# LAW OF MASS COMMUNICATIONS

## FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA

TWELFTH EDITION

DWIGHT L. TEETER, JR.

BILL LOVING

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# PREFACE TO THE TWELFTH EDITION

This Twelfth Edition of Law of Mass Communications brings this textbook to its 40th anniversary. When the first edition appeared in 1969, the great libel decision by the Supreme Court of the United States in New York Times v. Sullivan (1964) had only recently put the brakes on Alabama's efforts to use civil libel as seditious libel. That transparent attempt to punish criticism of racist public officials had the potential for suing news media into oblivion for daring to publish information about misdeeds by public officials. Also, four decades ago, the tort law of privacy had filled in far less of the outline crafted in 1960 by Dean William L. Prosser, and copyright law was still guided by a horse-and-buggy era statute, the Copyright Act of 1909.

The more things change, the more things stay the same, says the French proverb. Don't believe that! For communications industries and for the law, rewrite that proverb to say, "The more things change the more you need to know."

The 2008 edition, like its 2004 predecessor, is completed when the United States is at war. Essayist Gore Vidal has described the nation as being in a state of "perpetual war for perpetual peace." War obviously is attainable; peace is problematic. When the nation is at war, declared or not, the United States always endures times when its freedoms are under attack not only from the outside but also from within, but zealots–some patriotic, some merely opportunistic--who seize upon crises as excuses to pass restrictive and privacy-invading legislation.

The centerpiece of U.S. government efforts to make the nation secure is the USA PATRIOT ACT, the acronym for legislation bearing the clumsy by flag-waving title: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. This legislation and the excesses it spawned remind historians of the Alien and Sedition Act of 1917 and its 1918 "Sedition" Amendment. Wartime inevitably increases secrecy.

There are many other citizens' and communication law issues. Collisions of privacy interests with hyperactive newsgathering and arrogant intrusiveness by government agencies and private businesses continue to cause myriad problems for citizens, whether or not they are professional communicators.

Convergence of communication industries, including continuing exponential growth of the Internet and the World Wide Web, chal-

lenges students as never before. Students need mastery of sufficient techniques to work across media and to learn enough communications law to stay out of legal trouble. The Internet may be "new"and copyright law may be old, but the rules of intellectual property apply whether the medium is the printed page, LCD or plasma.

This textbook serves the first course in communications law and does not have the answer for every legal question that arises. Each occurrence rests on its own unique facts that will govern its outcome. New issues arise as media evolve. To help students cope with constant change, Law of Mass Communications presents governing principles along with case illustrations.

In this Twelfth Edition of Law of Mass Communications, Dwight Teeter and Bill Loving have built upon the work of the late Professor Harold L. Nelson of the University of Wisconsin, founding lead author of this book, and of Dr. Don R. Le Duc, Ph.D., J.D., Emeritus Professor of Communication, University of Wisconsin-Milwaukee. Professor Le Duc was co-author for the Seventh (1992) and Eighth (1998) editions. Dwight Teeter was Dean, University of Tennessee College of Communications, from 1991 to 2002, returning to full-time teaching in 2003. In 1991, he received the Society of Professional Journalists Distinguished Teaching Award. Professor Bill Loving, J.D., is a consultant on journalistic performance and on libel, copyright, and privacy lawsuits and an occasional First Amendment litigator. In 1997, he received the Oklahoma Society of Professional Journalists First Amendment Award.

The authors thank those who have helped us. Dwight Teeter acknowledges his special thanks to the Instructor Jean E. Moore, who retired in 2007, and to Professor Sibyl D. Marshall, both of the Joel A. Katz Library of the University of Tennessee College of Law. Also of great help and support were Dean Emeritus Kelly Leiter, my team teaching partner for sixteen years, and the renowned First Amendment advocate Richard L. Hollow, J.D., of the Knoxville firm Hollow & Hollow. Teeter offers special thanks to another remarkable attorney who also taught him much about libel and First Amendment law, J. Houston Gordon of the Covington, Tennessee, firm bearing his name.

Bill Loving's thanks again go to his students, past and present, for continuing to surprise, inspire, challenge and otherwise ensure that every class is a whole new experience. He also thanks Professor Wilma Wirt of Virginia Commonwealth University. He thanks Hannah Allam and the team at Knight-Ridder for their efforts to bring forth the truth about the Iraq invasion.

Both Teeter and Loving gratefully acknowledge superb help, over the years, from the unflappable production guru and problem-solver James D. Coates of Foundation Press.

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# Part I

# PHILOSOPHICAL AND CONSTITUTIONAL FOUNDATIONS OF FREE EXPRESSION

## Chapter 1

## FOUNDATIONS FOR FREEDOM

**Sec.**



A major test of a nation's freedom is the degree of liberty its people have in speaking, writing, and publishing. The hand of authority rests lightly on speech and press at some places and times, heavily at others. But its presence is felt everywhere, including the nations of the Western World which generally consider themselves the most freedom-loving of all.

Throughout history, some degree of legal control over expression has been in force even in the most free societies. Although values of free speech and press may be considered paramount and exalted, there are circumstances where other values may take priority and win in a conflict over rights. For example, the individual's right to a good reputation limits verbal attacks through the law of civil libel. In wartime, assertions of national security may take precedence over press freedom. Multitudes of laws regulating business, industry and trade apply fully to the commercial press, to advertising, to public relations, and to broadcasting and to newer communication technologies.

The goal of this textbook is to serve students in a first or survey course in communication law. A major reason for this book is to help communicators try to "stay out of trouble," to learn something about the pitfalls of libel and slander, invasion of privacy, and copyright infringement. Perhaps the examples and discussion offered here can serve, as legal historian James Willard Hurst suggested of his field, like training for wrestlers: to help keep their balance, to avoid being upset by sudden and unexpected on-

slaughts.[1] And on many occasions, of course, trying to behave ethically will prevent legal questions from arising at all.

This book will provide students with some "how to" information, especially in chapters dealing with access to information.[2] It also tries to give students some understanding of the legal systems of the United States, especially as they interact with the sweeping field vaguely called "communication law." The law of mass communications can *not* be taught as if it is some compartmentalized area marked off by logical boundaries. Of necessity, this book cuts across most areas covered in a law school curriculum:

*Constitutional Law* deals with the basic governmental framework, as with a state constitution or the federal Constitution. The federal Constitution—the highest law of the land—divides government powers into the legislative, executive, and judicial branches. Powers of government are apportioned among those branches, and the document also lists, in its first ten amendments, powers that the U.S. government may *not* use against its citizens.

The federal Constitution is one of many constitutions in the United States. There are, after all, fifty-one legal systems: the federal system plus fifty state systems. In addition, there are charters governing the organization and operation of cities and counties. Keep in mind that the federal Constitution is the highest law of the land: state constitutional provisions in conflict with it are not enforceable.[3]

By their nature, as basic or "organic" law, written constitutions are not easily changed. As spelled out in the federal Constitution, it takes the vote of three-fourths of the states (via states' legislatures or called constitutional conventions) to amend the Constitution.

If a state or lower federal court decision conflicts with the federal Constitution, that law or decision may be found unconstitutional and thus null and void. Constitutional law involving the First Amendment guarantees of free speech and press is central to this book.

Most of the nation's law is *statutory:* made by legislatures, from Congress to state legislatures to county boards and city councils. If the meaning of a statute is at issue in a legal case or controversy,

[1] James Willard Hurst, Introductory Lecture, course on Legal History, University of Wisconsin–Madison, Spring, 1961.

[2] See Chapters 8 and 9.

[3] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Constitution, Article VI.

the meaning of the statute can be interpreted by courts. This search for meaning, called *statutory construction,* tries to define vague terms in the statute, often by digging back into the statute's *legislative history.* What did the legislature intend to do when it passed the measure?

There are plentiful examples of statutes directly affecting the communication media. Consider, for example, the basic federal anti-obscenity law, 18 U.S.C.A. § 1461 [Title or Volume 18, United States Code, at Section 1461]. That statute, passed in 1872, forbids sending obscene material through the mails or in interstate commerce. But what is obscene? The statute is unclear. As discussed in Chapter 3, U.S. courts have devoted much energy trying to define "the obscene."

*Statutory* law was not always the most important branch of law in the United States. Well into the Nineteenth Century, *common law* was the most important point of growth. *Common law* was law that was "found" or "discovered" by judges, based on the way particular disputes or transgressions were handled by prior judges or courts. It was a tradition of the law. *Common law* is distinct from *civil law.*[4] As Winston Churchill explained in his A History of the English Speaking Peoples, "The law was already there, in the customs of the land, and it was only a matter of discovering it by diligent study and comparison of recorded decisions in earlier cases, and applying it to the particular dispute before the court."[5] Judges, in other words, made law, using earlier decisions as *precedent* to guide them.

Although the United States began its legal order on the *common law* system derived from the English tradition, actual judge-made law-making has been rare during the past century. It has been suggested that the rarity of common-law creation in the Twentieth Century has spurred considerable scholarly fascination with the law of privacy. Much of privacy law has common-law origins, as described in Chapter 6, for it was created by courts instead of legislatures.

*Equity* is an area which originated in England centuries ago. An officer of the Crown called the Chancellor devised a court—called a Court of Chancery or a Court of Equity (based on what was fair or equitable)—to decide disputes which did not fit into the ordinary framework of the regular or "law" courts. Courts in the

[4] *Civil law* also is the term applied to civil lawsuits where one party sues another party to protect private rights. It can be confusing but for all intents and purposes, when you are dealing with law in the United States, the term *civil law* will refer to civil lawsuits. The exception is Louisiana which continued its *civil law* tradition from its French legal antecedents.

[5] Winston S. Churchill, A History of the English Speaking Peoples (New York: Barnes & Noble, 1993), p. 224.

United States have combined the functions, and now are said to "sit in both law and equity." Pieces of "equity" remain and are sometimes in the news. For example, in some situations the monetary award remedy available by winning a lawsuit would not be appropriate. In such instances, what is "equitable" is to have a court order someone to do something (as in a writ of "mandamus," which is Latin for "we demand"), or not to do something (as by a court granting an injunction or "cease and desist" order).

One of the most famous First Amendment decisions featured in this book—the "Pentagon Papers" case discussed in Chapter 2—involved an injunction ordering *The New York Times* not to publish stories based on secret documents on the history of the Viet Nam conflict. In 1971, the Supreme Court of the United States overturned the injunction to allow publication of the "Vietnam Archive" stories to continue.

*Administrative* law has grown rapidly in the past century. As the nation grew more complex, Congress found itself overmatched by commercial and industrial growth involved in the industrial revolution and the nation's westward expansion. Beginning in 1890 with the Interstate Commerce Commission (to regulate railroads), Congress delegated some of its power to an administrative agency. Similar agencies followed; two having particular applicability to the mass media are the prime federal regulator of advertising, the Federal Trade Commission (FTC), established in 1914, and the Federal Communications Commission (FCC), established in 1934 but actually following a pattern set by the Federal Radio Commission Act of 1927.

Additionally, the federal Executive branch has the power to make a kind of law through *executive orders.* For example, the "Confidential," "Secret" and "Top Secret" document classifications were established in 1951 by a presidential executive order by Harry S Truman, and remain in effect today.

Another way of classifying legal actions is as *criminal* and *civil* actions. *Black's Law Dictionary* (Seventh Ed.) defines a crime as "A social harm that the law makes punishable." A crime can be accomplished by *omission,* failing to perform a legally commanded duty (e.g. failure to register for the draft) or *commission* (e.g. killing someone on purpose with a blunt instrument). The latter example could lead to a charge of murder, or wrongful taking of another's life. Crimes are variously classified as *misdemeanors* (minor crimes, usually carrying a jail term of less than a year) and *felonies* (major crimes, generally defined as carrying a jail term of more than a year).

Crimes to be taken up in this book include obscenity, seditious libel, and some aspects of copyright infringement.

*Civil Law* includes personal damage actions ("lawsuits") in which a person asks for "the establishment, recovery, or redress of private and civil rights." If a publication hurts your reputation by printing a false and harmful statement about you, you could bring a legal action ("sue"), asking for "damages" ("money") in order to be made whole (restored to the position or condition that you occupied before the defendant committed her tortious conduct). Much of this book is taken up with discussion of damage actions in the areas of libel, invasion of privacy, and copyright infringement.

Another term which is basic in law school curricula is *tort.* It is a French word meaning "wrong," and the law assumes that if persons have serious wrongs done to them, they ought to be able to sue for compensation, in other words, to be restored to the position or state they occupied before the defendant committed her tort. Libel is a tort. Invasion of privacy is a tort.

For a further exposure to legal terminology, please see Appendices B and C of this book.

## SEC. 1. THE WORTH OF FREEDOM

**Major values underlying free speech and press include society's need for maximum flow of information and opinion and the individual's right to fulfillment.**

Freedom to speak, to write, to travel—and to criticize governments and government officials—now seems as natural as breathing to most residents of the United States. Early in the Twenty First Century, North Americans generally take for granted systems of representative self-government, with legislative and executive officials—and some judges as well—selected at regular intervals via secret ballots.

Taking freedoms for granted can be the world's most dangerous complacency. Particular concern should be directed at official efforts to discourage dissent or to push for some particular orthodoxy. If dissenters' freedoms are not protected, then all freedoms are in danger. Sometimes, individuals will find that they hold views that are widely despised, and will take risks in speaking out, especially in times of great social or political tension. And if there is no dissent, the results may be disastrous. Consider the words of Martin Niemoeller, haunted by the millions of Jews killed in Hitler's Holocaust:[6]

> First they came for the socialists, and I did not speak out—because I was not a socialist. Then they came for the trade unionists, and I did not speak out—because I was not a trade

[6] Martin Niemoeller, Exile in the Fatherland, ed. by H.G. Locke (Grand Rapids, MI: Eerdmans, 1986), p. viii.