A Practical Guide to Media Law

Ashley Messenger
May this book serve well its readers and the interests of Truth
A. M.
CONTENTS

Preface xiii
Acknowledgments xvii
About the Author xix

1 Court Systems, Citation, and Procedure 1
   The Two Court Systems 1
   In Which System Should a Case Be Filed? 3
   The Two Kinds of Cases 4
   How to Find “Law” and Understand Citation Systems 6
   Why Does All This Information Matter? 9
   Practical Conclusions 10

2 The First Amendment—Theory and Practice 11
   The First Amendment and The Scope of Its Coverage 11
   Theories of the First Amendment 15
   First Amendment Doctrines 16
   Practical Effects 18
   Practical Conclusions 21

3 Libel: The Risk of Criticism, Insults and Trash Talk 22
   Elements 23
   Is the Statement Defamatory? 24
   Is the Statement False? 28
   Is there a Factual Assertion? 30
   Does the Statement Identify a Valid Plaintiff? 37
   Was the Statement Published? 39
   Did the Defendant Act with the Requisite Level of Fault? 40
   Did the Plaintiff Suffer Damages? 47
   How do the Elements Work Together? 50
   Defenses 53
   The “Libel-Proof” Plaintiff 53
   Statute of Limitations 53
# Contents

Absolute Privilege for Statements Made in the Official Course of Government Business  54
Consent  54
Fair & Accurate Report Privilege  55
Neutral Reportage  56
Wire Service Defense  58
Common Interest  59
Anti-SLAPP Statutes  59
Retraction Statutes and Other Statutory Defenses  60

**Practical Conclusions**  61

## 4 Privacy: Publishing Private, Embarrassing or Sensitive Information  62

**Publication of Private Facts**  64
- Is the Information Private?  64
- To Whom Was the Information Disclosed?  66
- Was the Disclosure “Highly Offensive to a Reasonable Person”?  67
- Was the Information Newsworthy or of Legitimate Public Concern?  67
- Are There Any Additional Defenses?  72

**Trade Secrets: A Version of “Privacy” for Businesses?**  73

**Practical Conclusions**  74

## 5 Publicity: Using Someone’s Name or Likeness  76

**What is the Right of Publicity?**  76
**What Does it Mean to “Appropriate” Someone’s Name or Likeness?**  77
**What Constitutes A “Commercial Purpose”?**  79
**Is the Right of Publicity Descendable?**  83
**Are there Any Defenses to Publicity Claims?**  84

**Practical Conclusions**  84

## 6 Copyright: Issues with Creating Content or Using Other People’s Content  86

**Types of Intellectual Property**  87
**What is Copyrightable (And What is Not Copyrightable)?**  88
**How Does one Obtain a Copyright?**  90
**What Does a Copyright Protect and for how Long?**  92
Under what Conditions can Someone Use Copyrighted Material?  94
  License  94
  Alternative License  96
  Fair Use  96
  Other Exceptions  103

If a Copyright Holder Sues for Infringement, What Do they Need to Prove?  103
Are there any Defenses to Copyright Infringement Claims?  103
What are the Consequences of Copyright Infringement?  104
What is the Relationship of Copyright Law to “Moral Rights” and Plagiarism?  104
Do I Have to Credit the Creator of a Work if I Use it?  105
The “Hot News” Doctrine  105
Practical Conclusions  106

7 Trademarks: The Use of Product Names and Logos  108
What is a Trademark?  109
What are the Requirements for a Trademark?  109
  Is the Mark Already Taken?  109
  Is the Mark Sufficiently Distinctive?  110
  Is the Mark Immoral and Scandalous?  111
How Long will Protection Last?  111
What is Infringement?  112
What is Dilution?  114
What is Cybersquatting?  115
Practical Conclusions  116

8 Use of Photos, Illustrations and Other Images  118
Is the Use of the Photo Legally and Ethically Proper?  118
  Libel or False Light  119
  Privacy  121
  Right of Publicity  124
  IIED  125
Do you have the Rights Required to Use the Photo?  126
Can you be Prosecuted or Fined? (In Other Words, is there a Government Regulation that Covers the Use of the Photo/Image?)  131
Practical Conclusions  132
9 Use of Music  133
  Different Kinds of Rights in Music  134
  Getting the Right License for the Use  135
  Fair Use  137
  Other Provisions Related to the Use of Music Online  140
  Practical Conclusions  140

10 Negligence Claims Against the Media: Content That May Result in Personal Injury  142
  What is Negligence?  143
  How Does Negligence Apply to Copycats?  144
  How Does Negligence Apply to Encouragement and Advice?  145
  How Does Negligence Apply to Incorrect, Incomplete, or Otherwise Harmful Information?  145
  How Does Negligence Apply to Other Media-Related Harm?  147
  Practical Conclusions  148

11 Is There a Right of Access to Information, Places, or Events?  149
  General Rules With Respect to Whether you Have a Right of Access to Information  150
    Private Materials  150
    Federal Agencies  151
    Federal Legislature  161
    State Laws  161
    Judicial Branch  162
  Specific Laws that Might Affect Your Ability to Access Particular Types of Information  171
  Rules that Govern Access to Places and Events When Right of Access is not Clear  172
    Is there a Right of Access to News Scenes?  172
    Is there a Right of Access to Press Conferences?  173
    Is there a Right of Access to Prisons?  174
    Is there an Enforceable Right to take Photographs or use Video Cameras in Public or at Public Events or Meetings?  174
  Practical Conclusions  176
12 Can One Be Sued or Prosecuted for Gathering News? 178
Going on Property 179
Audio Recordings and Eavesdropping 180
Taking Photos/Video 181
  Intrusion into Seclusion 182
  Failure to Obey Reasonable Orders by Police and Security 183
  Violation of Criminal Prohibitions on taking Photos and Video of Certain Federal
  Facilities Relating to National Security 185
Using Hidden Cameras or Microphones 185
Accessing Emails, Voicemails, or Secure Electronic Systems 186
Looking Through or Taking Someone’s Belongings 187
Misrepresenting Oneself 187
Using Passwords, Badges, and Other Security Materials 188
Violating Criminal Laws 188
Getting Access to Subjects or Sources 189
Making Promises of Confidentiality 189
Practical Conclusions 190

13 Efforts to Subpoena or Search Journalists 191
Is there a “Reporters Privilege”? 191
  Is there an Applicable Shield Law? 193
  Is there Protection based on Common Law? 194
  Are there Procedural Rules that Might Apply? 196
What happens if there is no Applicable Privilege? 197
Search Warrants Against Journalists 198
Practical Conclusions 200

14 Punishing or Restricting Protests and Other Public Speech 201
Will the First Amendment Protect Dissemination of “Dangerous” Ideas or
Beliefs? 201
Where or How Can Ideas Be Disseminated? 204
  Public Forums 204
  Time/Place/Manner (TPM) Restrictions 205
Can Particular Methods of Expression Be Prohibited? 208
  Profanity, Fighting Words and Other Offensive Speech 208
  Symbolic Speech 209

Practical Conclusions 210

15 Punishing or Restricting Sensitive or Offensive Topics 211
  Publication or Possession of Classified Information or Matters that Affect National Security 212
    Attempts to Stop Publication 212
    Criminal Prosecution 213
    Spying on the media 217
  Hate Speech 218
    Can the Government Punish Hate Speech? 218
    Can Private Entities (Businesses, Schools, Organizations, Etc.) Punish Someone for Using Hate Speech? 222
    Can a Speaker Be Civilly Liable in a Lawsuit Based on Hate Speech? 223
  Sexual Content 224
    Obscenity and Indecency 224
    Child Pornography 227
    Civil Lawsuits 227
  Violent Content 228
  Threats 229

Practical Conclusions 230

16 Political Speech, Elections and Campaigns 232
  The Constitutionality of Campaign Laws 233
  Anonymity 235
  Right of Reply Laws 236

Practical Conclusions 237

17 Ads/Promotions/Marketing 238
  Issues to Consider for Advertising Goods and Services 239
    Government Regulation 239
    False or Misleading Statements 242
    Other Issues Relating to the Content of the Ad 243
  Issues for Those who Accept Advertising 243
    Liability for False or Harmful Advertising 243
    Liability for Discriminatory Housing Ads 244
    Refusal of Ads 245
Lotteries, Contests, Prizes and Other Promotional Activities 245

Practical Conclusions 248

18 **Television & Radio—FCC Regulation**  249

What is the FCC and What Does it Do?  249

What Kind of Entities are Subject to FCC Regulation?  250

What Kind of Regulations Can the FCC Enforce?  251

  Indecency  252
  Profanity  252
  The Fairness Doctrine and Right of Reply  252
  Political Elections  253
  Children's Programming  254
  Other Advertising Regulations  254
  Other Content Regulations  255
  Complaints Regarding Broadcast Content  256

What are the Issues Pertaining to Public Broadcasting?  256

Can the FCC Regulate the Internet?  258

Practical Conclusions 259

19 **Special Classes of Speakers**  260

  Students  260
  Government Employees  263
  Speakers whose Speech is Government Funded  264

Practical Conclusions  266

20 **Special Considerations: How the Internet Has Affected Publishing and the Law**  267

Terms of Service  268

Privacy Policies  269

Gathering Information from Children  270

Immunity from Claims  271

Speaking Anonymously  274

International Aspects of Publishing Online  277

  Foreign Censorship  277
  Jurisdiction  280
  Geo-Filtering and Other Potential Remedies  283

Cyberbullying, Cyberharrassment, and Cyberstalking  283
21 Practical Issues Related to Media Law 288

Non-Legal Consequences/Considerations 288
   Business Consequences 289
   Death Threats 290
   Private Censorship 290

Assessing Risk 291

Media Liability Insurance 292

Journalism Ethics 292
   The Relationship Between Legal and Ethical Considerations 293
   An Overview of the Principles of Journalism Ethics 296
   The Difference Between Ethics and Self-Censorship 298

Practical Conclusions 299

Case Index 301
Subject Index 309
How to Use This Book

This book is written from a somewhat unique point of view. I am a practicing media lawyer who works in-house with a national news organization and I also happen to teach media law in journalism school. In my capacity as an in-house lawyer, one of my responsibilities is to provide training to professional journalists on legal issues. I need to communicate tricky and ambiguous legal concepts in practical, easy-to-apply ways.

From my point of view, teaching media law to journalism students should be no different from the training I do in-house. Students are expected to go out into the so-called “real world” to work, and, ideally, a media law class will teach them the kinds of things they will be expected to know once they are professionals.

_A Practical Guide to Media Law_ is intended to help nonlawyers understand the legal issues involved in modern communications and journalism. This book is particularly useful for future journalists, who need to be trained in the legal issues that will affect their work; but it is also an excellent guide for anyone who communicates in any capacity: tweeting, Facebooking, commenting, blogging, posting photos, managing public relations, running a website, etc. It’s a training manual for the real world of communications.

The Practical Approach to Media Law

The organization of this book attempts to address some specific challenges I’ve encountered while teaching media law to nonlawyers. The main challenge is that they lack sufficient background in law to understand some of the more subtle aspects of the cases, such as how legal principles might apply to various factual scenarios, the difference between civil and criminal principles, and the procedural issues that arise.

To overcome the students’ lack of legal background, I have found that it is useful to organize the chapters by conduct—what people actually do and what they need to know if they are going to do it (for example, criticizing others, publishing photos, taking photos, or advertising a product). This also happens to make the book a useful reference to keep for future use.

I have divided the material into five sections that group conduct by the potential kinds of liability or legal issues that might arise. Dividing the material this way makes it easier for students to see how conduct can give rise to potential legal issues.

The book discusses cases to illustrate how the principles have been applied in real-life scenarios; however, in most instances, case discussions do not provide significant detail about the court opinions. They simply highlight the principle I am trying to illustrate. My goal is to provide information in a clear and structured way so that students can grasp the basic principles that apply. This gives the reader great flexibility. If one is interested in learning more about the subject, the case citations are provided in the Case Index, and the user can find and read the cases in full. Similarly, if the book
references a historical incident with which one is unfamiliar, an online search should provide additional information.

The law is not static; it is dynamic. Conversations about law should be equally dynamic, incorporating what is historically significant with the practical realities of the present situation. This book tries to balance all the competing interests in a way that will resonate with users and prompt thoughtful consideration of the kinds of issues that generate legal controversy.

Features and Structure of the Text

The text explains complicated legal issues in a clear, concise manner. There are several charts and graphs to help organize the material and see how concepts are related. Visual learners may appreciate having the concepts represented graphically. Some chapters also contain boxed supplemental material that is related to the concepts discussed in the chapter.

Section I presents key introductory material to ground students in the basics of the U.S. judiciary and the First Amendment. Chapter 1 explains the court systems and procedures and also explains how precedent can be used to understand legal principles. Chapter 2 outlines various theories of the First Amendment and explains how they have become doctrine or rules that courts follow to decide cases. It also explains how lawyers evaluate legal issues and risks.

Section II discusses the various ways that people can be sued for what they publish. This section focuses on civil claims, such as libel, privacy, copyright or trademark infringement, and negligence, although it does mention related criminal charges that might be brought. Also, the chapters emphasize the conduct that gives rise to claims; thus, there are separate chapters on using photos and using music, even though both of those activities implicate copyright rights. The use of photos may also give rise to libel or privacy claims, and thus the chapter covers those topics as well. In essence, the organization of the material is designed to help students understand all legal issues that might arise from their conduct without having to engage in the kind of “issue-spotting” that one is trained to do in law school.

Section III covers the issues related to the newsgathering process. One chapter addresses whether there is an enforceable right of access to information or places, and the other chapter focuses on whether one may be civilly or criminally liable for newsgathering activities.

Section IV addresses the myriad ways the government can interfere with speech or press. It covers rules regarding search and subpoena power, prosecution based on protests and other public speech, attempts to restrict publication of sensitive topics, regulations of election speech and advertising, the authority of the FCC, and restrictions on special classes of speakers such as students or government employees. These chapters also make a point to note when the speech at issue might also give rise to the kinds of civil claims addressed in Section II.

Section V addresses practical issues that matter in contemporary media. One chapter focuses on how the Internet has affected legal issues. It addresses matters such as the applicability of website Terms of Service, the right to speak anonymously, the potential for international liability, and the impact of social media. The other chapter
addresses practical considerations related to media law, such as ethical, business and safety issues that arise from speech. It also provides information about risk assessment and obtaining media liability insurance.

Disclaimer
The purpose of this book is to discuss legal issues that might arise in media law or communications contexts. It illustrates legal principles with examples and draws general conclusions based on existing case law. However, this book should not be construed as providing legal advice, nor should it be used for guidance in any specific factual situation a reader might encounter. A person who is faced with a potential legal issue should always consult their own lawyer for advice. One thing this book should demonstrate is that the outcome of any case always depends on the specific facts presented and the law of the applicable jurisdiction. Therefore, the general information provided herein should not be interpreted as suggesting that there would be any particular outcome in any potential case. This book is for general informational and educational purposes only. Consult a lawyer if you face any legal issues or concerns.

Supplemental Materials

This text is available in a variety of formats—digital and print. To learn more about Pearson’s programs, pricing options and customization, visit www.pearsonhighered.com.
I would like to thank several people for their help with and/or suggestions for this book: Lucy Dalglish, Gregg Leslie, Cori Zarek, Len Niehoff, Barbara Wall, Beth Soja, Greg Lewis, Michelle Shanahan, Scott Sholder, Marc Messenio, Adam Goldstein, Jill Olmstead, Patricia Castro, and Michael Kiernan. I am also grateful to the following reviewers for their feedback: Timothy Boudreau, Central Michigan University; Al Quatremont, Louisiana College; Jim Burton, Salisbury University; Cori Zarek, University of Maryland/American University; John Watson, American University; Jens Koepke, California State University—Northridge; and Andy Alali, California State University—Bakersfield.

Most of all, I would like to thank all my students and interns, as I have learned at least as much from them as they have learned from me. Several students have made suggestions or comments on the book in its various iterations, and I am grateful for their input.
Ashley Messenger is a practicing media lawyer and a professor of First Amendment and media law.

She serves as Associate General Counsel to NPR, specializing in First Amendment and media law issues. She has previously served as Editorial Counsel to *U.S. News & World Report* and was the McCormick-Tribune Fellow at the Reporters Committee for Freedom of the Press.

She has taught First Amendment law at the University of Michigan Law School, and she is an adjunct faculty member at American University, where she teaches media law in both the graduate and undergraduate journalism programs. She has also taught media law at George Washington University and George Mason University.

Ashley is a member of the Media Institute’s First Amendment Advisory Council; former co-chair of the Media Law Resource Center’s Pre-Publication/Pre-Broadcast Review Committee; Vice Chair of the D.C. Bar Media Law Committee; and on the governing board of the ABA Forum on Communications Law. She received a B.A. in philosophy from the University of Massachusetts at Amherst and a J.D. from Pepperdine University.