

LAW & ETHICS

FOR PROFESSIONAL COMMUNICATORS



RHONDA BREIT

Law and Ethics for Professional Communicators

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Preface

Law and Ethics for Professional Communicators has had a long gestation period. I started researching the book in 2002, when I took up a position with the University of Queensland's School of Journalism and Communication. Media law and professional communication practices have changed a lot in that time and many of the chapters in this book have been re-written numerous times in order to reflect the current position.

The original proposal for this book was far more ambitious than the final product. The completed book is a compromise — like so many creative and intellectual endeavours. But I hope that the final product goes some way to meeting its aim of describing the symbiotic relationship between law and communication. I also hope that through my analysis and discussion of this relationship that I am able to inspire readers with some of my passion for this broad and complex area of study. It is a truly fascinating area that requires a lot more involvement from professional communicators and members of the public. I hope this book goes some way towards facilitating their involvement.

After several years of research and reflection, this book was finally completed in 2007. There are so many people to thank. First, I must thank the wonderful journalists, public relations practitioners and lawyers who freely gave up their time to tell me about their experiences. In particular, I would like to thank journalist and former Victorian Privacy Commissioner Paul Chadwick, Socom Chairperson Sheila O'Sullivan, Chris McLeod (*Herald and Weekly Times*), David Fagan (*The Courier Mail* editor), Chris Masters (ABC journalist), Michael McKinnon (The Australian FOI editor), PR ethicist David Potts, media commentator journalist and lawyer Richard Ackland, Hedley Thomas (*The Courier Mail* journalist), Australian Press Council Chair Ken McKinnon, MEAA Federal Secretary Christopher Warren and barrister Peter Applegarth. My thanks also to my colleagues at the University of Queensland's School of Journalism and Communication, particularly Associate Professor Pradip Thomas who has offered

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Finally, I would like to thank my family. I could not have completed this book without the support, encouragement, love and devotion of my husband, John and son William. I would also like to express my gratitude to my brother, Bill and sisters, Robbie Vicki and Joanne.

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Introduction

When asked to identify the biggest legal challenge facing professional communicators, Walkley Award winning journalist, lawyer and inaugural Privacy Commissioner of Victoria Paul Chadwick quickly replied: ‘ignorance’ (Chadwick, 2003). Journalists, and other professional communicators, have a ‘duty’ to understand the law in order to perform their role effectively, according to Chadwick (Chadwick, 2003).

But another challenge professional communicators’ face is adapting to the changing media environment where traditional roles are being blurred. Technological advances in communications technologies coupled with massive economic, social and cultural change have transformed the media environment, valorising information to a level where media corporations are viewed as some of the most powerful organisations in the world. Now information and communication are international commodities (McChesney, 1997). But at the same time, improved technologies and educational standards — particularly in relation to media literacy — in many parts of the world, have resulted in a ‘seismic transformation in what and how people learn about the world around them’ (Project for Excellence in Journalism, 2006).

The *State of the News Media Survey 2006*, which is an annual survey of United States journalism conducted by the Project for Excellence in Journalism, has concluded that:

Power is moving away from journalists as gatekeepers over what the public knows. Citizens are assuming a more active role as assemblers, editors and even creators of their own news. Audiences are moving from old media such as television or newsprint to new media online.

This has prompted calls for journalists to ‘redefine their role and identify which of their core values they want to fight to preserve — something they have only begun to consider’ (Project for Excellence in Journalism, 2006).



Part of this transformation in journalism is being brought about because of the emergence of public relations practitioners as specialist communicators. Increasingly, journalists are dependent on public relations practitioners as sources of information. At the production level however, media corporations are mindful of the need for cross-marketing and cross-promotion resulting in a form of public relations being embedded into journalistic practice. Therefore this book looks at the communication process more broadly to take account of the increasingly dependent relationships between journalism and public relations.

The changes cited are impacting on media audiences. The audiences that communicators hope to reach are now transcending traditional borders, creating an international media environment. These changes to the media environment present legal and ethical problems. This book charts the roles of professional communicators (journalists and public relations practitioners) in the new media environment analysing some of the key legal and ethical challenges such communicators might encounter.

It could be argued that advertising law is also important and should be dealt with in a book on professional communication. However, the author has chosen to focus on journalism and public relations because their aim is information delivery — albeit with different objectives — rather than selling a product (this point will be discussed further in Chapter 1).

This collective analysis of journalism and public relations helps posit these communication practices within a media and legal context. This book argues that law and ethics are integral to professional communication. As van Hoecke (2002, p 7) notes law is part of the communication process because it offers a framework for human action and communication. But law is also a product of communication between various parties and sections of society including legislators and citizens, courts and litigants, legislators and the judiciary as well as contracting parties (van Hoecke, 2002, p 7).

Just as the law is integral to how professional communicators do their job; journalists and public relations practitioners have a role to play in facilitating the communication process that gives rise to and defines the role of law in society. Thus the relationship between (professional) communication and law is symbiotic. This book seeks to explore this symbiotic relationship between professional communication and the law.

Purpose and approach

Given the range of legal issues arising from professional communication, this book does not purport to be an exhaustive treatise. It does seek to position law and professional communication into a practical context thereby aiding professionals to take an active role in the legal decision-making within their workplace. In summary, it aims to:

- identify the relationship between law and professional communication and the fundamental rights that underpin professional communication in

Australia, offering a theoretical framework for our analysis of professional communication law;

- provide an overview of the diverse range of legal issues arising from professional communication practices;
- impart a functional understanding of the legal rules and principles that regulate professional communication in Australia and predict future legal and ethical problems facing professional communicators.

Designed for non-lawyers with a focus on the application of legal and ethical principles, the book analyses the roles of professional communicators in Australia and the legal and ethical problems they face. Having described the media and legal context in which professional communicators operate, the book uses contemporary examples and interviews with journalists and public relations practitioners to examine legal and ethical issues arising for Australian practitioners. The practical focus of this book is grounded on interviews with professional communicators. During these candid discussions about what they do and the legal problems they face in performing their roles, practitioners were encouraged to discuss the legal and ethical problems they have encountered throughout their careers. Using the practitioners' stories, the author has identified the common legal problems facing journalists, public relations practitioners and literary writers. Unsurprisingly, the key problem areas to emerge from the practitioners' stories are defamation, contempt of court and copyright issues. However, as technology becomes more important privacy is a troubling issue, mainly due to the uncertainty surrounding recently introduced and amended legislation. As the Australian media landscape changes, so do the strategies for minimising the harmful effect of legal responses to problems. Therefore it is important to predict potential problems and canvass issues not considered by the practitioners arising from the roles they perform. In this sense, the author is predicting future legal and ethical problems that may emerge from expanding communication functions, the use of technology and the legal response to these changes.

Traditional approaches to analysing legal problems — where the law is considered under headings like defamation, contempt of court, advertising law — may work well for law students, but non-lawyers have to understand *why* they need to know about the law. By having practitioners tell their stories, the author can make the law relevant for the non-lawyer, identifying how it intersects with everyday practice. A thematic approach to legal issues will be adopted, where the discussion focuses on the relationship between law and communication. In this way, the book attempts to bring these issues alive for professional communicators to help practitioners minimise the legal and ethical risks arising from the roles they perform.

Focus of the book

The book focuses on the Australian legal system, however, it does attempt to position professional communication law in an international or global context. This introduction explains the pedagogy of the book, what it aims to do. Chapter 1 sets the

context for discussion of professional communication law. It outlines the media and legal environment, offering a conception of the relationship between professional communication and law in terms of communication. First, the chapter looks at the roles performed by various professional communicators, mapping the relationships between journalism and public relations, identifying areas of commonality and tension. This is followed by an examination of the legal environment.

Having provided a framework for evaluating the relationship between law and professional communication, the book generally outlines the key legal problems facing professional communicators.

Chapter 2 discusses the concept of freedom of speech and its importance to the communicative context in which journalism and public relations operate. It maps the theoretical traditions that have framed our understanding of freedom of expression in Australia and then analyses how this has been operationalised in terms of Australia's media policy. This provides the context for analysing Australia's Freedom of Information (FOI) laws that are considered in Chapter 3.

Chapter 3 analyses the effectiveness of Australia's FOI laws by using a five-dimensional matrix. It argues professional communicators are central to FOI effectiveness, offering examples of how journalism and public relations have contributed to the FOI culture in Australia. The chapter concludes that a multi-dimensional approach is needed to assess FOI culture. Legal reform must be accompanied by changes at communicative levels — including a more nuanced understanding of the nature, quality and value of information. And here greater attention must be paid to the distinctions between what is public and what is private information.

Chapter 4 focuses on the distinctions between the concepts of public and private. Like FOI, privacy is a multi-dimensional concept. These multiple dimensions operate on a number of levels. First, the chapter outlines the numerous conceptions of privacy that have framed our understanding of privacy in Australia. It then looks at the various ways in which the law protects privacy, concentrating on the emerging common law tort of privacy, information privacy protection, privacy of conversations, trespass, nuisance and breach of confidence. The chapter concludes that privacy is 'a multi-faceted concept with multiple legal, social and cultural dimensions' of which professional communicators must be mindful. However, it cautions that changing technology and social conditions means that attitudes towards privacy are changing and therefore laws must change. But just as laws must change, so too professional communicators must reflect on their practices and adjust to take account of this change.

Chapters 5 and 6 look at the relationship between professional communication and the courts as an example of where journalists, public relations practitioners and the judiciary are working collaboratively to promote public understanding. Chapter 5 grounds this discussion by revisiting the role of publicity in the courts and the legal principles that underpin it. The chapter highlights the important role of publicity to

the effective administration of justice. On the other hand, effective administration of justice might at times need to restrict publicity and therefore censor communications surrounding court activity and processes. The emerging tensions — between journalists, public relations practitioners and the courts — can result in an uncomfortable relationship. The chapter explains how the appointment of Public Information officers is moderating the tensions between journalists and the judiciary, thus offering an example of where journalism, public relations and courts work together for the public interest. Chapter 6 maps the legal risks associated with communicating information relating to the courts and professional communicators' obligations to comply with court orders.

In the information and communication era, reputations and professional communication are integrally linked. Professional communicators can help build reputations and they can also destroy them. But at the same time, the professional communicator's own reputation is under scrutiny. Chapters 7 and 8 look at the laws that protect reputation and analyse how they affect professional communication.

Chapter 7 positions the concept of 'reputation' to help identify why the law protects them. Understandings of reputation are contestable. In fact, Bell (2006, p 139) distinguishes between the 'cultural and legal meanings' of reputation, arguing the 'cultural context within which defamation law is practised and publicly understood has changed rapidly and radically'. Chapters 7 canvasses what a plaintiff must prove in order to bring an action in defamation, outlining the legal meaning attributed to a person's reputation under the Uniform Defamation Laws enacted in Australia in 2005 and 2006. The chapter argues, however, that despite the comprehensive reforms across Australia, the gaps between legal and cultural understandings of reputation have not been addressed.

Chapter 8 outlines the defences available to a publisher to justify publication of defamatory material highlighting the legal burden professional communicators' face in justifying publication.

Chapter 9 looks at the various ways in which professional communicators can protect their creative endeavours. It focuses on intellectual property law particularly the areas of copyright, trade marks, confidential information and registration of domain names. It explores whether there is copyright in news and press releases, outlining potential problems facing professional communicators.

Chapter 10 explores the role of contracts in professional communication. It argues contracts permeate every aspect of professional communication by defining a professional communicator's responsibilities but they also delimit the way a professional communicator goes about gathering and disseminating information. This chapter identifies the essential elements of a contract, while identifying some of the key problems and opportunities emerging from the use of online contracts. The chapter concludes with a discussion of employment contracts and a professional communicators' duty of care.

Chapter 11 addresses professional communication ethics and accountability. First, it identifies a number of distinctions between ethics and law and then maps the key theories of ethics that have influenced the debate on professional communication ethics in Australia. It goes on to map the regulatory environment and evaluate the codes of ethics and codes of professional conduct that apply to professional communication in Australia in terms of key criteria relating to best practice in self-regulation. It concludes by looking at some key ethical issues facing professional communicators, including the changing media environment; celebrity, opinion and the changing face of news; celebrity and privacy and the changing media audience. It concludes with a brief discussion on public interest and an examination of the audiences' role in media ethics.

In conclusion, the book calls on professional communicators to engage in a dialogue about their regulatory environment. Just as journalists and public relations practitioners are engaging with issues of convergence in the media environment, they need to deal with issues of convergence in the regulatory environment.

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