1998 Edition

Mass Media Law

Don R. Pember

1998 Edition

Mass Media Law

Don R. Pember
University of Washington

Boston, Massachusetts Burr Ridge, Illinois Dubuque, Iowa
Madison, Wisconsin New York, New York San Francisco, California St. Louis, Missouri

McGraw-Hill
A Division of the McGraw-Hill Companies

MASS MEDIA LAW, 1998 EDITION

This book is printed on recycled, acid-free paper containing 10% postconsumer waste.

1 2 3 4 5 6 7 8 9 0 QPF 9 0 9 8 7

ISBN 0-697-32716-7

Publisher: Phil Butcher
Sponsoring Editor: Marjorie Byers
Developmental Editor: Valerie Raymond
Marketing Manager: Carl Leonard
Project Manager: Jayne Klein
Production Supervisor: Sandy Hahn
Designer: LuAnn Schrandt
Cover photo © COMSTOCK, INC.
Compositor: Electronic Publishing Services, Inc.
Typeface: 10/12 Times Roman
Printer: Quebecor Printing Book Group/Fairfield

ISSN Number 1088-9973

www.mhhe.com

Mass Media Law

Preface

The First Amendment to the U.S. Constitution, which among other things guarantees freedom of speech and freedom of the press, was ratified more than 200 years ago. When this critical element in our political machinery was approved mass media consisted solely of newspapers, magazines, and books. Handbills and leaflets also fall within the protection of the First Amendment but are not generally regarded as mass media.

As each new medium in the growing panoply of communication technology developed, it seemed as though the First Amendment had to be invented all over again. Motion pictures were denied First Amendment protection for nearly half a century. Radio and then television were relegated to second class First Amendment status when the courts finally considered the freedom of expression of broadcasting. Cable television struggled to find its First Amendment protection. The battle in the 1990s has been over computer-mediated communication, notably the Internet. In June of 1997 the Supreme Court, in a ruling as important as any First Amendment decision in the last 30 years, ruled that communication transmitted on the Internet is given the same First Amendment protection as communication carried in newspapers, magazines, and books, the highest level of First Amendment protection. In a single decision the high court undercut an important federal law regulating speech on the Internet, the Communications Decency Act, as well as the attempts of many others at all levels of government to censor the content of computer-mediated communication.

While the high court's ruling answers what was perhaps the most important question regarding the Internet and the law, other more mundane questions abound. In this edition of Mass Media Law you will find material regarding the intersection of the law and the Internet in many chapters. Included are discussions about where computer-mediated communications stand in relation to the First Amendment, and legal problems involving libel, invasion of privacy, copyright, access to information, obscenity and indecency, and messages transmitted on the Internet. At least one observer who read the unfinished manuscript suggested bunching all material related to the Internet and the law into a single chapter. But that makes no more sense than having separate chapters on mass media law and magazines, mass media law and newspapers, mass media law and books, etc. Computer-mediated communication is simply another means of transmitting large quantities of data to a great many people with great speed, the hallmark of all mass media. The Internet, which is special and unusual in many ways, remains a mass medium.

While there are substantial additions to this new 1998 edition, much of the material remains consistent with the 1997 version. We have retained the enhanced Instructor's Manual, with computerized test capabilities, and the Student Study Guide. Instructors with questions regarding these ancillary materials should call their McGraw-Hill Representatives.

Innumerable people helped get this 1998 edition of Mass Media Law into the bookstores. This was a transition year with the book being started in the late summer of 1996 under the aegis of Brown & Benchmark and being completed in August of 1997 under the stewardship of a new publisher, McGraw-Hill. This author found the transition incredibly smooth, and thanks must go to the dedicated staffs of both publishers. Kudos go to the Brown & Benchmark support team, including Kassi Radomski, Jayne Klein, and Karen Dorman. And thanks to the talented and thoughtful staff at McGraw-Hill, including Marge Byers, Valerie Raymond, Jennifer Kaldawi, and Jayne Klein. Several colleagues who teach mass communications law in a variety of venues also get my thanks for the time they spent reading the manuscript and their insightful comments. Former student, talented colleague, and good friend Michelle Johnson of Westfield State College provided invaluable assistance by generating a terrific Student Study Guide. My thanks to her for taking on this task at a late date. Finally, as always, my thanks and my love go to my wife Diann for her thoughtful and helpful comments, her continual support, and for producing from grubby manuscript an attractive and well-organized Instructor's Manual.

Don R. Pember
Seattle, Washington
July 1, 1997

BILL OF RIGHTS
FIRST 10 AMENDMENTS TO THE CONSTITUTION

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Article III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first 10 Amendments (Bill of Rights) were adopted in 1791.

CONTENTS

THE AMERICAN LEGAL SYSTEM 1

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 the American Republic. From the 1770s, when in the midst of a war of revolution we attempted to legally justify our separation from the motherland, to the late 1990s, 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 Alexis de Tocqueville and others, political 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.

Americans have protested nearly every war the nation has fought—including the Revolutionary War. The record of these protests is contained in scores of court decisions. The prohibition and crime of the '20s and the economic woes of the '30s 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 17 chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the five 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 before law exists. 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.

Scholars still debate the genesis of "the law." A question that is more meaningful and easier to answer is: What is the source of American law? There are really five major sources of the law in the United States: the Constitution, the common law, the law of equity, the statutory law, and the rulings of various executive and administrative bodies and agencies. Historically, we can trace American law to Great Britain. As colonizers of much of the North American continent, the British supplied Americans with an outline for both a legal system and a judicial system. In fact, because of the many similarities between British and American law, many people consider the Anglo-American legal system to be a single entity. Today in the United States, our federal Constitution is the supreme law of the land. Yet when each of these five sources of law is considered separately, it is more useful to begin with the earliest source of Anglo-American law, the common law.

THE COMMON LAW

The **common law,** which developed in England during the 200 years after the Norman Conquest in the 11th century, is one of the great legacies of the British people to colonial America. During those two centuries, the crude mosaic of Anglo-Saxon customs was replaced by a single system of law worked out by jurists and judges. The system of law became common throughout England; it became the common law. It was also called the common law to distinguish it from the ecclesiastical (church) law prevalent at the time. Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according to community custom, and governmental sanction was applied to enforce the resolution. As such, the common law was, and still is, considered "discovered law." When a problem arises, the court's task is to find or discover the proper solution, to seek the common custom of the people. The judge doesn't create the law; he or she merely finds it, much like a miner finds gold or silver.

This, at least, is the theory of the common law. Perhaps at one point judges themselves believed that they were merely discovering the law when they handed down decisions. As legal problems became more complex and as the law began to be professionally administered (the first lawyers appeared during this era, and eventually professional judges), it became clear that the common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of the judges. While judges continued to look to the past to discover how other courts decided a case when given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves.

1. Abraham, *Judicial Process.*