MEDIA LAW

Third Edition

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Jon Paul Dilts is an Associate Dean and Associate Professor of Journalism at Indiana University, Bloomington. He is an attorney and has conducted numerous workshops on media law for lawyers, journalists, and business communicators. Professor Dilts also has been a newspaper reporter, a newspaper and magazine editor, and is the author of a book on the history and architecture of Indiana courthouses. He has been at Indiana University for ten years teaching undergraduate courses in communications law and intellectual property as well as graduate courses about the First Amendment, international media law, and news coverage of the courts. He has a bachelor's degree in English from Saint Meinrad College, a master's degree in Journalism from Indiana University, and a law degree from Valparaiso University. He lives in Bloomington with his wife, Anne, and their two teenage sons, Christopher and Andrew.

PREFACE

With this, the third, edition of *Media Law,* a valued colleague in the School of Journalism at Indiana University, Bloomington, joins me as a coauthor. Jon Paul Dilts is an associate professor and an associate dean of the school. He also is a lawyer with a strong interest in enforcement of media access to public records and meetings of public bodies, freedom of the student press, and the law of intellectual property. Before he turned to law and to teaching, he was a reporter, wire editor, and city editor for the *Peru* (Indiana) *Daily Tribune.* So compatible have we proven to be that when I read the final drafts of the chapters assigned to him for revision I was hard-pressed to distinguish between the second edition material written by me and the new material written by him.

In revising *Media Law,* we have tried not to lose sight of the textbook's original purpose: to give today's journalism students, whatever their career objectives, a solid grounding in the constitutional, statute, administrative, and common law that applies to communicators in any medium. We also believe that all journalism students, including those who will not go on to careers in communications, will benefit as citizens from an understanding of the philosophy supporting the most fundamental of all rights—liberty of speech and press—and the legal principles that both protect and limit that liberty. Thus, this edition of *Media Law,* like the first two, is based firmly on the cases that, under our system of jurisprudence, tell us what the law is. Some users of *Media Law* have been kind enough to report that their students like the book because of the stories it tells, explaining the landmark cases. We continue to tell stories because Professor Dilts believes, as do I, that the law offers fascinating insights into the lives of real people who either were caught up by the system, or chose to challenge it, and in the process put their liberty or their property at stake to make a legal point. Thus, *Media Law* continues to be a practical guide to coping with the legal problems likely to confront professional communicators. It also continues to offer insights into the meaning and application of the speech and press clauses of the First Amendment. But that is not all. The authors are committed to the belief that beyond the question, "Is it legal?" there is a more important question, "Is it right?" Thus, as with the first two editions, each chapter ends with a section, "In the Professional World," that discusses the ethical aspects of its subject matter. These sections are not intended to be exhaustive—many journalism textbooks deal exclusively with ethics—but they are intended to provoke discussion.

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PART 3. LEGAL REGULATION OF THE MEDIA

INTRODUCTION

As the title indicates, this is a textbook on media law. The term "media" was chosen deliberately to describe the broad scope of the subject matter. This text is written for all communications students, no matter what their present career goals—be it advertising, public relations, corporate communications, photography, or the gathering and dissemination of news in any medium. The "law" of the title also is used in its broadest sense. It includes constitutional law, with special emphasis on the guarantees of freedom of speech and press found in the First Amendment to the U.S. Constitution. It also includes statutes and administrative rulings defining what communicators can and cannot do. In this century, the Supreme Court of the United States had been compelled on many occasions to rule on cases in which attempts to regulate the media have raised First Amendment questions. Under the Constitution, these decisions also are "the law of the land," and they make up a significant portion of *Media Law.*

This book is grounded in the authors' belief that all communications students—not just those thinking of careers in print or electronic journalism—should understand that no society can call itself free unless it not only tolerates, but insists on, freedom of speech and press. Thus, we start with a summary of the many meanings of the term "law" and an outline of the state and federal court systems. Law and the courts not only define the limits of acceptable conduct, but also protect the rights of individuals who test those limits. Students who assimilate the subject matter of the introductory chapter will find the remainder of the text easier to understand.

The first chapter outlines the development of the idea of freedom, particularly the freedom of ordinary folks to disagree with people in authority. It is an idea that still has not been fully accepted, as is illustrated by the subject matter of Chapter 2. In it, students will find that our own government has, in times of stress, punished its critics and that under extreme conditions courts will even sanction government censorship.

Starting with the third chapter, the subject matter of *Media Law* will vary in its appeal to students, depending upon their career goals. However, based on his experience, the author believes the libel chapters are pertinent to all communications students. While print journalists have been the targets of most of the landmark libel cases, no one is exempt from being sued for defamation. One of the landmark cases grew out of a television news program, *60 Minutes.* A Supreme Court decision in a case involving a credit rating service has led to an increasing number of defamation actions against corporate communicators. Public relations releases and advertisements also have been the targets of libel actions. Recently, corporations have been filing libel suits against individuals who circulated petitions criticizing their effect on the environment or their safety records.

Invasion of privacy, treated in Chapter 5, also is a potential source of litigation for all communicators. Once largely a problem for aggressive and nosy reporters, it is increasingly of concern to advertisers, public relations practitioners, and the producers of television docudramas seeking to capitalize on the lives of celebrities. The Supreme Court has held that persons in the public eye have a right of publicity which can be protected against exploitation by others.

Two of the latter chapters, on obscenity and copyright, should be of interest to all students. In a sense, the chapter on obscenity is related to Chapter 2, on censorship, because written and pictorial materials portraying explicit sexual activity have been, and continue to be, the leading subjects of censorship in our society. It is unlikely that students in college and university communications courses are preparing for careers that will involve them in testing the limits of obscenity law. However, all of us need to know that well-meaning persons have used the term "obscene" loosely in seeking to ban school textbooks, cut off public support for certain forms of art, censor the lyrics of popular songs, or force television programs off the air. Thus, obscenity law should be of general interest to all who are concerned with attempts to put limits on freedom of expression.

Copyright is of general interest because all forms of expression are eligible for legal protection against unauthorized copying once they are put in tangible form. A communicator who "borrows" a few lines of a popular song, a photograph, a sketch, or an extended quotation from a newspaper article is a potential copyright infringer, subject to legal penalties. Chapter 13 also includes a section on trademarks, the distinctive graphics or words that become a part of a business firm's identity. Such marks also are protected by law.

The titles of the remaining chapters pretty well define their appeal and usefulness to the individual student. The chapters on fair trial, the journalist's privilege, and the right to know are mainly of interest to gatherers and editors of news, print or electronic. However, potential business communicators will find the chapter on the right to know pertinent because businesses have become major users of the Freedom of Information Act. The chapters on the electronic media and advertising obviously

appeal to specific interests. However, all of us, as voracious users of cable and over-the-air television, and as targets of advertising, should have a general interest in the laws that regulate those media. Finally, the chapter on the business aspects of the media has been revised in this edition to include employment handbooks and the role of communications in securities fraud, making it pertinent to potential business communicators and public relations practitioners.

One final note. Given the rapidly changing nature of the communications media and of the business community, it is likely that students who are dead set on a particular career goal will find themselves in an entirely different field before they retire. Those who have built the broadest base of knowledge will find a career change easier to make.

THE LEGAL SYSTEM

The Meaning of "Law"

As used in this text, "law" has two general meanings, each quite different but nevertheless closely interrelated. The primary meaning refers to law as the legal rules by which we live. These include statutes enacted by Congress and state legislatures, ordinances adopted by local governing bodies, the rules adopted by administrative bodies at all levels; they also include the decisions of courts interpreting all of the above or applying rules based on custom, which is known as common law. In this sense, put in basic terms, laws are the words that define conduct required of us, or forbidden to us, for the common good.

In its secondary meaning, law is the system of courts, judicial processes, and legal officers through which the rules are applied. In this sense, it is a means of resolving disputes to reach an end loosely described as justice.

In the first meaning of the term, laws usually are classified as to their origin. The major sources of such law are described below.

Constitutional Law

Constitutional law stands at the apex of our system of laws. As the name suggests, it is derived from the constitutions, federal and state, that are the basic charters of government. From the earliest days of the Republic, supreme courts, national and state, have had the power to nullify any law that is not based on powers given the legislature by a constitution or that violates a right guaranteed by one. Thus, constitutions are not dead collections of words. They have been kept alive by courts' interpretations of what the words mean when applied to a specific set of facts in a case based on a clash of interests. It is these interpretations that make up constitutional law. Because the federal Constitution is at the apex of the hierarchy of laws, constitutional questions can arise from all other kinds of law.

No one can say with certainty what any part of the U.S. Constitution means until

the Supreme Court has decided what it means in a particular case. This does not mean that lower courts can't interpret the Constitution. The judge of even a lowest-level state court has the authority—and the duty—to do so when the parties to a case raise a constitutional question. But such decisions are subject to appeal and review by courts at a higher level. The higher the court in the hierarchy, the greater is the weight carried by its decisions. However, the Supreme Court of the United States is the final authority on all federal constitutional questions. Even its decisions are not carved in stone. On occasion, the Court has changed its mind about the meaning or application of a constitutional principle.

The same principles govern the interpretation of the constitutions of each of the fifty states. Here, the rule is that a state constitution means whatever that state's supreme court says it means. Such rulings are supposed to be respected by the U.S. Supreme Court, and almost always are. However, if a provision of a state constitution violates some provision of the U.S. Constitution, the Supreme Court can declare it void if it is at issue in a case accepted for review.

Statute Law

Statute law is the great body of law that is a product of legislative action: by Congress at the national level, by legislatures at the state level, and by city and county councils at the local level. In theory, statute law is drafted to reflect the people's will, as perceived by their elected representatives acting on their behalf. Such law provides for punishment of wrongdoing, but it also defines and makes provisions for benefits. The Social Security system, for instance, is the product of a large body of statute law. Such law is said to be prospective in that we are supposed to know what it is and guide our conduct accordingly. In reality, none of us can know, except in general terms, what is in the thousands of statutes under which we live. Federal law alone fills twenty-four volumes of the United States Code, and every session of Congress adds more.

Administrative Law

In the last fifty years, Congress, to an increasing extent, has enacted laws stating broad objectives, leaving the details of reaching those objectives to administrative agencies. Under such laws, Congress sets goals and creates an agency charged with seeing that they are reached. The Environmental Protection Agency, for instance, was given the duty of holding air and water pollution to specified minimums. It is up to the agency to devise specific regulations and impose them on polluters so as to meet those minimums.

When regulations are drafted and adopted in accordance with procedures prescribed by Congress and the courts, they have the effect of law. They may be enforced through the agency's own hearing system, subject to an appeal to the courts. Because of the number of agencies empowered to regulate various aspects of society, and the complexity of the problems with which they try to cope, the body of administrative law surpasses in volume the statutes enacted by Congress. Administrative law is of

special concern to broadcasters, who are subject to rules adopted by the Federal Communications Commission, and to advertisers, who are regulated by the Federal Trade Commission.

Common Law

Voluminous as the bodies of statute and administrative law are, neither can anticipate, and thus forestall, every kind of dispute that is apt to arise between individuals. And yet there must be some orderly means of resolving disputes because the alternative may be a resort to violence. Indeed, at one time dueling was an accepted means of settling differences. Ten centuries ago, courts in medieval England began to recognize that a duel did not determine who was right but only who was stronger. Thus courts began to apply commonsense principles to the resolution of disputes to which no statute applied. Some of these involved property rights. However, as early as the thirteenth century, courts began to protect personal rights, such as harm to reputation, awarding compensation to victims of damaging lies. Over the centuries, a huge body of law, based on nothing more tangible than a court's sense of what justice requires, has been established. This is known as common law. It is a product of cases, decided at a particular time on a specific set of facts. However, embedded in these cases are principles that editors of legal encyclopedias and digests have done their best to analyze and present in orderly form for the guidance of lawyers, judges, and students.

Because common law is a product of specific cases, it is more flexible than statute or administrative law. This is one of its strengths. It has survived and grown because it is adaptable to changing conditions. Some legal scholars hold that despite its flexibility it is, at bottom, based solidly on eternal principles, on verities, and on a sound sense of what the community will or will not stand for.

In the next three subsections, we shift our focus to summarize systems or processes of law with which communicators must deal, or in which they may be involved.

Criminal Law

Society so abhors some conduct—such as murder, robbery, and drug abuse—that it provides for its punishment. The rules defining such infractions make up the body of criminal law. With rare exceptions, criminal law is statute law. The purpose of the legislature in defining a crime and its punishment is to deter lawbreaking. All of us stand on notice that if we use illegal drugs or drive a car after having one beer too many, we run a risk of being arrested. If the prosecutor believes the evidence against us is strong enough, we will find ourselves in court, facing a judge.

If so, our fate will be determined by application of the processes of criminal law. Our offense will be treated as an offense against society, as represented by the state, with the prosecutor acting as its agent. However, we will not be helpless. The Constitution requires the court to assume that we are not guilty. We have a right to be tried by a jury if we so desire. If we choose not to plead guilty the prosecutor must present enough credible evidence to prove our guilt beyond a reasonable doubt.