalists and broadcasters, but the sum of the parts emerges as an entity which calls for independent study. We have painted the trees in order to invite readers to see the wood – or at least the overgrown legal jungle – which infests the business of publishing in Britain today.

Most European countries have a statutory 'Press Law' which comprehensively enshrines the privileges and responsibilities of news enterprises. In Britain, the tradition that journalists should have no greater

rights, and no heavier duties, than those which attach to any other citizen, has tended to obscure the development by Parliament and the courts of special rules for circumscribing the freedom of the press. The principles which can be derived from these disparate rules lack consistency and coherence because they have been imposed haphazardly, by different bodies and from different perspectives. Laws widely drafted or declared to catch criminal and commercial pirates have been pressed into service to stop public interest reporting, and regulatory enterprises have been established with broad powers to censor films and broadcasting without thought for the safeguards necessary to secure freedom of speech. At the same time, the mechanisms which normally work to ensure legal principles conform to social expectations and modern conditions seem to have been suspended: reports of Royal Commissions, Law Commissions and Official Committees recommending reforms in different areas of media law have been placed in the 'too hard' basket, by governments who cannot use them to win votes and by bureaucrats who have no desire to co-operate with the greater freedom of information that particular reforms would produce. The roll-call of the last decade's distinguished dust-gatherers is lengthy: Franks on Official Secrets, Faulks on Libel, Younger on Privacy, Wilson on Public Records, Whitford on Copyright, Williams on Obscenity, the Annan Committee on the Future of Broadcasting and the Royal Commissions on both Broadcasting and the Press, Law Commission reports on breach of confidence, criminal libel and blasphemy – this neglect is evidence enough of the official indifference towards the public right to know. When one Home Secretary was taxed by an MP with his failure to implement an election manifesto promise to introduce a Freedom of Information Act, his response was to sneer: 'Only two or three of your constituents would be interested'. The media, which has failed to use its own resources to make constituents interested in media law reform, is as responsible as the courts, the Government and the civil service for the present confusion and uncertainty which beset public interest reporting.

At first blush, the array of media laws and regulations appears formidable. There are criminal laws – of contempt, official secrecy, sedition, obscenity and the like, which can be enforced by fines and even by prison sentences. There are civil laws, relating to libel and breaches of copyright and confidence, which can be used to injunct public interest stories and programmes before publication, or to extract heavy damages afterwards. And there are laws which permit regulatory bodies, like the Independent Broadcasting Authority and the British Board of Film Censors, to censor films and television programmes and video cassettes. These laws have emanated from different sources at different times: statutory laws, imposed by Parliament and interpreted by the courts; common law, built up by judges with reference to precedents from centuries of case law, decisions of regulatory bodies based on broad duties to ensure 'good taste' and 'due impartiality', and informal 'arrangements' like the lobby and the 'D' notice system which exert secret pressures and persuasions.

Newspapers and broadcasting organisations employ teams of lawyers to advise on stories which might otherwise court reprisals. Press lawyers are inevitably more repressive than press laws, because they will generally prefer to err on the safe side, where they cannot be proved wrong. The lawyer's advice provides a broad penumbra of restraint, confining the investigative journalist not merely to the letter of the law but to an outer rim bounded by the mere possibility of legal action. Since most laws pertaining to the media are of vague or elastic definition, the working test of 'potential actionability' for critical comment is exceptionally wide. Journalists are often placed on the defensive: they are obliged to ask, not 'what *should* I write' but 'what *can* I write that will get past the lawyer?'. The lawyers' caution is understandable if they are instructed by proprietors who want to avoid the high legal costs of defending, even successfully, actions brought by the government or by wealthy private plaintiffs.

For all these obstacles, however, media law is not as oppressive as it may at first appear. When there is a genuine public interest in publishing, legal snares can usually be sidestepped. We have been anxious, in writing this book, to emphasise ways in which legal problems can be avoided in practice. Many laws which are restrictive in their letter are enforced in a liberal spirit, or simply not enforced at all. Editors and broadcasters will be familiar with the solicitor's 'letter before action', threatening proceedings in the event that investigations unflattering to clients are published. Often such letters are bluff, and it is important to know how and when that legal bluff can be called. In addition, it must be remembered that the law can give as well as take away: there are many little-known publicity provisions which can be exploited by inquisitive reporters. Although the law creates duties, it also provides rights which assist those who know what to look for and where to find it. In the chapters on reporting significant areas of power and influence – the courts, Whitehall, local government, Parliament and business – we have endeavoured to highlight sections of the law which help, rather than hinder, the investigative journalist. Our hope is that journalists will regard the book not merely as a manual for self-defence, but as a guide to a complicated armoury of legal weapons for battering down doors unnecessarily shut in their faces.

It is, nonetheless, regrettable that so much of media law should impinge upon public interest reporting, and so little of it work to eradicate discreditable press practices. The blind Goddess of Justice seems to raise her sword against investigative journalism while her other hand fondles the Sunday muck-raker. Although the scales of justice balance badly, they can always be tipped, and we have indicated at appropriate points in the text the reforms which would permit the media to fulfil its responsibility to the public. Freedom of information legislation, for example, would give statutory support to the principle that, in a democracy, the public have a right to know the basis upon which decisions which affect the common good are made. The dangers of suppressing important stories on the pretext of confidence or copyright

could be minimised by a public interest exception to the rules which regulate the grant of injunctive relief. Where actions or reputations are mishandled by the media individuals should have equal access to a speedy system of redress for mis-statements of fact, without the delays, uncertainties and expense of libel proceedings or Press Council adjudications. The right to enjoy a private life free from media harassment and embarrassment might also receive some effective guarantee. Developments of this sort would promote accurate and responsible journalism, while at the same time opening up new areas of public importance for investigation and criticism. The worst aspects of defamation, breach of confidence and official secrecy should die unlamented, replaced by a proper concern for public disclosure and protection of human rights.

The views expressed in this book have been formed in the course of advising and defending individual journalists and broadcasters, and it is to them that we owe the greatest debt of thanks. Oliver Freeman initiated the work, and together with the staff of Oyez Longman displayed a patience and understanding which was increasingly appreciated as time and deadlines passed us by. John Griffith, Bill Cornish, Leonard Leigh and Christopher Hird kindly read earlier drafts of some chapters. We are indebted to Heather Rogers, Mary Percival, Michael Rudin and Nicholas Paul for additional research, and to Claire Davis and Jane Heginbotham for their work on the manuscript. Jeananne Crowley and Camilla Palmer would doubtless be offended if we were to thank them for their support.

The Temple
March 1984

Geoffrey Robertson
Andrew Nicol

Addendum to Chapter 4
Confidence

Public Interest Defence – pp 117–119

The public interest considerations which the courts will take into account in deciding whether to injunct publication of a story obtained by illegal or improper methods have been the subject of two recent decisions of the Court of Appeal:

> In *Francome* v *Mirror Group Newspapers* (1984) *The Times*, 17 March the 'Daily Mirror' was restrained from publishing details of private telephone taps, made in contravention of the Wireless Telegraphy Act, which allegedly revealed breaches of the rules of racing by a well-known jockey. The Master of the Rolls accepted that the media could defend publications in breach of confidence which revealed illegal or 'anti-social' conduct (including 'activities which are seriously contrary to the public interest') but described the editor's assertion of a right to decide for himself whether to comply with the law as 'arrogant and wholly unacceptable'. Although the courts would seek to avoid a clash between the law and an editor's 'moral imperative' to publish a public interest story, such occasions were rare, especially in the case of a newspaper with a commercial interest in exposure, where the editor could safeguard the public interest by handing tapes over to the police or the Jockey Club for further investigation. The Daily Mirror could not publish extracts from the illegal recordings, although it was free to make its allegations against Francome in bold terms, and use the telephone taps in its defence if sued for libel. It would be unjust to order the newspaper to reveal the identity of the source which had supplied the taped intercepts, at least in the interlocutory proceedings. Should the case come to trial, section 10 of the Contempt Act might well protect the newspaper from the necessity to make such disclosure.

Francome is to be welcomed in so far as it indicates that the court should not order the media to name a source except in cases of urgency (*BSC* v *Granada*) or national security (*Secretary of State for Defence* v *Guardian Newspapers*): see page 125. The decision to injunct publication was heavily influenced by the fact that the tapes were made in breach of the criminal law: the additional ground of breach of confidence may not of itself have sufficed, and the court confirmed that the public interest defence extends to some forms of anti-social behaviour as well as to

revelation of crime and fraud. The emphasis upon the media's financial interest in investigative journalism, as a factor militating against the right to publish, was unfortunate: the point is fairly taken in relation to circulation – building sensationalism, but hardly applies to serious analysis of political impropriety or official inadequacy. The notion that the public interest is served by secretly bringing matters of scandal and concern to the attention of the authorities may be over-optimistic, as the court accepted in the important case of *Lion Laboratories Ltd* v *Evans and Express Newspapers* (1984) *The Times*, 27 March:

> The plaintiffs were manufacturers of the intoximeter, an electronic device approved by the Home Office for police testing of motorists suspected of driving with excess alcohol. 'The Express' wished to publish documents obtained in breach of the plaintiff's confidence which threw doubt upon the accuracy of the intoximeter. The Court of Appeal refused to injunct publication because the accuracy of an instrument which was being used to convict many persons of road traffic offences was 'a matter of grave public concern'. Although the newspaper proposed to breach confidence and copyright by publishing the documents, it should not be restrained because it had 'a serious defence of public interest which might succeed at the trial'.

If the Daily Mirror was obliged to send the *Francome* tapes to the police, why not oblige The Express to forward its documentary evidence to the Home Office which was responsible for approving the machine? Lord Justice Griffiths replied that The Express was entitled to take the view that publication would put more pressure on a Department already committed to the machine than 'a discreet behind-the-doors approach'. A campaign of public pressure on authority was 'an essential function of a free press, and we would all be worse off if the press was unduly inhibited in this field'.

Lion Laboratories is a decision of great importance for the media, in so far as it authoritatively decides that the public interest defence to actions for breach of copyright and confidence is not limited to cases where it can be shown that the plaintiff has misbehaved. In order to resist an interim injunction, the media need only show a legitimate ground for supposing publication to be in the public interest, 'a serious defence of public interest which may succeed at trial'. It thus echoed a 1915 Court of Appeal decision (*Neville* v *Dominion of Canada News Ltd* [1915] 1 KB 556 CA) which refused to enforce a newspaper's contractual promise not to comment on the plaintiff's land development activities. Such promises were contrary to public policy because they were not consistent with the proper conduct of a newspaper. In the *Lion Laboratories* case, Lord Justice Stephenson acknowledged:

> 'There is confidential information which the public may have a right to receive and others, in particular the media, may have a right and even a duty to publish, even if this information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer.'

Table of Cases