

Media and the Law

Second Edition

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Media and the Law

Second Edition

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MATTHEW  BENDER

PREFACE

Our approach to this casebook was informed by our backgrounds as lawyers who have spent much of our careers representing media companies and litigating actual cases on their behalf. Thus, while this volume surveys the entirety of the media law landscape, we have tended to focus in particular on real world problems—in other words, the issues that are most likely to confront media lawyers and their clients in their everyday practices.

The text is divided into four parts. The first addresses fundamental definitional and constitutional issues. It begins with an examination of how to define the media in the twenty-first century, and why definitional constructs matter. It then proceeds to examine the overarching First Amendment principles that set this field of law apart from most others. As former Supreme Court Justice Potter Stewart observed, the press is the only private entity that is explicitly protected by a provision of the Constitution.

The next two parts of the text constitute its substantive core, examining issues that arise, first, from the dissemination of information and, second, from how information is collected in the first place. The chapters cover civil and criminal liability as well as certain affirmative rights to access information. The final part addresses somewhat more esoteric, although important legal issues relating to the media business and the special problems that arise from the electronic dissemination of information.

This second edition of the casebook has been updated substantially, with a particular focus on the legal challenges posed by new communication technologies, including social media and the Internet. It also contains more cases from outside the United States, which will allow students to see how other jurisdictions approach these issues. Given the global distribution of content today, a comparative perspective is essential for every lawyer who advises media clients.

Each chapter begins with a short overview that attempts to put the subject addressed in context. The remaining bulk of the chapters consist principally of edited versions of the relevant cases and legal scholarship. It is our belief that in order to understand the problems and issues that confront the media, it is important for students to read the cases, rather than short summaries of them. Although the latter can certainly help reduce the size of a volume, our view is that such summaries inevitably sacrifice the nuance and context that often make an important difference in the resolution of the questions presented. Many of the chapters also include review problems to help students synthesize the material.

What you will not find in this volume are extensive end notes or questions. There are three reasons for this. First, in our experience, students tend not to read them. Second, we believe that most teachers prefer to focus their classes on the issues they believe are important. Finally, by reading the cases unencumbered by excessive commentary, students are better encouraged to think for themselves about the issues presented, rather than simply learn a collection of rules that they can conveniently regurgitate without much thought as to why they matter.

Lee Levine
David Ardia
Dale Cohen
Mary-Rose Papandrea

DEDICATION

To David Kohler, who provided the solid foundation on which this second edition of his casebook rests.

ABOUT THE AUTHORS

David Kohler, the former Senior Vice President and General Counsel of CNN, was a Professor of Law and Director of the Donald E. Biederman Entertainment and Media Law Institute at Southwestern Law School in Los Angeles, California until his untimely death in 2009 following publication of the first edition of this casebook. Both at CNN and before that in private practice, Professor Kohler had over 25 years of experience representing the media in defamation, invasion of privacy, newsgathering, copyright and other First Amendment matters, and he wrote and lectured extensively on these subjects.

Lee Levine, a founding partner of the Washington, D.C.-based law firm of Levine Sullivan Koch & Schulz, LLP and an adjunct professor at the Georgetown University Law Center, has represented media clients in libel, invasion of privacy, newsgathering, copyright and related First Amendment cases for more than 30 years. In the United States Supreme Court, Mr. Levine has argued *Harte-Hanks Communications, Inc. v. Connaughton* on behalf of the newspaper defendant, and *Bartnicki v. Vopper* on behalf of the media defendants. He is the lead author of the two-volume treatise *NEWSGATHERING AND THE LAW* (Lexis Law Publishing 4th ed. 2011), the co-author (with Stephen Wermiel) of *The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan* (2014), and the author of several articles addressing issues in media law.

David Ardia is an assistant professor of law at the UNC School of Law and a faculty associate at the Berkman Center for Internet & Society at Harvard Law School. Before joining the UNC faculty, he founded and directed the Berkman Center's Digital Media Law Project. Prior to going to Harvard, Professor Ardia was assistant counsel at The Washington Post, where he provided pre-publication review and legal advice on First Amendment, newsgathering, intellectual property, and general business issues. He is a former member of the Newspaper Association of America's legal affairs committee and is a current member of the Online News Association's legal advisory board and the First Amendment and Media Litigation Committee of the American Bar Association.

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NOTE ON EDITING

As is the case with virtually all casebooks, the cases, articles and other materials contained in this volume have been significantly edited. We have attempted to retain the essence of the materials while keeping them as brief as is reasonably possible. Ordinarily, we have not indicated where material has been deleted unless doing so is important to understanding the edited excerpt, or the failure to do so would confuse the reader. At the same time, we have generally left editing notes by the authors of the decisions or articles undisturbed, and where we have added explanatory material, it is indicated by brackets. We also left in the section headings where we thought it would aid the reader's understanding. Where other cases are cited within the text of an edited decision, we have attempted to include the full citation if the cited case is not otherwise included within this volume, but otherwise we have omitted full citations.

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