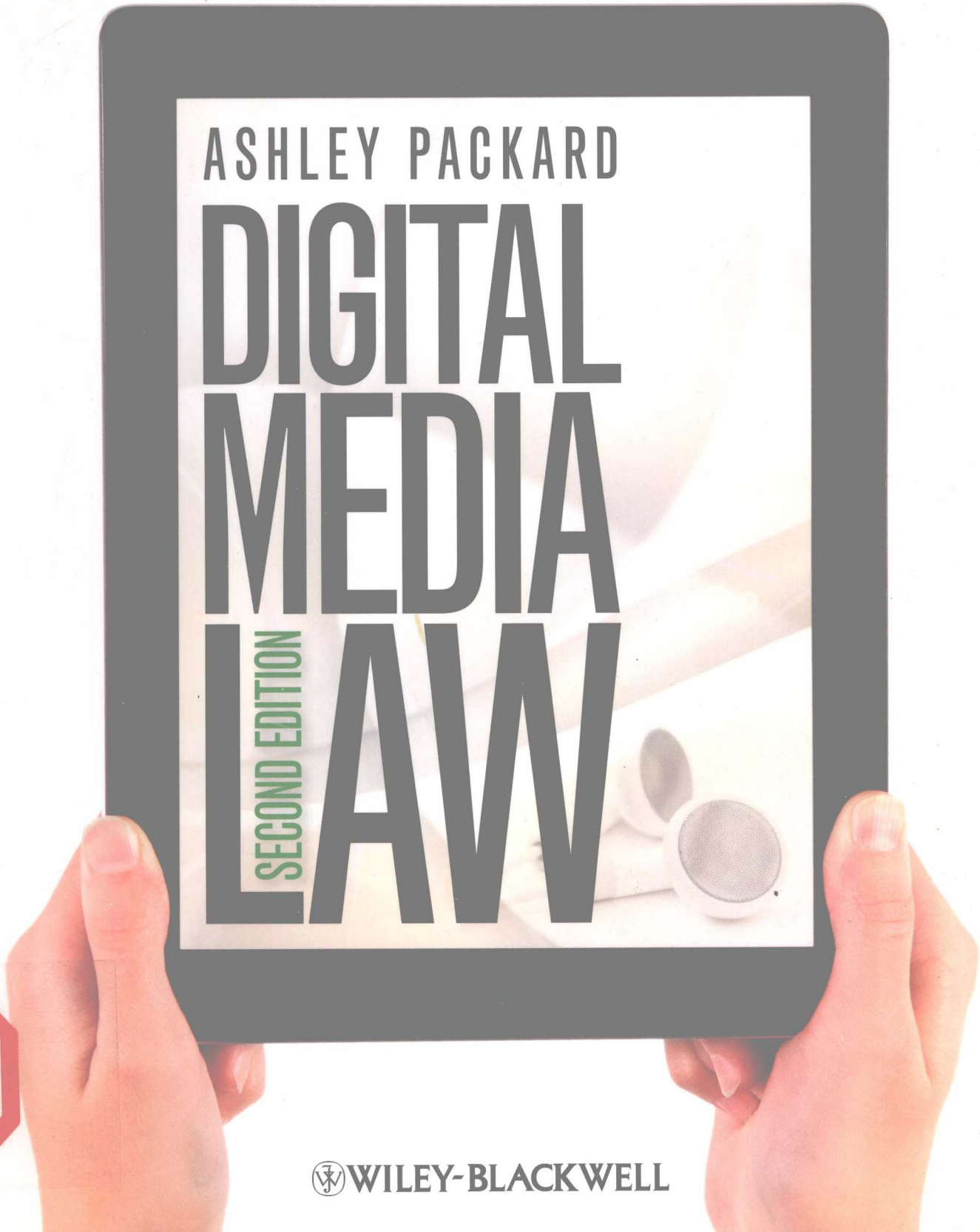
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Digital Media Law

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Ashley Packard

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Preface

It is time to stop thinking about media law as though it were the exclusive domain of traditional media organizations. Our global shift to digital media has precipitated a shift in information control. Meanwhile the affordability of digital media and their ease of use has democratized media production. With the right equipment, anyone can produce a website, listserv, blog or video with the potential to reach a mass audience. When *anyone* can become a media producer, *everyone* should know something about media law – both to protect their own rights and to avoid violating the rights of others.

This text focuses on digital media law, which like digital media, is characterized by its general applicability. The information presented here is applicable to professionals in fields such as publishing, public relations, advertising, marketing, e-commerce, graphic art, web design, animation, photography, video and audio production, game design, and instructional technology among others. But it is equally relevant to individuals who use digital media for personal interests – either to express themselves through social networking sites, blogs, and discussion boards or to engage in file trading or digital remixing.

As a field, digital media law is also characterized by its global impact. Digital media are borderless. Material uploaded to the Internet enters every country. Material broadcast via satellite reaches across entire continents. What does *not* travel internationally, however, is the First Amendment. American publishing companies and writers have been sued in courts all over the world for publishing information on the Internet that violated the laws of other countries. Foreign courts will apply their laws to material that is accessible within their borders through the Internet or via satellite if they perceive that material to have caused harm there. Producers of digital media need to understand how jurisdiction is determined and when foreign law can be applied to them.

Digital Media Law focuses on issues that are particularly relevant to the production and use of digital media. Its cases and controversies are based on freedom of expression, information access and protection, intellectual property, defamation, privacy, indecency, and commercial speech in the context of new media. This growing area of law also encompasses regulations imposed on the content and operation of telecommunications, such as broadcast, cable and satellite media, cellular communications, and the Internet. The material is framed to appeal to the broad audience of future media producers in communication and digital media disciplines. Current examples bring legal concepts to life. The text is also accompanied by a website (www.DigitalMediaLaw.us) that provides updated information about new court decisions and legislation, links to cases, and supplementary material. A little computer icon () appears in the text near cases and

controversies that are still in progress. You can visit the "What's New" section on the website for new information about them.

Chapter 1 provides an introduction to the legal system and a guide to locate primary sources of law. Use it to gain a basic understanding of law before moving on to other topics.

Chapter 2 explores the First Amendment. Speech is presumed to be protected in the United States unless proven otherwise. This chapter addresses the extent of that protection and its limitations.

Chapter 3 covers telecommunications law, including regulations for broadcast media, cable, direct broadcast satellite, and phone service. It explores the varying levels of First Amendment protection that apply to different media and the Federal Communications Commission's efforts to adapt its rules to converging technologies.

Chapter 4 discusses the Internet's regulatory structure and explains the difference between domestic and international concepts of net neutrality. It describes legislative efforts to make the Internet more accessible to people with disabilities. It also details statutes in place to combat cybercrime and introduces the concept of virtual law.

Chapter 5 provides an introduction to the legal area of procedure called conflict of laws. It explains how jurisdiction, choice of law, and enforcement of foreign judgments applies to transnational conflicts involving digitally disseminated content.

Chapter 6 describes federal and state guarantees of access to information and protections for information sources. This area of law, which has always been of particular significance to traditional journalists, is now increasingly important to bloggers and podcasters.

Chapters 7 and 8 provide an overview of intellectual property law. Chapter 7 explains copyright law, a field that applies to every digital media producer's work. Chapter 8 describes patent law, trademark protection, trade secret protection, and cybersquatting legislation.

Chapter 9 addresses defamation law, which has always been the bane of traditional media, but is now increasingly applied to "average people" who post damaging accusations on websites, blogs, and listservs. It explains how U.S. libel law differs from that of other countries and the impact that difference has on the treatment of plaintiffs and defendants.

Chapter 10 explores protections for privacy, scattered among state and federal statutes, common law, and state constitutions. It addresses rights to privacy in the marketplace, work, home, and electronic communications.

Chapter 11 delves into the regulation of sex and violence. In particular, it explores varying protections accorded indecency v. obscenity and how states have tried to apply these theories to control violence in media.

Chapter 12 explains differences in First Amendment protection accorded to commercial speech. It describes the efforts of regulatory agencies to control deceptive advertisements, spam, and antitrust violations.

A glossary is provided at the back of the book for looking up key terms. After you've learned more about the law, you may be interested in doing some of your own research. Look in the appendix for a simplified guide to legal research. It will help you find different sources of law and understand how to read legal citations.

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Without the dedicated editorial staff at Wiley-Blackwell, particularly Elizabeth Swayze and Julia Kirk, you would not be reading this book. Their experience and generosity guided me through its production. I also owe a debt of gratitude to the kind professors who reviewed the book for Wiley and, through their insightful comments, made the manuscript better. My deepest appreciation goes to my talented illustrator, Kalan Lyra, who took abstract ideas and turned them into something visually meaningful. I also want to thank three wonderful research assistants: Kyle Johnson, Jessica Casarez and Nick Pavlow. I remain indebted to William Fisch and Martha Dragich, my professors of constitutional law and legal research. Finally, my most sincere thanks goes to my husband, Chris, and daughter, Eliza, who supported me even when they realized how much time this book was taking away from them.

Brief Contents

Detailed Contents

1 Introduction to the Legal System

It makes no sense to dive into a particular area of law without understanding the basic structure of the legal system and its terminology. This chapter describes the primary sources of law in the United States and how to find them. It explains the structure of the federal and state court systems, the basic differences between civil and criminal law, and the role of judicial review in the United States. It can be used to establish a foundation before proceeding to other chapters and as a reference later when you need to review a particular concept.

The Meaning of Law

Before discussing how law is made, it might be helpful to define it generally. Law is a system to guide behavior, both to protect the rights of individuals and to ensure public order. Although it may have a moral component, it differs from moral systems because the penalties for its violation are carried out by the state.

Digital media law encompasses all statutes, administrative rules, and court decisions that have an impact on digital technology. Because technology is always changing, digital media law is in a state of continuous adaptation. But its basic structure and principles are still grounded in the "brick-and-mortar" legal system.

Sources of Law in the United States

All students are taught in civics class that there are three branches of government and that each serves a unique function in relation to the law. The *legislative* branch makes

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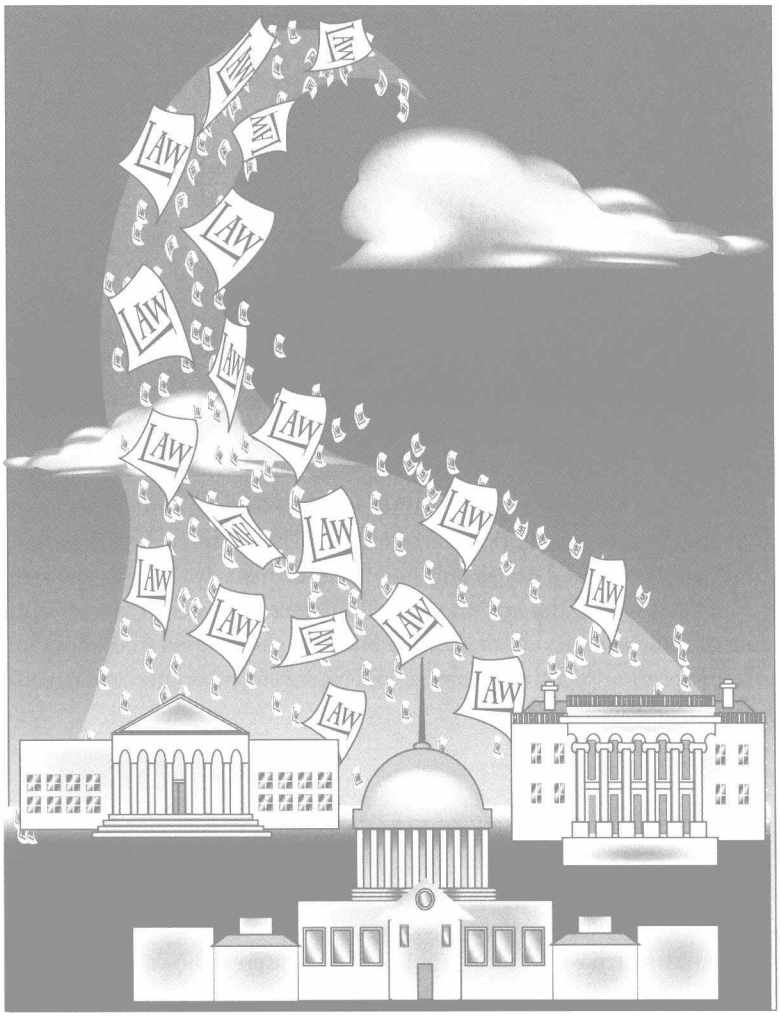

Figure 1.1 The legislative, executive and judicial branches of government make law. Illustration: Kalan Lyra

law, the *judicial* branch interprets law, and the *executive* branch enforces law. Although this is true, it is also a little misleading because it suggests that each branch is completely compartmentalized. Actually, all three branches make law. The legislative branch produces statutory law. The executive branch issues executive orders and administrative rules. The judicial branch creates law through precedential decisions. In the United States, sources of law include constitutions, statutes, executive orders, administrative agencies, federal departments, and the common law and law of equity developed by the judiciary. The most important source of law, however, is the U.S. Constitution.

Constitutions

A political entity's constitution is the supreme law of the land because it is the foundation for government itself. The constitution specifies the organization, powers, and limits of government, as well as the rights guaranteed to citizens. Because the legislative, judicial, and executive branches of government draw their power from the U.S. Constitution, they cannot act in opposition to it. For this reason, federal courts will overturn statutes and administrative rules that exceed constitutional boundaries. They will also reverse lower courts when their decisions stray too far afield.

The U.S. Constitution declares its supremacy in Article XI: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The *only* way to get around the Constitution is to alter the document. Ratification of an amendment requires approval from three-fourths of the states. Twenty-seven amendments have been ratified since the Constitution was signed. The first ten are known as the Bill of Rights.

The Constitution Society provides links to the U.S. Constitution and all state constitutions at www.constitution.org/.

In addition to the federal Constitution, there are 50 state constitutions. States are *sovereign* entities with the power to make their own laws. However, their laws must operate in accord with federal law. The U.S. Constitution includes a supremacy clause that requires state courts to follow federal law when conflicts arise between it and state constitutions or state law.[1] The federal constitution also requires that states give "full faith and credit" to other states' laws and judicial decisions.

Statutes

When we think about the word "law," we generally have in mind the statutes passed by our elected representatives as part of city councils, county commissions, state legislatures, and the U.S. Congress. These laws, called *ordinances* at the city level and statutes at the state and federal level, are meant to serve as guidance to people before they act. Criminal law, in particular, must give people fair warning that an act is illegal before punishing them for violating it, so it is *always* statutory.

Federal statutes are found in the United States Code, available at http://uscode.house.gov/. State codes may be found at http://www.whpgs.org/f.htm.

Statutes are intended to address potential social needs and problems, so they are written broadly to apply to a variety of circumstances. But their broad language sometimes creates confusion regarding the meaning of particular terms. In such cases, it falls to courts to interpret their meaning. Courts do this by looking at the statutory construction of laws, otherwise known as their *legislative history*. When laws are passed, they go through a series of committees. Each committee files a report, documenting its actions related to the law. This history of the legislative process usually includes the legislators' intent regarding the law's scope and interpretation. Judges may review the reports to find out what was discussed when legislators were hammering out the legislation and how they intended it to be applied.

As you read federal statutes, you will notice that many of them apply to activities carried out through "interstate or foreign commerce." For example, the federal stalking statute applies to anyone who uses "a facility of *interstate or foreign commerce* to engage in a course of conduct that causes substantial emotional distress." Likewise, federal law

[1] U.S. Const. art VI, § 2.

prohibits the transmission of obscene materials through *interstate and foreign commerce.* This phraseology is added to bring activities within the federal government's jurisdiction. The federal government does not have police power as states do. *Police power* – the right to legislate to protect the health, safety and welfare of citizens – is reserved for the states. So the federal government regulates activity related to these issues through its exclusive jurisdiction over interstate commerce. Article 1, Section 8 of the U.S. Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States . . . " Application of the term "commerce" does not mean that money must change hands. When the Constitution was written, commerce was also used in a non-economic context to refer to conduct. Congress applies the term loosely to conduct that crosses state and national borders. Activities carried on within a single state must be regulated under state law.

Executive orders

Within the executive branch of government, mayors, governors, and presidents have the power to issue *executive orders* that are legally binding. Some executive orders are issued to fill in the details of legislation passed by the legislative branch. For example, if Congress passes a bill requiring action on the part of federal agencies without providing sufficient information about how its mandate is to be implemented, the president may issue an executive order specifying procedure.

Executive orders may be found through the National Archives website at http://www.archives.gov/federal-register/executive-orders/.

In other cases, executives issue orders of their own accord to promote their policies. By directing federal agencies and officials to enforce their orders, presidents have created national parks, integrated the armed services, desegregated schools, funded and defunded stem cell research, and prohibited financial transactions with countries known for terrorism. Executive orders are also frequently used to regain order in the event of a threat to security. Following a natural disaster like a hurricane, for example, a governor may issue a state of emergency, which would empower him or her to make binding rules for a certain period of time.

Executive orders are passed without the legislature's consent, but the legislature may override them with enough votes. Congress can override a presidential executive order by passing legislation that contradicts it. If the president vetoes the legislation, Congress can override the veto with a two-thirds vote. Executive orders also may be challenged in court if they exceed the president's constitutional authority. For example, Harry Truman tried to avert a national strike of steel mill workers during the Korean War by issuing an executive order to the Commerce Department to seize control of private steel mills. The Supreme Court held the action unconstitutional.[2]

Administrative agencies and federal departments

Also within the executive branch, independent administrative agencies and federal departments are empowered to make *administrative rules* that carry the force of law.

[2]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Independent administrative agencies

Independent administrative agencies are so named because, although they are part of the executive branch of government, they carry out the mandates of the legislative branch in specific government-regulated industries. Agencies monitor technical areas of law thought to be better handled by specialists than members of Congress. Not only do they have the power to make rules and enforce them with fines and other retaliatory measures, but federal agencies also serve a quasi-judicial function. Their administrative courts are usually the first to hear cases related to violations of agency rules.

Congress provided the protocol for agency rule making and enforcement in the Administrative Procedures Act.[3] One of the Act's purposes is to keep agency rule making open to provide opportunities for public participation. To that end, the law requires agencies to publish notices of proposed rule making, opinions, and statements of policy in the *Federal Register*. Administrative rules are later codified in the *Code of Federal Regulations*.

The Federal Register is a daily digest of proposed and final administrative regulations issued by federal executive departments and agencies in the United States. It is available online at http://www.gpo.gov/fdsys/.

After their initial publication in the Federal Register, U.S. agency and department rules are codified in the Code of Federal Regulations, available online at http://www.gpo.gov/fdsys/.

Another purpose of the Administrative Procedures Act is to keep the process for rule making and adjudication across agencies relatively consistent by prescribing uniform standards and a mechanism for judicial oversight. A federal court may set aside an agency decision if the rule is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[4] It is not the court's role to substitute its judgment for that of the agency, but to ensure that when an agency creates a new rule or modifies established policy that it articulates "a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[5] A court may conclude that an agency action is arbitrary and capricious if the agency has:

- relied on factors Congress did not intend it to consider;
- failed to consider an important aspect of the problem;
- offered an explanation for its decision that contradicts evidence before the agency; or
- is too implausible to be ascribed to a difference in view or agency expertise.[6]

Independent agencies most likely to be involved with digital media law are the Federal Communications Commission and Federal Trade Commission. The Federal Communications Commission regulates interstate and international communication emanating from the United States. The Federal Trade Commission enforces fair advertising, consumer protection, and antitrust rules.

[3] 5 U.S.C. § 551 et seq. (2011).

[4] 5 U.S.C. § 706(2)(A) (2011).

[5] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[6] *Id.*

Federal departments

Federal departments also make administrative rules, but do not act independently of the executive branch of government. Their leaders are appointed by the president and make up the president's cabinet.

The federal departments most likely to be involved with digital media law are the Departments of Commerce and Justice. The Department of Commerce fosters economic development and technological advancement. Among its many bureaus, the National Telecommunications and Information Administration, or NTIA, acts as the administrative branch's policy advisor for telecommunication issues. The Department of Justice, led by the Attorney General, supervises federal law enforcement. As such, it is involved in the prosecutions of crimes, such as incitement to violence, fraud, threats, and distribution of obscenity, that may be carried out through digital media. The Justice Department also represents the United States in suits against the government through the Office of the Solicitor General. Cases challenging U.S. law before the Supreme Court frequently include the Attorney General's name as one of the parties.

Common Law and Law of Equity

The role of courts in all legal systems is to determine whether law is applied appropriately in particular cases. But in common law legal systems – like those of the United Kingdom and its former colonies, such as the United States – courts also have the power to make law. There are two types of judge-made law: *common law* and *law of equity*.

There are a variety of sources for locating caselaw. A useful free resource is FindLaw, at www.findlaw.com/casecode. Additional sources are described in the Legal Research Appendix.

Common law, also known as caselaw, is a body of legal precedent established through prior court decisions. Judges create common law when no statutory law covers the issue before them. Later judges rely on those precedents for guidance in future legal disputes based on similar circumstances.

The use of common law dates back to twelfth-century England. In order to wrest power for legal decision-making from local officials, King Henry II dispatched judges to travel in circuits around the country dispensing justice in the king's name. Because the king's judges had no knowledge of events that had taken place prior to their arrival, they assembled juries of local men to aid them in their decision-making. Jurors determined the facts of the case, while the judge determined the applicable law – a practice that is still in use today. These circuit judges adopted the customary rules they considered most appropriate and shared their decisions with each other. Their precedents eventually crystallized into a national common law dispensed by the Courts of the King's Bench, Common Pleas, and Exchequer – collectively known as the Common Law Courts.[7]

In a modern context, most common law is created in the areas of tort and contract law. *Torts* are civil wrongs that result in harm or injury and which act as grounds for lawsuits. *Contracts* are agreements between two or more parties that are enforceable by law. Within the context of digital media, for example, common law applies to such torts

[7] William Searle Holdsworth, A History of English Law 204–31 (Little, Brown & Co. 1922) (1903).

as libel, invasion of privacy, intentional infliction of emotional distress and misappropriation of trade secrets, and to "click to sign" contracts connected with Internet and software use.

These types of cases are normally litigated at the state level, where most common law is made. At the federal level, common law has largely been supplanted by statute. However, federal courts still use it to delineate the boundaries of statutory and constitutional law. We see this occur when courts look back to previous decisions to determine the meaning of a particular term or phrase used in a statute in an effort to interpret the law.

When one party harms another through a practice prohibited by law, the wounded party can turn to the courts for redress. Under common law, a court can provide damages to compensate for that harm. However, this is not always what is needed to remedy a situation. Sometimes, what a plaintiff needs is for a court to act *before* the harm occurs, in order to prevent irreparable harm. Common law does not apply before the fact. However, law of equity, which serves as a supplement to common law, provides a mechanism for this.

Using law of equity, which also dates back to twelfth-century England, judges can create more flexible remedies for plaintiffs than those available under common law. Take, for example, a situation in which Apple learns that a disgruntled employee has stolen plans for its yet-to-be-released iMind – a device that transmits data directly into the human brain – and is threatening to upload them to the Internet. Once the plans have been published online, Apple will be able to sue the employee for misappropriation of it trade secrets under common law. It may even be able to collect a small portion of its damages. But, by that time, Apple's competitors will have access to its new product plans, and the potential damages incurred will far outweigh any damages the employee could repay. Equity fills the gap. Using the law of equity, a judge can issue a restraining order or injunction to prevent the thief from acting before the harm occurs.

Within the media context, equitable relief most often takes the form of *injunctions*, which are court orders that require someone to do something or not to do something. But courts grant other forms of equitable relief as well. Parties in doubt of their rights with regard to a particular legal issue may request a *declaratory judgment* from a court as a precursor to further legal action. This legally binding opinion sets out the rights and obligations of parties within a legal controversy. A party threatened with a lawsuit for engaging in a particular behavior, for example, might seek a declaratory judgment to assess his or her rights before acting.

Understanding precedents

The practice of following precedents under common law is known as *stare decisis* (pronounced "stair-ee da-sy-sis"), which literally means "to stand by that which is decided." The part of the case that sets the precedent is called the *holding*. This is the court's decision regarding the legal question presented. In some cases, a court will be very helpful by saying, "We hold that . . . ," but other times you have to sift though a lot of text to find the golden nugget.