

4TH EDITION

MEDIA LAW AND ETHICS

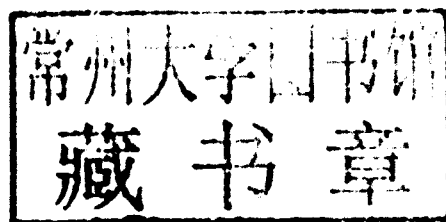


ROY L. MOORE AND
MICHAEL D. MURRAY

MEDIA LAW AND ETHICS

FOURTH EDITION

ROY L. MOORE
MICHAEL D. MURRAY



 **Routledge**
Taylor & Francis Group
NEW YORK AND LONDON

Please visit the companion website at

www.routledge.com/cw/moore

Fourth edition published 2012
by Routledge
711 Third Avenue, New York, NY 10017

Simultaneously published in the UK
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2012 Taylor & Francis

The right of the editors to be identified as the authors of the editorial material, and of the authors for their individual chapters, has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

First edition published by Lawrence Erlbaum Associates, Inc. 1994
Third edition published by Routledge 2008

Library of Congress Cataloging in Publication Data
Moore, Roy L.

Media law and ethics / Roy L. Moore, Michael D. Murray. — 4th ed.
p. cm. — (Routledge communication series)

Includes bibliographical references and index.

1. Mass media—Law and legislation—United States—Cases. 2. Mass media—Moral and ethical aspects—Case studies. I. Murray, Michael D. II. Title.

KF2750.M662 2011

343.7309'9—dc23

2011027522

ISBN: 978-0-415-89462-3 (hbk)

ISBN: 978-0-415-89463-0 (pbk)

ISBN: 978-0-203-14458-9 (ebk)

Typeset in Adobe Garamond, Optima, and Fritz Quadrata
by EvS Communication Network, Inc.

Printed and bound in the United States of America on acid-free paper
by Sheridan Books, Inc.

Preface to the Fourth Edition

Thank you for your interest in the new fourth and thoroughly revised edition of the first college textbook to explicitly address both mass media law and media ethics under one cover. The intersection of these two vital areas often leads to more questions, creates more potential problems, attracts the most interest and provides the best promise for examining important decision-making by the mass media.

In the preface of the first edition of this textbook, growing interest was noted in having both law and ethics addressed together in a single course at many departments and schools of mass communication and journalism. This awareness has evolved as a well-accepted pattern and a concept endorsed not only by major media programs but also by professional organizations. We have come to even better understand the symbiotic relationship and importance of having these two areas simultaneously addressed.

Public confidence in the mass media continues to erode as more journalists and media outlets have been exposed for unethical conduct. The emergence of non-traditional “new media” creates another level of interest in related ethical issues. As a small step in addressing these challenges, the new edition continues with the dominant theme—an interspersing of legal and ethical concepts and concerns at every step along the way and, whenever possible, includes discussion of current views regarding the disposition of key legal cases in an ethical context. With changes taking place quickly in the current mass media environment, we offer the reader a look at the regulation of new and emerging technologies, including vast expansion via the Internet. The change in title that we made in the last edition—from “Mass Communication” to “Media”—continues to reflect an emphasis on and awareness of an ever-broadening field.

We have enlisted two colleagues, Dr. Michael Farrell and Dr. Kyu Ho Youm, to write highly specialized chapters devoted specifically to media ethics and international media law, respectively. Dr. Farrell has revised and expanded his chapter from the previous edition on media ethics, and Dr. Youm has contributed a new chapter on mass media international law.

Dr. Farrell, former managing editor of the *Kentucky Post*, is Associate Professor and Director of the First Amendment Center at the University of Kentucky. Dr. Youm is Professor and Jonathan Marshall First Amendment Chair in the School of Journalism at the University of

Oregon. He is current president of the Association for Education in Journalism and Mass Communication (AEJMC).

When the first edition of this book was published, the international influences and the impact of the Internet on such areas as intellectual property rights and privacy as well as public and governmental concerns over broadcast indecency were not major topics of discussion. We now function in a media regulation environment in which these issues often dominate. Now, even newer technologies have emerged, including high-definition television and HD and satellite radio. These technologies, along with handheld devices such as GPS, iPods, PDAs, and cell phones have created regulatory challenges and expanded the outlets for information, talent and even controversy. Some of the programming of the so-called new media has been forced to switch or has voluntarily crossed over from the traditional media outlets. Telecommunications issues remain the most controversial and this new fourth edition of *Media Law and Ethics* examines the most contentious issues and avenues for legal experts and mass media practitioners to explore in this evolving landscape.

Not only have we have continued with a separate chapter devoted exclusively to media ethics written by Dr. Farrell, but each of the other chapters still includes a discussion of the ethical dimensions of that specific legal topic. We do this to explore where the law ends and ethics begin. For example, although the First Amendment protects a reporter who publishes a rape victim's name from the public record, such disclosure is unethical in the eyes of many journalists. Appropriating another writer's ideas in a story is not copyright infringement so long as only ideas but not expressions are used, but is such conduct ethical? Snapping photos of a severely injured child being pulled from an automobile accident is generally not an invasion of privacy, nor is photographing parents at the moment of being informed of the loss of their child. However, most media outlets would refrain from publishing or broadcasting blood and gore from such an event out of respect for the child and the family.

Comprehension of the law is only the first step. Every journalist must establish a personal code of ethics. There is no shortage of ethical guidelines, but the standards are best understood within the context of mass media law. The question should not be "How do I avoid a lawsuit?" but rather "How do I do what is right?" Answering the latter question is often more difficult than ascertaining the appropriate legal principle, but, as professional communicators, we must be able to respond affirmatively to both queries. Mass media law and media ethics are inseparable and complement one another in a way that makes the bond between them stronger than the base on which they stand individually. We believe our enthusiasm and attention to the relationship of media law and media ethics are reflected in this text. Similarly, in addition to Dr. Youm's new chapter, we discuss relevant international cases and issues as they arise throughout the book.

We continue to welcome and benefit from comments from readers and adopters of this book, and we thank those who have helped us in improving this practical resource for both budding and seasoned journalists. We especially hope our student readers will adopt and practice high ethical principles and develop a keen understanding of media law so they can eventually enter one of the most exciting and noble professions in the world and do so well prepared.

Our special thanks go to our very devoted wives, Pam and Carol. When the authors met 35 years ago and shared office space as assistant professors in a converted dormitory at Virginia Tech, our wives set the tone and kept us "on track." They have supported us on assignments and chipped in on occasions when the burdens became too great. Now grown up, our children—

Derek, Ellen, and Kate—are always supportive and have always been there for us with patience, love, and understanding. Finally, thanks to our former students, our colleagues and our friends around the country for their comments and encouragement. We have been blessed with great teachers and exceptional students. We particularly thank Graduate Assistant Sarah E. Tollie, who provided editorial assistance with this new edition.

Roy L. Moore
Michael D. Murray

About the Authors

Roy. L. Moore is Professor and Dean of the College of Mass Communication at Middle Tennessee State University and Professor Emeritus of Journalism at the University of Kentucky. He served previously as Associate Vice President for Academic Affairs and Professor of Mass Communication at Georgia College & State University. At the University of Kentucky he was the Associate Dean of the College of Communications and Information Studies and Professor in the School of Journalism and Telecommunications. He also served as a Faculty Trustee on the Board of Trustees and Executive Director of the First Amendment Center. He earned his Ph.D. in Mass Communication from the University of Wisconsin-Madison and his J.D. from Georgia State University. He is a practicing attorney and a national authority on libel law and First Amendment issues. He has served as an expert witness in several media law cases. During 2001–2002 he was an American Council on Education (ACE) Fellow at the University of Georgia. In addition to the previous three editions of this textbook, he is also author of *Advertising and Public Relations Law* (second edition, 2011), co-authored with Carmen Maye and Erik L. Collins. He chaired the Law Division of the Association for Education in Journalism and Mass Communication (AEJMC) and was honored for life-long service by the Mass Communication and Society Division. He was named a “Great Teacher” by the University of Kentucky Alumni Association.

Michael D. Murray is University of Missouri Board of Curators’ Distinguished Professor in Media Studies and Chair of the Faculty Senate and University Assembly on the UM-St. Louis campus. He earned his undergraduate degree at St. Louis University and Ph.D. from the University of Missouri-Columbia, where he was honored with a distinguished alumnus award. He wrote his dissertation on the controversial CBS *See It Now* programs on Senator Joseph McCarthy. He taught at Virginia Tech and the University of Louisville, where he founded the Communication program and also held post-doctoral fellowships at Stanford University, University of London and Cambridge University. He is an authority on the history of broadcast news and regulatory issues and has been honored by most of the major academic organizations with a mass media or regulatory component, including Association for Education in Journalism and Mass Communication (AEJMC), American Journalism Historians Association (AJHA),

Broadcast Education Association (BEA), International Radio & Television Society (IRTS) and the National Communication Association (NCA). He served as founding director of the Greenspun School of Journalism and Media Studies at the University of Nevada-Las Vegas and is author or editor of seven books including *Mass Communication Education*, co-edited with Roy L. Moore. He served as review and criticism editor for *Journal of Broadcasting and Electronic Media* and serves on the Publication Boards of the Broadcast Education Association and *Journal of Media Education*.

Brief Contents

<i>Contents</i>	<i>ix</i>
<i>Preface to the Fourth Edition</i>	<i>xxi</i>
<i>About the Authors</i>	<i>xxv</i>
1 Sources and Types of American Law	1
2 The U.S. Legal System	17
3 The Judicial Process	47
4 Ethical Dilemmas, Issues, and Concerns in Mass Communication MIKE FARRELL	95
5 Prior Restraint	143
6 Corporate and Commercial Speech	229
7 Electronic Mass Media and Telecommunications	299
8 Libel	361
9 Indecency, Obscenity, and Pornography	431
10 Right of Privacy	481
11 Press and Public Access to the Judicial Processes, Records, Places, and Meetings	549
12 Intellectual Property	595

13 International and Foreign Law	677
KYU HO YOUNG	
<i>Case Index</i>	<i>731</i>
<i>Subject Index</i>	<i>737</i>

Contents

<i>Preface to the Fourth Edition</i>	xxi
<i>About the Authors</i>	xxv
1 Sources and Types of American Law	1
Constitutional Law 2	
<i>The Federal Constitution</i> 2	
<i>State Constitutions</i> 4	
Statutory Law 5	
Administrative Law 6	
Common Law 7	
Equity Law 8	
Civil versus Criminal Law 10	
Torts versus Contracts 14	
Summary 14	
Endnotes 14	
2 The U.S. Legal System	17
The Federal Court System 19	
Code of Conduct for United States Judges 24	
Venue versus Jurisdiction 25	
Transitory versus Local Causes of Action 27	
The U.S. Courts of Appeals 27	
<i>Diversity</i> 28	
The U.S. Supreme Court 30	
<i>Distinguishing Characteristics of the U.S. Supreme Court</i> 32	
<i>Mandatory versus Discretionary Jurisdiction</i> 33	
<i>Writ of Certiorari</i> 34	
<i>Appellate Briefs and Oral Arguments</i> 35	
<i>Deliberations</i> 36	

<i>Types of Opinions</i>	36
<i>Terms of Service on the Court</i>	37
<i>Size of the Court</i>	38
<i>The Court's Schedule</i>	38
<i>Mootness, Ripeness, and Standing</i>	39
State Court Systems	41
Summary	44
Endnotes	45

3 The Judicial Process

47

The Civil Lawsuit	47
<i>The Complaint</i>	47
<i>The Answer</i>	50
<i>Denials</i>	50
<i>Counterclaims</i>	51
<i>Motions in General</i>	52
<i>Pretrial Motions</i>	52
<i>Discovery in General</i>	53
<i>Depositions</i>	54
<i>Interrogatories</i>	55
<i>Written Depositions</i>	56
<i>Subpoenas</i>	56
<i>Privileged Discovery</i>	57
<i>Pretrial Conferences</i>	58
The Civil Trial	59
<i>Jury Selection</i>	60
<i>Ethical Concerns in Covering Juries</i>	64
<i>Sequestration</i>	65
<i>Opening Statements and Burden of Proof</i>	65
<i>Presentation of Evidence</i>	68
<i>Direct Examination versus Indirect Examination</i>	68
<i>Following Cross Examination</i>	70
<i>Motion for Directed Verdict versus Judgment Notwithstanding the Verdict</i>	70
<i>Expert Witnesses</i>	72
<i>Closing Arguments</i>	73
<i>Judge's Instructions to the Jury</i>	74
<i>Jury Deliberations</i>	74
<i>The Verdict</i>	75
<i>6th Amendment Ban on Double Jeopardy</i>	76
<i>Impeachment of the Verdict</i>	77
<i>Debriefing Jurors</i>	77
<i>Determining Damages</i>	77
<i>Final Judgment</i>	79
The Criminal Trial	79

<i>Grand Jury Indictments</i>	79
<i>Filing of an Information</i>	81
<i>Citations</i>	82
<i>Arrest Warrant</i>	82
<i>Preliminary Hearing</i>	82
<i>Arraignment</i>	83
<i>Settlement Prior to Trial</i>	84
<i>Discovery</i>	84
<i>Sentencing</i>	85
Alternative Dispute Resolution	85
<i>Summary Jury Trial</i>	86
<i>Arbitration</i>	87
<i>Mediation</i>	87
<i>American Arbitration Association</i>	88
Summary and Conclusions	90
Endnotes	91

4 **Ethical Dilemmas, Issues, and Concerns in Mass Communication** 95

MIKE FARRELL

The Bad Old Days	97
The Credibility Factor	98
The Foundation of Ethics	101
<i>Inform and Entertain</i>	101
<i>The Marketplace of Ideas</i>	102
<i>Agenda Setting</i>	104
<i>Watchdog Function</i>	105
Why Journalism's Ethical Problems Are Different	106
Approaches to Ethics	109
<i>Ethics Codes</i>	110
<i>A Reporter's Duty</i>	111
<i>The Journalist's Code</i>	112
Being Ethical	112
<i>Ethical Issues</i>	113
<i>Journalists and Politicians</i>	116
<i>Plagiarism</i>	118
<i>Celebrities In The Public Eye</i>	120
<i>Non-celebrities Caught in the Media Eye</i>	121
Accepting Gifts and Trips	122
Checkbook Journalism	124
The Reporter's Privilege	126
The Case for Protecting Sources	130
The Seminal Case	131
<i>The Real Impact</i>	134
Endnotes	136

5 Prior Restraint

143

Contempt of Court 148

Civil Contempt 148

Dickinson Rule 151

Direct versus Indirect Contempt 152

Constitutional Limits on Contempt Power 153

Post-Bridges Decisions 154

The Classic Case: Near v. Minnesota (1931) 155

New York Times Co. v. United States (1971) 158

Ethical Concerns in the Pentagon Papers Case 164

Judicial Prior Restraints 167

Prior Restraint on Freedom of Speech 172

Applying the First Amendment Through the 14th

Amendment: *Gitlow v. New York (1925)* 174

Symbolic Speech 180

Burning Cards, Flags, and Crosses 180

United States v. O'Brien (1968): Burning Cards 180

A Matter of Scrutiny 181

Street v. New York (1969): Flag Burning Protected 182

Flag Desecration Protection Continues 182

Texas v. Johnson (1989) and United States v. Eichman (1990): More Flag Burning 183

Cross Burning and the First Amendment: R.A.V. v. City of St.

Paul, Minnesota (1992) and Virginia v. Black (2003) 185

Prior Restraint in the 21st Century: Cross Burning II 187

Prior Restraint in the Classroom 188

Hazelwood School District v. Kuhlmeier (1988): A Retreat from Tinker? 189

Prior Restraint and National Security 193

Prior Restraint on Crime Stories 194

Free Speech Rights in a Political Context: Public and Private Protests 195

Offensive Language on Clothing: Cohen v. California (1971) 195

Abortion Protests 196

Funeral Protests 201

Violent Video Games 202

Data Mining and the First Amendment 203

Signs: City of Ladue v. Gilleo (1994) 204

Workplaces and Restricted Zones 206

Public Accommodation 207

Religious Speech 210

Political Communication 211

Nontraditional Speech Contexts 215

Prior Restraint: Post 9/11 217

Conclusions 218

Endnotes 219

6 Corporate and Commercial Speech **229****The Development of the Commercial Speech Doctrine** 231

Valentine v. Chrestensen (1942) 232

Jamison v. Texas (1943) 233

Murdock v. Pennsylvania (1943) 233

Martin v. City of Struthers (1943) 234

Douglas v. City of Jeannette (1943) 234

Watchtower Bible and Tract Society v. Stratton (2002) 234

Commercial Speech for Professionals and Corporations 235**First Amendment Rights of Media Corporations** 235

New York Times v. Sullivan (1964) 235

Pittsburgh Press v. Pittsburgh Commission on Human Relations (1973) 237

Bigelow v. Virginia (1975) 238

City of Cincinnati v. Discovery Network, Inc. (1993) 240

First Amendment Rights of Nonmedia Corporations

Virginia State Board of Pharmacy v. Virginia

Citizens Consumer Council (1976) 241

Linmark Associates, Inc. v. Willingboro (1977) 243

Hugh Carey v. Population Services International (1977) 243

First National Bank of Boston v. Bellotti (1978) 244

Consolidated Edison and Central Hudson Gas & Electric (1980) 244

First Amendment Protection for Unsolicited Mail Advertising:*Bolger v. Youngs Drug Products Corp.* (1983) 247**First Amendment Rights of Professionals: Lawyer Advertising** 248**Lawyer Solicitation: *Ohralik* and *In Re Primus*** 250**Advertising by Other Professionals: *Friedman v. Rogers* (1979)**and *Thompson v. Western States Medical Center* (2002) 257**Truthful Commercial Speech: From *Posadas* to *Johanns*** 258**Fruit, Mushrooms and Beef: A Gourmet Meal or a Mystery Recipe?** 264

United States v. United Foods (2001) 265

Johanns v. Livestock Marketing Association (2005) 266

The Federal Trade Commission and Other Federal Agencies 267*The FTC and Deceptive Advertising* 268*The Wheeler-Lea Amendments (1938): Regulating**Unfair and Deceptive Practices* 269*FTC Composition and Structure* 269**FTC Modes of Regulation** 271*Investigations* 271*Cease-and-Desist Orders* 271*Consent Agreement or Order* 272**Trade Regulation Rules** 273*The Issuance of Trade Regulation Rules* 274*Advisory Opinions* 275*Industry Guides* 275

<i>Consumer Education</i>	276
<i>Corrective Advertising</i>	276
<i>Affirmative Disclosure</i>	277
<i>Substantiation</i>	278
Regulation by Other Government Agencies	280
<i>Self-Regulation</i>	282
<i>National Advertising Review Council</i>	282
Advertising Ethics and Other Considerations	283
<i>Puffery</i>	284
<i>Testimonials</i>	284
<i>Tobacco and Alcohol Advertising: Some Legal and Ethical Issues</i>	285
<i>Other Ethical Issues</i>	289
Summary and Conclusions	290
Endnotes	292

7 **Electronic Mass Media and Telecommunications** 299

Origins of Broadcasting	302
<i>The Pioneers</i>	303
Origins of Government Regulation	304
<i>Passive Role of the Courts</i>	306
Intervention of Congress: The Radio Act of 1927	306
Federal Radio Commission	306
Communications Act of 1934	307
<i>Federal Communications Commission</i>	307
Limits on FCC Authority	308
Regulatory Scheme	310
Federal Communications Commission General Authority	312
FCC Policies Regarding Political Broadcasting	312
<i>Section 315: Access for Political Candidates</i>	313
<i>Cable Television and the Equal Opportunities Rules</i>	314
<i>Section 315 and Broadcast Stations</i>	314
<i>FCC Interpretation of Section 315</i>	315
<i>Aspen Institute Rulings on Political Debates</i>	316
<i>Expansion of Scope of Aspen Decision</i>	317
<i>FCC's Easing of the Burden of Section 315</i>	317
<i>Section 312: Political Candidates for Federal Offices</i>	318
An Exception to the Exceptions Under Section 315	319
<i>Two Hypotheticals</i>	319
A Big Break for Politicians: Lowest Unit Charge	320
Censorship of Political Broadcasting	321
Political Editorials and Personal Attack Rules	324
Fairness Doctrine	325
Indecency and Obscenity in Broadcasting and Telecommunications	327
<i>Shock or Topless Radio</i>	328
Some Ethical Considerations	332

Indecency and Obscenity Continued	333
Action for Children's Television v. Federal Communications Commission (<i>ACT I</i> , 1988)	335
Action for Children's Television v. Federal Communications Commission (<i>ACT II</i> , 1991)	336
Action for Children's Television v. Federal Communications Commission (<i>ACT III and ACT IV</i> , 1995)	337
<i>The Ratings Game: From TV-Y to TV-MA</i>	338
Children's Programming	341
Regulation of New and Newer Technologies	342
Cable Television	342
Media Ownership	347
Cross-Ownership	347
National Ownership Rules	349
Local and Long Distance Telephone Services	349
Satellite Television Rules	350
Technological Developments	350
Internet Neutrality Rules	352
Summary and Conclusions	352
Endnotes	353

8 Libel

361

Origins of Defamation	372
Libel versus Slander	373
Libel Per Se versus Libel Per Quod	374
Trade Libel	375
The Typical Libel Case	377
E. W. Scripps Co., The Kentucky Post and Al Salvato v. Louis A. Ball	377
<i>Elements of Libel</i>	380
<i>Defamation</i>	380
<i>Falsity</i>	382
<i>Identification</i>	384
<i>Group Libel</i>	386
<i>Publication</i>	388
<i>Privilege: Absolute, Qualified, and Constitutional</i>	389
Hutchinson v. Proxmire (1979)	390
<i>State and Local Recognition of Privilege</i>	391
<i>Qualified Privilege</i>	392
Time, Inc. v. Mary Alice Firestone (1976)	392
Negligence or Greater Fault: <i>New York Times v. Sullivan</i> (1964)	394
Actual Malice Requirement	397
<i>Garrison v. Louisiana</i> (1964): The Death of Criminal Libel?	398
New York Times' Progeny: Extending the Actual Malice Rule	400
<i>Gertz v. Welch</i> (1974): Handing the Standard of Care for Private Individuals Back to the States	402