LAW AND REGULATION

REFORMING THE RULES

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The Washington Post/Getty Images

The U.S. Constitution establishes the right of free expression. Reporting on court actions is an important part of the press' public responsibility. On May 15, 2014, advocates for Internet neutrality demonstrate in front of the Federal Communications Commission building in Washington, D.C.

What's Ahead?

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- Law Must Balance Rights and Responsibilities

"America's broadband networks must be fast, fair and open."

—FEDERAL COMMUNICATIONS COMMISSION, ANNOUNCING OPEN INTERNET RULES ON FEBRUARY 26, 2015

According to the precedent-setting New York Times v. Sullivan case, which helped define press freedom in 1964, the U.S. media's role is to encourage "uninhibited, robust and wide-open" debate.

"Even though absolute press freedom may sometimes have to accommodate itself to other high constitutional values, the repeal or modification of the First Amendment seems unlikely," wrote *New York Times* columnist Tom Wicker. "If the true freedom of the press is to decide for itself what to publish and when to publish it, the true responsibility of the press must be to assert and defend that freedom."

The mass media in America are businesses operating to make a profit, but these businesses enjoy a special trust protected by the U.S. Constitution. The legal and regulatory issues the mass media face today are attempts by the government, the public and the mass media industries to balance the nation's legal rights and public responsibilities, as envisioned in the First Amendment.

U.S. Constitution Sets Free Press Precedent

All legal interpretations of the press's responsibilities attempt to determine exactly what the Framers of the U.S. Constitution meant when they included the First Amendment in the Bill of Rights in 1791. The First Amendment established the concept that the press should operate freely:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In his book *Emergence of a Free Press*, Leonard W. Levy explains his interpretation of the First Amendment:

> By freedom of the press the Framers meant a right to engage in rasping, corrosive and offensive discussions on all topics of public interest. . . . The press had become the tribune of the people by sitting in judgment on the conduct of public officials. A free press meant the press as the Fourth Estate, [as] . . . an informal or extra-constitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable and accountable.

While efforts to interpret the Framers' meaning continue, along with challenges and rebuttals to existing laws and regulations, the discussion of the restrictions and laws covering free expression today can be divided into six categories: (1) federal government restrictions, (2) prior restraint, (3) censorship, (4) libel, (5) privacy and (6) right of access.

Government Tries to Restrict Free Expression

At least four times in U.S. history before 1964, the federal government felt threatened enough by press freedom to attempt to control access to information. These four notable attempts to limit how the mass media operate were the Alien and Sedition Laws of 1798, the Espionage Act of 1918, the Smith Act of 1940 and the Cold War congressional investigations of suspected Communists in the late 1940s and early 1950s. All four challenges were attempts by the government to control free speech.

PhotoQuest/Getty Images

Eugene V. Debs was the most notable person convicted of violating the Espionage Act of 1918. He was jailed for speaking publicly against World War I. He was released from prison by a presidential order in 1921.

The Alien and Sedition Laws of 1798

Under the provisions of the Alien and Sedition Laws of 1798, 15 people were indicted, 11 people were tried, and 10 were found guilty. The Alien and Sedition Laws set a fine of up to $2,000 (more than $50,000 in today's dollars) and a sentence of up to 2 years in jail for anyone who was found guilty of speaking, writing or publishing "false, scandalous and malicious writing or writings" against the government, Congress or the president.

The laws expired in 1801, and when Thomas Jefferson became president that year, he pardoned everyone who had been found guilty under the laws.

The Espionage Act of 1918

Although Henry Raymond had challenged censorship of Civil War reporting (see **Chapter 12**), journalists and the general population during the Civil War accepted government control of information. But during World War I, Congress passed the Espionage Act of 1918.

Not all Americans supported U.S. entry into the war. To stop public criticism, the Espionage Act made it a crime to say or write anything that could be viewed as helping the enemy. Under the act, 877 people were convicted. Many, but not all, of them were pardoned when the war ended.

The most notable person cited under the Espionage Act of 1918 was labor organizer and Socialist Party presidential candidate Eugene V. Debs, who was sentenced to two concurrent ten-year terms for giving a public speech against the war. At his trial, Debs said, "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." Debs was released from prison by a presidential order in 1921.

The Smith Act of 1940

During World War II, Congress passed the Smith Act of 1940, which placed some restrictions on free speech. Only a few people were cited under it, but reporters were required to submit their stories for government censorship before publication.

President Franklin D. Roosevelt created the Office of Censorship, which worked out a voluntary Code of Wartime Practices with the press. The code spelled out the types of information the press should not report about the war, such as troop and ship movements, and the military retained power to censor all overseas war reporting.

The Office of Censorship also issued the Code of Wartime Practices for American Broadcasters, which were guidelines for news broadcasts and commentaries. (See **Impact/Society**, "Excerpts from the 1943 Code of Wartime Practices for American Broadcasters," p. 280.) The federal government exercised its power over broadcasters because it licensed broadcast outlets.

HUAC and the Permanent Subcommittee on Investigations

The fourth major challenge to the First Amendment protection of free speech came in the late 1940s and early 1950s, culminating with actions of the House Un-American Activities Committee (***HUAC***) against

HUAC House Un-American Activities Committee.

IMPACT Society

Excerpts from the 1943 Code of Wartime Practices for American Broadcasters

Note: During World War II, the Office of War Information tried to control what was broadcast from the United States. Following are some of the voluntary *rules radio broadcasters were expected to follow.*

Gene Lester/Getty Images

Under provisions of the 1943 Code of Wartime Practices for American Broadcasters, all live radio programs—including this 1944 radio show featuring singers (*left to right*) Dinah Shore, Frank Sinatra and Bing Crosby—were subject to on-air censorship.

News Broadcasts and Commentaries

It is requested that news in any of the following classifications be kept off the air unless made available for broadcast by appropriate authority or specifically cleared by the Office of Censorship.

- Weather—Weather forecasts other than those officially released by the Weather Bureau.
- Armed forces—Types and movements of United States Army, Navy, and Marine Corps units, within or without continental United States.

Programs

- Request programs—No telephoned or telegraphed requests for musical selections should be accepted. No requests for musical selections made by word-of-mouth at the origin of broadcast, whether studio or remote, should be honored.
- Quiz programs—Any program which permits the public accessibility to an open microphone is dangerous and should be carefully supervised. Because of the nature of quiz programs, in which the public is not only permitted access to the microphone but encouraged to speak into it, the danger of usurpation by the enemy is enhanced.

Foreign Language Broadcasts

- Personnel—The Office of Censorship, by direction of the president, is charged with the responsibility of removing from the air all those engaged in foreign language broadcasting who, in the judgment of appointed authorities in the Office of Censorship, endanger the war effort of the United Nations by their connections, direct or indirect, with the medium.
- Scripts—Station managements are requested to require all persons who broadcast in a foreign language to submit to the management in advance of broadcast complete scripts or transcriptions of such material.

Excerpted from U.S. Government Office of Censorship, *Code of Wartime Practices for American Broadcasters*. Washington, DC: Government Printing Office, 1943, pages 1–8.

Bettmann/CORBIS

Senator Joseph R. McCarthy (at the easel) explains his theory of Communism during the Army-McCarthy hearings in 1954. Army counsel Joseph N. Welch, who was defending people who were declared subversive by McCarthy, is seated at the table. News reports and Edward R. Murrow's exposure of McCarthy's investigative excesses eventually triggered public criticism of McCarthy's tactics, and his Senate colleagues censured him.

The Washington Post/Getty Images

Katharine Graham (*right*), publisher of *The Washington Post*, and Executive Editor Ben Bradlee celebrate the U.S. Supreme Court's 6-3 decision on June 30, 1971, to allow publication of the Pentagon Papers.

the Hollywood Ten (see **Chapter 7**) and the Senate's Permanent Subcommittee on Investigations, presided over by Senator Joseph R. McCarthy.

These congressional committees set a tone of aggressive Communist hunting. After television broadcasts in 1954 of McCarthy's investigation of Communist influence in the Army and other reports eventually exposed his excesses, McCarthy's Senate colleagues censured him by a vote of 67 to 22. But while the hearings were under way, they established a restrictive atmosphere that challenged the public's right to free expression.

Prior Restraint Rarely Used

Prior restraint means government censoring of information before the information is published or broadcast. The Framers of the Constitution clearly opposed prior restraint by law. However, in 1931, the U.S. Supreme Court established the circumstances under which prior restraint could be justified.

Near v. Minnesota

J. M. Near published the weekly *Saturday Press*, which printed the names of people who were violating the nation's Prohibition laws. Minnesota authorities obtained a court order forbidding publication of *Saturday Press*, but the U.S. Supreme Court overturned the state's action.

In *Near v. Minnesota* in 1931, the Court condemned prior restraint, although it acknowledged that the government could limit information about troop movements during war and could control obscenity. The Court also said "the security of community life may be protected against incitements to acts of violence and the overthrow of orderly government."

Saturday Press had not violated any of these prohibitions, so the Minnesota court's order was lifted. But future attempts to stop other publications were based on the *Near v. Minnesota* decision, making it a landmark case.

In two important instances since *Near* (the Pentagon Papers and *United States v. The Progressive*), courts were asked to bar publication of information to protect national security.

The Pentagon Papers

On June 13, 1971, *The New York Times* published the first installment of what became known as the Pentagon Papers—excerpts from a document titled *History of U.S. Decision-Making Process on Vietnam Policy*. The Pentagon Papers detailed decisions that were made about U.S. involvement in Vietnam starting in the 1940s.

The documents were labeled top secret, but they were given to *The Times* by one of the report's authors, Daniel Ellsberg, a consultant to the Defense Department and the White House. Ellsberg said that he believed the papers had been improperly classified and that the public should have the information.

After the first three installments were published in *The Times*, Justice Department attorneys obtained a

Prior Restraint Government censorship of information before the information is published or broadcast.

restraining order against the paper, which stopped publication of the installments for 2 weeks while *The Times* appealed the case. While the case was being decided, *The Washington Post* began publishing the papers, and *The Post* also was stopped, but only until the U.S. Supreme Court decided the *Times* case. On June 30, 1971, in a 6-3 decision, the Court agreed that the newspapers should be permitted to publish the Pentagon Papers.

In *New York Times Co. v. United States*, the Court said the government did not prove that prior restraint was necessary. *The Times* and *The Post* then printed the papers, but the court action had delayed publication of the information for two weeks. This was the first time in the nation's history that the federal government had stopped a newspaper from publishing specific information.

Legal fees cost *The Post* and *The Times* more than $270,000 (equivalent to $1.6 million today). Forty years later, on June 13, 2011, the U.S. government publicly released the complete set of documents once known as the Pentagon Papers.

The *Progressive* Case

The next instance of prior restraint happened in 1979, when editors of *The Progressive* magazine announced that they planned to publish an article by Howard Morland about how to make a hydrogen bomb. The author said the article was based on information from public documents and interviews with government employees. The Department of Justice brought suit in Wisconsin, where the magazine was published, and received a restraining order to stop the information from being printed (*United States v. The Progressive*). *The Progressive* did not publish the article as planned.

Before the case could reach the U.S. Supreme Court, a Wisconsin newspaper published a letter from a man named Charles Hansen that contained much of the same information as the Morland article. Hansen sent eight copies of the letter to other newspapers, and the *Chicago Tribune* also published the letter, saying that none of the information was proprietary. Six months after the original restraining order, *The Progressive* published the article.

Government Manages War Coverage

The U.S. government historically has tried to control its image during wartime. Four recent examples of government press management occurred in Grenada, the Gulf War, Afghanistan and Iraq.

In 2009, the U.S. government eased previous restrictions on press access during the Gulf War when, with the family's consent, it allowed reporters to photograph caskets of fatally injured soldiers that were being returned home.

Restricting Press Access in Grenada

In an incident in 1983 that never reached the courts but that was a type of prior restraint, the Reagan administration kept reporters away from the Caribbean island of Grenada, where the administration had launched a military offensive. A press blackout began at 11 p.m. on October 24, 1983.

The administration didn't officially bar the press from covering the invasion on October 25, but the Pentagon refused to transport accredited reporters and turned back press yachts and airplanes that attempted to enter the war zone. About a dozen print journalists and photographers were able to get in anyway, but no television crews were allowed.

More than 400 journalists from 170 news organizations around the world who couldn't get to Grenada were left on Barbados, waiting for the news to get to them. Charles Lachman of the *New York Post* flew to Barbados and then to St. Vincent. Then he and some other reporters paid $6,000 to charter a boat to Grenada. They arrived 5 days after the invasion and discovered that a hospital had been a casualty of the military action, information the military had tried to keep from being reported.

News Blackouts and Press Pools During the Gulf War

In the 1990s, the Gulf War posed another tough battleground for the rights of reporters versus the rights of the military to restrict access. On Saturday, February 23, 1991, when the ground assault began about three weeks into the Gulf War, the Defense Department announced the first 24-hour news blackout in U.S. military history. Press organizations protested the ban, but the military argued that modern communications technology necessitated the blackout.

Subsequent Pentagon rules for war coverage, reached in cooperation with journalists, imposed stricter limits on reporting in the Persian Gulf than in any previous U.S. war. Reporters were required to travel in small "pools," escorted by public affairs officers, and every story the pool produced was subject to military censorship. This system, called ***pool reporting***, was created to respond to reporters' complaints about news blackouts during the Grenada incident.

An unprecedented number of journalists—1,300 in Saudi Arabia alone—posed a challenge for military press officers. In a commentary protesting the restrictions, *The New Yorker* magazine said, "The rules, it is clear, enable the Pentagon to promote coverage of subjects and events

Pool Reporting An arrangement that places reporters in small, government-supervised groups to cover an event.

that it wishes publicized and to prevent reporting that might cast it, or the war, in a bad light." Yet, in a *Los Angeles Times* poll of nearly 2,000 people 2 weeks after the fighting started, 79 percent approved of the Pentagon's restrictions, and 57 percent favored even further limits.

War in Afghanistan

During the early days of the war in Afghanistan—especially in the months immediately following the September 11, 2001, terrorist attacks in the United States—the military carefully controlled press access to information, citing national security. The military used press pools and provided its own video footage of troop landings, produced by the military's combat film teams.

"In World War II, accredited journalists from leading news organizations were on the front lines to give the public an independent description of what was happening," reported *The New York Times*. "In the new war on terrorism, journalists have had limited access to many of the United States forces that are carrying out the war. . . . The media's access to American military operations is far more limited than in recent conflicts."

PAUL J. RICHARDS/Getty Images

Members of the U.S. Army Honor Guard carry the casket of Spc. Ryan M. Lumley, from Lakeland, Fla., who died in combat in Afghanistan. The George W. Bush administration's (2001–2009) ban on press coverage of fatally wounded U.S. soldiers was lifted in 2009 by the Obama administration, and allowed coverage with the family's permission. This transfer of Lumley's casket occurred at Dover Air Force Base, Del., on December 5, 2011.

"Embedded" Reporters During Iraq War

Beginning in 2003, during the Iraq War, the U.S. government adopted a system called *embedding*, which meant that members of the press traveled with the military, but the press's movements were restricted and managed by their military units.

Embedding was a reaction to the press's limited access in Afghanistan, but many journalists said they still had restricted access to the real action in Iraq. However, the coverage left the impression with the public that the press was giving the whole story, when in fact the press had access to only a very restricted view. (For more about embedded reporters, see **Chapter 12**.)

Photographs of War Fatalities

During the Iraq War, the George W. Bush administration (2001–2009) banned the media from covering the arrival of war fatalities as they were returned to America, saying the administration wanted to protect the families' privacy. Critics of the ban said that the government was trying to hide the consequences of war from public view. In 2009, the Obama administration lifted the ban, and the press now is allowed access to photograph the return of fatally wounded soldiers, with family permission.

Today, the federal government still requires the accreditation of war zone reporters (see **Chapter 12**), but the U.S. military and the press operate under a less restrictive, more accommodating arrangement.

WikiLeaks Challenges Government Secrecy

Founded in 2006 by Australian Julian Assange, WikiLeaks is a whistle-blowing organization devoted to uncovering government secrets and publishing them on its Web site. Beginning in 2010, WikiLeaks began releasing classified U.S. diplomatic documents, including military information and State Department communications.

In late July 2010, WikiLeaks posted tens of thousands of confidential military documents about the wars in Iraq and Afghanistan. "The battlefield consequences of the release of these documents are potentially severe and dangerous for our troops, our allies and Afghan partners, and may well damage our relationships and reputation in that key part of world," Defense Secretary Robert M. Gates told Pentagon reporters.

On November 28, 2010, *The New York Times* began publishing a series of articles based on a new release of State Department documents. "Some 250,000 individual cables, the daily traffic between the State Department and more than 270 American diplomatic outposts around the world were made available to *The Times* by a source who insisted on anonymity," reported *The Times* in an explanatory front page Note to Readers that accompanied the first article.

FABRICE COFFRINI/Getty Images

On May 23, 2015, WikiLeaks founder Julian Assange appears in a video transmitted from the Ecuadorian Embassy in London, England, where he was granted political asylum. Despite U.S. government objections, WikiLeaks had posted more than 700,000 confidential State Department documents on its Web site as of December 28, 2010, and since then has continued to release restricted documents on the Web.

The Times acknowledged that WikiLeaks originally obtained the documents but did not directly cite WikiLeaks as *The Times*' source. "As daunting as it is to publish such material over official objections, it would be presumptuous to conclude that Americans have no right to know what is being done in their name," *The Times* explained.

Outraged at the leaks, several countries called for Assange's arrest. For months, he eluded authorities by traveling to various European countries. He eventually turned himself in to British authorities on December 7, 2010. According to *The New York Times*, as of December 28, 2010, WikiLeaks had posted 391,832 secret documents on the Iraq war, 77,000 classified Pentagon documents on the Afghan conflict and 250,000 State Department cables.

In July 2010, the U.S. military charged Pfc. Bradley Manning, an intelligence analyst, with downloading large amounts of classified information from a computer at a military base in Iraq and sharing the information with WikiLeaks. In February 2013, Manning pleaded guilty to 10 of the charges against him. On July 30, 2013, a military judge found Manning not guilty of "aiding the enemy," but found him guilty of 20 other charges, including 6 violations of the Espionage Act. On August 21, 2013, Manning was sentenced to 35 years in prison.

On February 23, 2011, a British court ordered that Assange be extradited to Sweden for charges unrelated to the WikiLeaks case. He appealed and the case is pending. Assange currently is living inside the Ecuadorian Embassy in London, where he has been granted political asylum. The U.S. government has not filed any charges against Assange for his role in publishing secret U.S. documents on the Internet. WikiLeaks continues to release restricted documents on its Web site.

When should the government be able to prevent military information from reaching the public? When should the press be granted access? The Supreme Court has never specifically addressed these questions, and the U.S. press and news organizations remain vulnerable to fluctuating military restrictions.

USA PATRIOT Act Meets Public Resistance

In 2001, a few weeks after the terrorist attacks on the World Trade Center in New York City, Congress passed the USA PATRIOT Act (an abbreviation for ***U***niting and ***S***trengthening ***A***merica by ***P***roviding ***A***ppropriate ***T***ools ***R***equired to ***I***ntercept and ***O***bstruct ***T***errorism), designed to give the U.S. government broad powers to track, detain and interrogate people who were deemed a threat to the country.

Among the provisions of the act was Section 215, which allows the Federal Bureau of Investigation (FBI) to obtain "business records." These could include public library records, such as computer log-ins and lists of books people check out, although the act did not specifically mention libraries.

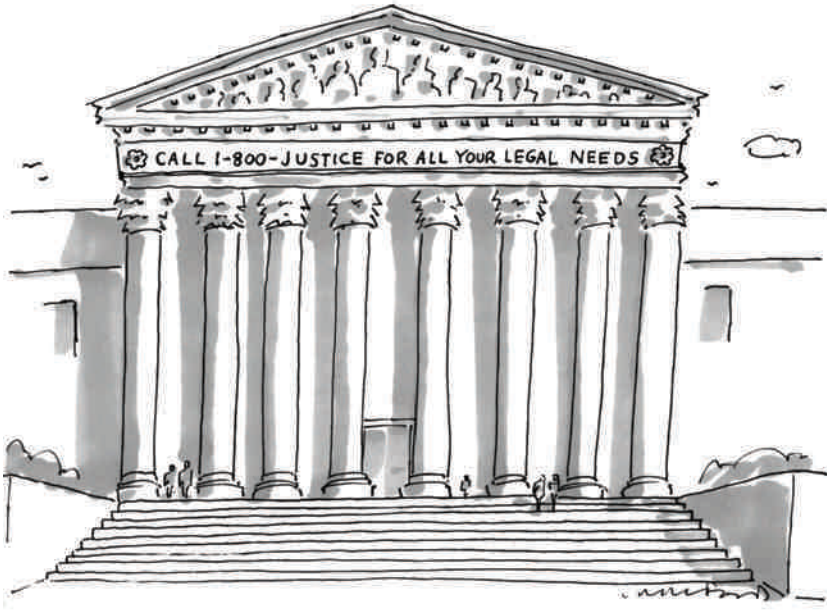
The American Library Association (ALA) said librarians would cooperate with a government investigation, but only if they received a search warrant. The librarians said the PATRIOT Act allowed officials to seize anything they wanted without a search warrant, which librarians said would inhibit the use of public libraries—a clear limit on free expression.

Some libraries posted signs warning patrons that federal authorities might review their records; others systematically shredded patrons' sign-in sheets to use library computers. The ALA went on record opposing unwarranted government access to library records. The American Civil Liberties Union (ACLU) sued in several cities nationwide to keep library records private, and in 2004 a Los Angeles federal judge ruled that parts of the PATRIOT Act were unconstitutional violations of the First and Fifth Amendments to the U.S. Constitution.

In 2005, the FBI demanded library records from Library Connection, a nonprofit library group in Bridgeport, Conn., saying the agency needed the information as part of a terrorism investigation under the PATRIOT Act. The ACLU challenged the request in court, saying the request was unconstitutional. Eventually the FBI withdrew its request.

In March 2006, Congress reauthorized the act for another four years, including Section 215. Opponents, including the ALA, vowed to renew their challenges to the most aggressive provisions of the act, especially Section 215, to stop what they said was an intrusion into important American civil liberties.

In 2007, a federal judge in New York struck down provisions of the PATRIOT Act that had authorized the government to issue so-called National Security Letters (***NSLs***), compelling businesses (such as Internet service providers, telephone companies and public libraries) to release customer information without a judge's order or grand jury subpoena.



Michael Crawford The New Yorker Collection/The Cartoon Bank

U.S. District Judge Victor Marrero said using the PATRIOT Act, even as rewritten and reauthorized in 2006, to obtain customer information without court authorization "offends the fundamental constitutional principles of checks and balances and separation of powers." President Obama signed a four-year extension of the act on May 30, 2011.

When the act again came up for renewal in 2015, the ALA and civil liberties organizations lobbied fervently against the bulk collection of consumer information by the National Security Agency (NSA). The USA PATRIOT Act was renamed the USA Freedom Act when President Obama signed it on June 2, 2015, and new provisions of the act curtailed the government's bulk data collection program. This eliminated the threat that libraries and telecommunications companies would be required to disclose customers' information to the government without a court order.

"Unless people feel free to investigate and read, and now, look at Web sites . . . they cannot truly be good citizens and they cannot oversee the government," said Emily Sheketoff, head of the ALA's Washington, D.C., office.

What Is the Standard for Obscenity?

Different media industries historically have reacted differently to threats of ***censorship***, the practice of suppressing material that is considered morally, politically or otherwise objectionable. Most threats of censorship concern matters of morality.

According to the American Library Association, the top three reasons critics try to challenge content are:

1. The material is considered "sexually explicit."

2. The material contains "offensive language."

3. The material is "unsuited to an age group."

In the U.S., censorship almost always occurs after the fact. Once the material is printed or displayed, the courts can be asked to review the content for obscenity.

To avoid ongoing government scrutiny, the motion picture and recording industries have accepted some form of self-regulation (ratings systems) to avoid government intervention. The electronic media are governed by laws in the federal criminal code against broadcast obscenity, and the federal Cable Act of 1984 bars obscenity on cable TV.

Print media, including book publishers, have been the most vigorous defenders of the right to publish. The print media were the earliest mass media to be threatened with censorship, beginning with the philosopher Plato, who suggested in 387 B.C. that Homer's *Odyssey* be censored for immature readers.

Government efforts to censor free expression happen on the local and federal levels.

Local Efforts

More than 2,000 years after Homer's *Odyssey* was threatened with censorship, Boston officials banned the sale of the April 1926 issue of H. L. Mencken's magazine *The American Mercury*. The local Watch and Ward Society had denounced a fictional story in the magazine as "salacious." The story featured "Hatrack," a prostitute whose clientele included members of various religious congregations who visited her after church.

NSL National Security Letter.

Censorship The practice of suppressing material that is considered morally, politically or otherwise objectionable.

In Boston, surrounded by his supporters, Mencken sold a copy of the magazine at a prearranged time to a member of the Watch and Ward. The chief of the Boston Vice Squad arrested Mencken and marched him to jail, where he spent the night before going to court the next morning. "Mencken passed an uneasy night," says Mencken's biographer Carl Bode, "knowing that he could be found guilty and perhaps even be imprisoned. . . . Returning to court he listened to Judge Parmenter's decision: 'I find that no offense has been committed and therefore dismiss the complaint.'"

Mencken spent $20,000 (the equivalent of $270,000 today) defending *The Mercury*, but according to Bode, "the net gain for both *The Mercury* and Mencken was great. *The Mercury* became the salient American magazine and Mencken the international symbol of freedom of speech." Mencken was defending his magazine against local censorship. Until 1957, censorship in America remained a local issue because the U.S. Supreme Court had not considered a national censorship case.

U.S. Supreme Court Writes Obscenity Criteria

Censorship still primarily is a local issue, and two landmark Supreme Court cases—*Roth v. United States* and *Miller v. California*—established the major criteria for local censorship.

ROTH V. UNITED STATES. This 1957 decision involved two separate cases. Samuel Roth was found guilty in New York of sending obscenity through the mail, and David S. Alberts was found guilty of selling obscene books in Beverly Hills. (The case carries Roth's name because his name appeared first when the cases were combined for review.) The U.S. Supreme Court upheld the guilty verdict and, according to legal scholar Ralph Holsinger, established several precedents:

- The First Amendment does not protect obscenity.
- Obscenity is defined as material "utterly without redeeming social importance."
- Sex and obscenity are not synonymous. Obscene material is material that appeals to "prurient [obsessively sexual] interest."
- A test of obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (This last description of obscenity has become known as the ***Roth test***.)

MILLER V. CALIFORNIA. In the late 1960s, a California court found Marvin Miller guilty of sending obscene, unsolicited advertising material through the mail. The case reached the U.S. Supreme Court in 1973. The decision described which materials a state could censor and set a three-part test for obscenity.

According to the Supreme Court, states may censor material that meets this three-part local test for obscenity. The local court, according to legal scholar Ralph Holsinger, must determine:

1. Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to prurient interest.
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
3. Whether the work, taken as a whole, lacks serious *L*iterary, *A*rtistic, *P*olitical or *S*cientific value—often called the ***LAPS test***.

The *Roth* and *Miller* cases together established a standard for obscenity, leaving the decision in specific obscenity challenges to local courts. The result is that widely different standards exist in different parts of the country because local juries and elected officials are free to decide what they consider offensive in their communities. Books and magazines that are available to young readers in some states may be unavailable in other states. (See **Impact/Society**, "2014 Top 10 Most Frequently Challenged Books," p. 289.)

School Boards as Censors

Many censorship cases begin at schools and local government boards, where parents' groups protest books, magazines and films that are available to students, such as these examples:

- In 2014, a school district in Riverside, Calif., banned the popular novel *The Fault in Our Stars* from its middle school library after one parent objected to its portrayal of death, illness and sex.
- A school district in Little Rock, Ark., removed Harry Potter books from its library because the school board claimed the tales of wizards and spells could harm schoolchildren.
- A school board in Minnesota banned four books, including *Are You There, God? It's Me, Margaret* by Judy Blume, a very popular young adult author.

Roth Test A standard court test for obscenity, named for one of the defendants in an obscenity case.

LAPS Test A yardstick for local obscenity judgments, which evaluates an artistic work's literary, artistic, political or scientific value.

- The state of Alabama ordered 45 textbooks pulled from the shelves after a federal judge said the books promoted "secular humanism."

The ALA fiercely opposes any attempt to censor or restrict access to information. Since 1990, the ALA and several other organizations have sponsored Banned Books Week to bring public attention to the issue of censorship. "Censorship has no place in a free society," said ALA President Camila Alire. "Part of living in a democracy means respecting each other's differences and the right of all people to choose for themselves what they and their families read."

Most reported book challenges take place in schools and in public libraries, according to the ALA. These challenges usually are reversed when appealed, but while the specific issues are being decided, the books, magazines and videos are unavailable, and censorship efforts continue nationwide. (See **Impact/Profile**: "John Green's *The Fault in Our Stars* is Banned, Then Returned to Riverside, California, Classrooms," p. 288 and **Impact/Society: Illustration 14.1**, "2014 Top 10 Most Frequently Challenged Books" pp. 288–289.)

The *Hazelwood* Case

In 1988, the U.S. Supreme Court for the first time gave public school officials considerable freedom to limit what appears in student publications. The case, *Hazelwood v. Kuhlmeier*, became known as the *Hazelwood* case because the issues originated at Hazelwood High School in Hazelwood, Mo.

The high school paper, funded mostly from the school budget, was published as part of a journalism class. The principal at Hazelwood regularly reviewed the school paper before it was published, and in this case he deleted two articles the student staff had written. One deleted article was about student pregnancy and included interviews with three students who had become pregnant while attending school.

Although the article used pseudonyms instead of the students' names, the principal said he believed the anonymity of the students was not sufficiently protected. He also believed the girls' discussion of their use or nonuse of birth control was inappropriate for a school publication. By a vote of 5 to 3, the U.S. Supreme Court agreed.

The *Washington Post*, however, editorialized against the decision. "Even teenagers," the *Post* editorial said, "should be allowed to publish criticism, raise uncomfortable questions and spur debate on subjects such as pregnancy, AIDS and drug abuse that are too often a very real aspect of high school culture today."

The Hazelwood principal's action drew the attention of the *St. Louis Post-Dispatch*, which published the censored articles, bringing them a much wider audience than the students at Hazelwood High.

Many states subsequently have adopted legislation to protect student newspapers from similar censorship. The Supreme Court decision is significant, however, because it has changed the way local officials in some states monitor school publications.

Libel Law Outlines the Media's Public Responsibility

"Americans have increasingly begun to seek the refuge and vindication of litigation," writes legal scholar Rodney A. Smolla in his book *Suing the Press*. "Words published by the media no longer roll over us without penetrating; instead, they sink in through the skin and work inner damage, and a consensus appears to be emerging that this psychic damage is serious and must be paid for."

Three cases demonstrate how the mass media become targets of litigation:

1. In 1983, entertainer Carol Burnett sued the *National Enquirer* for $10 million for implying in an article that she was drinking too much and acting rude in a Washington, D.C., restaurant.
2. In 1989, entertainer Wayne Newton was awarded $19.2 million in damages after he sued NBC-TV for a story that linked him to organized crime.
3. In September 2010, Republican U.S. Senate candidate Jeff Greene, a Florida real estate developer who lost the Democratic primary, sued the *St. Petersburg Times* and *The Miami Herald* for $500 million, saying the newspapers' stories were part of "a coordinated and agreed upon plan to assassinate Greene's character."

These three cases involve the law of ***libel***, a legal restraint on press freedom in the U.S. (A libelous statement is one that unjustifiably exposes someone to ridicule or contempt.) The cases clearly indicate the mass media's legal vulnerability to charges of participating in and/or provoking irresponsible, damaging behavior.

How can the country accommodate both the First Amendment concept of a free press and the right of the nation's citizens to keep their reputations from being unnecessarily damaged?

Libel A false statement that damages a person's character or reputation by exposing that person to public ridicule or contempt.

IMPACT *Profile*

John Green's *The Fault in Our Stars* is Banned, then Returned to Riverside, California, Classrooms

By Shirley Biagi

On September 22, 2014, the Riverside, California, Unified School District voted 6 to 1 to ban the international bestseller by John Green, *The Fault in Our Stars*, from the district's middle schools. The board banned the book, about two young adults who are dying of cancer, after one parent complained about sex and crude language. The book remained available in the district's high schools.

In voting for the ban, board member Tom Hunt read a 32-line passage from the book that described the pair's sexual relationship. Then Hunt commented, "This is two young people who are facing death. This is not appropriate for middle school."

According to *Time* magazine, when a fan asked author John Green to respond to news of the ban, he said, "I guess I am both happy and sad. I am happy because apparently young people in Riverside, California, will never witness or experience mortality since they won't be reading my book, which is great for them. But I am also sad because I was really hoping I would be able to introduce the idea that human beings die to the children of Riverside, California, and thereby crush their dreams of immortality."

After national publicity about the ban, the board voted 3-2 three months later to return the book to middle school library shelves. Praising the board's December action, Riverside's local newspaper, *The Press-Enterprise*, published an editorial on December 11, 2014 that concluded, "The idea that government officials ought to have a say in what books children have access to is concerning. What a young person chooses to read should more appropriately be determined by the youth and their parents or guardians. For public institutions to moralize by committee or decree is an inappropriate exercise of government power."

AP Images/Matt Sayles

John Green, author of the international bestseller *The Fault in Our Stars*, whose book was banned by the Riverside (California) Unified School District in 2014 and then reinstated.

Sullivan Case Establishes a Libel Landmark

Modern interpretation of the free speech protections of the First Amendment began in 1964 with the landmark *New York Times v. Sullivan* case in which the U.S. Supreme Court began a process that continues today to define how the press should operate in a free society. Many of today's arguments about the free press's role in a libel case derive from this decision.

The *Sullivan* case began in early 1960 in Alabama, where civil rights leader Dr. Martin Luther King, Jr., was arrested for perjury on his income tax form (a charge of which he was eventually acquitted). The Committee to Defend Martin Luther King bought a full-page ad in the March 29, 1960, *New York Times* that included statements about harassment of King by public officials and the police. The ad included a plea for money to support civil rights causes. Several notable people were listed in the ad as supporters, including singer Harry Belafonte, actor Sidney Poitier and former First Lady Eleanor Roosevelt.

IMPACT Society

ILLUSTRATION 14.1

2014 Top 10 Most Frequently Challenged Books

Each year, the American Library Association's Office for Intellectual Freedom compiles a list of the top ten most frequently challenged books in order to inform the public about censorship in libraries and schools. The ALA condemns censorship and works to ensure free access to information.

A challenge is defined as a formal, written complaint filed with a library or school requesting that materials be removed because of content or appropriateness. The number of challenges reflects only incidents reported. We estimate that for every reported challenge, four or five remain unreported. Therefore, we do not claim comprehensiveness in recording challenges.

American Library Association, ala.org

Chris Felver/Getty Images

Sherman Alexie is the author of *The Absolutely True Diary of a Part-Time Indian*, 2014's most frequently challenged book. Alexie recounts his experiences as a 14-year-old who left the Spokane Reservation, where he grew up, to attend a local high school 22 miles away.

L. B. Sullivan, who supervised the police and fire departments as commissioner of public affairs in Montgomery, Ala., demanded a retraction from *The Times* regarding the statements about King's harassment, even though he had not been named in the ad. *The Times* refused, and Sullivan sued *The Times* for libel in Montgomery County, where 35 copies of the March 29, 1960, *Times* had been distributed for sale. The trial in Montgomery County lasted three days, beginning on November 1, 1960. The jury found *The Times* guilty and awarded Sullivan $500,000.

Eventually, the case reached the U.S. Supreme Court. In deciding the suit, the Court said that although *The Times* might have been negligent because it did not spot some misstatements of fact that appeared in the ad, *The Times* did not deliberately lie—it did not act with what the Court called *actual malice*.

Bettmann/Corbis

In the U.S., legal interpretation of free-speech protections of the First Amendment began with the landmark *New York Times v. Sullivan* case. L. B. Sullivan (*second from right*) appears in November 1960 with his attorneys. Although Sullivan's libel suit was successful in Alabama, the U.S. Supreme Court decided in 1964 that he had failed to prove malice on the part of *The New York Times*.

To prove libel of a public official, the official must show that the defendant published information with *knowledge of its falsity* or out of *reckless disregard* for whether it was true or false, the Court concluded. The *Sullivan* decision thus became the standard for subsequent libel suits: Public officials in a libel case must prove actual malice.

Redefining the *Sullivan* Decision

Three important cases further defined the *Sullivan* decision.

GERTZ V. ROBERT WELCH INC. The 1974 decision in *Gertz v. Robert Welch Inc.* established the concept that the expression of opinions is a necessary part of public debate, and so an opinion—an editorial or a restaurant review, for example—cannot be considered libelous. The *Gertz* case also expanded the definition of public *official* to public *figure*. Today, the difference between public figures and private figures is very important in libel suits.

People who are defined as *private citizens* by a court must show only that the libelous information is false and that the journalist or news organization acted negligently in presenting the information. *Public figures*, however, must show not only that the libelous information is false but also that the information was published with actual malice—that the journalist or the news organization knew the information was untrue or deliberately overlooked facts that would have proved the published information was untrue.

HERBERT V. LANDO. The 1979 decision in *Herbert v. Lando* established the concept that because a public figure suing for libel must prove actual malice, the public figure can use the discovery process (the process by which potential witnesses are questioned under oath before the trial to help define the issues to be resolved at the trial) to determine a reporter's state of mind in preparing the story.

Because of this decision, reporters are sometimes asked in a libel suit to identify their sources and give up their notes and the tapes of the interviews they conducted to write their stories. Reporters usually refuse and, as a result, may face legal sanctions.

MASSON V. NEW YORKER MAGAZINE. In 1991, the U.S. Supreme Court reinstated a $10 million libel suit brought against *The New Yorker* magazine by psychoanalyst Jeffrey M. Masson. Masson charged that author Janet Malcolm libeled him in two articles in *The New Yorker* and in a book when she deliberately misquoted him. Malcolm contended the quotations she used were recorded or were written in her notes.

Malcolm wrote, for example, that Masson said, "I was like an intellectual gigolo." However, this exact phrase was not in the transcript of her interview. Masson contended that he never used the phrase. Issues in the case included whether quoted material must be verbatim and whether a journalist can change grammar and syntax. When the case was heard again in 1994, the Court found that Malcolm had changed Masson's words but that the changes did not libel Masson. The *Masson* case is an

Patrick Rolands/Cartoon Stock

This paper only prints the truth or the closest thing to it that doesn't get us sued for libel.

important example of the Court's attempts to define the limits of libel.

Charges and Defenses for Libel

To prove libel, someone must show that:

- The statement was communicated to a third party.
- People who read or saw the statement would be able to identify the person, even if that person was not actually named.
- The statement injured the person's reputation or income or caused mental anguish.
- The journalist or the print or broadcast organization is at fault.

Members of the press and press organizations that are faced with a libel suit can use three defenses: (1) truth, (2) privilege and (3) fair comment.

TRUTH. The first and best defense against libel, of course, is that the information is true. True information, although sometimes damaging, cannot be considered libelous. Publishing true information, however, can still be an invasion of privacy, as explained later in this chapter. Furthermore, truth is a successful defense only if truth is proved to the satisfaction of a judge or jury.

PRIVILEGE. The press is free to report what is discussed during legislative and court proceedings, even though the information presented in the proceedings by witnesses and others may be untrue or damaging. This is called ***qualified privilege***.

FAIR COMMENT. The courts also have carefully protected the press's freedom to present opinions. Because opinions cannot be proved true or false, the press is free to comment on public issues and to praise a play or criticize a movie, for example.

Legal Outcomes Reflect Mixed Results

The outcomes of the three cases listed at the beginning of this discussion of libel law (on p. 287) were the following:

1. The jury in the Carol Burnett case originally awarded her $1.6 million, but the amount was reduced to $150,000 on appeal.
2. The jury awarded Wayne Newton $19.2 million in 1989. NBC appealed the case, and in 1990 the courts overturned the award, ruling there was not enough evidence to prove actual malice, but NBC's legal costs were in the millions of dollars.
3. The Jeff Greene case was dismissed. In responding to the charges, the editor of the *St. Petersburg Times* said, "It is our firm opinion that the allegations in this lawsuit are preposterous. We believe Jeff Greene is a sore loser and he's trying to blame the newspapers because he can't accept the verdict of the voters." The Greene case could be considered an example of a ***SLAPP*** suit—*s*trategic *l*awsuit *a*gainst *p*ublic *p*articipation. (See "Internet Comments Bring SLAPP Suits," p. 292.)

In two of the three cases, the courts faulted members of the media for their reporting methods, but neither members of the press nor the media companies were found legally responsible. All three cases show that journalists and media organizations must always be diligent about their responsibilities, and there are serious financial and professional consequences for news organizations that forget to act responsibly and heed the law.

Most successful libel judgments eventually are reversed or reduced when they are appealed. Often the major cost of a libel suit is the defense lawyers' fees. Large media organizations carry libel insurance, but a small newspaper, magazine or book publisher, broadcast station or Internet site may not be able to afford the insurance or the legal costs.

Qualified Privilege The freedom of the press to report what is discussed during legislative and court proceedings.

SLAPP Strategic lawsuit against public participation.

Internet Comments Bring SLAPP Suits

Bloggers and other Internet users who post critical comments on sites like Facebook, Twitter and Yelp may find themselves the target of what lawyers call a SLAPP. This is a common tactic of businesses and government officials because suing someone for defamation can intimidate the person with the prospect of an expensive court battle against a well-financed opponent.

Today, the Internet makes a person's critical comments available instantly, and some companies and public officials are threatening libel suits against their critics. There are 27 states with anti-SLAPP laws, which may require that the person who brings the suit pay the combined legal costs if the suit is dismissed.

Federal anti-SLAPP legislation, which would make protections uniform across the country, continues to be debated in Congress. "Just as petition and free speech rights are so important that they require specific constitutional protections, they are also important enough to justify uniform national protections against SLAPPs," said Mark Goldowitz, director of the California Anti-SLAPP Project.

Invasion of Privacy Defined Four Ways

The public seems to think invasion of privacy is one of the mass media's worst faults. However, libel suits are much more common in the United States than suits about invasion of privacy. Because there is no U.S. Supreme Court decision covering privacy like *The New York Times v. Sullivan* covers libel, each state has its own privacy protections for citizens and its own restrictions on how reporters can get the news and what can be published.

Privacy is an ethical issue as well as a legal one. (See **Chapter 15** for a discussion of the ethics of privacy.) Generally, the law says the media can be guilty of invasion of privacy in four ways:

1. By intruding on a person's physical or mental solitude.
2. By publishing or disclosing embarrassing personal facts.
3. By giving someone publicity that places the person in a false light.
4. By using someone's name or likeness for commercial benefit.

If they are successful, people who initiate privacy cases can be awarded monetary damages to compensate them for the wrongdoing. However, very few invasion of privacy cases succeed.

Physical or Mental Solitude

The courts in most states have recognized that a person has a right not to be pursued by the news media unnecessarily. A reporter can photograph or question someone on a public street or at a public event, but a person's home and office are private. For this reason, many photographers request that someone who is photographed in a private situation sign a release form, designating how the photograph can be used.

One notable case establishing this right of privacy is *Galella v. Onassis*. Jacqueline Onassis, widow of President John F. Kennedy, charged that Ron Galella, a freelance photographer, was pursuing her unnecessarily. He had used a telephoto lens to photograph her on private property, and he had pursued her children at private schools. In 1973, Galella was ordered to stay 25 feet away from Onassis and 30 feet away from her children.

Embarrassing Personal Facts

The personal facts the media use to report a story should be newsworthy, according to the courts. If a public official is caught traveling with her boyfriend on taxpayers' money while her husband stays at home, information about the boyfriend is essential to the story. If the public official is reported to have contracted AIDS from her boyfriend, the information probably is not relevant to the story and could be protected under this provision of privacy law.

In reality, however, public officials enjoy few legal protections from reporting about their private lives. Information available from public records, such as court proceedings, is not considered private, and if the public official's husband testifies in court about his wife's disease, for example, the information could be reported.

False Light

A writer who portrays someone in a fictional version of actual events should be especially conscious of ***false light*** litigation. People who believe that what a writer or photographer *implies* about them is incorrect (even if the portrayal is flattering) can bring a false-light suit.

The best-known false-light suit is the first, *Time Inc. v. Hill*. In 1955, *Life* magazine published a story about a Broadway play, *The Desperate Hours*, which portrayed someone taking a hostage. The play's author said he based it on several real-life incidents. One of these involved the Hill family, a husband and wife and their five children who

False Light The charge that what was implied in a story about someone is incorrect.

had been taken hostage in their Philadelphia home by three escaped convicts. The Hills told police the convicts had treated them courteously, but the Hills were frightened by the events and eventually moved to Connecticut.

When *Life* decided to do a story about the play, the cast went to the Hills' old home, where *Life* photographed the actors in scenes from the play—one son being roughed up by the convicts and a daughter biting a convict's hand. None of these incidents had happened to the Hills, but *Life* published the photographs along with a review of the play.

The Hills sued Time Inc., which owned *Life* magazine, for false-light invasion of privacy and won $75,000, which eventually was reduced to $30,000. When the case went to the U.S. Supreme Court, the Court refused to uphold the decision, saying the Hills must prove *actual malice*. The Hills dropped the case, but the establishment of actual malice as a requirement in false-light cases was important.

In 1974, in *Cantrell v. Forest City Publishing Co.*, the U.S. Supreme Court held that a reporter for the Cleveland *Plain Dealer* had wrongly portrayed the widow of an Ohio man who was killed when a bridge collapsed. The story talked about the woman as if the reporter had interviewed her, although he had only interviewed her children. She was awarded $60,000 in her false-light suit, and the U.S. Supreme Court upheld the verdict.

Only a few false-light cases have been successful, but the lesson for the press is that portraying events and people truthfully avoids the problem altogether.

Right of Publicity

This facet of privacy law is especially important in the advertising and public relations industries. A portable toilet seems a strange fixture to use to establish a point of law, but a case brought by former *Tonight Show* host Johnny Carson demonstrates how the right of publicity protects someone's name from being used to make money without that person's permission.

In *Carson v. Here's Johnny Portable Toilets*, Carson charged, in 1983, that a Michigan manufacturer of portable toilets misappropriated Carson's name to sell the toilets. The manufacturer named his new line Here's Johnny Portable Toilets and advertised them with the phrase "The World's Foremost Commodian." Carson said that he did not want to be associated with the product and that since he had begun hosting *The Tonight Show* in 1957 he had been introduced with the phrase "Here's Johnny." The court agreed that "Here's Johnny" violated Carson's right of publicity.

The right of publicity can apply to a person's picture on a poster or name in an advertisement. In some cases, this right is covered even after the person dies, so the members of the immediate family of a well-known entertainer, for example, are the only people who can authorize the use of the entertainer's name or likeness.

Bartnicki v. Vopper

In an important recent case for the press, *Bartnicki v. Vopper*, the U.S. Supreme Court in 2001 reaffirmed the media's right to broadcast information and to comment on that information, no matter how the information was obtained.

The case resulted from a cell phone conversation between Pennsylvania teachers' union negotiator Gloria Bartnicki and Anthony Kane, the union's president. The union was in the middle of negotiating a teachers' contract. During the conversation (which was intercepted and recorded without Bartnicki's or Kane's knowledge), Kane is heard to say that if the school board didn't increase its offer, "We're going to have to go to their homes . . . to blow off their front porches."

A local activist gave the recording to radio station WILK-AM, and talk-show host Fred Vopper (who used the on-air name Fred Williams) aired the recording. Bartnicki and Kane sued Vopper under the federal wiretap law, which provides civil damages and criminal prosecution for someone who disseminates information that is illegally intercepted. The case pitted the public's right to know versus the erosion of personal privacy by new technologies.

U.S. Supreme Court Justice John Paul Stevens wrote the opinion for the 6-3 majority that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." In this decision, the Court again reaffirmed the press's right to report information in the public interest.

Debate Continues over Fair Trial, Courtroom Access and Shield Laws

The answers to three other questions that bear on press freedoms and individual rights remain discretionary for the courts:

1. When does media coverage influence a jury so much that a defendant's right to a fair trial is jeopardized?
2. How much access should the media be granted during a trial?
3. Should journalists be required to reveal information they obtained in confidence while reporting a story if a court decides that information is necessary to the judicial process?

Fair Trial

The best-known decision affecting prejudicial press coverage of criminal cases is *Sheppard v. Maxwell*. In 1954, Dr. Samuel Sheppard of Cleveland was sentenced to life imprisonment for murdering his wife. His conviction followed reams of newspaper stories, many of

which proclaimed his guilt before the jury decided the case. The jurors, who went home each evening, were told by the judge not to read newspapers or pay attention to broadcast reports, but no one monitored what the jurors did.

Twelve years later, lawyer F. Lee Bailey took Sheppard's trial to the U.S. Supreme Court, where the conviction was overturned on the premise that Sheppard had been a victim of a biased jury. In writing the decision, Justice Tom C. Clark prescribed several remedies. He said that the reporters should have been limited to certain areas in the courtroom, that the news media should not have been allowed to interview the witnesses and that the court should have forbidden statements outside the courtroom.

AP Images/Uncredited

Whether to allow cameras in the courtroom is a state-by-state decision. Cameras were barred during the 2015 trial of James Holmes, who was charged with killing 12 people and injuring 58 in a movie theatre in Aurora, Colo. However, cameras were allowed to show the trial's final arguments on July 14, 2015. (Holmes is on the far left in the white shirt. On the screen is a picture of the youngest shooting victim, Veronica Moser-Sullivan.)

Courtroom Access

The outcome of the *Sheppard* case led to many courtroom experiments with restrictions on the press. The most widespread practices were restraining (gag) orders and closed proceedings. With a gag order, the judge limits what the press may report. Closed proceedings excluded the press from the courtroom. But since 1980, several court cases have overturned most of these limitations. Today the press is rarely excluded completely from courtroom proceedings, and the exclusion lasts only as long as it takes the news organization to appeal to a higher court for access.

Although print reporters usually gain access, the presence of cameras in the courtroom is a sticky issue between judges (who want to avoid the cameras' disruption) and broadcast news people (who want to photograph what is going on). The U.S. Supreme Court, for example, never allows cameras.

In some high-profile cases, cameras have been allowed to record complete trials. In 1994, for example, Court TV broadcast the entire murder trial of former football star O. J. Simpson. In 2015, cameras were barred from the trial of James Holmes, who was charged with killing 12 people and injuring 58 at a theater in Aurora, Colo. But cameras were allowed to photograph closing arguments on July 14, 2015. (See **Illustration 14.2**, "Cameras in the Courtroom: A State-by-State Guide.")

Whether to allow cameras in the courtroom is a state-by-state decision. Some states allow cameras during civil but not criminal trials. Other states try to limit access altogether. The U.S. courts and the press are not yet completely comfortable partners.

Shield Laws

Traditionally, U.S. courts have been reluctant to compel journalists to reveal information they gather from confidential sources as part of their reporting on stories. In 1972, in *Branzburg v. Hayes*, the U.S. Supreme Court ruled for the first time that journalists do not have a constitutional privilege to refuse to testify but that there was "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards."

According to the Congressional Research Service, "31 states and the District of Columbia have recognized a journalist's privilege through enactment of press '***shield laws***,' which protect the relationship between reporters, their source, and sometimes, the information that may be communicated in that relationship." This means, for example, that reporters in California, Alaska and Colorado have state shield law protection, but reporters in

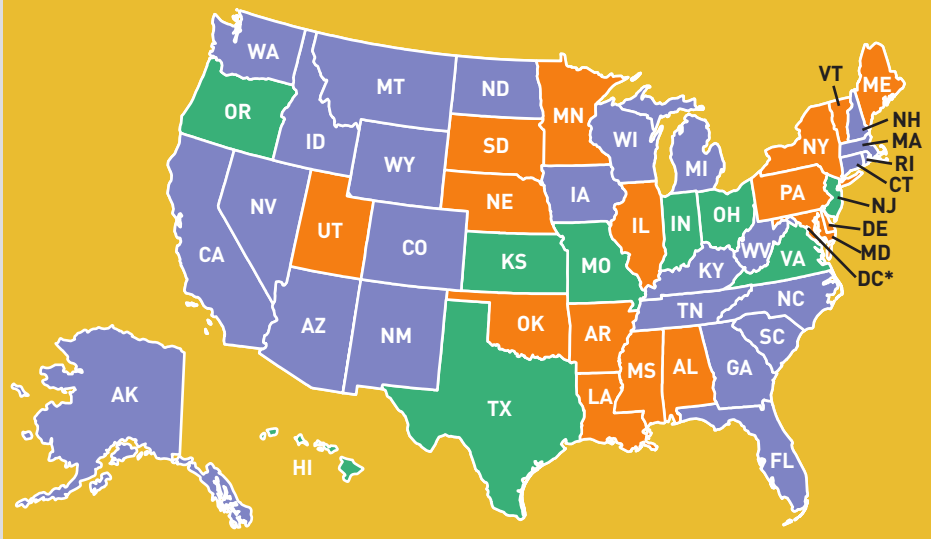
Shield Laws Laws that protect journalists from revealing their sources and the information that is communicated between journalists and their sources in a journalistic relationship.

IMPACT Society

ILLUSTRATION 14.2

Cameras in the Courtroom: A State-by-State Guide

Most states allow at least some camera access to courtroom proceedings. The U.S. Supreme Court does not allow cameras.



TIER I: States that allow the most coverage.

TIER II: States with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony.

TIER III: States that allow appellate coverage only, or that have such restricting trial coverage rules that essentially prevent coverage.

* The District of Columbia is the only jurisdiction that prohibits trial and appellate coverage entirely.

Radio-Television Digital News Association, rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php

Texas, South Dakota and Connecticut do not. Occasionally members of Congress have introduced legislation to create a federal shield law to protect journalists on a national level, but Congress has never seriously considered the issue. This leaves journalists at the mercy of individual state shield laws.

FCC Regulates Broadcast and Cable

People who work in the American mass media are expected to abide by the country's legal framework. The print media are not regulated specifically by any government agency, but regulation of broadcast and Internet media comes from government agencies that oversee aspects of the media business.

The largest single area of regulation comes from the Federal Communications Commission (FCC), which oversees broadcast and Internet providers. Other regulating agencies, such as the Federal Trade Commission, scrutinize specific areas related to the media, such as advertising.

Since 1927, the rationale for broadcast regulation has been that the airwaves belong to the public and that broadcasters are trustees operating in the public interest. The history of U.S. broadcast regulation can be traced to government's early attempt to organize the airwaves. The FCC, based in Washington, D.C., now has five commissioners who are appointed by the president and approved by the U.S. Senate. Each commissioner serves a five-year term, and the president appoints the chairperson.

FCC regulation touches many aspects of broadcast and Internet operations. Because U.S. broadcast stations must be licensed by the FCC to operate, the federal government exercises more direct control over broadcast and Internet media than over the print media. And like the print media, broadcasters also must operate under the nation's laws covering libel, obscenity and the right of privacy.

Telecommunications Act of 1996 Changes the Marketplace

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996, the most far-reaching reform in U.S. government regulation of mass media since the creation of the FCC in 1934. The act affects all aspects of the media industries, especially broadcast, cable, telephone and the Internet. The act is transforming the nation's media industries.

Justin Sullivan/Getty Images

The Telecommunications Act of 1996 removed many regulations governing the services telecommunications companies provide. A telecommunications company can now offer Internet, telephone and satellite TV together, called a "bundle," for power users. A worker climbs a cellular communications tower in Oakland, California, on March 6, 2014.

When Congress created the FCC in 1934, the agency was charged with ensuring that broadcasters operated in the "public interest, convenience and necessity." The Telecommunications Act, however, is an extension of the philosophy of deregulation—that free competition, with less government regulation, eventually improves consumers' choices, lowers costs and encourages investment in new technologies.

This philosophy of open competition governs the media industries in the 21st century. The strategies of providing multiple services and targeting select users are two examples of the effects of the act today.

Goal: To Sell Consumers "The Bundle"

"It's War!" declared *The Wall Street Journal* on September 16, 1996. The battlefield was telecommunications, and the goal was the ***bundle***. In telecommunications, this term describes the combination of services the media industries now offer. After the 1996 Telecommunications Act passed, large companies began delivering a combination of telecommunications services that they think consumers want. The *Journal* reported:

> Thanks to a combination of deregulation and new technologies, war has broken out in the communications market. Everybody has joined the fray—long-distance telephone giants, the regional [local telephone] Bell companies and the cable-TV operators, the satellite outfits, the fledgling digital wireless phone firms and the Internet service providers. Even your old-fashioned power company.

And they all want the same thing: to invade one another's markets and sell you one another's products and services. In short, they want to sell you The Bundle. Your long-distance telephone company, such as AT&T or Verizon, wants to become your local telephone company, your satellite TV company, your cable company and your Internet service provider.

Targeting the Power User

This bundling of services means that you can pay one monthly bill for several types of media services to a single company, which, of course, dramatically increases that company's portion of media revenue. "The goal for these companies is twofold," says Richard Siber, a wireless analyst for Andersen Consulting in Boston. "One is locking in a customer for life and providing one-stop shopping. And the other is revenue maximization, getting you to use their products more and more."

BusinessWeek magazine called this intense competition for customers a "telescramble." The primary target is the so-called power user, someone who uses a lot of media at home or in business.

The Telecommunications Act of 1996 created this battlefield for consumers' attention with huge financial incentives for the winners. The economic future of every media company in the country has, in some way, been affected by this battle.

Deregulation Unleashes the Media

The major provisions of the Telecommunications Act affect telecommunications, broadcast and cable. The Communications Decency Act, which was part of the Telecommunications Act, attempted to regulate access to cable and television programming and monitor the content of computer networks, including the Internet.

Bundle The combination of telecommunications services that the media industries can offer consumers.

Created a Goal of Universal Service

The Telecommunications Act of 1996 established, for the first time, a goal of universal service—meaning that, as a matter of public policy, everyone in the U.S. should be guaranteed access to affordable telecommunications services.

The FCC's responsibility is to decide what exactly constitutes universal service, and whether Internet access is part of that service guarantee, to improve the economies of rural areas as well as major cities.

Deregulated Free Media

The Telecommunications Act of 1996 also continued a policy of deregulation of commercial radio and TV ownership that began in the 1980s. Radio and over-the-air broadcast TV are viewed as "free media."

Unlike cable stations and satellite companies, which require extra equipment and charge consumers for their services, over-the-air broadcasting is available to anyone with a radio or television—and 99 percent of U.S. households have a TV set. Over-the-air broadcasting offers the largest potential audience for free media.

Relaxed Ownership and Licensing Rules

The FCC licenses every radio and TV station in the country and, before the act passed, the renewal process was very complicated. TV stations were required to renew their licenses every five years and radio stations every seven. The act relaxed the renewal requirements and extended the renewal period for both radio and TV to eight years.

Previously, broadcast companies were allowed to own only 12 television stations. The act eliminated the limits on the number of TV stations one company may own and instead used a station's potential audience to measure ownership limits. The act said existing television networks (such as NBC and ABC) can begin new networks, but they cannot buy an existing network. NBC cannot buy ABC, for example, but NBC could begin a second network of its own, such as NBC2.

Before the act passed, radio broadcasters were allowed to own 20 AM or 20 FM radio stations nationwide. The act removed the limit on the number of radio stations a company may own, and in each market, the number of stations that one owner can hold depends on the size of the market.

The act also allows ***broadcast cross-ownership***. This means that companies may own TV and radio stations in the same broadcast market as well as broadcast and cable outlets in the same area.

In 2003, the FCC made it even easier to own more TV stations, and today one company is allowed to own TV stations that reach 35 percent of the U.S. population. The broadcast industry continues to lobby to reduce the limitation or remove it completely.

In 2002, the FCC began considering ***media cross-ownership*** rules that, for example, would allow broadcasters to own newspapers as well as broadcast stations in the same geographic area. The concept of media cross-ownership remains under study, and FCC rules still prohibit media cross-ownership of a daily newspaper and a full-power broadcast station (AM, FM, or TV) in the same market.

Encouraged Local Phone Competition

Due to deregulation, cable, satellite and telephone companies today are competing to deliver telecommunications services to home customers.

To encourage competition for delivery of video services, the act allowed local telephone companies to enter the video delivery business and repealed the FCC's "telco-cable cross-ownership" restrictions (***telco*** is an abbreviation for "telephone company"). Local telephone companies now can deliver video services either by making an agreement with a cable or satellite operator or by creating their own delivery system.

In turn, cable companies were allowed to enter the local telephone business. Large cable companies also may deliver new types of telephone services, such as carrying messages to and from mobile phones.

The act also allowed long-distance carriers to offer local telephone service. Within two months of the act's passage, the long-distance carrier AT&T filed to be allowed to offer local telephone service in all 50 states. "If we get this right," said former FCC Chairman Reed Hundt, "you'll be buying communications services like shoes. Different styles, different vendors."

Ends Cable Rate Regulation

In an attempt to control spiraling cable charges to consumers, Congress passed the 1992 Cable Act to regulate rates. Cable companies, facing competition from telephone companies, argued that Congress should remove rate regulation to allow them to compete and increase cable income.

The act removed most rate regulation for all cable companies. All that remains is FCC regulation to monitor the "basic tier" of cable service, often called "basic cable." Overall, this resulted in rate increases for most cable consumers.

Broadcast Cross-Ownership The practice of one company owning TV and radio stations in the same broadcast market.

Media Cross-Ownership Government rules that would allow a broadcast company to own a newspaper business in the same geographic area.

Telco An abbreviation for "telephone company."

TV Industry Agrees to Ratings and the V-Chip

Under pressure from Congress, television executives agreed to implement a voluntary ratings system for television programs by January 1997. The new ratings system *applies to all programming except sports, news magazines and news shows.*

The ratings divide programs into six categories, ranging from TV-Y (appropriate for all children but specifically designed for a very young audience, including children between the ages of 2 and 6) to TV-MA (specifically designed to be viewed by adults and therefore possibly unsuitable for children younger than 17).

Producers, networks, cable channels, syndicators and other people who originate TV shows rate their own programs, unlike movies (which are rated by an independent board). TV ratings evaluate violence and sexual content, and the results are displayed on the screen at the beginning of each program and coded into each TV program. The codes are read by a v-chip, a microchip device that must be included in all new TV sets. The v-chip allows parents to program the TV set to eliminate shows they find objectionable, although follow-up studies have shown that few parents use this option.

Six months after this rating system was adopted, the TV networks added a more specific rating for violent or sexual content. Today, the broadcast networks and program services display content ratings on most programs.

Congress Attempts to Control Access to Indecent Content

Along with the major provisions of the Telecommunications Act to increase competition, Congress added several provisions to try to control content. These provisions, together called the Communications Decency Act (CDA), attempted to define and control users' access to specific content.

The CDA made it a felony to send indecent material over computer networks and relied on a very broad definition of the word *indecent*. Under the act's provisions, violators could have been fined up to $250,000.

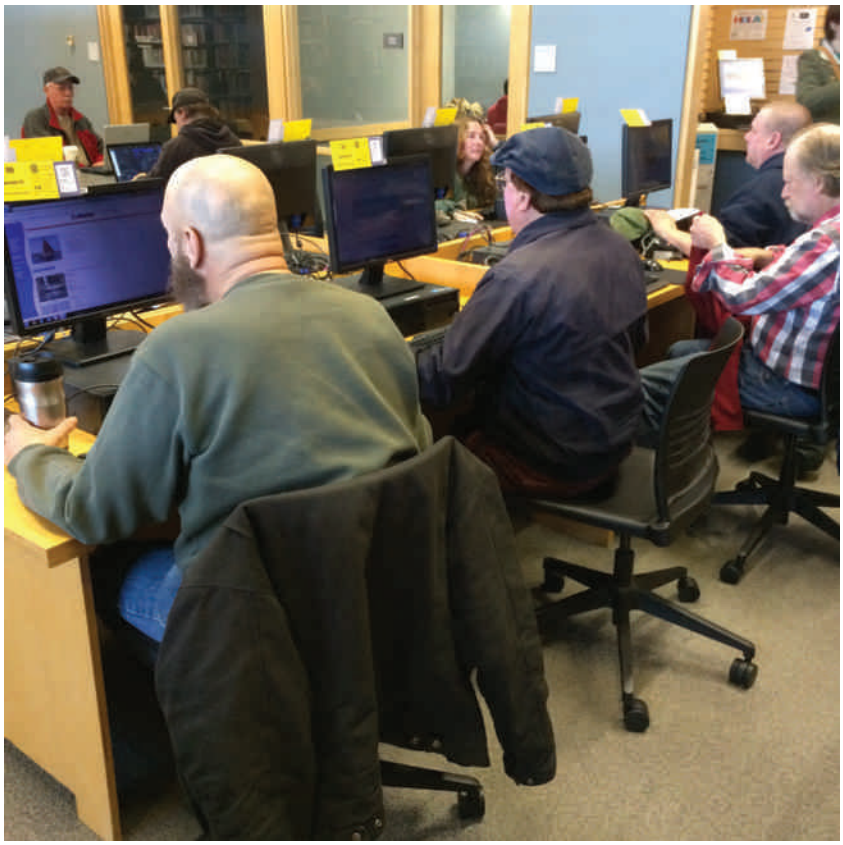
On June 12, 1996, a three-judge panel unanimously declared that the Internet indecency provisions were unconstitutional, and the judges blocked the law's enforcement. They issued a restraining order, which meant that the Internet indecency provisions could not be enforced and that violations could not even be investigated.

In 1997, the U.S. Supreme Court struck down the indecency provision of the Communications Decency Act, making it much harder for Congress to limit Internet access in the future.

This decision is important because Congress and the president, through the FCC, historically have regulated the broadcast industries, but none of the regulations that apply to the broadcast media apply to print. The content of the print media, by law and by practice, has historically remained unregulated because of the First Amendment's protection of free expression. What is interesting is that, in striking down the CDA, the courts defined and protected free expression through an electronic delivery system—the Internet—as if it were a print medium.

Supreme Court Upholds Internet Filters for Public Libraries

In 2003, the U.S. Supreme Court upheld another law that said that libraries that accept federal funds must



Kevin Schafer/Getty Images

In 2003, the U.S. Supreme Court voted 5-4 to uphold a law that said that libraries that accept federal funding must equip their computers with content filters. The American Library Association argued that Internet filters are a form of censorship. Patrons at the Seattle Public Library access the Internet in January 2015.

equip their computers with content filters to block pornography, a blow for freedom of expression. The case was defended in court on behalf of 13-year-old Emalyn Rood, who logged onto the Internet in an Oregon library to research information on lesbianism, and Mark Brown, who researched information about his mother's breast cancer on a Philadelphia library computer—information that may have been blocked by a commonly used Internet filter.

In a close 5-4 decision in *United States v. American Library Association*, the U.S. Supreme Court said the requirement for Internet filters is "a valid exercise of Congress' spending power." This decision allows the U.S. government to require Internet filters at libraries that receive federal funding. Librarians argued that Internet filters are a form of censorship that blocks valuable information from people who need it.

Government Monitors Broadcast Indecency

In early 2004, responding to congressional pressure for more government control over the airwaves, the FCC proposed a $775,000 fine against Clear Channel Communications for a Florida radio broadcast of various episodes of *Bubba the Love Sponge Show*. The FCC fined Clear Channel the maximum amount then allowed—$27,500 for each time the episode ran (a total of $715,000) plus $40,000 for record-keeping violations at the station. Clear Channel said the programs were meant to entertain, not to offend its listeners.

FCC Chairman Michael Powell also urged Congress to increase the maximum fine for indecency to $275,000 per incident, saying the maximum fine of $27,500 per episode wasn't large enough to discourage objectionable programming.

Just a few days later, singers Janet Jackson and Justin Timberlake, performing on CBS-TV during Super Bowl halftime, provoked controversy when Timberlake reached over and ripped off part of Jackson's costume, exposing her breast to an estimated 90 million Americans and a much bigger worldwide audience.

Jackson and Timberlake apologized for the incident, but the FCC launched an investigation. FCC rules say that radio and over-the-air TV stations may not air obscene material at any time. The rules also bar stations from broadcasting indecent material—references to sex or excretions—between 6 a.m. and 10 p.m., when the FCC says children are more likely to be listening or watching. (Cable and satellite programming is not covered by the restrictions.) The FCC fined CBS $550,000 for the Janet Jackson incident.

In 2007, CBS appealed the Jackson fine before the 3rd U.S. Circuit Court of Appeals in Philadelphia, saying the network had taken precautions beforehand to avoid any

Michael Caulfield Archive/WireImage/Getty Images

In 2002, singer Cher appeared on the Billboard Music Awards and made some impromptu comments that included a profanity. The FCC fined Fox television network, which broadcast the awards, for indecency. In July 2010, a three-judge panel in New York, hearing the Billboard Music Awards case and several others dealing with the issue of fleeting expletives, struck down the indecency rule, saying it had a "chilling effect" that interfered with freedom of expression.

incidents, including a five-second audio delay. In 2008, a federal appeals court overturned the decision, saying, "The FCC cannot impose liability on CBS for the acts of Janet Jackson and Justin Timberlake, independent contractors hired for the limited purposes of the Halftime Show."

Then in a July 2010 ruling on a group of indecency cases, a federal appeals court in New York found that the FCC's indecency policy violated the First Amendment. The cases involved ***fleeting expletives***, profanity uttered without warning on live television. In the instances cited, celebrities including Cher and Bono made impromptu remarks during awards shows on live television, and the FCC fined the networks that aired the shows.

The court said that the FCC's policy against indecency had a chilling effect on free speech "because broadcasters have no way of knowing what the FCC will find offensive."

Fleeting Expletives Profanity uttered without warning on live television.

These controversies highlight the difficulties that arise when a federal government agency attempts to monitor free expression without an established national legal standard for obscenity. The definition of broadcast indecency often is based on politics and public pressure at the FCC, which shifts emphasis from one presidential administration to another.

The main issues are these: Should a government entity have the power to decide what's obscene or indecent and then to enforce those restrictions? And what effect, if any, could these decisions have in a media environment where there are so many alternative, unregulated outlets available to consumers of all ages?

Don Arnold/Getty Images

To combat video piracy, the music and movie industries launched the Copyright Alert System in 2013. The Sydney, Australia, premiere of *Game of Thrones* on April 13, 2015, features a fire-breathing dragon. In March 2015, Torrentfreak.com, which tracks online piracy, reported that *Game of Thrones* was on track to become the most-pirated TV show of the year.

Intellectual Property Rights Affirmed

The right of ownership for creative ideas in the U.S. is legally governed by what are called ***intellectual property rights***. Four recent developments—the Digital Millennium Copyright Act, the U.S. Supreme Court decision in *New York Times Co. v. Tasini* and decisions in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* and *Arista Records LLC v. Lime Group LLC*—are beginning to define the issues of electronic copyright in the digital era.

Digital Millennium Copyright Act

Passed in 1998, the Digital Millennium Copyright Act (***DMCA***), which became effective on October 28, 2000, begins to address copyright issues provoked by the Internet. The law makes several changes in U.S. copyright law to bring it into compliance with two World Intellectual Property Organization (***WIPO***) treaties about digitally transmitted copyrighted and stored material. (The WIPO is responsible for promoting the protection of intellectual property throughout the world.)

The DMCA, designed to prevent illegal copying of material that is published and distributed on the Internet, makes it illegal to circumvent technology that protects or controls access to copyrighted materials, such as music shared on the Internet. The DMCA also makes it illegal to manufacture materials that will help people gain access to copyrighted materials. The DMCA became effective on October 28, 2000.

Supporters of the DMCA—which includes most media industries that hold copyrights on creative works, such as movies, books and music—say the DMCA is an important law that must be enforced to protect intellectual property. Opponents say the law goes too far and limits technological development.

In March 2007, media conglomerate Viacom, whose media properties included MTV, Comedy Central and Nickelodeon, sued Google and YouTube, saying the companies deliberately gathered a library of copyrighted video clips without permission. Earlier in 2007, Viacom asked YouTube to remove 100,000 clips that it said infringed on Viacom copyrights.

Google said the "safe harbor" provisions of the DMCA covered YouTube. Generally these provisions say that Web site owners are not liable for copyrighted material that others upload to their site if the Web site owners promptly remove the material when the copyright owner asks them to do so.

However, Google announced four months later that it was developing video recognition technology to detect and remove copyrighted material from its site before it was posted.

Still, illegal video sharing is very difficult to monitor and prevent. In March 2015, Torrentfreak.com, which

Intellectual Property Rights The legal right of ownership of ideas and content published in any medium.

DMCA Digital Millennium Copyright Act.

WIPO World Intellectual Property Organization.

tracks online piracy, reported that *Game of Thrones* was on track to become the most pirated TV program of 2015 after there were 7 million pirated downloads in the first three months of the year. "The majority of TV-show piracy," reported Torrentfreak, "occurs outside the U.S.," by people who cannot receive the programs legally until after the shows air in America. *Game of Thrones*, aired on HBO, is available only to subscribers.

In February 2013, the music and movie industries launched the Copyright Alert System, administered by the Center for Copyright Information. Music and movie companies monitor online traffic and then alert an Internet provider when a file is downloaded illegally.

The Internet provider is authorized to issue an escalating series of six warnings after which the provider may slow down or block the offender's Internet access. "We think there is a positive impact of (alert) programs like this, and that they can put money in the pocket of artists and labels," Jonathan Lamy, a spokesman for the Recording Industry Association, told *The New York Times*.

New York Times Co. v. Tasini

In 2001, a U.S. Supreme Court decision in *New York Times Co. v. Tasini* affirmed that freelance writers separately own the electronic rights to material they have written, even though a publisher had first issued their writing in printed form. In 1993, freelance writer Jonathan Tasini, president of the National Writers Union, discovered that an article he had written for *The New York Times* was available on a database for Mead Data Center Corporation, which was paying royalties for the material to the *Times*. Tasini hadn't been paid for this use, so Tasini sued the *Times* and several other publishing companies.

The suit claimed that publishers violated copyright law by using writers' work on electronic databases without their permission and that this limited the rights of freelance authors to separately publish their work digitally and be paid for it. The *Times* claimed the digital versions of written works were simply "revisions" of paper copies, which meant the rights belonged to the publisher so the writers deserved no further compensation.

On June 25, 2001, by a vote of 7-2, the U.S. Supreme Court agreed with Tasini. Writing the majority opinion, Justices Breyer and Stevens said that upholding the freelance authors' copyright would encourage the development of new technologies and the creation of new artistic work. The Court ordered the *Times* to delete thousands of articles from its database for which it had not obtained the rights.

This case is very important for anyone in the U.S. who creates intellectual property. The Court established the legal concept that the right to reproduce creative material electronically is very distinct from the right to reproduce creative material in print and that writers and other creative artists should be compensated separately for electronic and print rights to their work.

Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd. and *Arista Records LLC v. Lime Group LLC*

In 2005, the U.S. Supreme Court ruled unanimously in the *Grokster* case that a software company can be held liable for copyright infringement if someone uses the company's software to illegally download songs and movies, known as illegal file sharing. The decision effectively shut down the Internet sites Grokster and StreamCast, also named in the suit. The companies provided free software that allowed users to download Internet content free.

In 2010, a New York district court ordered that the major remaining file-sharing Web site, LimeWire, shut down in response to a suit by 14 recording companies, including Arista Records, Capitol Records and Virgin Records, which alleged that LimeWire was guilty of copyright infringement. (Lime Group LLC is the parent company of the Web site LimeWire.)

The Grokster and LimeWire cases are two more examples of the strong legal tradition in the U.S. that guarantees intellectual copyright protection for creative content and the aggressiveness with which mass media companies pursue people who try to use intellectual property without permission or payment.

FCC Adopts Open Internet Rules

On February 26, 2015, following a year of public debate, the Federal Communications Commission approved groundbreaking ***net neutrality*** rules, called the Open Internet Order, that classify Internet services in the U.S. as a public utility. Commission Chairman Tom Wheeler said the Open Internet rules were designed to preserve the Internet as a "core of free expression and democratic principles."

The new rules cover mobile data services for smartphones and tablets as well as hardwired lines. The

Net Neutrality Rules for Internet service providers that require them to keep their networks open and available to carry all legal content. Under these rules, providers cannot restrict access to their network by other providers nor can they limit the type or delivery of content they carry.

Bloomberg/Getty Images

Michael Copps, former FCC commissioner, speaks in favor of net neutrality outside the FCC's headquarters in Washington, D.C., on February 26, 2015, the day the FCC announced its Open Internet Order guaranteeing net neutrality.

commission had a choice whether to classify the Internet as an information service or as a public utility. Under an information service classification, the FCC would have had very little power to regulate Internet service providers, and the Internet would have been more vulnerable to censorship. The information service classification also would have allowed Internet service providers to create different tiers of service for commercial users versus consumers (faster service for commercial clients who use more services, for example, giving them priority over consumers).

Instead, the FCC decided 3-2 that the Internet should be regulated as a utility just like telephone service. Traffic on the Internet should not be subject to censorship and all customers should be treated equally, said the FCC. (Net neutrality also is covered in **Chapter 9**.)

Among the Open Internet Order's provisions are three new Bright Line Rules that ban "practices that are known to harm the Open Internet," according to the FCC. The Bright Line Rules are:

1. **No Blocking.** Broadband providers may not block access to legal content, applications, services or non-harmful devices.
2. **No Throttling.** Broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services or non-harmful devices.
3. **No Paid Prioritization.** Broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes."

The goal of the new regulations, said the FCC, is the principle that "America's broadband networks must be fast, fair and open."

Courts and Regulators Govern Advertising and PR

Advertising and public relations are governed by legal constraints and by regulation. *New York Times v. Sullivan* (see p. 287) was a crucial case for advertisers as well as for journalists. Since that decision, two other important court cases have defined the advertising and public relations businesses—the *Central Hudson* case for advertising (which is considered "commercial speech" under the law because advertisers pay for their messages) and the *Texas Gulf Sulphur* case for public relations.

Central Hudson Case

In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the U.S. Supreme Court issued the most definitive opinion yet on commercial speech. During the energy crisis atmosphere of the 1970s, the New York Public Utilities Commission banned all advertising by public utilities that promoted the use of electricity. Central Hudson Gas & Electric wanted the ban lifted, so the company sued the commission.

The commission said the ban promoted energy conservation, but the U.S. Supreme Court disagreed, and the decision in the case forms the basis for commercial speech protection today. "If the commercial speech does not mislead, and it concerns lawful activity," explains legal scholar Ralph Holsinger, "the government's power to regulate it is limited. . . . The state cannot impose regulations that only indirectly advance its interests. Nor can it regulate commercial speech that poses no danger to a state interest." The decision prescribed standards that commercial speech must meet to be protected by the First Amendment.

The main provisions of the standards are that (1) the advertisement must be for a lawful product and (2) the advertisement must not be misleading. This has become known as the ***Hudson test***. To be protected, then, an advertisement must promote a legal product and must not lie. This would seem to have settled the issue, but controversy continues.

Should alcohol advertising be banned? What about ads for condoms or marijuana? Courts in different states have disagreed on these questions, and no Supreme Court decision about these specific issues exists, leaving many complex questions undecided. The Hudson test remains

Hudson Test A legal test that establishes a standard for commercial speech protection.

the primary criterion for determining what is protected commercial speech.

Texas Gulf Sulphur Case

The most important civil suit involving public relations occurred in the 1960s in *Securities and Exchange Commission v. Texas Gulf Sulphur Company*. Texas Gulf Sulphur (TGS) discovered ore deposits in Canada in late 1963 but did not announce the discovery publicly. TGS quietly purchased hundreds of acres surrounding the ore deposits, and TGS officers began to accumulate more shares of the company's stock.

Meanwhile, the company issued a press release that said that the rumors about a discovery were "unreliable." When TGS announced that it had made a "major strike," which boosted the price of the company's stock, the Securities and Exchange Commission took the company to court.

AP Images/Sandy Huffaker

In 2013, the FTC expanded its enforcement to cover online access to personal information about children. New regulations require that online operators, such as Internet gaming sites, obtain parental consent before they gather information that could be used to identify, contact or locate a young person.

The U.S. Court of Appeals, Tenth Circuit, ruled that TGS officers had violated the disclosure laws of the Securities and Exchange Commission. The court also ruled that TGS had issued "a false and misleading press release." Company officers and their friends were punished for withholding information. According to *The Practice of Public Relations*, "the case proved conclusively that a company's failure to make known material information (information likely to be considered important by reasonable investors in determining whether to buy, sell or hold securities) may be in violation of the antifraud provision of the Securities and Exchange Acts."

The *Texas Gulf Sulphur* case remains a landmark in the history of public relations law. The decision in the case means public relations people can be held legally responsible for information they do not disclose about their companies. Public relations people at publicly held corporations (businesses with stockholders) are responsible not only to their companies but also to the public.

Federal Government Regulates Advertisers

The main regulatory agency for advertising and public relations issues is the Federal Trade Commission (FTC), although other agencies such as the Securities and Exchange Commission and the Food and Drug Administration sometimes intervene to question advertising practices.

In 1914, the Federal Trade Commission assumed the power to oversee deceptive interstate advertising practices under the Federal Trade Commission Act. Today, the FTC's policy covering deceptive advertising says, "The Commission will find an act or practice deceptive if there is a misrepresentation, omission or other practice that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment."

The commission acts when it receives a complaint the staff feels is worth investigating. The staff can request a *letter of compliance* from the advertiser, with the advertiser promising to change the alleged deception without admitting guilt. Next, the advertiser may argue the case before an administrative law judge, who may write a consent agreement to outline what the advertiser must do to comply with the law. A cease-and-desist order may be issued against the advertiser, although this is rare. The FTC can fine an advertiser who doesn't comply with an FTC order.

The Federal Trade Commission's five members serve seven-year terms. They are appointed by the president and confirmed by the U.S. Senate, and no more than three members can be from one political party. Because the FTC's members are presidential appointees, the commission's actions often reflect the political climate under which they operate.

In 2013, under the Obama administration, the FTC announced expanded federal safeguards to extend to children's apps and Web sites. The new rules mean that online operators must obtain parental consent before they gather information (such as photos, videos and audio recordings) that could be used to identify, contact or locate a young person.

Law Must Balance Rights and Responsibilities

Legal and regulatory issues governing advertising and public relations, then, are stitched with the same conflicting values that govern all aspects of mass media. The courts, the FCC, the FTC and other government agencies that monitor the mass media industries are the major arbiters of ongoing constitutional clashes.

Important legal decisions make lasting and influential statements about the role of law in protecting the constitutional guarantee of free expression in a country with constantly shifting public values. Through the courts and regulation, government must balance the business needs of the mass media industries with the government's role as a public interest representative.

REVIEW, ANALYZE, INVESTIGATE

CHAPTER 14

U.S. Constitution Sets Free Press Precedent

- The U.S. media's role is to encourage "uninhibited, robust and wide-open" debate.
- The legal and regulatory issues that media face are attempts to balance the media's rights and responsibilities, based on the First Amendment.

Government Tries to Restrict Free Expression

- Before 1964, the First Amendment faced four notable government challenges: the Alien and Sedition Laws of 1798, the Espionage Act of 1918, the Smith Act of 1940 and the Cold War congressional investigations of suspected Communists in the late 1940s and early 1950s.
- All of these challenges were attempts to limit free expression.

Prior Restraint Rarely Used

- American courts rarely have invoked prior restraint. The two most recent cases involved the publication of the Pentagon Papers by *The New York Times* and the publication of directions to build a hydrogen bomb in *The Progressive* magazine.
- In both cases, the information eventually was printed, but the intervention of the government delayed publication.

Government Manages War Coverage

- Attempts by the Reagan administration to limit reporters' access to Grenada during the U.S. invasion in October 1983 were a subtle form of prior restraint.
- Pentagon rules that created press pools for Gulf War coverage in 1991 were reached in cooperation with journalists, but imposed stricter restrictions on reporting than in any previous U.S. war.
- In 2001, the U.S. government controlled release of information to the American public about the war in Afghanistan even more than in the Gulf War.
- During the early months of the war in Afghanistan, the military used press pools and provided its own video footage of troop landings, produced by the military's combat film teams.
- During the Iraq War in 2003, the U.S. government used a system called *embedding*, which meant that members of the press traveled with the military, but the press's movements were restricted and managed by their military units.
- During the Gulf War, the George W. Bush administration (2001–2009) banned the media from covering the return of war fatalities to the U.S., saying the administration wanted to protect the families' privacy. In 2009, the Obama administration lifted the ban and now allows press coverage of the arrival of fatally wounded soldiers, with family permission.

WikiLeaks Challenges Government Secrecy

- In 2010, WikiLeaks began releasing classified U.S. diplomatic documents about the Iraq and Afghanistan wars on its Web site.
- The U.S. government warned that the WikiLeaks postings could endanger military personnel and civilians.
- On November 28, 2010, *The New York Times* began publishing a series of articles based on a new release of U.S. State Department documents posted on WikiLeaks.
- On February 23, 2011, WikiLeaks founder Julian Assange was ordered extradited to Sweden, but eventually he found asylum at the Ecuadorian Embassy in London. The U.S. government has not filed any charges against Assange for publishing secret U.S. documents on the Internet.

- The U.S. military charged Pfc. Bradley Manning with downloading large amounts of classified information from a military database and sharing the documents with WikiLeaks.
- On August 21, 2013, Pfc. Manning was sentenced to 35 years in prison.

USA PATRIOT Act Meets Public Resistance

- Congress passed the USA PATRIOT Act in 2001, giving the U.S. government broad powers to track, detain and interrogate people deemed a threat to the country.
- Among the provisions of the PATRIOT Act was Section 215, which allowed the FBI to monitor business records, including computer log-ins and the lists of books people check out of public libraries.
- The American Library Association and the American Civil Liberties Union challenged Section 215 in court.
- In 2007, a federal district court agreed that some provisions of the PATRIOT Act went against constitutional principles of checks and balances and separation of powers.
- President Obama signed a four-year extension of the PATRIOT Act on May 30, 2011.
- The USA PATRIOT Act was renamed the USA Freedom Act when President Obama signed it on June 2, 2015.
- New provisions of the USA Freedom Act curtail the government's bulk collection of consumer data.

What Is the Standard for Obscenity?

- *Roth v. United States* defined obscenity as material that is "utterly without redeeming social importance."
- *Miller v. California* established a three-part local test for obscenity: whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value (often called the LAPS test).
- Many censorship cases begin at school and local government boards.
- Most reported book challenges are reversed when appealed.
- The American Library Association compiles a list each year detailing the nation's ten Most Challenged Books.
- In the 1988 *Hazelwood* case, the U.S. Supreme Court gave public school officials considerable freedom to limit what appears in student publications.

Libel Law Outlines the Media's Public Responsibility

- In 1964, the *New York Times v. Sullivan* case set a precedent, establishing that to be successful in a libel suit, a public official must prove actual malice.
- The press can use three defenses against a libel suit: truth, privilege and fair comment.
- Most successful libel judgments eventually are reversed or reduced when they are appealed. Often the major cost of a libel suit is the defense lawyers' fees.
- *Gertz v. Robert Welch Inc.* established the concept that the expression of opinions is a necessary part of public debate.
- Because of the *Herbert v. Lando* decision, today reporters may be asked in a libel suit to identify their sources and to surrender their notes.
- The *Masson v. New Yorker Magazine* case addressed the journalist's responsibility for direct quotations.
- Businesses and public officials have used SLAPP suits to try to intimidate individuals and news organizations that write unfavorable stories or post critical comments on the Internet.

Invasion of Privacy Defined Four Ways

- Invasion-of-privacy lawsuits are much less common than libel suits.
- There is no U.S. Supreme Court decision that governs invasion of privacy, so each state has its own interpretation of the issue.
- Generally, the media can be guilty of invading someone's privacy by intruding on a person's physical or mental solitude, publishing or disclosing embarrassing personal facts, giving someone publicity that places the person in a false light or using someone's name or likeness for commercial benefit.
- In an important case for the press, *Bartnicki v. Vopper*, in 2001, the U.S. Supreme Court reaffirmed the media's right to broadcast information and to comment on that information, no matter how the information was obtained.

Debate Continues over Fair Trial, Courtroom Access and Shield Laws

- *Sheppard v. Maxwell* established the legal precedent for limiting press access to courtrooms and juries.
- Most states allow some camera access to courtroom proceedings.
- The U.S. Supreme Court does not allow cameras.
- In 1994, Court TV broadcast the entire murder trial of football star O. J. Simpson.
- In 2015, cameras were banned during the trial of James Holmes, who was charged with killing 12 people and injuring 58 in a movie theater in Aurora, Colo., but the court allowed camera coverage of closing arguments.
- Individual state shield laws protect journalists from being compelled to reveal their sources, but no federal shield law guarantees these rights to every journalist nationwide.

FCC Regulates Broadcast and Cable

- Unlike print, which is not regulated by the government, broadcast media and Internet service providers are regulated by the FCC.

- Since 1972, the concept behind broadcast regulation has been based on the belief that broadcasters are trustees operating in the public interest.

Telecommunications Act of 1996 Changes the Marketplace

- The Telecommunications Act of 1996 was the most far-reaching reform in the way the U.S. government regulates mass media since the creation of the FCC in 1934.
- Following passage of the Telecommunications Act, large companies began positioning themselves to deliver the combination of telecommunications services for consumers called The Bundle.
- The major provisions of the Telecommunications Act of 1996 affect telecommunications, broadcast, satellite and cable.

Deregulation Unleashes the Media

- The FCC under President Clinton moved to a policy of deregulation of station ownership.
- The Telecommunications Act of 1996 established a goal of universal service.
- In 2003, the FCC adopted regulations, still in place today, that allow one company to control 35 percent of the broadcast audience.
- The act allowed broadcast cross-ownership, but not media cross-ownership.
- The act encouraged local phone competition and ended cable rate regulation.

TV Industry Agrees to Ratings and the V-Chip

- Under pressure from Congress, television executives devised a voluntary system of ratings for TV programming.
- The programming codes can be read by a v-chip, which allows parents to program a TV set to eliminate objectionable programs, although few parents use this option.

Congress Attempts to Control Access to Indecent Content

- The Communications Decency Act (CDA), part of the Telecommunications Act, attempted to regulate cable and TV programming and Internet content.
- In 1997, the U.S. Supreme Court struck down the Internet indecency provisions of the CDA.
- In 2003, the U.S. Supreme Court ruled that the federal government may withhold funding from schools and libraries that refuse to install Internet filters for pornography on their computers.
- In 2004, the FCC increased fines for broadcast programs the FCC determines are indecent.
- The FCC fined CBS-TV for Janet Jackson's "wardrobe malfunction" during the 2004 Super Bowl.
- In a July 2010 ruling on a group of indecency cases concerning fleeting expletives, a federal appeals court in New York found that the FCC's indecency policy violated the First Amendment.

Intellectual Property Rights Affirmed

- The right of ownership of creative ideas in the United States is legally governed by a concept called intellectual property rights.
- The Digital Millennium Copyright Act (DMCA), the U.S. Supreme Court decision in *New York Times Co. v. Tasini*, the U.S. Supreme Court decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* and *Arista Records LLC v. Lime Group LLC* have begun to define the issues of digital copyright.
- These four examples affirm the strong legal tradition in the U.S. of guaranteeing intellectual copyright for creative content.
- Internet piracy is very difficult to monitor and prevent.
- To combat video piracy, the music and movie industries launched the Copyright Alert System in 2013.

FCC Adopts Open Internet Rules

- On February 26, 2015, the FCC approved net neutrality rules called the Open Internet Order.
- The FCC decided 3-2 that the Internet should be regulated as a utility just like telephone service.
- The FCC rules mean that traffic on the Internet will not be subject to government censorship and that all customers will be treated equally.
- Among the Open Internet Order's provisions are three new Bright Line Rules for broadband, which are (1) no blocking, (2) no throttling and (3) no paid prioritization.
- The goal of the new regulations, said the FCC, is the principle that "America's broadband networks must be fast, fair and open."

Courts and Regulators Govern Advertising and PR

- The Hudson test for advertising means that to be protected by the First Amendment, an ad must promote a legal product and must not lie.
- The *Texas Gulf Sulphur* case established the concept that a publicly held company is responsible for any information it withholds from the public.
- The main government agency regulating advertising is the Federal Trade Commission.
- The agency today is becoming more aggressive about policing advertisers than it was during the previous 20 years.
- In 2013, the FTC expanded its enforcement to cover online access to personal information about children.

Law Must Balance Rights and Responsibilities

- The courts, the FCC and the FTC arbitrate the media's rights and responsibilities.
- Government must balance the media's business needs with the government's role to protect the interests of the public.

Key Terms

These terms are defined in the margins throughout this chapter and appear in alphabetical order with definitions in the Glossary, which begins on page 361.

Broadcast Cross-Ownership ***297***
Bundle ***296***
Censorship ***285***
DMCA ***300***
False Light ***292***
Fleeting Expletives ***299***
HUAC ***279***
Hudson Test ***302***
Intellectual Property Rights ***300***
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Media Cross-Ownership ***297***
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WIPO ***300***

Critical Questions

1. List and explain five major events or legal decisions in the evolution of the interpretation of the First Amendment in America from its beginnings to today.
2. Why is *New York Times v. Sullivan* a precedent-setting case for the American mass media?
3. List and describe the four elements necessary to prove libel. Why are so few libel cases successful?
4. Why are the courts generally reluctant to use prior restraint to stop publication? List two cases in which the courts did invoke prior restraint. What was the outcome in each case?
5. List and explain three specific cases that demonstrate how the U.S. legal system is responding to challenges posed by consumer access to Internet media.

Working the Web

This list includes sites mentioned in the chapter and others to give you greater insight into media law and regulation.

American Booksellers for Free Expression (ABFE Group at ABA)

bookweb.org/abfe

The "bookseller's voice in the fight against censorship," ABA's Foundation for Free Expression was a stand-alone nonprofit from 1990 to 2014, when it merged with the ABA and is now the ABFE Group at ABA. ABFE participates in legal cases about First Amendment rights and provides education about the importance of free expression. Resources and information about Banned Books Week and the Free Speech Resources for Booksellers are available on the ABFE site.

American Library Association (ALA)

ala.org

Founded in 1876 as part of the Centennial Exposition in Philadelphia, the ALA's mission is to provide "leadership for the development, promotion and improvement of library and information services and the profession of librarianship to enhance learning and ensure access to information for all." The ALA is open to any interested person or organization. Among the professional tools available on the ALA site are articles, guidelines and other resources about such issues as censorship, copyright, diversity and equal access.

Federal Communications Commission (FCC)

fcc.gov

Established by the Communications Act of 1934, the FCC regulates interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia and all U.S. territories. The FCC provides "leadership in strengthening the defense of the nation's communications infrastructure." The site offers resources such as an FCC Encyclopedia, new rules on the Open Internet, guides on texting and driving and caller ID and spoofing, plus Connect America Phases 1 and 2.

FindLaw

findlaw.com

FindLaw provides legal information for the public on common legal topics, including intellectual property, copyright and the Internet as well as civil rights, education law, employees' rights and criminal law and blogs covering the use of social media to fight crime.

Index (Index on Censorship)

indexoncensorship.org

Inspired by poet Stephen Spender, Index on Censorship was established in 1972 to publish stories about dissidents living behind the Iron Curtain. Today, the Index is an international organization that continues to be the "voice of free expression . . . fighting for free speech around the world and challenging censorship whenever and wherever it occurs." The site contains the online edition of *Index Magazine* and information on global censorship issues and campaigns and the organization's annual Freedom of Expression Awards.

Institute for Nonprofit News (INN; formerly the Investigative News Network)

inn.org

Comprising over 100 nonprofit media organizations in North America, INN "supports mission driven journalism" and represents the "urgent need to nourish and sustain the emerging investigative journalism ecosystem to better serve the public." The site has information about INN membership plus technology training and Web hosting.

International Media Lawyers Association (IMLA)

internationalmedialawyers.org

The IMLA "is an international network of lawyers working in the areas of media law, media freedom and media policy, and committed to promoting and defending the fundamental human rights of freedom of expression and freedom of information." The site has an alphabetical listing by country of resources available throughout the world as well as links to the Open Society Justice Initiative and Synchronicity, a philanthropic environmental organization.

Media Center at New York Law School

nyls.edu/media_center/media_law_and_policy/

Founded in 1977, the Media Center is New York Law School's home for the study of telecommunications, new media and media law and policy. According to the center, it is "one of the nation's oldest training programs for media lawyers and the only one that offers a digital video lab for the production of visual media relating to justice and the law." The center offers public programs and conferences, produces a weekly cable television program on media law and policy, produces the *Media Law Reporter* and runs the center's Web site.

Media Law Resource Center (MLRC)

medialaw.org

This nonprofit association represents media content providers and members of the media law profession. Established in 1980, the MLRC closely monitors legislation at all levels of government relating to media law and the First Amendment. The more than 115 members of the association include publishers, Internet companies, cable programmers and media insurance providers. The MLRC site offers information on the association's publications such as *Media Law Daily* and the *Media Law Letter* as well as MLRC conferences held annually throughout the world.

National Freedom of Information Coalition (NFOIC)

nfoic.org

The NFOIC is a nonpartisan organization with the mission "to ensure government transparency at the state and local level through advocacy, education and resolve." Each year, NFOIC holds a two-day Freedom of Information Summit. The coalition also administers the Knight Freedom of Information Fund, which provides legal and financial assistance for open government law trials held throughout the U.S.

ProPublica

propublica.org

ProPublica is a nonprofit news organization that publishes investigative journalism in the public interest. Its mission is "to expose abuses of power and betrayals of the public trust by government, business and other institutions." ProPublica feels that investigative journalism is at risk of disappearing from for-profit media. Founded by Paul Steiger, the former managing editor of *The Wall Street Journal*, ProPublica is headquartered in New York City. ProPublica's site contains links to current and archived print stories as well as podcasts and a complete database of information and statistics from recent investigative projects.

Silha Center for the Study of Media Ethics and Law (University of Minnesota)

silha.umn.edu/

The Silha Center was established in 1984 through a grant from Otto Silha, the former president and publisher of the *Minneapolis Star* and the *Minneapolis Tribune*, and his wife, Helen Silha. The center, housed in the Department of Journalism and Mass Communication at the University of Minnesota, funds graduate student research and publishes the

Bulletin three times a year covering issues relating to media law and ethics and cosponsors *Media Ethics*, published at Emerson College.

Student Press Law Center (SPLC)

splc.org

Established in 1974 in Washington, D.C., the Student Press Law Center advocates for student free press rights, online freedom of speech and open government on U.S. high school and college campuses. SPLC provides free information and legal assistance as well as low-cost materials on the First Amendment to students and educators.

WikiLeaks

wikileaks.org

Based in Melbourne, Australia, WikiLeaks publishes and comments on leaked documents, alleging government and corporate misconduct. Unlike other wikis, source documents published on WikiLeaks cannot be edited or changed by the public. WikiLeaks claims that "transparency in government activities leads to reduced corruption, better government and stronger democracies." The site provides separate discussion and source pages for content published on the site.

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MindTap® Log on to MindTap for *Media/Impact* to access a variety of additional material—including learning objectives, chapter readings with highlighting and note-taking, **Impact/Action Videos**, activities, and comprehension quizzes—that will guide you through this chapter.

MASS MEDIA ETHICS

TAKING RESPONSIBILITY

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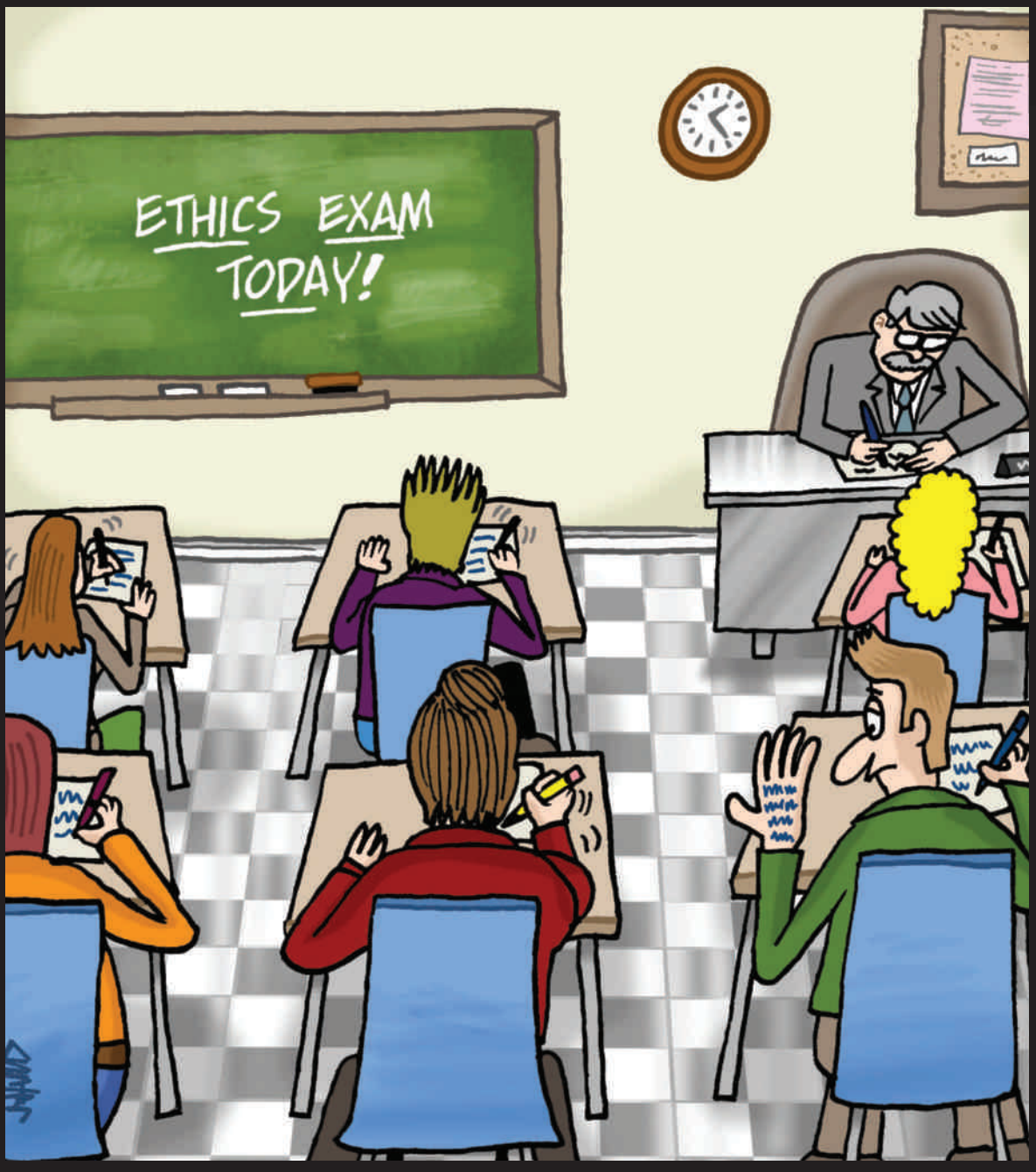

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