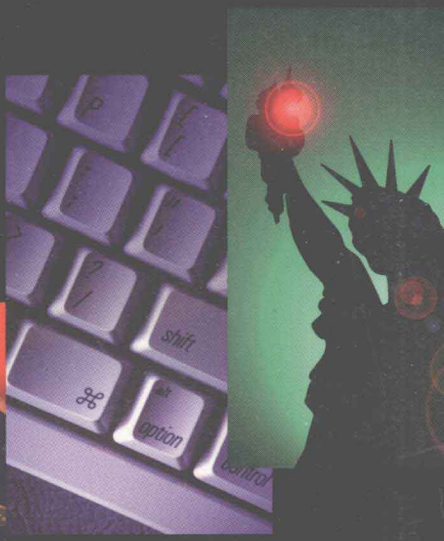
# MORE SPEECH, NOT LESS


## Communications Law in the Information Age

*Foreword by Paul Simon*

MARK SABLEMAN

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COMMUNICATIONS LAW IN THE INFORMATION AGE

Mark Sableman

*With a Foreword by Paul Simon*

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*For Paul, Charlotte, and Brian,*
*beneficiaries and future guardians of "the Blessings of Liberty"*
*promised in our Constitution*

*[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.*

— JUSTICE LOUIS D. BRANDEIS

# Foreword

I first encountered Mark Sableman in reading one of the nation's liveliest and least-known publications, the *St. Louis Journalism Review*, founded by Charles Klotzer. Through its pages, I learned the views of a true champion of First Amendment rights.

History can teach us many lessons, and one is that freedom is not easily preserved. If there are not voices like Mark Sableman and others to remind us of our heritage, there will be a gradual erosion of our basic freedoms. The threats to freedom rarely come as ogres; rather the threats come packaged attractively, with labels of things all of us espouse. Mark Sableman believes that communications laws, which affect the basic freedoms of thought and expression, are too important to be left to the experts. His message is that by understanding and actively seeking to influence their direction, informed citizens can help preserve freedom as changing times bring new issues—and new threats—to the forefront.

Years ago I served in the U.S. Army and was part of the Counter Intelligence Corps, an entity that no longer exists. I quickly learned that some items were properly classified as secret, like the names and identities of those who provided information from the other side of the Iron Curtain. But there were also many things classified to which the public should have had access, including matters that would have embarrassed military authorities if the information had been made public. Individual citizens who solicited classified information, whether such status was justified or not, received the answer that national security required that matters be kept secret. And who would undermine national security?

It is easy to find excuses to restrict freedom when it is politically convenient. As I write this, U.S. citizens, with a few narrow exceptions, can-

not legally visit Cuba. The reason: We do not want to help a dictator. I don't want to help dictators, but shouldn't American citizens be able to travel anywhere, as long as there is no threat to their physical safety, and learn what is happening in other nations? A government that advocates freedom should not restrict that movement of its people and their right to acquire knowledge and ideas.

What does the increasing concentration of media ownership do to the free flow of ideas in our nation? I cast one of six votes in the Senate against the Telecommunications Act that passed Congress in 1996 in part because it would open the door to huge concentrations of radio and television ownership. When that bill passed, Westinghouse, CBS, and Infiniti were the three biggest owners of radio stations in the nation. Within two years of the passage of that Act, all of their radio stations were gathered under one umbrella of corporate ownership.

The great concentration of newspaper ownership is likewise unhealthy, but there is little the federal government can do about it. We can do something about radio and television ownership, and yet we are not doing it, in part because of the entanglement between the ownership of radio, television, and newspapers and because lawmakers are reluctant to confront these corporate behemoths, which are capable of swaying public opinion. Again, the threats to freedom come in different wrappings at different times.

With the explosion of technology, difficult decisions will have to be made in the years to come. All of us soon will be able to possess genetic maps of ourselves. How do we move ahead with such issues, preserve privacy, and yet make information available for research? Will individuals have the right to give this information to employers and insurance companies? And if we can voluntarily provide it, will it cause discrimination against those who do not provide it? Where do media rights fit in all of this? Many of the new technologies will involve us in gray areas where lines must be drawn and redrawn with great care, and these crucial evaluations, distinctions, and decisions will be determined by which justices sit on the United States Supreme Court.

As we confront these and many other difficult policy choices, we need, more than ever, informed and active citizens who understand, care about, and seek to influence both our overall political direction and particular policy choices. We need to understand the issues, and we need to embrace the values of freedom.

Mark Sableman's pleas for understanding communications laws and policies, and for honoring First Amendment values, are pleas that we all should heed as we encounter ever more complex questions and enter ever more complicated times

Paul Simon

# Preface

For almost twenty years, I have practiced the law of personal, business, and media communications, and for more than half of this period I have regularly set forth my observations in articles in the *St. Louis Journalism Review* and other publications. For this book, I have revised and organized many of those articles and essays into a guide, both descriptive and analytical, for interested citizens.

The articles have often been pegged to local and regional events and cases, but they discuss legal principles, policies, and trends that are common to the whole country. In the articles, I have attempted to examine, explain, and analyze legal principles and developments as they affect professional communicators (journalists, writers, and artists) and, just as important, communications recipients—the citizen readers, listeners, and viewers to whom media and other mass communications are directed.

Communication among humans is nothing new. It has been a defining characteristic of human society and has existed since the first cave men and women gossiped about their cave neighbors, criticized their cave leaders, and organized cave conferences and conventions. Human communication during the late twentieth century derives from the first cave talk but departs from it in many non-content-related ways. Communication has intensified, accelerated, and mechanized in astonishing ways. As with industrialism in an earlier century, communications in our time has experienced a kind of "takeoff" in media, messages, and modes (such as interactivity). The legal implications have followed; wherever there is growth in society, there is growth in law.

Communications law matured and expanded—and bedeviled those who sought either simple solutions or hard-and-fast rules—in the 1980s

and 1990s. During these years, it became clear that our system had definitively rejected sweeping solutions on either side. Free expression advocates saw First Amendment absolutism (such as that advocated by Justices William O. Douglas and Hugo Black) fail in the 1960s, and in the following decades their hopes for an ever-expanding constitutional protection for expression were lost as well. But the throw-the-book-at-'em press critics and the extremists who sought to impose a government censor's heavy blue pencil on unorthodox expressions lost, too, as the 1980s and 1990s became a time of legal fine-tuning, not major constitutional backtracking.

In each of the many legal areas affecting communications (areas like libel, privacy, copyright, and advertising), intricate webs of legal *do*s and *don't*s, practical pitfalls and effective safe harbors, have been constructed. These rules and practicalities have developed through the cumulative effect of judges' decisions, legislative enactments, public opinion, technological advances, and (more significantly than most credit it) journalistic self-analysis and self-criticism.

To take but one example, American libel law today consists of a complicated patchwork of rules and practicalities, based on sources as disparate as English common law, First Amendment principles, empirical journalistic standards, and modern semantic understandings. The plaintiff-favored thicket of the old common law is gone, felled by Justice William J. Brennan Jr.'s eloquent and trenchant analysis in *New York Times Co. v. Sullivan*. But the sunny paradise of journalistic freedom predicted by many after the 1964 *Sullivan* ruling never came into being, either. The constitutional privilege of *Sullivan*, particularly as construed, limited, and factually tested in the 1980s and 1990s, is simply another *defense* to libel, not the near-perfect immunity that many press advocates once hoped for and even expected.

So in modern libel law, neither side is guaranteed a victory; both must confront and navigate the accumulated rules, principles, and practicalities. Are particular words sufficiently disparaging to be actionable? Go to the old common law rules, informed by modern semantics. Are *opinions* actionable or only statements of facts? It depends, according to the Supreme Court, which directs you to follow a difficult and somewhat counterintuitive analysis. Does the *Sullivan* defense, which was designed to protect discussion of public issues and public figures, apply in a particular case? That depends, too—though less on the issues or public fig-

ures involved than on how the journalist approached them. Does it matter what other journalists or the public think? Technically, it matters hardly at all; but in reality, journalistic practice and public opinion matter tremendously.

Legal issues pervade in almost all other areas of communications, as they do in libel. Freelancers and artists grapple with copyright issues. Advertisers and business promoters work around advertising regulations as well as trademark and publicity rights. Broadcasters and cablecasters deal with content, financial, and technical regulations. Book publishers, student editors, and musicians all struggle with agency-imposed rules, direct and indirect attempts at content regulation, and the threat of damage claims. And conduits, content providers, and users alike face legal problems as they use (and develop) the new electronic media of computer-based communications.

Law, and lots of it, is here to stay in the communications field. Communications professionals must understand the legal issues and govern their conduct accordingly.

But more than just knowing the rules is at stake. Since we have rejected the absolutes on either side, the policy choices that are made within the broad middle area are all-important. These policy choices are very much influenced by the attitudes, values, and priorities of those who, in one way or another, participate in the public debate on communications and free expression. Both communications professionals and informed citizens who care about what they read, hear, and learn must understand and influence the *direction* of the law. That is, opinion leaders and the public need to debate and understand the value of press freedoms, in the context of the (sometimes difficult and troublesome) practical situations in which new and groundbreaking issues arise.

No one can approach these subjects free of bias. My primary bias is a simple one—the preference for, in Justice Louis D. Brandeis's words, "more speech, not enforced silence" in all but the most extreme situations. The "more speech" formula is not legal doctrine. The preferences of Justices Black and Douglas for absolutely no restrictions on speech never made it as constitutional law. But the "more speech, not less" principle (as it is usually expressed today) remains alive as an instinct, a preference, and an influential point of view. This viewpoint is, admittedly, but one of many respectable positions or perspectives in the continuing debate over calls for limits on potentially harmful speech, imposition of responsibility

on speakers (if such a thing is possible), and control over communications as a means of attaining social objectives.

The importance of this public debate is the reason why I have sought to turn a gimlet eye to, and share my observations on, communications law during this period of its development and maturity. In this field, the law is not just something that *happens*. It is something we all help *create*. It demands understanding and critical thinking by everyone who cares about the power of information and the magic of words and images.

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Of course, I acknowledge the patience and encouragement of my family, especially my wife, Lynn, who has indulged me in my popular writing avocation during my "free time" away from the practice of law (i.e., nights and weekends).

# More Speech, Not Less

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