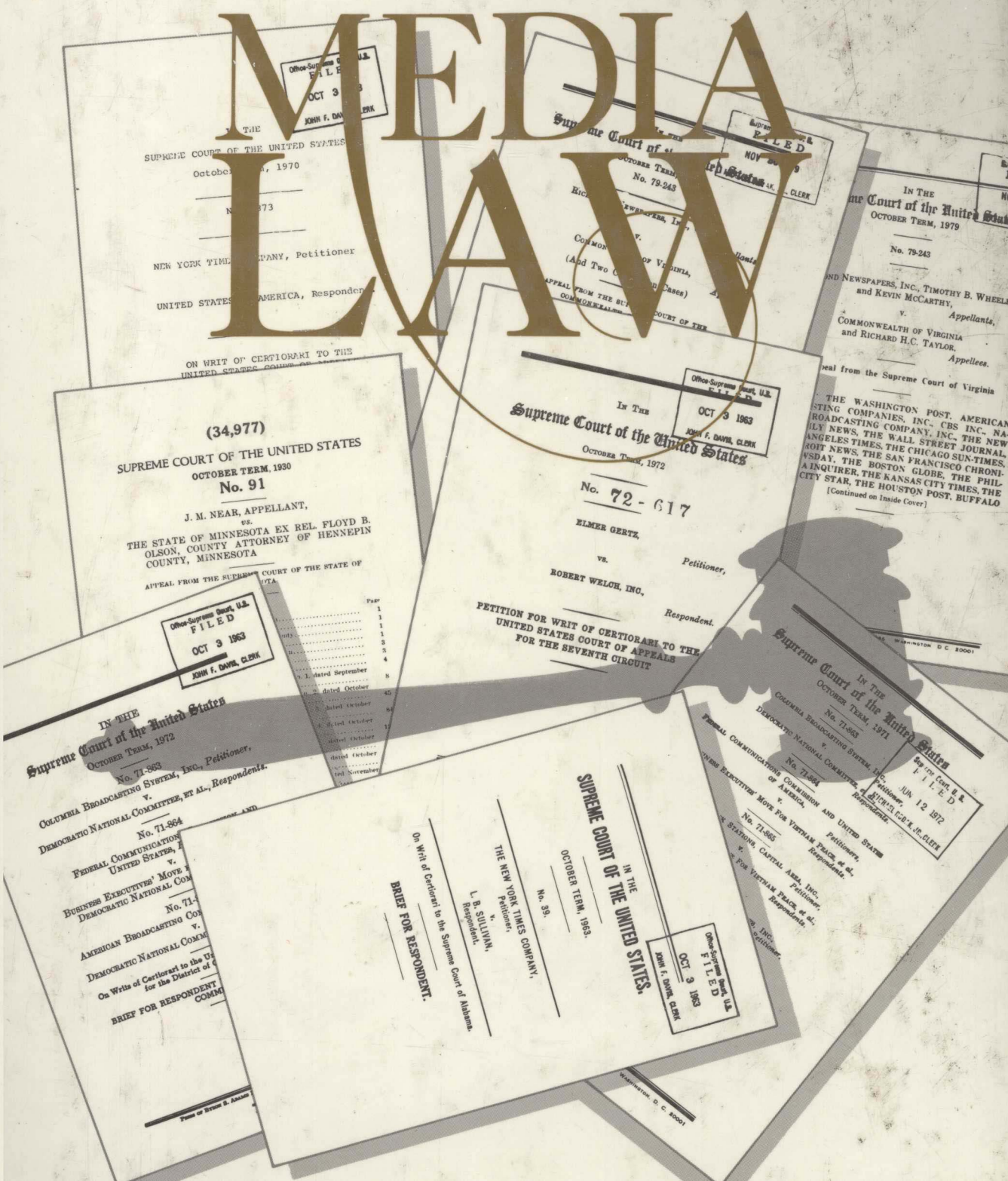
RALPH L. HOLSINGER

MEDIA LAW



Media Law

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PETER SANDMAN
Rutgers University

Random House  New York

First Edition
987654

Library of Congress Cataloging in Publication Data

Holsinger, Ralph L.
Media law.

Includes indexes.
1. Mass media—law and legislation—United States.
2. Press law—United States. I. Title.
KF2750.H65 1986 343.73'0998 86-26148
347.303998
ISBN 0-394-32953-8

Manufactured in the United States of America

Cover Design: Fred Charles
Book Design: Glen M. Edelstein

PREFACE

Media Law is written for today's journalism students—in the broad meaning that term has assumed in the 1980s. Thus, while major chapters are designed to help future reporters and editors recognize and avoid the many legal pitfalls that await the unwary, there is essential information here, too, for students planning careers in broadcasting, advertising, public relations, and corporate communications.

I began this book because my students made it clear to me that they wanted a text written in the language of journalists, and they wanted it to be interesting. Because I had worked as a newspaper reporter and editor for eighteen years before I became a teacher, I thought I could meet their demands. During my newspaper career, I had covered state and federal courts, the Ohio Legislature, Congress, and federal administrative agencies, which gave me a good grounding in how laws are made and applied. As a reporter, I had to meet the daily challenge of gathering news, frequently from reluctant sources, and writing for a mass audience. This gave me experience in translating the complexities of government and law into language readers could understand.

Later, as managing editor of a metropolitan daily newspaper, my horizons were broadened. I learned to consult lawyers to avoid legal problems that had not seemed very important to me as a reporter. I also became much more aware of those gray boundaries of the law where ethical considerations come into play, which not only made me appreciate the many points at which journalists risk collision with the legal system, but aroused my interest in learning more about what we mean when we talk about the First Amendment guarantee of freedom of speech and press.

Thus, when I joined the journalism faculty at Indiana University, Bloomington, more than twenty years ago, I began a systematic reading of First Amendment and media law cases. I am forever indebted to the late Austin Clifford, professor of torts at the Indiana University School of Law, who taught me at an early stage that the meaning of the law is found in the cases and cannot be understood without them. Thus, *Media Law* is based firmly on the cases. Some of these have defined the constitutional limits of the freedom of the press clause of the First Amendment. Others have interpreted the many statutes applying to journalists and the mass media. The major Supreme Court cases—most notably *New York Times* v. *Sullivan*, *Gertz* v. *Robert Welch, Inc.*, and *Branzburg* v. *Hayes*—are given extensive treatment. Students need to become familiar with these cases, above all others, because courts look to them for guidance in the important areas of libel and the right of journalists to protect their confidential sources.

While I place great reliance on the cases, I recognize that decisions usually are written by judges for lawyers. This means that students, and even journalism professors, can find them hard to understand. Thus, I have used verbatim excerpts only where I thought the judges wrote more clearly than I could. Where they did not, I have tried to translate their legal language into words students can understand. In this I have been guided by my students who have been kind enough to evaluate my lectures as usually clear and interesting. As a teacher, I have always acted in the belief that to be boring is to commit a cardinal sin. I have tried to apply that belief to my writing.

Media Law is written on three levels. At its heart, it is a practical guide to the legal problems likely to confront professional journalists. At this level, I have given a great deal of emphasis to libel, invasion of privacy, and the clash between lawyers and journalists over the right of accused persons to a fair trial and the right of journalists to protect their confidential sources and information. But there also is practical guidance for students who plan careers in broadcast news, advertising, and public relations. The chapter on copyright law should be of interest to students thinking of a career in the creative arts. A final chapter covers the business aspects of the media, including the right to distribute news and opinion in public places.

At a second level, *Media Law* is a guide to the meaning of the speech and press clauses of the First Amendment. I have written these parts of the book in the belief that the right to speak and write without hindrance from government is absolutely essential to a free society. The First Amendment says flatly, "Congress shall make no law . . . abridging the freedom of speech, or of the press." And yet the Congress has passed laws restricting both freedoms, and the Supreme Court has upheld them. I think it is important that students get some idea of why we have a First Amendment and of why limits have been imposed on it. Freedom can not be taken for granted—in today's world, the freedoms of speech and press are endangered species. Each generation must care enough about freedom of expression to protect it, or it will be lost here, too. Therefore, I have written about the development of the idea of freedom, the philosophy underlying the First Amendment, the various theories as to its meaning, and the major cases interpreting the speech and press clauses.

At the third level, I have gone beyond the law into the realm of ethics. I think this dimension makes *Media Law* unique among communications law texts. Each chapter ends with a section, "In the Professional World," that discusses the ethical aspects of its subject matter. These sections are not exhaustive, but they are written to suggest that the question, "Is it right?" is sometimes as important as the question, "Is it legal?"

Shortly after I became a teacher, the late Richard G. Gray became chairman of Indiana University's then Department of Journalism. He entrusted me with organizing our first senior seminar on the philosophy and ethics of the media. That has developed into a course all seniors are required to take. I still teach it occasionally. In the early 1970s, I was cochairman, along with George Gill of the *Louisville Courier-Journal* and Paul Poorman of the *Detroit News*, of the first Professional Standards Committee of the Associated Press Managing Editors Association. In effect, it was a committee on ethics and later under other leadership drafted the association's code of ethics. Over the years, its studies have contributed significantly to raising the level of ethical performance among newspaper professionals and to the growing body of literature on journalism ethics. I hope that "In the Professional World" will stimulate students to think about the ethical dimension of whatever branch of journalism they enter.

A major problem in writing a textbook on media law is deciding what to leave out. State and federal courts decide hundreds of cases each year in which the media or media professionals are involved as plaintiffs, defendants, or interested parties. Fortunately, most of these simply apply settled principles and therefore plow no new legal ground. Other court decisions may seem to change the law, but do so at such a low level that the decision can be put on hold until a higher court either reverses or affirms. Still other decisions change the law, but in esoteric detail of interest only to lawyers specializing in the field. Then there are those decisions, frequently by the Supreme Court of the United States, that make significant changes in principle. In this book, I have tried to focus on the latter. To do otherwise would result in clutter more likely to confuse than to inform students. Therefore, I have given major treatment to two kinds of case. First, of course, are the landmark decisions that have established essential principles of media law. Second are the cases that illustrate how other courts have applied the essential principles.

Part I deals with the origins and development of the idea that freedom of expression serves the public interest. Chapter 1 begins with a survey of the idea's historical origins, leading up to the adoption of the First Amendment as part of the Bill of Rights of the Constitution. The second part of the chapter examines the meaning of the First Amendment, first through the works of legal scholars, and then through the theories applied by the Supreme Court.

Chapter 2 is devoted exclusively to the various ways in which government officials at all levels have sought, and continue to seek, to prevent publications considered harmful to society or national security. When government acts directly to prevent publication, as it has in time of war, it is called censorship. When, as is more common, a court is asked to prevent publication, it is called prior restraint. Although some scholars believe that the purpose of the First Amendment was to prevent prior restraint, the Supreme Court has held that publication can be prevented if the government can demonstrate a compelling need for it.

Chapter 3 deals with the power of government to punish persons whose speech or writing threatens to harm national security. This is a power that was widely used during World War I, and again during the so-called Cold War with the Soviet Union after World War II, but has lain dormant since. However, at this writing, the Reagan administration has warned several newspapers, a news magazine, and a television network that they may be subject to punishment if they disclose too much detail about the CIA's intelligence gathering methods.

Part II covers libel, invasion of privacy, fair trial, the right of journalists to protect their confidential sources, and access to government information. Few months pass without a major confrontation between professional reporters and editors and the courts in one or more of these areas of media law.

Chapter 4 surveys the complex and volatile law of libel. Important Supreme Court decisions, two of them handed down in the 1985–1986 session, have made this one of the most important areas of First Amendment law. The keys to understanding this chapter are found in the sections devoted to *New York Times* v. *Sullivan* and *Gertz* v. *Robert Welch, Inc.*

Chapter 5 deals with invasion of privacy. While polls show that it is a major concern of many persons, courts have been reluctant thus far to return privacy judgments against the media primarily because newsworthiness is a strong defense, and the Supreme Court

has held that facts found in the public records of a court are not actionable. Certain aspects of privacy law that apply to advertisers and public relations practitioners are also discussed in Chapter 5.

Chapter 6 begins with a survey of criminal justice procedures and moves to an examination of the meaning of a fair trial. At the heart of this chapter is a conflict between two guarantees found in the Bill of Rights. Journalists believe that the freedom of the press clause gives them the sole right to decide what news they can publish about the criminal justice system. Lawyers and judges believe that on occasion news can be of such a nature as to prevent a fair trial, thus violating a defendant's rights as defined by the Sixth Amendment.

Chapter 7 deals with another major source of conflict between the courts and the media: the right of journalists to protect their confidential informants. The chapter is based on *Branzburg* v. *Hayes*, a Supreme Court decision widely seen at the time as a defeat for the news media. However, the Court was so badly divided that lower courts, particularly in the federal system, have found in it a limited First Amendment privilege for journalists.

Chapter 8 is devoted in large part to the Freedom of Information Act, a federal statute prescribing the terms under which the media and others can obtain data from federal agencies. The Act contains nine exceptions, seven of which have resulted in a considerable body of case law. The chapter ends with a unique feature—the answers to six commonly asked questions about access to information at state and local levels.

Part III brings together the media and aspects of the media that are regulated by government. Here First Amendment guarantees have been held subordinate to more compelling public interests. Part III has chapters on obscenity, which the Supreme Court has held to be so lacking in ideas that it can be banned outright; broadcasting, which is the only news medium licensed by the government; advertising, which only recently was held to be protected by the First Amendment, but to a lesser degree than news and opinion; copyright, which permits creators of original works in any medium to protect them from unauthorized copying, and the business aspects of the media, which are subject to the same degree of regulation as any other kind of business.

The key to Chapter 9 is *Miller* v. *California*, the Supreme Court's most recent attempt to define obscenity. In that decision, the Court gave local juries broad discretion in determining whether sexually explicit materials violate community standards. The topic is of interest mainly because it helps define the limits of First Amendment protection for materials some find objectionable.

Chapter 10 focuses on those aspects of broadcasting law that have survived a movement toward deregulation that began with President Carter. At this writing, broadcasting stations still must offer equal opportunities for air time to political candidates and they must abide by the fairness doctrine, which requires stations to present all sides of controversial public issues. The closing section focuses on cable television, which has cast doubt on the scarce frequency theory, which for more than fifty years has supported government regulation of broadcasting.

Chapter 11 surveys the Supreme Court decisions which established First Amendment protection for commercial advertising. This protection is limited to truthful advertising for legal goods and services, and may be overridden if government can establish a compelling reason for regulating or even prohibiting advertising. This chapter also explains the media's right to refuse advertising and examines the largely discredited argument that the public should have a mandatory right to present its views in the

media. It includes a 1986 Supreme Court decision holding that public utilities can not be compelled to include special interest messages with their bills.

Chapter 12, on copyright, is largely concerned with the distinction between fair use and infringement. It includes the Supreme Court's 1985 decision in *Harper & Row* v. *Nation*, rejecting the argument that highly newsworthy infringements should be protected by the First Amendment. This chapter also contains an explanation of plagiarism that my students found useful.

The final chapter focuses on the business aspects of the media. Much of it deals with the application of antitrust law to the media, including President Kennedy's ill-fated attempt to preserve competitive newspapers. It also presents the leading cases dealing with the right to place newsracks in public places and with the taxation of the media.

I have tried to avoid making one chapter dependent upon another. I have done this in recognition of the fact that some instructors elect not to cover all that comes under the broad topic of media law. However, I also have learned from the many instructors who have read all or part of this manuscript that there is little agreement as to what can be left out. Therefore, I have decided to offer it all and trust those who adopt the book to decide what they need and what can be ignored.

While it was student reaction to the textbooks I chose that spurred me to think about a book of my own, nothing would have happened had it not been for two persons, Richard G. Gray and Roth Wilkofsky. Dick not only was my chairman, director, and dean for fifteen years, he was my friend. He believed that I had a book in me and he let me know during our annual review chats that I ought to write it. When I decided to give it a try, Roth, as a senior editor at Random House, was willing to consider a proposal. From the beginning, he has given me strong support, and showed the utmost patience when time proved that writing a book is not as easy as I once naively thought it was. He has gone many extra miles with me to bring the work to fruition. For that, I wish there were stronger words than "thank you." I deeply regret that Dick Gray died before I finished this book.

At a critical moment in the project, Dr. Peter Sandman, professor of journalism at Rutgers University, agreed with Roth's request to read the manuscript. His helpful advice resulted in major restructuring designed to make the book a better teaching instrument, and I am grateful for his help.

I also wish to thank the following reviewers of various drafts of the manuscript for their helpful suggestions: Douglas Anderson, Arizona State University; Edmund Blinn, Iowa State University; John J. Breen, University of Connecticut; James K. Buckalew, San Diego State University; T. Barton Carter, Boston University; Bill Chamberlin, University of North Carolina, Chapel Hill; Carolyn Stewart Dyer, University of Iowa; Marian Huttenstine, University of Alabama; Paul Jess, University of Kansas; Kelly Leiter, University of Tennessee; Kent R. Middleton, University of Georgia; John Murray, Michigan State University; James M. Neal, University of Nebraska, Lincoln; Mack Palmer, University of Oklahoma; P. E. Paulin, Oklahoma State University; David Protess, Northwestern University; J. D. Rayburn, University of Kentucky; Jack Schnedler, Northwestern University; Todd Simon, Michigan State University; Don Smith, Pennsylvania State University; William Steng, Oklahoma State University; and John D. Stevens, University of Michigan.

I also want to acknowledge support from two lawyers, my long-time friend Francis T. Martin of Cincinnati and Ralph Fuchs, emeritus professor of law at the Indiana University

School of Law. Both were formidable advocates who were willing to tolerate a journalist's attempts to talk law and offer constructive advice. I regret that neither lived to judge his pupil's work.

I have been helped, too, by my students who have been willing, semester after semester for more than fifteen years, to enroll in my communications law classes despite my reputation as a tough grader. They have taught me what sells and what does not when your audience is made up of twenty-year-olds trying to learn enough law to pass a required course on the way to a degree. A goodly number of my students have thought enough of my wares to desert journalism and go on to law school.

Dr. Herbert Terry of the Telecommunications faculty at Indiana University offered helpful advice, and more documents than I could use, for the chapter on broadcasting.

Keith A. Buckley and Linda K. Fariss, research librarians at the I.U. School of Law, have been most helpful in finding obscure citations and essential reference materials.

Finally, I acknowledge the support of Elizabeth, my wife. It has not been easy for her to share me with a project that has demanded a goodly part of my time on more days than I care to count.

Despite their involvement in the work, none of the above should be held responsible for any errors or omissions that have made their way into print. The buck stopped at the point where my fingers met the keyboard of my typewriter.

Ralph L. Holsinger

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PART 1

FREEDOM OF SPEECH AND FREEDOM OF THE PRESS

CHAPTER 1

FREEDOM OF SPEECH AND PRESS: HISTORY AND PHILOSOPHY

For more than two thousand years, people have struggled to win the right to speak freely and critically about political, economic, religious, and social issues. And for most of that time, in most places, they did so at the risk of severe punishment, including death. Even today, many governments consider critics of official policies enemies of the state, to be tortured, imprisoned, or exiled. The Soviet Union and the Union of South Africa are but two examples.

Those who believe in freedom of speech and press argue that such freedom ensures government that is responsive to the needs of the people. Only if men and women are

free to talk about their problems can they arrive at mutually acceptable solutions. The Supreme Court of the United States has endorsed that view, holding in several cases that debate on public issues should be robust, uninhibited, and wide open.

There are also those who believe that the news media should serve government by helping it win public approval for policies designed by government officials to meet the people's needs. In this view, uninformed criticism merely creates dissatisfaction and interferes with the ability of government to perform.

The debate between those who advocate freedom of expression and those who argue for restraint continues today. Every recent American president has complained that a "negative press" has made it difficult to carry out his policies. Nor are critics of freedom of speech and press confined to government. When American Nazis have demonstrated in Jewish neighborhoods, or when Ku Klux Klansmen have burned crosses in cities with a large black population, riots have resulted. At another level, people have sought to censor or ban MTV, the lyrics of popular rock songs, and movies featuring sex and violence because they believe such things contribute to the decay of our culture. So the question of how far freedom of speech and press should be permitted to go remains important as we approach the end of the twentieth century.

This chapter presents a brief history of the development of the idea that people ought to be free to criticize their rulers. The first part is designed to highlight the forces that led to the American Declaration of Independence and the Constitution, particularly the First Amendment guarantees of freedom of speech and press. The second part examines the philosophy supporting and limiting freedom of speech and press.

Major Cases

American Communications Association v. *Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

Schenck v. *United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

THE HISTORY OF FREEDOM OF SPEECH AND PRESS

The Idea of Freedom

In the fifth century B.C., the city-state of Athens adopted a form of democracy. The experiment proved short-lived, but the idea that people should be able to govern