Chapter 16

Formal Controls: Laws, Rules, Regulations

THE PRESS, THE LAW, AND THE COURTS

A Free Press

The First Amendment of the Constitution says in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press." As simple and straightforward as that may sound, the precise meaning of these works has long been debated.

Prior Restraint

When the government attempts to censor the press by restraining the media before something is printed or broadcast, that's called prior restraint. Though prior restraint is rare, the courts have held that the First Amendment is not absolute; the government can, under certain circumstances, restrain speech and the press, but the task of proving the necessity to do so is difficult. In most cases, the Supreme Court has sided with the press.

The Near Case. In the 1920s, the Minnesota legislature passed a law under which newspapers that were considered public nuisances could be curtailed by means of an injunction (an order from a court that requires somebody to do something or refrain from doing something). Even though the Minnesota law was designed, in part, to prevent press abuses against minorities, the Supreme Court held that good intentions did not supersede the greater danger of prior restraint.

The Pentagon Papers. In the early 1970s the Nixon administration attempted to suppress a story set to run in the New York Times. The nine-part series described a top secret Defense Department study (a copy of which was illegally leaked to the press) which had been commissioned to research the roots of the Vietnam conflict. Citing that the report would "cause irreparable injury to the defense interests of the United States," the Nixon administration successfully received an injunction against the Times to temporarily prohibit publishing that story. For the first time in history, a U.S. newspaper had been ordered to suppress a specific news story. Other papers (who by now also had copies of some or all of the documents) began publishing them; the administration countered with more injunctions, but very quickly the number of papers outpaced the administration's ability to keep up with injunction orders.
The Supreme Court, with unprecedented haste, heard the case only 17 days after the initial story appeared in the *Times*. The Court said the government had not proven a sufficient and significant danger to national security that would justify the need for prior restraint. The Court didn't rule that prior restraint could never be applied, simply that this time the government had not shown sufficient cause to merit that action.

**More Recent Cases.** Prior restraint has been attempted several times since the days of the Pentagon Papers. For example, the CIA successfully got parts of a book deleted because it contained classified information. Although there is a strong constitutional case against prior restraint, gray areas still exist wherein censorship might be considered legal.

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**PROTECTING NEWS SOURCES**

Reporters argue that if they are forced to disclose confidential sources, those sources will dry up and the public's right to know will be adversely affected. The government counters by citing it has a greater need to administer justice and to protect the rights of an individual to a fair trial.

**The Reporter's Privilege**

In the early 1970s the Supreme Court ruled that the First Amendment did not necessarily protect reporters from their obligation to testify before grand juries and to answer questions concerning a criminal investigation. The Court said that there were instances in which a reporter's claim to privilege could be valid. They also suggested that the states further define reporter rights by passing shield laws (legislation protecting a reporter from revealing his or her sources). As of 2007, 32 states and the District of Columbia have passed shield laws, but the differences between them and the variations in their interpretations have left these issues clouded and confused. A Federal shield law was introduced in Congress in 2007, but it is not likely to pass.

**Search and Seizure**

The ability to protect a reporter's notes and a newsroom's records from revealing a news source or other information relevant to an investigation is also in legal limbo. Here, the courts have offered even less protection, though Congress passed legislation in 1980 that required government to obtain a subpoena (an order to appear or present evidence) in order to obtain press records. A subpoena is more limited in focus than a warrant, and it can be challenged in the courts before being executed.

Several important rulings suggest that the courts are taking a more skeptical view of the media’s claim to privilege. Reporters must carefully consider these issues before promising confidentiality to a news source.
The Sixth Amendment guarantees a defendant the right to a trial before an impartial jury; on the other hand, the First Amendment guarantees freedom of the press. Trial judges are responsible for the administration of justice while reporters are responsible for informing the public about the workings of the legal system. Sometimes these responsibilities clash.

Publicity Before and During a Trial

If a potential jury member has read, seen, or heard stories in the news media about a defendant (pretrial publicity) that appears to indicate that person's guilt, it is possible that the defendant will not receive a fair trial. Sensationalized media coverage can be extremely prejudicial. The Supreme Court outlined safeguards which judges could use to prevent undue influence from publicity. These include sequestering the jury (moving them into seclusion), moving the case to another county, and restricting potentially damaging statements by lawyers, witnesses, and others.

Gag Rules

Some judges have invoked restrictive orders, or gag orders, which restrain trial participants from giving information to the media or restrain media coverage of events that occur in court. Press access to pre-trial proceedings, pre-trial evidence, jury selection, and even the actual trial proceedings themselves has had a see-saw history of restriction and openness. In the 1980s, the Supreme Court reaffirmed the press’ right to open court access, but the Court also ruled that judges theoretically could--using strict guidelines laid down by the Court--restrict press access if the situation warranted it.

Cameras and Microphones in the Courtroom

Still cameras, newsreel film, and radios first invaded the courts in the 1930s. After some notable abuses, the American Bar Association adopted Canon 35 of its Canons of Professional Ethics. Canon 35 suggested that courts bar film and broadcast in covering court proceedings. Soon after, most states did just that. Later, TV coverage also became a court outcast.

Slowly, however, state-by-state, courtroom restrictions of AV materials have relaxed, and as of 2007 all 50 states allow some form of coverage. The rules for coverage vary state by state. However, cameras are not allowed in federal district courts, nor in the Supreme Court of the United States.
Government Information

After World War II, members of the press complained that government secrecy was becoming a major problem. Reporters were being restricted from official meetings, and access to government documents was often difficult to obtain. In response, Congress passed the Freedom of Information Act (FOIA) in 1966, which gave the public the right—with some restrictions—to find out what the federal government was up to.

The law states that every federal executive-branch agency must publish instructions on what methods a member of the public should follow to get information. If information is improperly withheld, a court can force the agency to disclose what is sought. There are nine areas of exempted material such as trade secrets, criminal investigations and oil well maps.

In 1996, the Electronic Freedom of Information Act (EFOIA) was also passed to make more government information available on the Internet, although agencies have been slow to implement all the requirements of the EFOIA.

Sunshine Acts, allowing press access to most government meetings—again, with some restrictions—have also helped further public access to government proceedings. Many states have adopted similar FOIA and Sunshine Acts to cover state and local government proceedings.

The Patriot Act, passed in October 2001 gave the government more power to monitor email and telephone records, as well as to restrict access to official records.

Access to News Scenes

A reporter’s right to access a news scene, above and beyond the public’s right to the same access, is still in the evolutionary stage of definitive court decisions. The Supreme Court has suggested the press has no more of an inherent right to visit news scenes or public facilities than does the public at large, or to put in another way, when the public is not admitted, neither is the press. State laws themselves vary widely in the interpretation of what are a reporter’s access limits.

DEFAMATION

The right of free speech and the rights of a free press sometimes come into conflict with the right of an individual to protect his or her reputation. These conflicts are dealt with under defamation laws, which can be broken down into several areas:

- libel — written defamation that tends to injure a person's reputation or good name or that diminishes the esteem, respect, or goodwill due a person

- slander — spoken defamation; broadcast defamation is often considered libelous because
the defamation usually has broader impact than a typical slander case; libel is also considered a more serious offense than slander

- **libel per se** — some words are always libelous; falsely written accusations, such as labeling a person a "thief" or a "swindler" automatically constitutes libel

- **libel per quod** — normally innocent words could be libelous under certain circumstances

For someone to win a libel suit against the media, that person must prove five things:

1. that he or she has actually been **defamed** and harmed by the statements
2. that he or she has been **identified** (although not necessarily by name)
3. that the defamatory statements have been **published**
4. that the media were at **fault**
5. *in most instances*, that what was published or broadcast was **false**

In proving that the media are at fault, people suing for libel must generally also prove that the purported defamatory statement is indeed false, so that virtually anyone who brings a libel suit must show the wrongfulness of what was published. But the media are responsible for whatever they report, and thus can’t hide behind the fact that they were only repeating what someone else said.

**Defenses Against Libel Suits**

1. **truth** -- If what's been reported is true, there is no libel. Proving a statement’s truth is difficult, and this defense is rarely used.

2. **privilege** -- The courts have held that in some situations, the public's right to know takes precedence over a person's right to preserve a reputation. In common cases, like government or public proceedings, the press is protected as long as the reporter gives a fair and accurate report of those events, even if what’s reported contains a libelous statement.

3. **fair comment and criticism** -- Any person who voluntarily puts himself into the public eye or is at the center of public attention is open to fair criticism. This applies only to fair criticism, not misrepresentations of fact. The dividing line between opinion and fact can be blurry.

In 1964, the Supreme Court significantly loosened the potential restrictions on comments concerning public officials or public figures in the *New York Times vs. Sullivan* case. A civil rights group published an ad in the *Times* concerning a protest in Montgomery that Sullivan, an Alabama police official, claimed libeled him. Evidence revealed that several statements in the ad were indeed false. An Alabama court found in favor of Sullivan and awarded him $500,000; shortly thereafter, however, the Supreme Court overturned the decision and enumerated three major principles that would affect all future defamation decisions:
1. Editorial advertising is protected by the First Amendment.

2. Even false statements might qualify for First Amendment protection if they concern a public official’s public conduct.

3. Public officials must prove that defamatory statements were made with actual malice.

**Actual malice** means publishing a statement with the knowledge that it was false or publishing a statement in "reckless disregard" of whether it was false or not. The Court later expanded this protection to include public figures as well as public officials, but still later noted that being involved in a newsworthy event doesn't necessarily make a person a public figure.

Private citizens however still need to show some degree of fault or negligence by the media. In many states this simply means showing that the media did not exercise ordinary care in carrying a story. People suing for defamation collect awards in one or both of two forms: **actual damages** (dollar damages the defamation actually cost them), and/or **punitive damages**, in which juries tend to award big fines with the intent of punishing media performance. To be awarded punitive damages, however, even a private citizen must show the media acted with actual malice.

**Defamation and the Internet**

If a defamatory message is posted on the Internet, only the author can be held liable for the content; the Internet service provider cannot be liable unless it is the author. Less clearly defined, however, is the issue of jurisdiction. Where can lawsuits be filed? If Internet materials are available around the world, does that mean that suits might originate from anywhere in the world?

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**INVASION OF PRIVACY**

**The Right to Privacy**

A single defamatory publication might often prompt two suits: libel and invasion of privacy. The difference between the two is that while libel protects a person's reputation, the right of privacy protects a person's peace of mind and feelings. Second, libel involves publication of false material; invasion of privacy might be triggered by disclosing the truth. There are four ways the media can invade someone's privacy:

**Intrusion upon Solitude.** Intruding upon a person's solitude or seclusion generally involves using surveillance cameras or microphones to eavesdrop on private activities. Reporters’ use of hidden cameras presents special problems, and they should think carefully before using hidden recordings while gathering news.
Unauthorized Release of Private Information. Release of private information (e.g., health) without consent.

Creating a False Impression. Presenting people in a false light is closely related to libel. Some TV stations get in trouble with this when they use existing or stock footage in a new story. Stock footage, for example, can create a false impression of the person who is the subject of the current story.

Appropriation of Identity. Appropriating someone’s name or likeness for commercial purposes is most frequently a concern to celebrities. However, ordinary people also have the right not to have their images used without their permission.

Trespass

Trespassing is unauthorized entry into somebody else’s territory. Court rulings suggest that journalists do NOT have a special First Amendment privilege to break the law in pursuit of a legitimate news story that will advance the public interest. In respect to the media, this area of the law has usually focused on the tactics some reporters use to gain entry onto private property, such as going undercover and pretending to be somebody they really weren’t in order to get pictures or story background. The Food Lion vs. ABC case in 1996 is a classic example.

COPYRIGHT

Copyright laws protect authors against unfair appropriation of their work. First enacted in 1909, the copyright laws were fundamentally amended in 1976 in response to emerging communication technologies. The new laws protect such things as literary and dramatic manuscripts, music works, sound recordings, motion pictures, and TV programs. The law also specified what is not covered, such as ideas, news, a discovery, or a procedure. For works created after January 1978, copyright lasts for the life of the author plus 70 years; works created before then are protected for a total of 95 years. Copyright protection extends only to copying the work in question; independently-created similar works are not copyright infringements.

Someone can, however, use portions of a copyrighted work under the law's fair use provisions; such uses might include teaching purposes, research, news reporting, and critical reviews. To qualify for protection under fair use laws, these four factors are considered:

1. the purpose of the use (profit vs. non-profit education)
2. the nature of the copyrighted work
3. the amount reproduced in proportion to the copyrighted work as a whole
4. the effect of the use on the potential market value of the copyrighted work

In the famous Betamax case, the Supreme Court ruled that viewers who owned VCRs could copy programs off the air for later viewing (timeshifting) since it constituted fair use of the material.
Copyright law does apply to the Internet. This was firmly demonstrated in the Napster case, in which the recording industry filed suit against the file-sharing service. Napster argued its activities were protected under the fair use provisions, but the courts disagreed.

**OBSCENITY AND PORNOGRAPHY**

This area of the law revolves around the rights of free speech under the First Amendment when they come into conflict with the right of society to protect itself from what it considers harmful messages. Although obscenity is clearly not protected by the law, the courts have been unable to adequately define what actually constitutes obscenity.

**Obscenity laws** began with the 1860s Hicklin Rule, a standard that judged an entire book obscene if even isolated passages had a tendency to deprave or corrupt the mind of the most susceptible person.

In 1957 the Supreme Court presented a new definition of obscenity in its Roth v. United States ruling. The Roth test mandated that something was obscene if, “to the average person, applying contemporary standards, the dominate theme of the material taken as a whole appeals to prurient interests.” Later, other decisions added refinements by saying that the material had to be “patently offensive” and “utterly without redeeming social value” to be obscene. A 1969 ruling came up with the concept of variable obscenity when it stated that certain magazines were obscene when sold to minors but not obscene when sold to adults.

In 1973 the Court tried to close up the obscenity loophole when it adjudicated the Miller v. California case. The Miller test employed these new principles:

1. whether the average person, applying contemporary community standards, would find that the work as a whole appeals to prurient interest

2. whether the work depicts or describes in a patently offensive way certain sexual conduct that is specifically spelled out by state law

3. whether the work as a whole lacks serious literary, artistic, political, or scientific value.

Despite the attempts at clarification, and the indirect suggestion that obscenity problems be handled on a local level, the problem of defining pornography to everyone’s satisfaction continues. The Internet brings on a whole new set of legal issues in terms of creating, defining, and distributing pornographic materials.

The Court has failed to uphold legislation such as the Communications Decency Act and the Child Online Protection Act, and has ruled that the Internet should be given the highest level of First Amendment protection, similar to that given to books and newspapers, rather than the more limited rights of broadcasting and cable where regulation is more common.
Because the public owns the airwaves, the government decides who gets a license to broadcast over certain frequencies on behalf of the public interest, and whether or not, after a time, they can renew that license. The broadcast media, therefore, are subject to more regulations than the print media.

**The Federal Communications Commission**

The governing body, the FCC, does not make the laws but rather interprets them. One of its biggest jobs is to continually interpret the concept of operating within the “public interest.” One of its responsibilities is to examine programming and determine whether public interest is being served, not just from a technical standpoint, but also from perspective of a well-rounded program lineup. The Federal Radio Commission, forerunner to the FCC, ruled in its 1929 Great Lakes decision that the broadcasting of programs that tended to injure the public—fraudulent advertising, attacks on ethnic groups, attacks on religion—were not in the public interest.

In regulating stations, the FCC can make its influence felt in a number of ways. From the mildest to the most severe levels these include:

- Fine a station up to $250,000
- Renew a license only for a probationary period, usually a year
- Revocation or failure to renew a license

The last step is rarely taken; from 1934 to 1978, only 142 licenses were revoked. Some 99.8 percent of all licenses are renewed.

While rules relaxed during the deregulatory period of the 1980s, regulations began to increase in the 1990s. For example, Congress passed the Children’s Television Act, which among other things limits the amount of commercial time for children’s programs and also mandates that TV stations devote at least three hours of informational and educational programming for children each week.

**Indecent Content**

Congress, the courts, and the FCC have had a difficult time trying to find a compromise between protecting the principles of the First Amendment while also protecting children from accidental exposure to indecent content aired on radio and television. Several time periods that banned indecent content were tried, but the one that stuck is the one that now prevents broadcasters from airing potentially indecent content between 6 a.m. to 10 p.m. That "safe harbor" covers the hours during which children are most likely to see television.
Congress has passed stiffer regulations covering indecency, and the FCC has continued its crackdown on indecency. The commission has also begun to make an effort to crack down on violent content.

**The Equal Opportunities Rule**

The *Equal Opportunities rule*, Section 315 of the Communications Act, states that if a station permits one candidate for a specific office to appear on the air, it must offer the same opportunity to all other candidates for that office. If a station gives one person or party free time, other qualifying persons or parties must also get the same amount of free time. Exceptions enacted by Congress include legitimate newscasts and on-the-scene coverage of authentic news events.

**The Fairness Doctrine**

No longer in existence, the *Fairness Doctrine* nonetheless continues to pop up for serious reinstatement consideration from time to time, including a recent attempt in 2007. When it was in effect, it said that broadcasters had to seek out, and make a good faith effort at presenting, opposing viewpoints on matters of public importance.

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**REGULATING CABLE TV**

Regulation of cable has fluctuated over the years; in the 1950s the FCC ruled it had no jurisdiction over cable but by 1972 the FCC had a comprehensive set of rules governing cable. Cable systems are not licensed by the FCC. Cable systems are franchised by state and local governments. A franchise is an exclusive right to operate in a given territory.

The most recent regulations arose because of widespread consumer complaints against rising fees and poor service. Congress passed the *Cable TV Act of 1992*, which re-instated the FCC’s power to regulate cable fees and services.

Two provisions of this act had important consequences. First, most consumers saw their monthly cable rates go down. The second effect was in response to an industry challenge to overturn the rule that required it to carry the signals of local broadcast stations. The Supreme Court ruled that cable operators had more First Amendment protection than broadcasters, but less than newspapers and magazines. The Court held that Congress could pass laws which guaranteed that the free flow of information not be restricted by a private firm that controlled the means of transmission. By 1997, the Court ruled in favor of the "must carry" provision. In 2006-2007, the FCC Chair proposed cable consumers be given an “a la carte” option rather than the “bundling” or “tiering” typically offered by cable companies. The argument was that an a la carte system would enable consumers to avoid channels that might carry indecent material.
The Telecommunications Act of 1996 was the first major overhaul of communication laws in more than 60 years, and it affected every industry regulated by the FCC. Some of the law’s key provisions are:

- no limit on total number of radio or TV stations that can be owned by one person or company, provided that no more than eight stations may be owned in a single market
- no limit on the number of TV stations that can be owned as long as that number doesn’t reach more than 35 percent (later changed to 39 percent) of the nation’s TV households
- extended the term of broadcast licenses to eight years
- allowed telephone companies to enter the cable field
- allowed cable companies to enter the telephone business
- deregulated the rates of many cable systems
- mandated that new TV sets come with the ability to block programs with strong sexual or violent content (the V-Chip)
- mandated that the TV industry to come up with a voluntary system to rate programs with violent, sexual, or indecent content

The Telecommunications Act unleashed a wave of consolidation in the industry, and many cable subscribers have seen their rates increase. It took a while, but competition between cable and telephone companies has become more vigorous. A rapidly changing business and technology environment has prompted Congress to re-examine the 1996 Act.

Deceptive Advertising

When the Federal Trade Commission was started in 1914, its first mission was to curtail questionable business practices such as bribery, false advertising, and product mislabeling. Protecting consumer rights came later in 1938 with the passage of the Wheeler-Lea Act, which gave the FTC the power to prevent deceptive advertising that harmed the public.

The FTC has several enforcement techniques, including:
- it can issue trade regulations, which suggest guidelines for an industry to follow
- it can use consent orders, in which the advertiser agrees to halt a certain advertising practice, but does not admit to violating the law.
. it can issue a **cease-and-desist** order after holding a formal hearing that determines a particular advertising practice does indeed violate the law.
. violating a cease-and-desist order can lead to FTC-imposed **fines**.
. it can require companies to issue **corrective advertising**, in which potentially misleading claims are clarified.

The FTC has also stopped advertisements that targeted children when the products advertised were deemed harmful to children, such as the R. J. Reynolds’ “Joe Camel” campaign. In 2000, the FTC targeted the film industry for marketing R-rated films to children, and more recently the agency cracked down on ads making deceptive health claims.

**Commercial Free Speech Under the First Amendment**

For many years the Supreme Court did not view advertising (or commercial speech) as having any First Amendment protection. The 1964 *New York Times vs. Sullivan* case extended a new protection, however, to advertising that dealt with important social matters. More recent cases suggest that in many instances commercial speech falls under the constitutional protection, and in 1980 the Court outlined a four-part test for determining that protection:

1. Commercial speech that involves an unlawful activity or advertising that is false or misleading is not protected.
2. The government must have a substantial interest in regulating the commercial speech.
3. The government’s regulation must actually advance the involved interests of the state.
4. The state’s regulations may be only as broad as necessary to promote the state’s interests.

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