



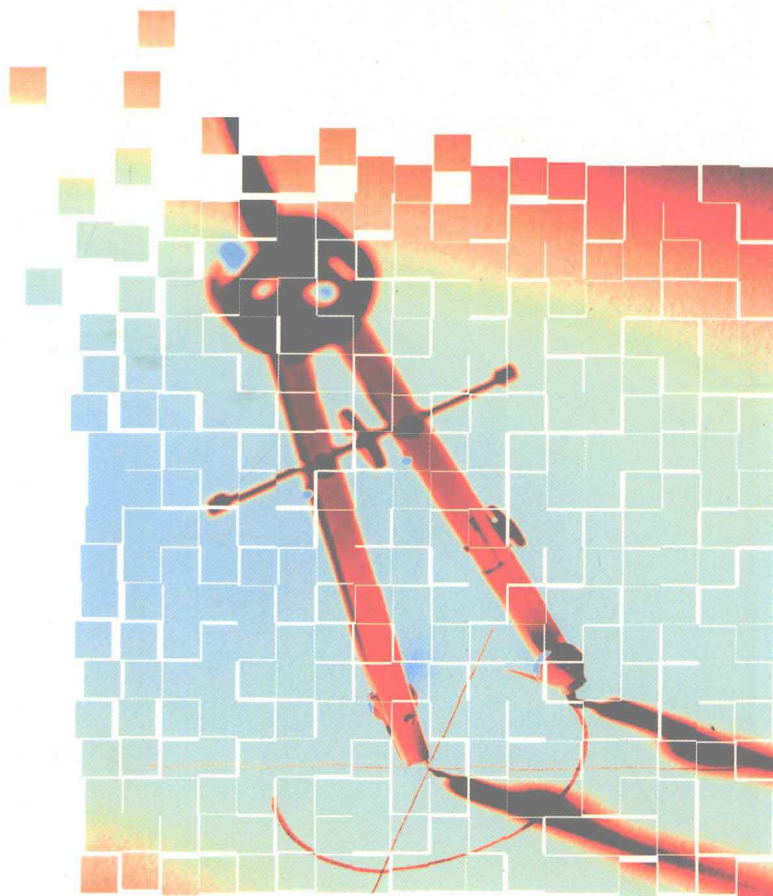
媒介法原理

2004年版

MAJOR PRINCIPLES OF MEDIA LAW

2004 edition

Wayne Overbeck



北京大学出版社
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(2004年版)

韦恩·奥弗贝克



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Wayne Overbeck

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本套丛书是对国外原版教材的直接影印,由于各个国家政治、经济、文化背景的不同,原作者所持观点还请广大读者在阅读过程中加以分析和鉴别。我们希望本套丛书的出版能够促进中外文化交流,加快国内新闻传播学专业教学的发展。

我们欢迎业内专家和学者对我们的工作进行指导,欢迎每一位读者给我们提出宝贵的意见和建议。

北京大学出版社政法事业部
2004年10月

《世界传播学经典教材》总序

龚文庠

传播学是上个世纪诞生于美国和欧洲的一门新兴学科,引进中国只有二三十年之久。五年前国家教育部才将它列入正式学科目录。中国经济持续高速发展,带动了媒体产业的大改革、大发展,传播学就成了顺应时代潮流的热门学科。

然而由于这是一门年轻的“舶来”学科,按照一些学者的说法,尚处在从“译介”到“本土化”的初级阶段。在教学、研究的过程中,我们常感到对一些术语、概念、理论难以把握,往往是众说纷纭、莫衷一是,有时在激烈争论之后才发觉问题出现在翻译上。例如将 communication 译为“传播”,有人就方便地将传播误解为“宣传+广播”。有人将新闻与传播混为一谈,用“新闻传播学”(news communication)来涵容传播学。有人说,新闻学研究新闻媒体,新闻媒体就是大众媒体,所以新闻学与传播学没有多大区别,因为新闻学研究的就是大众传播。于是出现了将传播学视为新闻学之分支的怪现状。究其原因,一些模糊或错误概念的产生,根子还在对原义的理解。例如英文 communication 在中文里没有对等词,译为“传播”是很勉强的。communication 含有双向的意思,如: to share or exchange opinions (Longman Dictionary of Contemporary English),而中文的“传播”有明显的从一方传往另一方的倾向。如果直接阅读英文词典或原著中对 communication 的界定和解释,就很容易把握原义,在讨论中也可以避免因译文歧义而白费口舌。

以本人阅读译文的亲身体验为例。在读亚里士多德的《修辞学》时我查看了几种英文译本,其中最令我受益的是 1926 年的译本,它采用希腊文原文与英译文逐页对照的版式。其他英译本多将书名译为“Rhetoric”(中国人民大学出版社的最新中文译本也译为《修辞学》),而 1926 年英译本却译为“Aristotle's 'Art' of Rhetoric”。这是按照希腊文原版本直译出来的,中文对应译文为《亚里士多德的讲演“读本”》。希-英对照译本传达了其他译本中“损失”掉的一个重要的意义:“art”在希腊文中是多义词,此处的 art 意为 handbook(读本、手册),也就是讲演手册。亚氏写此书的背景是,他不满于当时“智者派”(Sophists)们撰写的多种读本(art),于是自己写一部读本来正本清源,因而书名为《亚里士多德的讲演“读本”》。如果不是读到 1926 年的希-英对照译本,笔者就无法了解原著书名所含有的如此重要而丰富的信息。

我们当然不能一概否定和取消翻译,因为没有翻译,不同文化之间就无法交流,艺术家、科学家、思想家的智慧就不可能为全世界共享,人类文明也不可能像今天这样灿烂。

然而目前我们的翻译作品,尤其是学术著作的翻译中,存在着浮躁、不负责任的风气。我们需要大力提倡认真、严谨的译风,像严复那样,“一名之立,旬月踟躇”。对于学术译作,如果有条件,我们还应当尽量提供方便,让读者在遇到疑问时能够查对原文。

基于以上理由,北京大学新闻与传播学院决定编选这套《世界传播学经典教材》书系,分为英文版和中文版两类。英文版为原著影印本,加上我们的导读和部分译文;中文版为全文翻译,而每部英文中译本都有原作可以对照。

这套书系选取下列类型的著作:1. 传播学中有影响的名著,如曾10次再版的《说服:接受与责任》(*Persuasion: Reception and Responsibility*)。2. 传播学的重要分支学科,如《组织传播:理论学派与传播过程》(*Organizational Communication: Approaches and Processes*)、《跨文化交流》(*Communication Between Cultures*)、《媒介法原理》(*Major Principles of Media Law*)、《电子媒介经营管理》(*Management of Electronic Media*)等。3. 综合性研究,如《媒介研究:文本、机构与受众》(*Media Studies: Texts, Institutions and Audiences*)、《影响的互动:新闻、广告、政治与大众媒介》(*The Interplay of Influence: News, Advertising, Politics, and the Mass Media*)等。书系中所有影印本和中译本都将依据我们获得版权的原著最新版本。

书系的编选将采取开放式,除已经取得版权的十几种著作,还将陆续纳入新的选题。传播学理论的译介是一项庞大的工程,我们欢迎并希望更多同行、专家和有志者参与其事,互相切磋,共同推进传播学在中国的发展。

书籍的前言中经常流行一句套话:由于时间仓促,水平有限,错误在所难免,请读者见谅。有人批评说,时间仓促就不要急着出书,水平有限就应当等水平够格再发表,怎么反过来要求读者原谅呢?这话说得真好。我们将以严肃负责的态度,尽力把好本书系的质量关。读者诸君如发现问题,恳请不吝赐教。

导 读

周庆山

大众传播媒介在美国政治、经济、文化和社会生活的各个方面发挥着重要作用。同时,社会环境也反过来制约和控制着大众媒介的制度和运作规范。基本上,美国的大众传播活动是建立在法律制度的基础上的,因而有着一系列周密和稳定的操作规范,这个规范就是媒介法,也称大众传播法。

媒介法涉及多个法律部门,具有多种法律渊源,可以看作这些法律渊源的总和。媒介法主要是调整大众传播活动中涉及的各种社会关系的法律规范,除宪法、民法、刑法中有关规范大众传播活动的新闻出版、广播电视法等规范外,媒介法还包括电信法、信息自由法、隐私权法、著作权法、广告法、反不正当竞争法、公司法以及网络法律等的有关内容。

在美国,规制大众传播的主要法律来源是宪法第一修正案。第一修正案明确规定“国会不得制订法律……剥夺言论或出版自由……”。该条款保障人们发表的言论及撰写、出版和发行的文章书籍,不得受到事前约束。非但如此,第一修正案还限制政府在无正当理由的情况下,因个人曾发表意见和撰文而加以事后惩罚。另一方面,国会立法和有关的行政规章构成传播媒介法律制度的基本框架,同时,司法判例、法律裁决也起着不可忽视的作用,为“管制言论自由的各种正当理由”和“不能以此作为正当理由”之间的划分,为特别权衡保障言论自由与维护有关利益,提供可判断和依据的标准。

《媒介法原理》一书是对美国媒介法的理论与司法实践的一个梳理、归纳、抽象和价值判断。随着信息技术特别是网络技术的发展,信息传播媒介从印刷媒介和电子媒介发展到网络媒介等多元并存互动和竞争的时代,也出现了很多新的法律问题和矛盾,媒介法作为信息法的一个组成部分,面临着社会信息化时代的很多权利冲突,如言论自由与信息安全的协调、隐私权与知情权的冲突、信息的公共传播与信息所有权的冲突等等。法律的合理性与正当性从来都不是像数学公式一样精确和固定,在涉及一些权利冲突的传播实践方面,这本书提供了一些思考和分析其法律与伦理上的公正与效率的判断方法。

该书作者 Wayne Overbeck 是加利福尼亚州立大学传播学系教授,在过去的 38 年里为五所大学的近 14,000 名学生教授了媒介法基本原理的课程,具有丰富的媒介法教学经验,对目前美国的媒介法研究和教学状况也有全面深入的了解。作者在各章都穿插介绍了许多案例,这些案例使得本书内容更加丰富,既避免了内容的枯燥,又便于读者深入

理解和掌握相关问题。

本书是第 15 版,也是第 13 次年度修订出版,正如作者在序言中指出,此书也是第一本每年都加以更新的媒介法教科书。此次修订在去年的基础上增加了 2002—2003 年美国传播法的新发展,包括美国联邦最高法院关于第一修正案的 9 个新判例以及其他相关内容,在本书的序言中,作者以章节为序列举了各部分所增加的一些最重要的内容。

全书共十四章。其中,第一章介绍了美国司法体系的基本情况,包括法院系统、法律类型、法律查询等,是对本书所要介绍的主要内容——媒介法的背景(司法体系)的必要介绍。以后各章为媒介法的基本问题:第二章回顾和分析了新闻媒介自由问题,从英国的审查制度入手,介绍了美国新闻自由的发展历史,特别介绍了影响较大的宪法第一修正案,并对所谓反恐怖主义时代的新闻自由做出探讨;第三章为出版前约束的问题,这部分介绍了两个重要的判例——尼尔诉明尼苏达州案、“国家安全与五角大楼文件”案,以及“仇恨性言论”的审查和文学作品发行控制、歧视性征税等问题;第四章为诽谤问题,包括与口头诽谤和书面诽谤相关法律问题;第五章为隐私权法律问题,介绍了非法侵扰与非法侵占问题、私人事实的泄露问题、1974 年《隐私权法案》的主要内容以及互联网与隐私权的问题;第六章为版权与商标法律问题,其中版权部分包括了音乐、有线电视、录制技术、计算机和互联网等涉及的版权问题和合理使用问题,此外还涉及了国际版权、不正当竞争等内容,并对商标法有关问题进行了探讨;第七章为新闻报道与公开和公正审判的冲突问题,其中包括对新闻报道的限制问题;第八章是关于新闻采集人的特权问题,其中包括记者的特权问题、藐视法庭的问题,以及《保护新闻秘密法》的内容,并介绍了三个相关案例;第九章为信息自由法相关规定及对传播媒介采访报道的影响,介绍了联邦《信息自由法案》和联邦与州会议公开法相关规定,以及电子信息自由和进入限制性场所的相关规定问题,并对新闻工作者的获得政府信息提供了建议;第十章为猥亵犯罪的法律问题,本章介绍了猥亵确定的有关标准的变化,以及审查与地方色情管制措施;第十一章为电子媒介的管制,主要涉及无线广播电视、有线电视、新的电子媒介技术的许可与管制,还对联邦通信委员会的基本情况作了介绍;第十二章为媒介所有权问题,即媒介反垄断问题,主要涉及报纸、无线广播电视反垄断法和大众媒介并购的反垄断法问题;第十三章为广告自由、广告使用与管制问题,包括第一修正案和广告法人自由问题,联邦和州广告管制和自我管制问题以及互联网广告规范问题;第十四章专门介绍了学生出版自由问题,包括最高法院的判决、相关出版自由的案例以及私立学校的出版自由问题,这些问题对于我国读者来说是一个较为新鲜的领域。

本书的基本目标在于为传播学专业的众多学生提供一个清晰、简明的法律概要。因此,本书在内容上更多地是求全、求新,而不是求深。在各章之间的关系上,除第一章之外,后面的十三章在内容上并不存在内在的、严格的逻辑关系,本书章节体例安排是较为分散的,但却涉及了目前媒介法的几乎所有内容领域和最新动态;在各章内部,也存在

同样的状况。

在编排上,首先应当指出的是,本书前有案例表,后有法律选摘,这两部分为我们提供了很多有价值的内容;其次,前面已经提到,序言部分以章为序列举了此次修订所增加的主要内容,便于我们了解此次修订的主要变化以及 2002—2003 年间美国媒介法的主要发展情况;第三,作者在每章的最后都设置了“主要问题概览”,以“提问—回答”的方式进一步突出明确各章主要知识点,有利于突出重点,也便于学生对各章内容进行复习和总结;另外,在本书的最后,作者还为我们提供了有价值的索引。同时,作者提供了有关本书涉及的内容的最新修订和变化的网址([http://www. overbeck. com](http://www.overbeck.com)),以便读者及时获取最新成果。

无论是从内容上,还是从全书的体例编排上,都可以看出,作者力图使此书能够最大限度地起到便于媒介法教学工作的进行和学生在学中使用的作用。作者努力从特定读者对象的需要出发,围绕为众多的传播学领域的学生提供一个清晰的、简明的法律概要的目标,花了很大的心思,做了很多努力。此书是目前媒介法领域最新的教科书,相信这本书的出现必将使得媒介法的教授和学习都更加容易。

作为一本教科书,本书的主要预期受众群是高等学校新闻与传播学院、系的本科生和研究生,也可供法学院相关专业学生使用;随着我国新闻传播事业的法制建设不断发展,研究和制订我国大众传播法有必要借鉴国外的相关成果,因此,本书对于广大的新闻传播工作者和法律工作者来说也同样极具参考价值。

PREFACE

This is the 15th edition of *Major Principles of Media Law* and the 13th published on an annual revision cycle. This edition covers new developments through the end of the Supreme Court's 2002-2003 term and will be in print in time for fall, 2003 classes.

The preface again summarizes the year's new developments in communications law, including nine new U.S. Supreme Court decisions on First Amendment and communications-related issues during 2002-2003. The high court ruled on cases that stirred intense emotions such as *Lawrence v. Texas* (overturning a state sodomy law as an unconstitutional invasion of privacy) and *Virginia v. Black* (upholding a ban on cross burning when it is intended to intimidate), and issues that probably stirred fewer emotions such as *Moseley v. V Secret Catalogue* (limiting the reach of the Federal Trademark Dilution Act), *Eldred v. Ashcroft* (upholding the latest 20-year extension of copyright terms) and *Dastar v. Twentieth Century Fox Film Corp.* (allowing the re-release of a public domain television series over the objections of a trademark owner). The high court also limited punitive damage awards, an action likely to reduce the number of seven-figure judgments against mass media defendants, and curtailed use of the federal racketeering law against abortion protesters. The court even made headlines by deciding *not* to rule on a controversial commercial speech case, *Nike v. Kasky*.

Aside from the year's Supreme Court decisions, probably the most notable and controversial media law development of 2002-2003 was the Federal Communications Commission's long-anticipated ownership deregulation decision. With less controversy, the FCC also took several other major actions, adopting a third set of equal employment opportunity (EEO) rules, setting deadlines to push along the transition to digital television and authorizing in-band, on-channel digital radio broadcasting. Meanwhile, lower federal and state courts were ruling on important communications and First Amendment questions involving free expression, libel, privacy, intellectual property and the internet.

Here are some of the highlights of what has been added to the book since last year (in chapter order).

Chapter One (The Legal System) now discusses:

- * *State Farm v. Campbell*, the Supreme Court decision limiting punitive damages on constitutional grounds; and
- * Recent changes in the status of unpublished appellate court decisions as judicial precedents.

Chapter Two (The Legacy of Freedom) includes:

- * Additional coverage of the USA Patriot Act's implications.

Chapter Three (Prior Restraints) includes:

- * *Virginia v. Black*, the Supreme Court decision upholding a state law that banned cross-burning as an act of intimidation while holding that cross-burning at a rally in an open field, where there is no evidence of intimidation, is protected by the First Amendment;
- * *Scheidler v. National Organization for Women*, in which the Supreme Court ruled that the federal Racketeer Influenced and Corrupt Organizations (RICO) Act cannot ordinarily be used against abortion protesters;
- * Coverage of new developments concerning First Amendment rights on private property and formerly public sidewalks, including the Mormon Temple Square decision, *First Unitarian Church v. Salt Lake City Corp.*;
- * Federal and California decisions upholding the right of antiwar activists to hang banners on freeway overpasses where American flags have been allowed, but allowing police to ban anti-abortion sign-waving on overpasses;
- * *Honolulu Weekly v. Harris*, allowing the Hawaiian city to conduct content-neutral lotteries to award access to newsracks in public places; and
- * the new type of "Son of Sam" law enacted in California after the old law was ruled unconstitutional by the state Supreme Court.

Chapter Four (Libel and Slander) discusses:

- * The latest developments concerning *Suzuki Motor Corp. v. Consumers Union*, in which a federal appeals court issued a new opinion but still refused to grant summary judgment, allowing a jury trial on Suzuki's claim that CU's testing of the Suzuki Samurai was rigged;
- * Recent trends in anti-SLAPP legislation; and
- * New developments in long-arm jurisdiction based on internet postings, including the fourth circuit U.S. Court of Appeal's *Young v. New Haven Advocate* decision.

Chapter Five (Privacy) discusses:

- * *Lawrence v. Texas*, the Supreme Court decision invalidating a state sodomy law as an unconstitutional invasion of privacy and reversing the court's earlier *Bowers v. Hardwick* ruling;
- * Colorado's rejection of false light invasion of privacy as a separate legal action;
- * A federal appeals court decision upholding ABC's right to use a hidden camera in an expose' of questionable procedures at an Arizona medical laboratory;
- * A California appeals court decision disavowing *Brisco v. Reader's Digest*, a landmark state Supreme Court decision allowing a lawsuit for the reporting of old-but-true facts; and
- * *Winters v. DC Comics*, a California Supreme Court decision allowing fanciful caricatures of celebrities in comic books without consent, distinguishing an earlier decision that disallowed unauthorized sketches of the Three Stooges because they had little transformative value.

Chapter Six (Copyrights and Trademarks) discusses:

- * *Eldred v. Ashcroft*, the Supreme Court decision upholding the 20-year term extensions in the Sonny Bono Act;

- * *Moseley v. V Secret Catalogue*, in which the Supreme Court made it more difficult to prove a violation of the Federal Trademark Dilution Act;
- * *Dastar v. Twentieth Century Fox Film Corp.*, the Supreme Court decision rejecting a trademark owner's attempt to prevent the re-release of a television series that is in the public domain;
- * Many internet-related copyright issues, including the ongoing controversy over music royalty rates that webcasters must pay to record labels, the industry's new efforts to curb the sharing of movies and music by millions of computer users and a federal judge's ruling that some Napster-like services do *not* violate copyright law;
- * Music-related federal appeals court decisions concerning ownership of the Beach Boys name and the name "Barbie Girl;"
- * Similarities between the facts that led to the *Harper & Row v. The Nation* Supreme Court decision and the unauthorized pre-publication disclosure of key quotations from Hillary Rodham Clinton's memoirs in 2003;
- * *Los Angeles News Service v. CBS Broadcasting*, a federal appellate court decision allowing Court TV to use copyrighted video of the beating of a truck driver at the start of the 1992 Los Angeles riots but holding CBS to answer for providing the video; and
- * A new decision on substantial similarity issues raised by a new photograph very similar to an earlier photo of a vodka bottle for advertising purposes.

Chapter Seven (Fair Trial - Free Press) discusses:

- * New developments concerning courtroom camera and video access, including pending legislation to admit cameras to federal civil and criminal trial courts.

Chapter Eight (Newsgatherer's Privilege) has no major changes this year.

Chapter Nine (Freedom of Information) discusses:

- * New federal regulations adopted under the Health Insurance Portability and Accountability Act (HIPAA) that forbid the release of information by hospitals and health care providers that has traditionally been available to the news media;
- * Recent developments in the controversy over the scope of the FoI Act and the release of old classified documents in the aftermath of Sept. 11, 2001;
- * Notable developments in Florida, including a popular vote to strengthen the FoI provisions of the Florida Constitution and the jailing of a former president of the Florida State Senate for violating the open-meeting law; and
- * A federal appellate court decision allowing the media to witness more of the process when California prisoners are executed by lethal injection.

Chapter 10 (Obscenity and Pornography) discusses:

- * *U.S. v. American Library Association*, the Supreme Court decision upholding the requirement that libraries seeking federal funds use internet filtering software:

- * *ACLU v. Ashcroft*, the third circuit's response to last year's Supreme Court decision concerning the Child Online Protection Act (COPA), in which the appeals court affirmed its earlier holding that COPA is unconstitutional;
- * Congressional action on a bill to circumvent last year's *Ashcroft v. Free Speech Coalition* Supreme Court decision; and
- * Another federal appellate court decision allowing certain adult magazines to be banned in military stores under the Military Honor and Decency Act.

Chapter 11 (Regulation of the Electronic Media) discusses:

- * The Federal Communications Commission's adoption of a third set of Equal Employment Opportunity rules after two earlier versions of the rules were overturned by federal appellate courts;
- * The FCC's new license-revocation threats and other enforcement actions against broadcasters for airing allegedly indecent material;
- * *McConnell v. FEC*, the three-judge federal court decision overturning parts of the new campaign reform law that affect political advertising carried by broadcasters;
- * The FCC's decision to exclude public broadcasters from certain auctions for new frequencies in the aftermath of *National Public Radio v. FCC*;
- * New initiatives and deadlines adopted by the FCC in an attempt to speed the rollout of digital television; and
- * The approval of a new in-band, on-channel digital audio service to be offered by over-the-air radio stations.

Chapter 12 (Ownership and Antitrust Issues) discusses:

- * The FCC's controversial deregulation of ownership rules such as the television duopoly rule, the former 35 percent national television station ownership cap and the newspaper-television cross-ownership rule;
- * Recent developments in the Microsoft antitrust case; and
- * Proposed mergers and acquisitions of mass media companies, including News Corp.'s plan to acquire DirecTV.

Chapter 13 (Advertising Regulation) discusses:

- * The Supreme Court's end-of-term decision to dismiss the appeal of *Nike v. Kasky*, the case in which the California Supreme Court held that Nike could be sued for false advertising for news releases, letters to the editor and other corporate messages defending itself against charges of poor working conditions at its overseas factories;
- * New developments concerning cigarette advertising, including a global effort to halt it by treaty; and
- * The latest developments in the war by many states against unsolicited e-mail advertising (spam), including the adoption of a tough new law in Virginia.

Chapter 14 (Student Press Law) discusses:

- * *Hosty v. Carter*, in which the seventh circuit U.S. Court of Appeals held that student newspapers at public colleges and universities are protected by the

First Amendment and are not subject to the *Hazelwood* principle--but then withdrew that ruling for *en banc* reconsideration.

* * *

All of this happened in one year. As has been true ever since these annual revisions began, *Major Principles of Media Law* will be the first media law textbook in print with many of the year's new developments.

As this *Preface* has noted in previous years, having a textbook this current is possible only because of the emergence of desktop publishing technology--and because there are publishers willing to throw out the old production schedules for textbooks. A media law textbook produced on the traditional timetable is at least a year out of date when it arrives in college bookstores for the first time; it may be four or five years out of date before it is replaced by a new edition. That leaves those teaching a communications law class in the position of having to cover a lot of new developments in lecture or assign the students to read about them in a supplement--and then disregard the outdated parts of the textbook. After teaching the basic principles of communications law to almost 14,000 students on five campuses over the last 38 years, I'm convinced that having an up-to-date textbook makes teaching (and learning) this subject much easier.

Although much of the material is new, *Major Principles of Media Law* retains the primary goal it has had through 15 editions: to present a clear and concise summary of the law for mass communications students. If this book succeeds, much of the credit should go to the 35 reviewers who have offered so many helpful suggestions since the first edition was peer-reviewed 23 years ago. I particularly want to thank the most recent reviewers: Jens Koepke of California State University, Northridge, Gary Howard Mayer of Stephen F. Austin State University, Kathy Olson of Lehigh University and Mark Paxton of Southwest Missouri State University. They offered many valuable new insights.

Finally, I wish to thank Dean Rick Pullen of California State University, Fullerton, who wrote the original drafts of five chapters in 1980 and made many contributions as co-author of the first two editions of this book, as well as Janet and David Ewell, and Oli Rohrer, who proofread this year's manuscript as the deadline approached amidst late-breaking changes in communications law.

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July 1, 2003

Note: for information about major changes in communications law that occur during the 2003-2004 academic year, consult the author's website:

<http://www.overbeck.com>

TABLE OF CASES

- 44 Liquormart v. Rhode Island, 546
 600 West 115th Street Corp. v. Von Gutfeld, 130

 A&M Records et al. v. Napster, 266
 Abrams v. U.S., 51
 ACLU v. Ashcroft, 419
 Action for Children's Television v. FCC, 468, 469
 Adarand Constructors Inc. v. Pena, 443
 Adult Film Association v. Times Mirror, 576
 Alabama Student Party v. Student Government Assn., 596
 Alberts v. California, 400
 Albertson's Inc. v. Young, 82
 Alden v. Maine, 13
 Alderwood Associates v. Washington Environmental Council, 81
 Alexander v. U.S., 421
 Alpha Therapeutic Corp. v. Nippon Hoso Kyokai (NHK), 192
 Alpo Pet Foods v. Ralston Purina, 572
 Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 80
 American Library Association v. U.S., 418
 American Life League v. Reno, 85
 Ammerman v. Hubbard Broadcasting, 343, 344
 Anderson v. Liberty Lobby, 159
 Anheuser-Busch Inc. v. Schmoke, 547
 Antonelli v. Hammond, 582
 AP v. National Labor Relations Board, 509
 ApolloMedia Corp. v. Reno, 417
 Apple Computer Inc. v. Formula International, 261
 Apple Computer Inc. v. Franklin Computer Corp., 261
 Apple Computer Inc. v. Microsoft Corp., 262
 Apprendi v. New Jersey, 72
 Arkansas AFL-CIO v. FCC, 463
 Arkansas Educational Television Commission v. Forbes, 458
 Arkansas Writers' Project v. Ragland, 98
 Armstrong v. H & C Communications, 203
 Ashcraft v. Conoco Inc., 338
 Ashcroft v. ACLU, 396, 418
 Ashcroft v. Free Speech Coalition, 411
 Ashton v. Kentucky, 173
 Associated Press v. Walker, 141
 Associated Press v. District Court, 316
 Associated Press v. U.S., 510, 519
 Associates & Aldrich v. Times Mirror, 553
 Association of American Physicians and Surgeons v. Hillary Rodham Clinton, 380
 Astaire v. Best Film and Video, 217

 Astroline Communications v. Shurberg Broadcasting, 443
 AT&T v. City of Portland, 530
 Attorney General v. John Peter Zenger, 39
 Austin v. Michigan State Chamber of Commerce, 551
 Austin v. U.S., 421
 Auvil v. CBS 60 Minutes, 166

 Baez v. U.S. Justice Department, 370
 Baker v. F & F Investment, 333
 Baldwin v. New York, 328
 Bally Total Fitness v. Faber, 289
 Banzhaf v. FCC, 466
 Barnes v. Glen Theatre, 422
 Barron v. Baltimore, 52
 Bartnicki v. Vopper, 186
 Basic Books v. Kinko's Graphics Corp., 242
 Batchelder v. Allied Stores Int'l, 81
 Bates v. Arizona State Bar, 539
 Batjac Productions v. GoodTimes Home Video Corp., 237
 Bauer v. Kincaid, 378
 Bauer v. Sampson, 589
 Baughman v. Freienmuth, 591
 Bay Guardian Co. v. Chronicle Publishing Co., 515
 Bazaar v. Fortune, 583
 Beahm v. Food and Drug Administration, 570
 Beauharnais v. Illinois, 172
 Bechtel v. FCC, 441
 Becker v. FCC, 460
 Behrendt v. Times Mirror Co., 125
 Beilenson v. Superior Court, 162
 Bell v. U.S., 365
 Berger v. Hanlon, 189
 Bernstein v. U.S. Department of Justice, 105
 Bethel School District v. Fraser, 593
 Bibles v. Oregon Natural Desert Assn., 367
 Bigelow v. Virginia, 59, 537
 Bilney v. Evening Star, 202
 Bindrim v. Mitchell, 169
 Black Citizens for a Fair Media v. FCC, 449
 Bloom v. Illinois, 328
 BMI v. Claire's Boutiques, 254
 Board of Airport Commissioners v. Jews for Jesus, 90
 Board of Regents v. Southworth, 587
 Bock v. Westminster Mall Co., 81
 Bolger v. Young Drug Products Corp., 412, 542
 Boos v. Barry, 89
 Booth v. Curtis Publishing, 212
 Bose v. Consumers Union, 148
 Bowers v. Hardwick, 182
 Boy Scouts of America v. Dale, 93

- Boyd v. U.S., 178
 Bradbury v. Superior Court, 162
 Braden v. Pittsburgh University, 601
 Branch v. FCC, 460
 Brandenburg v. Ohio, 56, 71
 Brandywine-Main Line Radio v. FCC, 461
 Branzburg v. Hayes, 331, 388
 Braun v. Chronicle Publishing Co., 163
 Braun v. Soldier of Fortune Magazine, 108
 Bridges v. California, 328
 Briggs v. Eden Council for Hope and Opportunity, 162
 Bright v. Los Angeles Unified School District, 593
 Briscoe v. Reader's Digest, 29, 196
 Brookfield Communications v. West Coast Entertainment, 287
 Brother Records Inc. v. Jardine, 283
 Brown and Williamson Tobacco Co. v. Jacobson, 115
 Brown v. Board of Education, 14, 15
 Brown v. Calif. Dept. of Transportation, 95
 Brown v. Virginia, 340
 Bruno & Stillman v. Globe Newspaper Co., 336
 Bullfrog Films v. Wick, 102
 Burch v. Barker, 599
 Burnett v. National Enquirer, 156
 Burstyn v. Wilson, 414
 Butler v. Michigan, 400
 Butterworth v. Smith, 110
 Byers v. Edmonson, 108

 Cain v. Hearst Corp., 204
 Cairns v. Franklin Mint, 217
 Calder v. Jones, 157
 Caldero v. Tribune Publishing, 341
 California First Amendment Coalition v. Calderon, 389
 California First Amendment Coalition v. Woodford, 389
 California v. American Stores, 507
 Campbell v. Acuff-Rose Music Co., 250
 Cantrell v. Forest City Publishing Co., 205
 Capital Cities Cable Inc. v. Crisp, 484
 Carey v. Population Services International, 538
 Carson v. Here's Johnny, 208
 Carter v. Helmsley-Spear Inc., 278
 Cavalier v. Random House Inc., 232
 CBS v. Democratic National Committee, 466
 CBS v. FCC, 455
 CBS v. Superior Court, 345
 Central Florida Enterprises v. FCC, 448
 Central Hudson Gas and Electric v. Public Service Commission of New York, 538
 Chandler v. Florida, 320
 Chaplinsky v. New Hampshire, 70
 Cher v. Forum International, 211
 Chesapeake & Potomac Telephone Co. v. U.S., 496
 Chicago Joint Board - Amalgamated Clothing Workers of America v. Chicago Tribune, 552
 Children of the Rosary v. City of Phoenix, 555
 Chisholm v. FCC, 458
 Christ's Bride Ministries v. Southeastern Pennsylvania Transportation Authority, 555
 Church of Scientology v. Wollersheim, 162
 CIA v. Sims, 367
 Cincinnati v. Discovery Network, 96, 544
 Cinevision Corp. v. City of Burbank, 104
 Citizens Communications Center v. FCC, 448
 Citizen Publishing Co. v. U.S., 514
 Citizens Committee to Save WEFM v. FCC, 476
 Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 476
 City of Corona v. Corona Daily Independent, 97
 City of Erie v. Pap's A.M., 423
 City of Ladue v. Gilleo, 83, 542
 City of Lakewood v. Plain Dealer Publishing Co., 95
 City of Los Angeles v. Alameda Books, 424
 City of Los Angeles v. Preferred Communications, 490
 City of New York v. FCC, 485
 Clappitt v. Thurston County, 340
 Clift v. Narragansett Television, 195
 Coalition for a Healthy California v. FCC, 463
 Cochran v. NYP Holdings, 137
 Cohen v. California, 73
 Cohen v. Cowles Media Co., 352
 Cohen v. Illinois Institute of Technology, 601
 Comedy III Productions v. Gary Saderup Inc., 215
 Committee for an Independent P-I v. Hearst Corp., 517
 Community Communications v. City of Boulder, 527
 Community for Creative Non-Violence v. Reid, 239
 Compeco v. Day-Brite Lighting, 278
 Conklin v. Sloss, 196
 Consolidated Edison v. Public Service Commission of New York, 550
 Corrigan v. Bobbs-Merrill, 170
 Costco Companies v. Gallant, 82
 Cox Broadcasting v. Cohn, 109, 197, 218
 Cox v. Louisiana, 329
 Craig v. Harney, 329
 Curran v. Mt. Diablo Council of the Boy Scouts of America, 94
 Curtis Publishing Co. v. Butts, 141

 Dastar Corp. v. Twentieth Century Fox Film Corp., 283
 Debs v. U.S., 51
 Delaney v. Superior Court, 346
 Dennis v. U.S., 54
 Denver Area Educational Telecommunications Consortium v. FCC, 491