

Seventh Edition

The First Amendment Handbook



**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

The First Amendment Handbook

Seventh Edition

**The Reporters Committee for
Freedom of the Press**

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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.

— The First Amendment

Introduction

On a Sunday afternoon in March 1970, a group of journalists and media lawyers, concerned over FBI attempts to find the sources for journalists' reports on radical groups, gathered at Georgetown University to create an organization that would be available around the clock to provide legal assistance to any working reporter, anywhere in the United States, without charge.

Since that founding meeting, the Reporters Committee for Freedom of the Press has been just what its name implies — an organization dedicated first to the interests of the reporter. From the start, the medium of communication and the means of employment have not mattered. The committee has helped all those who take it as their mission to inform the public about current events.

For 40 years, The Reporters Committee has carried out that vision, giving legal advice to thousands of journalists and producing publications to help them do their jobs.

The First Amendment Handbook is one of those publications. First produced in 1986, and updated regularly since then, this booklet is designed to provide a basic primer on the laws affecting reporters' rights to gather and disseminate news.

At a time when newsgathering techniques are under increasing scrutiny, courts order journalists to jail for refusing to disclose confidential sources, government officials are finding new ways to close down access to public information in the name of national security, and big business tries to intimidate news organizations by filing lawsuits based on novel tort theories ranging from fraud to breach of duty of loyalty, American journalists need to be aware of the many potential pitfalls that await them, and of how they might avoid them. They need to know their rights, and how to fight back when they are threatened. The First Amendment Handbook is an important weapon in that fight.

In addition to helping reporters at home, The First Amendment Handbook has traveled the world, communicating the principles of a free press to journalists and lawmakers in developing democracies around the world in a succinct, easy-to-understand manner.

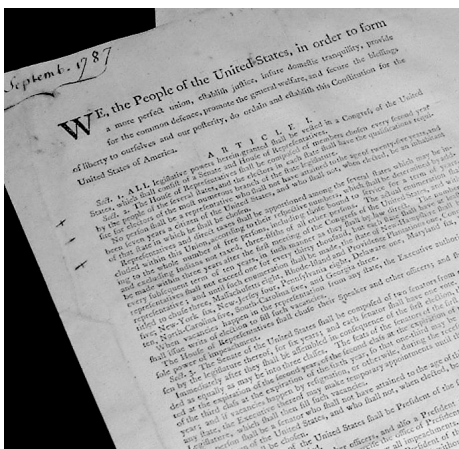
The latest edition of The First Amendment Handbook is available both in the familiar pocket-sized book-

let, and in an online version available at www.rcfp.org/handbook.

A handbook like this can never be a substitute for advice from a news organization's attorney. But we know that many journalists simply do not have access to an attorney when they have a pressing legal question. Thus, a primer like this will help educate the reader on the basics of the law and the right to gather and report the news. We believe that this Seventh Edition of *The First Amendment Handbook* will, like its predecessors, find a useful place in the pockets and desk drawers of members of the working press, as well as on their computer desktops.

As useful as we believe this handbook will be to reporters, we encourage journalists who gather and report news in any medium to call the Reporters Committee for assistance when they need to find an attorney. We can be reached at 800-336-4243 or hotline@rcfp.org.

The Reporters Committee would like to acknowledge the extensive efforts of our legal fellows and interns who have made significant contributions to each edition of this booklet. Our sincere thanks go to each of them.



The United States Constitution, printed September 1787. Courtesy of the Scheide Library, Princeton University.

Chapter 1

Libel

Libel occurs when a false and defamatory statement about an identifiable person is published to a third party, causing injury to the subject's reputation.

A libelous statement can be the basis of a civil lawsuit brought by the person or group allegedly defamed or, in rare cases, a criminal prosecution.

There is no uniform law for libel. Each state decides what the plaintiff in a civil libel suit must prove and what defenses are available to the media. However, constitutional law requires plaintiffs or prosecutors to prove fault before a news organization can be held liable for defamatory communications.¹ When a news organization is sued, the court must weigh protection of a person's reputation against the First Amendment values of freedom of speech and expression. Generally, this requires an examination of six different legal elements — defamatory communication, publication, falsity, identification, harm and fault — as well as a number of defenses available to media defendants.

Defamatory communication

A defamatory communication is one that exposes a person to hatred, ridicule, or contempt, lowers him in the esteem of his fellows, causes him to be shunned, or injures him in his business or calling. Defamation can take the form of libel (published or broadcast communication, including information published on a website) or slander (oral communication).

Courts generally are required to take the full context of a publication into account when determining whether the publication is defamatory. However, a headline, drawing, cutline or photograph taken alone can, in some cases, be libelous.²

Publication

For purposes of a libel lawsuit, publication occurs when information is negligently or intentionally communicated in any medium, from a newspaper to a website, to someone other than the person defamed.

The media can be liable for the republication of a libelous statement made by another person or entity but quoted in a news article.³ Letters to the editor that contain unsupported derogatory accusations or false statements, as well as advertising appearing in a publication, also can be the basis of a libel suit against the news publisher.

(Comments posted to a website usually won't subject the news website to liability; however, see "Third-party postings" below.)

Falsity

It often has been said that truth is an absolute defense to libel.⁴ Absolute accuracy is not the appropriate criterion. Rather, the general standard is that the information must be substantially true.

Under the common law, the media defendant had the burden of proving that the statements challenged by the plaintiff were true. The Supreme Court changed that standard for libel suits involving public officials and public figures.⁵ Thus, plaintiffs are required to prove that the statements of fact were false.

As a result of the Supreme Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, private individuals suing for libel also must prove the statement was false if it involved a matter of public concern.⁶

An altered or inaccurate quotation that damages the reputation of the person quoted can be actionable.⁷

Identification

Plaintiffs must prove that the alleged defamatory publication refers to them. This element of a libel lawsuit often is referred to as the "of and concerning" principle: There can be no liability if the statement at issue is not proven to be "of and concerning" the plaintiff.

Governmental entities cannot bring libel claims, nor can members of large groups (usually 25 people or more, as a rule of thumb). However, if the statement at issue can be interpreted as referring to a particular person in a group, that person can sue. Also, if the offending information pertains to a majority of the members of a small group, any member of the group has standing to sue.

A corporation may bring a libel claim if the alleged defamatory statement raises doubts about the honesty, credit, efficiency or prestige of that business. However, if the statements refer only to corporate officers, the corporation cannot litigate on their behalf.

Harm

The heart of a libel suit is the claim that the plaintiff's reputation was injured. In some states, harm does not need to be shown if the statements in question concern a criminal offense, a loathsome disease, a female's unchastity, or matters harming a person's business, trade, profession or office. When any of these types of statements is involved, damage to the plaintiff's reputation is presumed.

In most states, damage to reputation also is presumed when accusations of fraud, incompetence or improper behavior are made about business or professional people.

If the defamatory nature of the statements can be proven only by introducing facts that were not published as part of the original statements, a plaintiff usually must prove a monetary loss as a result of the publication to recover damages.

Fault (public officials vs. private figures)

All plaintiffs must demonstrate that the news organization was at fault in some way. The U.S. Supreme Court has recognized different standards for different types of libel plaintiffs, with public officials and figures required to show the highest degree of fault.

Celebrities and others with power in a community usually are considered public figures. Politicians and high-ranking government personnel are public officials, as are public employees who have substantial responsibility for or control over the conduct of governmental affairs. Some courts have found that public school teachers and police officers also are public officials.

But determining if a person is a private or public figure is not always easy. In some instances, private and public categories may overlap. For example, a businessperson who has high visibility because of fundraising efforts in a community may not be a public figure for purposes other than the individual's community activity.

Under the standard adopted by the Supreme Court in the seminal libel case *New York Times Co. v. Sullivan*, a plaintiff who is considered a public figure or official has a higher standard of proof in a libel case than a private plaintiff. The public figure or official must prove that the publisher or broadcaster acted with "actual malice" in reporting derogatory information. "Actual malice," in libel parlance, does not mean ill will or intent to harm. Instead, it means the defendant knew that the challenged statements were false or acted with reckless disregard for the truth.

In determining whether actual malice exists, a court may examine a reporter's newsgathering techniques. Although carelessness is not usually considered reckless disregard, ignoring obvious methods of substantiating allegations could be considered reckless.

In *Harte-Hanks Communications, Inc. v. Connaughton*,⁸ the Supreme Court held that even an extreme deviation from professional standards or the publication of a story to increase circulation do not in themselves prove actual malice. The Court also said that while failure to investigate facts does not necessarily prove actual malice, a "purposeful avoidance of the truth" may.

Edited quotations that are not verbatim will not necessarily demonstrate actual malice as long as the alterations do not materially change the meaning of the words the speaker used. In *Masson v. New Yorker Magazine, Inc.*,⁹ the U.S. Supreme Court acknowledged that some editing of quotations is often necessary, but it refused to grant blanket protection to all edits that are "rational" interpretations of what the speaker said.

If the plaintiff is a private litigant, he or she must at least prove that the publisher or broadcaster was negligent in failing to ascertain that the statement was false and defamatory. Some states may impose a higher burden on private-figure litigants, especially if the story in question concerns a matter of public importance.¹⁰

Defenses

Truth is generally a complete bar to recovery by any plaintiff who sues for libel. Ensuring that any potentially libelous material can be proven true can avoid needless litigation.

Fair report. Libelous statements made by others in certain settings often are conditionally privileged if the reporter, in good faith, accurately reports information of public interest. This privilege usually applies to material from official meetings such as judicial proceedings, legislative hearings, city council meetings and grand jury deliberations. In most states, accurate reports of arrests, civil and criminal trials and official statements made to, by and about law enforcement officials are privileged. Reports of this nature must be accurate and fair in order for the reporter to invoke the fair report privilege, and it is advisable that the reporter explicitly attribute the information to the official source.

Neutral report. Although less broadly recognized, this privilege can protect the publication of newsworthy but defamatory statements made about public figures

or officials by a responsible, reliable organization or person, as long as the statements are reported accurately and impartially. Legal recognition of neutral reportage arose in 1977 after three scientists sued *The New York Times* for reporting that the National Audubon Society called the scientists “paid liars” when the society said that “scientist-spokesmen” of the pesticide industry were being paid to falsely state that the pesticide DDT did not kill birds. The U.S. Court of Appeals in New York (2nd Cir.) reversed the \$20,000 jury award to each scientist, holding that the First Amendment protects the “accurate and disinterested reporting” of charges made by a “responsible, prominent organization.” The public interest in being informed about “sensitive issues,” the court noted, requires that the press be able to accurately report, without fear of liability, newsworthy accusations made by responsible, reputable organizations.¹¹ Other courts have adopted the privilege in narrowly defined circumstances and extended it beyond the Audubon holding to include statements made by a responsible person (in addition to those made by a responsible organization) about a public official (in addition to those made about a public figure). The privilege has been adopted in only a few jurisdictions and expressly rejected in several others.

Third-party postings. Internet publishers generally are not responsible for libelous information posted by their readers unless the publishers exercise editorial control over the content. Section 230 of the Communications Decency Act of 1996 insulates providers of interactive computer services from liability. Thus, news sites that let readers post comments will not be liable for those comments.

However, there are ways that this protection can be lost. For example, these news sites are not protected by Section 230 if, rather than merely posting comments provided by third parties, their operators create the online posting in question, extensively edit it, or incorporate the comments into subsequent news stories. Moreover, a website publisher may lose protection when he or she “prompts” responses from users. The U.S. Court of Appeals in Pasadena (9th Cir.), for example, held in 2007 that the roommate-matching website Roommates.com was protected from liability for comments posted by its users when it provided open fields for their “additional comments,” but the site lost Section 230 immunity when it provided “drop-down” menus with answers for users’ responses.¹²

Opinion is still protected speech under the First Amendment, although the Supreme Court limited the

formerly broad reach of opinion protection in *Milkovich v. Lorain Journal Co.*¹³ The Court ruled that there is no separate opinion privilege, but because factual truth is a defense to a libel claim, an opinion with no “provably false factual connotation” is still protected.

As a result of this decision, courts will examine statements of opinion to see if they are based on or presume underlying facts. If there are no facts given to support the opinion, or these facts are false, the “opinion” statements will not be protected.

Consent. If a person gives permission for the publication of the information, that person cannot later sue for libel. However, denial, refusal to answer or silence concerning the statement do not constitute consent.

The **statute of limitations** for bringing libel suits varies from state to state. The time limit for filing a libel lawsuit generally starts at the time of the first publication of the alleged defamation. If the plaintiff does not sue within the statutory time period, the litigation can be barred.

Although a **retraction** is not usually considered an absolute defense to a libel claim, it may reduce the damages a defendant must pay if found liable for defamation. However, retracting or correcting too much could be seen as an admission of falsity, which would be used against you in a libel suit. Before agreeing to publish a retraction, consult an attorney or contact the Reporters Committee for more information.

Anti-SLAPP statutes, which permit early dismissal of lawsuits that chill the exercise of free-speech rights, may help news organizations defend some libel suits. SLAPP stands for “strategic lawsuits against public participation,” and anti-SLAPP statutes protect those engaged in debate about controversial matters from lawsuits that would deter the exercise of their constitutional rights.¹⁴ Generally, anti-SLAPP statutes apply to news organizations as well as individuals exercising their free-speech rights.

Product libel

Journalists who write about consumer products should be aware that their reports may be subject to product disparagement laws.

In June 2002, a federal appeals court allowed a product disparagement lawsuit brought by Suzuki Motor Corporation to go forward against the publisher of *Consumer Reports* magazine.¹⁵ The court found that there

was sufficient evidence for a jury to find that the magazine rigged the results of automobile tests to give the Suzuki Samurai a “not acceptable” rating. A dissenting judge said the ruling created a standard for consumer reporting that intrudes on free expression.

A number of states have enacted statutes aimed specifically at restricting the “disparagement” of food products.¹⁶ The statutes generally authorize food producers to sue anyone who disparages a food product with information unsupported by reliable scientific data. While these have not been used often, Texas’ food disparagement law was used in a highly publicized case against “The Oprah Winfrey Show” in 1998. The plaintiffs in the case, Texas feed yard owners, claimed Winfrey caused a decrease in beef sales when she said she would never eat a hamburger again for fear of mad cow disease. Winfrey won the suit.¹⁷

Criminal libel

Fewer than half of the states have criminal defamation statutes. Some of those laws, though still on the books, have been invalidated by court decisions. Even in states where criminal libel laws exist, prosecution under those statutes is rare. Nevertheless, criminal libel laws are used against journalists from time to time, particularly when their reports are politically charged, and the person allegedly defamed has influence with a prosecutor’s office.

Criminal libel laws are subject to the same constitutional requirements as civil libel law. Thus, a person charged with criminal libel of a public figure can be found guilty only if the allegedly defamatory statement is false and was made with actual malice.¹⁸

Infliction of emotional distress

Individuals sometimes sue the news media for emotional distress caused by the publication of embarrassing, truthful facts.

However, in *Hustler Magazine v. Falwell*,¹⁹ the Supreme Court ruled that public figures and officials may not recover for intentional infliction of emotional distress without demonstrating that the material in question contained a false statement of fact that was made with actual malice. The high Court noted that editorial cartoonists and other satirists must be protected not only from libel suits, but also from suits claiming emotional distress, when caricaturing public figures or commenting on matters of public concern.

Advice for avoiding libel suits

Check sources thoroughly. Get independent corroboration whenever possible. A source could have a vendetta against the subject and willfully or unintentionally misrepresent the facts for his or her own purposes. Confidential sources, such as government employees, may disappear or recant in the face of a lawsuit. Don't rely on someone else to be accurate.

Do not let your opinion about whether someone is a public figure or official color your decision to verify the accuracy of a story. Juries do not respond favorably to reporters who fail to confront their subjects with defamatory information and provide them with an opportunity to comment.

If you cover the police or courthouse beat, make certain you understand criminal and civil procedure and terminology. Be especially careful to restate accurately any information obtained about arrests, investigations and judicial proceedings.

Be cautious when editing. Make sure the story does not convey the wrong information because of a hasty rewrite.

Watch for headlines and cutlines that might be defamatory even though the text explains the story.

Make sure news promos or teasers used to stir audience interest are not misleading or defamatory.

Do not use generic video footage or file photos when reporting on an activity that might be considered questionable.

Just because someone else said it does not mean that a news organization cannot be sued for republishing it. This includes letters to the editor. Check out any factual allegations contained in them as carefully as you would statements in a news story.

Be sensitive about using words that connote dishonest behavior, immorality or other undesirable traits, whether in your published story or in comments in your notes. Remember that a judge may order a news organization to produce reporters' notes, drafts and internal memoranda at a libel trial.

If contacted by someone threatening a libel suit, be polite, but do not admit error or fault. Talk the case over with your editor, supervisor or attorney immediately, and follow procedures established by your news organization. You can also contact the Reporters Committee for more assistance, particularly if you are an independent journalist.

Chapter 2

Invasion of privacy

Almost every state recognizes some right of privacy, either by statute or under common law — the traditional court-made law that U.S. courts adopted long ago from the English standards. Most state laws attempt to strike a balance between the individual’s right to privacy and the public interest in freedom of the press. However, these rights often clash.

The concept of a right to privacy was first articulated in an 1890 *Harvard Law Review* article by Louis Brandeis and Samuel Warren. It took U.S. courts 15 more years to recognize it. The Georgia Supreme Court was the first to do so in *Pavesich v. New England Life Insurance Co.*,¹ a case involving the use of an individual’s photograph in a newspaper advertisement without his permission.

Invasion of privacy is considered a personal tort, aimed at protecting the individual’s feelings — feelings often articulated by courts as “reasonable expectations of privacy.” Corporations ordinarily cannot claim a right of privacy, and surviving heirs generally cannot file suit on behalf of a decedent.²

Public figures have a limited claim to a right of privacy. Past and present government officials, political candidates, entertainers and sports figures are generally considered to be public figures. They are said to have exposed themselves to scrutiny voluntarily and to have waived their right of privacy, at least in matters that might have an impact on their ability to perform their public duties.

Although private individuals usually can claim the right to be left alone, that right is not absolute. For example, if a person who is normally not considered a public figure is thrust into the spotlight because of her participation in a newsworthy event, her claims of a right of privacy may be limited.

A right of privacy can be violated by any means of communication, including spoken words. This tort is usually divided into four categories: intrusion, publication of private facts, false light and misappropriation.

Intrusion

Privacy is invaded when one intentionally intrudes, physically or otherwise, upon a person’s solitude or into

his private area or affairs.

Intrusion claims against the media often center on some aspect of the newsgathering process. This tort may involve the wrongful use of recording devices, cameras or other intrusive equipment. Trespass also can be a form of intrusion. Reporters should be aware that, in addition to liability for tortious invasions of privacy, anti-paparazzi laws also may create statutory liability, sometimes both civil and criminal, for newsgathering that involves trespass or harassment. California enacted such a law in 1998, and the U.S. Congress considered a similar bill in 1999.³

Because the basis of an intrusion claim is the offensive prying into the private domain of another and not any subsequent publicity given to that person or his or her private affairs, an actionable claim for intrusion may arise whether or not a news story is published or aired. For example, the leading legal guide on the accepted definitions of torts (known as the Restatement (Second) of Torts) lists the following scenario as an example of a highly offensive intrusion for which the reporter would be subject to liability: “A, a woman, is sick in a hospital with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A’s room and over her objection takes her photograph. B has invaded A’s privacy,” regardless of whether B ever publishes the photograph.⁴

The California Supreme Court has held that audio and video recording of rescue efforts at an interstate accident scene would not constitute intrusion, but taping the same accident victims once they have been moved to a rescue helicopter could be considered an invasion of privacy.⁵

Publication of private facts

Publication of truthful information concerning the private life of a person that would be both highly offensive to a reasonable person and not of legitimate public interest is an invasion of privacy in some states. Liability often is determined by how the information was obtained and its newsworthiness, and varies from community to community, as offensiveness is a jury question.

Revealing private, sensational facts about a person’s sexual activity, health or economic status can constitute an invasion of privacy.

Reporting news events that take place in public generally does not constitute invasion of privacy. Arrests are considered newsworthy and, therefore, the press is free

to accurately report them. Even a couple's intimate moment in public, captured in a photograph, is not actionable as long as a reasonable person would not consider the picture private. Courts usually find that individuals have no "reasonable expectation of privacy" when they are in public.

Although relatively few courts have found publication of private information sufficiently offensive and sufficiently lacking in newsworthiness to impose liability on the media, there are instances when they may be liable for invasion of privacy based on the highly offensive public disclosure of private facts.

In perhaps the most well-known case, the Missouri Supreme Court ruled that *Time* magazine invaded Dorothy Barber's privacy when it published a story about her unusual eating disorder, which caused her to lose weight even though she consumed large amounts of food. A photograph of Barber, taken against her will as she lay in a Missouri hospital bed, accompanied the story, which dubbed her the "starving glutton." Because Barber's odd condition was not contagious, there was no need to reveal her identity to the public to alert people who had been in contact with her, the Missouri court said. Thus, *Time* could have informed the public about her newsworthy disease without the embarrassing revelation of her identity, the court added.⁶

Public revelations about children, particularly their medical conditions and treatment, also may subject the media to liability for invasion of privacy. In 1990, Eric Foretich, the father of nine-year-old Hilary Foretich, brought a privacy claim on behalf of his daughter against Lifetime Cable Network and the BBC after the networks featured Hilary in a television documentary about child abuse. The documentary showed Hilary talking to her mother during a therapy session and demonstrating with anatomically correct dolls how her father had allegedly abused her sexually. After a federal court ruled that Foretich had stated an actionable claim for private-facts invasion of privacy, Lifetime and BBC settled with Foretich, paying him \$175,000 but not admitting liability.⁷

Public records: If information comes from a public record, such as a birth certificate, police report or judicial proceeding, the media usually are not liable for reporting it. A newspaper can print a list of people who have been granted divorces, for instance, when the information is derived from court records, no matter how embarrassing it is to the individuals.⁸ However, not all information kept by public agencies is considered part of the public record.

Some states restrict the release of certain information, even though it is part of an official record, by sealing the files or restricting public and news media access to certain proceedings.

However, if the press lawfully obtains truthful information about a matter of public concern from government sources, the state may not constitutionally punish publication of the information absent the need to further a state interest of the highest order.⁹

Reporters should use caution in relying upon semi-public documents. For example, a police detective's notes that do not become part of the official police report may not be official records. If a document relied upon by a reporter was found to be only semi-public, the reporter might not be privileged to report the information contained in it.

However, one federal appellate court has ruled that publishing information from a secret police report is not an invasion of privacy because there is no reasonable expectation that information given to the police will be kept secret.¹⁰

Passage of time: The newsworthiness of a private fact may be affected by the passage of time. Problems may occur when individuals who were once notorious but are now rehabilitated become subjects of historical commentaries that refer to their former crimes or indiscretions. Private facts published in a popular feature, such as a "25 Years Ago Today" column, could be considered an invasion of privacy if the subject is not a public figure or is deemed to have lost his public figure status.

Disclosed facts about both public officials and public figures are not subject to the passage of time rule.

Community standards: The sensibilities of the community also must be considered when determining if a private fact should be reported. The law is not designed to protect the overly sensitive.

Newsworthiness as a defense: The court may consider several factors in determining whether information published is newsworthy, including the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily assumed a position of public notoriety.

For example, a man who saved Gerald Ford's life by striking and grabbing the arm of an attempted assassin just as she prepared to shoot the president lost a private-facts case based on the public disclosure of his sexual orientation after a California court ruled that the man's homosexuality was of legitimate public interest because

the man's courageous act cast often-stereotyped homosexuals in a positive light. There was also a newsworthy question about whether President Ford delayed a public expression of gratitude toward the man because of his sexual orientation.¹¹

False light

False light invasion of privacy occurs when information is published about a person that is false or places the person in a false light, is highly offensive to a reasonable person, and is published with knowledge or in reckless disregard of whether the information was false or would place the person in a false light.

Although this tort is similar to defamation, it is not the same. The report need not be defamatory to be actionable as false light. This type of invasion of privacy tends to occur when a writer condenses or fictionalizes a story, or uses stock footage to illustrate a news story.

False light includes embellishment (the addition of false material to a story, which places someone in a false light), distortion (the arrangement of materials or photographs to give a false impression) and fictionalization (references to real people in fictitious articles or the inclusion in works of fiction of disguised characters that represent real people). Some courts may consider works of fiction constitutionally protected expressions even if they contain characters that resemble, or clearly were based on, identifiable individuals known by the author or creator.¹²

Misappropriation

The use of a person's name or likeness for commercial purposes without consent is misappropriation. The law protects an individual from being exploited by others for their exclusive benefit. A person's entire name need not be used. If the person could reasonably be identified, the misappropriation claim probably will be valid.¹³

However, *incidental* references to real people in books, films, plays, musicals or other works, whether fact or fiction, generally are not misappropriations.¹⁴ Moreover, use of a photograph to illustrate a newsworthy story is not misappropriation. Even if a photo is used to sell a magazine on a newsstand, courts usually will not consider that use a trade or commercial purpose. The line between news and commercial use is not always clear, however, and even photographs used to illustrate an article may create liability for misappropriation if the article has an overriding commercial purpose.¹⁵

Right of publicity

Some states recognize a right of publicity, which protects a celebrity's commercial interest in the exploitation of his or her name or likeness. In some jurisdictions, this right may descend to heirs or be assigned to others after the person's death.

Use of a famous person's name or likeness, without consent, to sell a product is usually misappropriation. However, other unauthorized uses of celebrities' images may violate their publicity rights.

Model Christie Brinkley, for example, successfully sued to stop the unauthorized use of her picture on posters that hung in retail stores but did not advertise any product.¹⁶ Thus, trading on a celebrity's fame and popularity even for noncommercial purposes, including public relations campaigns or other promotions, is an unauthorized use of the famous person's name or likeness that could violate his or her right of publicity.

Other newsgathering concerns

Subjects of news stories sometimes sue news organizations under other causes of action, such as fraud or trespass. These claims have proceeded with varying success. In a case involving a hidden-camera investigation by ABC News that revealed a grocery chain's unsafe practices, a federal appeals court rejected a fraud claim but allowed nominal damages for claims of trespass and breach of the duty of loyalty. The court said that ABC News employees who gained employment with the grocer and videotaped nonpublic areas of the store could be liable for only \$2 in damages.¹⁷

Journalists should be mindful of privacy issues when engaging in "ride-alongs" with law enforcement officials. In 1997, the U.S. Court of Appeals in San Francisco (9th Cir.) held that members of a television news camera crew who taped the execution of a search warrant on private property were so closely aligned with the law enforcement officers that they became "state actors" who could be held liable for civil rights violations. The Supreme Court reviewed the case and held that police officers could be liable for bringing the media inside a home, but the Court declined to rule on the liability of the media defendants. The case ultimately settled out of court.¹⁸

Defenses

If a person *consents*, there can be no invasion of privacy. However, the reporter should be sure that the

subject has consented not only to the interview, but to the publishing or airing of the interview or photographs as well. When minors or legally incompetent people are involved, the consent of a parent or guardian may be necessary. A written release is essential for use of pictures or private information in advertising or other commercial contexts.

Truth can be a defense, but only in false light cases. A litigant claiming false light invasion of privacy who is involved in a matter of public interest must prove that the media intentionally or recklessly made erroneous statements about him. However, truth is not a defense to a claim based on publication of private facts.

If the public has a legitimate interest in the story as it was reported, *newsworthiness* can be a defense to the charge of invasion of privacy. But if the report of legitimate public interest includes gratuitous private information, publication of those private facts may be actionable.

Reporter's privacy checklist

Consent from the subject

- Is the subject an adult? If not, do you have parental consent?
- Is the person mentally or emotionally disabled and unable to give consent? Have you obtained valid consent from a guardian or other responsible party?
- Has that consent been revoked?
- Is the subject currently a private or public figure? Has the person's status changed over time?

Method of obtaining information

- Is it a public place?
- If it is a private place, do you have permission to be on the premises and permission to interview or photograph?
- Was the information contained in a public record? A semi-public record?

Content

- Would publication of the information offend community standards of decency?
- Have the facts been embellished with information of questionable accuracy?
- Is the information outdated and not obviously of current public interest, or has a current event revived its newsworthiness?
- Is the information vital to the story?

THE
New-York Weekly JOURNAL.

Containing the freshest Advices, Foreign, and Domestic.

MUNDAY December 17, 1733.

Mr. Zenger,

AM told your Encouragement has so far exceeded your Expectation, that you have sold off almost three Editions of Your Paper.

In all publick

It is agreed on all Hands, that a Fool may ask more Questions than a wise Man can answer; but nor with-
standing that, I would be glad to be satisfied in the following Points of Speculation that the above Affidavits afford. And it will be no great Puffe to a wise Man to answer with a Yea, or a Nay, which is the most that will be required in most of those Questions.

That the Inhabitants were destitute of supply the Want of far was sent hither (ire Credit,) because taken from the News which, if I am right, per known to be under Government, in which not suffered to insert any Superior approve of, in losing 50 L. per annum Title of The King's Province of New-York. I give the Reasons why they put into the New-York Gazette to those who directed it: Paragraph is far from true, favoured with the following which I send you with this to which I believe will be kindly your Readers, I have concealed of the Magistrate before whom taken, because, it being common fiducy without reading them, be ignorant of their Contents.

WILLIAM LIGGET late of Boston, Merchant, aged about 22 Years, being duly sworn on the holy Evangelists, on his Oath declares, That some Time in September last he sailed from Boston in the Sloop five Brothers of Oshew at Cape as then Master of the to Charles Bay, says he he heard he was ashore at Time they were and it only from came along with is the said Sloop Casar, that falls he verily believes there, if it in Louisiana there came a Schooner and as they Sloop and a Provinty of Deck of nity of deep k, but hat he three Says, in.

- Q. 1. Is it prudent in the French Governours not to suffer an Englishman to view their Fortifications, and as they found their Harbours, tarry in their Country to discover their Strength?
- Q. 2. Is it prudent in an English Governour to suffer a French Man to view our Fortifications, found our Harbours? &c.
- Q. 3. If the above Affidavits be true, had the French a bad Harour in Canada? or do they want Provisions?
- Q. 4. Was the Letter from the Governour of Louisiana to our Governour true?
- Q. 5. Might not our Governour as easily have discovered the falsehood of it as any Body else, if it would be so?
- Q. 6. Ought he not to have endeavoured to do it?
- Q. 7. Did our Governour endeavour to do it?
- Q. 8. Was it not known to the greatst Part of the Town, before the Sloop LeCasar had founded and taken the French-Marks from without Sandyhook up to New-York? Had taken the Views of the Town? Had been in the Fort?
- Q. 9. Might not the Governour have known the same Thing, if he would?
- Q. 10. Is there not great Probability that he did it for our Benefit or that of the French?

John Peter Zenger was charged with libel for publishing this story in the December 17, 1733, edition of the *New York Weekly Journal*. Courtesy of the Scheide Library, Princeton University.

Chapter 3

Surreptitious recording

Some reporters regard recorders and cameras as intrusive devices that all but ensure that interviewees will be uncooperative. To others, they are invaluable newsgathering tools that create important documentary evidence of a conversation.

News organizations frequently adopt policies regarding surreptitious use of these newsgathering tools. It is critical that reporters and news organizations know the state and federal laws that govern the use of cameras and recording devices. The summary that follows is intended as an introduction to those laws.

You may record, film, broadcast or amplify any conversation if all parties to the conversation consent. It is always legal to record or film a face-to-face interview when your recorder or camera is in plain view. In these instances, the consent of all parties is presumed.

Of the 50 states, 38, as well as the District of Columbia, allow you to record a conversation to which you are a party without informing the other parties you are doing so. Federal wiretap statutes also permit this so-called one-party-consent recording of telephone conversations in most circumstances.¹ Twelve states forbid the recording of private conversations without the consent of all parties. Those states are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington.²

The federal wiretap law, passed in 1968, permits surreptitious recording of conversations when one party consents, “unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.” Amendments signed into law in 1986 and 1994 expand the prohibitions to unauthorized interception of most forms of electronic communications, including satellite transmissions, cellular phone conversations, computer data transmissions and cordless phone conversations.

Most states have copied the federal law. Some expand on the federal law’s language and prohibit all surreptitious recording or filming without the consent of all parties. Some state statutes go even further, prohibiting unauthorized filming, observing and broadcasting in ad-

dition to recording and eavesdropping, and prescribing additional penalties for divulging or using unlawfully acquired information, and for trespassing to acquire it. In most states, the laws allow for civil as well as criminal liability.

Many of the state statutes make possession of wire-tapping devices a crime even though one-party consent to taping conversations may be allowed.

Most of the state statutes permit the recording of speeches and conversations that take place where the parties may reasonably expect to be recorded. Most statutes also exempt from their coverage law enforcement agencies and public utilities that monitor conversations and phone lines in the course of their businesses.

In general, state statutes apply to conversations that take place within a single state.

When the conversation is between parties in states with conflicting eavesdropping and wiretapping laws, federal law generally applies, although either state also may choose to enforce its laws against a violator.

If a reporter in a state that allows one-party-consent recording calls a party in a state that requires two-party consent, and records the conversation surreptitiously — which is legal under federal law — a state with tough laws prohibiting unauthorized recording may choose to apply its laws regardless of the location of the caller or the existence of the federal statute. It is important to know your state law and the law in the state into which you call before you record surreptitiously.

The federal law and many state laws make it illegal to possess — and particularly to publish — the contents of an illegal wiretap. Some states that allow recordings make the distribution or publication of those otherwise legal recordings a crime. The U.S. Supreme Court ruled in *Bartnicki v. Vopper* in May 2001 that the media could not be held liable for damages under the federal statute for publishing or broadcasting information that the media obtained from a source who had conducted an illegal wiretap. The recording related to a local union leader's proposal to conduct violent acts in the area. The Court ruled that any claim of privacy in the recorded information was outweighed by the public's interest in a matter of serious public concern.³ The Court did not indicate whether disclosure by the media under different circumstances would be legal.

The Federal Communications Commission also has adopted a policy, known as the "Telephone Rule,"⁴ which requires a reporter who records a telephone conversation

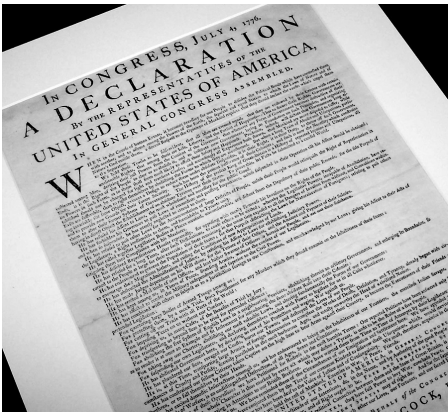
that will later be broadcast to inform the other party that the recording is intended for broadcast.

State hidden camera statutes

The laws of 13 states expressly prohibit the unauthorized installation or use of cameras in private places. In Alabama, Arkansas, California, Delaware, Georgia, Hawaii, Kansas, Maine, Michigan, Minnesota, New Hampshire, South Dakota and Utah, installation or use of any device for photographing, observing or overhearing events or sounds in a private place without the permission of the people photographed or observed is against the law. A private place is one where a person may reasonably expect to be safe from unauthorized surveillance.⁵

Alabama, Delaware, Georgia, Hawaii, Kansas, Maine, Michigan, Minnesota, South Dakota and Utah also prohibit trespassing on private property to conduct surveillance of people there. In most of these states, unauthorized installation or use of a hidden camera, or trespassing to install or use one, is a misdemeanor, punishable by a fine. In Maine, the privacy violation is a felony. In Michigan, unauthorized installation or use of a hidden camera is a felony, punishable by a \$2,000 fine and up to two years in prison.⁶

Several states have laws prohibiting the use of hidden cameras only in certain circumstances, such as in locker rooms or restrooms, or for the purpose of viewing a person in a state of partial or full nudity.⁷



A copy of the Declaration of Independence printed July 4, 1776. Courtesy of the Scheide Library, Princeton University.

Chapter 4

Confidential sources and information

The use of subpoenas to force journalists to disclose their confidential news sources and unpublished information significantly intrudes on the newsgathering process.

Apart from diverting staff and resources from newsgathering, subpoenas issued to the news media present serious First Amendment problems. The forced disclosure of sources or information threatens the constitutional right to a free press by undercutting the media's independence from government and deterring coverage of matters likely to generate subpoenas. Indeed, the U.S. Court of Appeals in Philadelphia (3rd Cir.) has recognized that "the interrelationship between newsgathering, news dissemination, and the need for a journalist to protect his or her source is too apparent to require belaboring."¹

Legislative protection of news sources

Thirty-nine states and the District of Columbia have adopted shield laws affording the media varying degrees of protection against subpoenas.² Some shield laws protect reporters from forced disclosure of their confidential news sources, but not of unpublished material. Other laws provide absolute or qualified protection according to the type of legal proceeding involved (civil or criminal) or the role of the journalist in the proceeding (defendant or independent third party).

In many states without shield laws, state courts have recognized some form of qualified privilege. In others, state constitutions may include "free press" provisions, which are similar to the U.S. Constitution's First Amendment protections, and afford qualified protection. Wyoming is the only state where neither the courts nor legislature has recognized a privilege to protect unpublished sources or information.

Journalism organizations have long been fighting for a federal reporter's privilege. At the end of 2010, shield bills had passed the House of Representatives and been approved by the Senate Judiciary Committee, but disagreement among senators about who would qualify as bona fide journalists entitled to protect their confidential sources has prevented passage by the full Senate.

Reporters should become familiar with the scope of

their state's privilege to withhold confidential sources and information, as recognized by a shield law, state constitution or in case law. The Reporters Committee maintains a compendium of reporter's privilege laws in the states and federal circuits at www.rcfp.org/privilege.

The constitutional privilege and its limits

The issue of whether the First Amendment creates a privilege to withhold confidential information came before the U.S. Supreme Court in 1972 in a trilogy of cases decided together under the name *Branzburg v. Hayes*.³ The Court ruled that reporters have no First Amendment right to refuse to answer all questions before grand juries if they actually witnessed criminal activity.

Justices Lewis Powell and Potter Stewart, however, recognized a qualified constitutional privilege in two separate opinions. Powell, while agreeing with the majority, wrote a concurrence arguing that reporters would still be able to contest subpoenas if they were issued in bad faith, or if there were no legitimate law enforcement need for the information. Stewart, dissenting, made a much stronger case for a robust privilege, arguing that anything less would allow officials to "annex" the news media as "an investigative arm of government." Two other justices joined Stewart. These four justices, together with Justice William O. Douglas, who dissented in a separate opinion, gave the notion of a qualified constitutional privilege a majority.

Since *Branzburg*, many federal and state courts have acknowledged the existence of some form of qualified constitutional privilege. Where the privilege is recognized, the courts generally use a three-part balancing test to assess whether the subpoenaed information is clearly relevant and material to the pending case, whether it goes "to the heart of the case" and whether it could be obtained from other sources besides the media.

The *Branzburg* ruling is usually strictly applied to any journalist subpoenaed to testify before a grand jury, especially if the reporter was a witness to a crime. When an important criminal proceeding is at stake, courts may find that the public interest is better served by compelling the reporter to testify.

In recent years, federal courts have shown greater reluctance to recognize a privilege under the First Amendment. Beginning in 2003, the U.S. Court of Appeals in Chicago (7th Cir.) has said twice that the privilege does not exist.⁴ In 2005, the U.S. Court of Appeals in

the District of Columbia (D.C. Cir.) said a grand jury's need for information outweighed any reporter's privilege after *New York Times* reporter Judith Miller refused to testify about her sources for a story about CIA operative Valerie Plame.⁵ Miller spent 85 days in jail before agreeing to testify.

In criminal trials, many courts apply the three-part balancing test to determine whether the defendant's Sixth Amendment right to confront all witnesses against him outweighs the reporter's need for confidentiality. The decision usually comes down to whether the information sought is clearly essential to the proof of the crime, or to the accused's defense.

Additionally, many states will not allow reporters to assert shield law protections to avoid testifying if they witness criminal activity.⁶

A reporter is most likely to enjoy at least a qualified constitutional privilege in civil cases to which he or she is not a party. The courts frequently find that the public interest in protecting the reporter's news sources outweighs the private interest in compelling the reporter's testimony.

In libel cases, however, reporters who are defendants may face demands to reveal their confidential sources, particularly if the contested information is the basis of the allegedly defamatory reports.

Public officials and public figures, who must demonstrate actual malice, argue that they need to know the names of confidential sources (if any exist) to demonstrate that the reporters knew their stories were false or acted in reckless disregard of the truth. These plaintiffs also argue that access to unpublished information is necessary to determine if the selection of information for a news story showed actual malice on the part of the news organizations.

A number of trial courts have held that before a reporter can be compelled to testify in libel cases, the plaintiff must prove by substantial evidence that the challenged statement was published and is both factually untrue and defamatory.

The plaintiff also must prove that reasonable efforts to discover the information from alternative sources have been made, and no other reasonable source is available. Further, these plaintiffs must show that the informant's identity is needed to properly prepare the case.

Courts also have begun to recognize that subpoenas issued to non-media entities that hold a reporter's telephone records, credit card transactions or similar

material may threaten editorial autonomy, and the courts may apply the reporter's privilege if the records are being subpoenaed in order to discover a reporter's confidential sources.⁷

Internet issues

Many courts have agreed that a journalist who publishes only online can be a reporter for the purposes of shield laws, provided that he or she regularly gathers and disseminates news to the public.

For example, the California Court of Appeal in 2006 interpreted the term "magazine or other periodical publication" in the state's shield law to include two websites devoted to news and information about Apple Macintosh computers and related products. In allowing the defendant-bloggers to invoke the shield law as protection from compelled disclosure of the identities of anonymous sources who leaked confidential trade secrets about soon-to-be-released Apple products, the court concluded that the online publishers' activities "constitute[d] the gathering and dissemination of news, as that phrase must be understood and applied under our shield law."⁸

Moreover, the New Hampshire Supreme Court found that the privilege derived from the state constitution's guarantee of freedom of the press protected a website providing information about the mortgage industry.⁹ The court rejected an argument that the website was ineligible for protection under the privilege because it was neither an established media entity nor engaged in investigative reporting. Rather, because the website "serve[d] an informative function and contribute[d] to the flow of information to the public ... [it was] a reporter for purposes of the newsgathering privilege," the court stated.

For the protection to apply to these online-only publishers, their intent to gather and report news must be evident. A panel of the New Jersey Appellate Division, in finding that a defendant — a website operator investigating the online adult entertainment industry — could not invoke the state shield law in relation to comments she posted on a pornography watchdog website, wrote that, "*new media should not be confused with news media. There is, of necessity, a distinction between, on the one hand, personal diaries, opinions, impressions and expressive writing and, on the other hand, news reporting.*"¹⁰

Regardless of their performance of a news function, however, online-only reporters who work in states with shield laws that require reporters to be salaried employees

of a traditional media organization may be less likely to qualify for the privilege.

A reporter's obligation to a source

Subpoena battles often arise out of a journalist's commitment to keep his or her source confidential. Many reporters consider their promises to confidential sources to be sacred, and routinely have faced jail to protect their sources.

In 1991, the Supreme Court was asked to decide whether a confidential source may sue a news organization that reveals its identity without its consent.¹¹ The Supreme Court ruled that the First Amendment does not protect journalists from such suits, and left it to the states to decide whether media organizations would be subject to ordinary rules of contracts and "promissory estoppel" (in which a court enforces a promise made to a party who relied on it to his detriment).

Many news organizations have reexamined their policies on whether reporters have the authority to promise unconditional confidentiality to a source, or whether editors can overrule such promises. You should familiarize yourself with the policy in effect at your news organization.

Anonymous comments online: Protecting newsgathering even for strangers

With the steady increase in online publishing, potential civil plaintiffs or prosecutors have been seeking the identities of anonymous online commenters on web stories. This is often done through a subpoena served on a news organization or on the publisher of a blog.

When faced with a subpoena for anonymous Internet comments or postings, a publication may choose to treat it like any other subpoena for newsgathering material, or it may decide that it has not promised commenters anonymity and therefore will comply with such subpoenas. The course of action you choose to take should depend on what you've promised your readers and commenters, and how willing you are to undertake a court fight over the subpoena.

If your news site has a privacy policy, it may already have procedures in place for how it will treat user information and whether or to what extent it will protect commenters' identities. However, it is not necessary for websites to maintain these policies in order for commenters' identities to be kept private.

In the legal context, websites or Internet providers can sometimes be the default gatekeepers between potential libel plaintiffs and their defendant commenters due to Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1). This federal law provides website and Internet service owners with tort immunity from comments posted by others, stating in relevant part, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Because the provider cannot be held liable, plaintiffs must find out the identity of the individual poster in order to file suit.

Some news organizations choose to fight commenter subpoenas pursuant to a local reporter’s privilege. Others do not. *The New York Times* in 2010 published an article discussing how major media outlets were questioning to what extent their online components should allow anonymous commenting in the future. The story noted the slow move away from widespread anonymity, which has been common on the Internet since its inception, sparked by lawsuits over anonymous comments.¹²

Regarding the use of shield laws to protect the identities of commenters, there is disagreement as to whether anonymous commenters are sufficiently analogous to sources that are promised anonymity or confidentiality in exchange for sensitive information. Such commenters play a less meaningful role in the newsgathering and reporting process, even if they are contributing relevant information, because they did not interact with the journalist reporting the story.

A few states have had rulings allowing shield laws to be used to protect anonymous speech on news organization’s websites, including Florida, Montana, Oregon and Texas.

Another factor that can instruct an organization’s decision is the nature of the comment itself.

The Cleveland *Plain Dealer* in March 2010 voluntarily unmasked the identity of an anonymous commenter after it learned that the account used was registered to a local judge who was hearing the case described in the article. The newspaper’s decision to voluntarily reveal the source of the online comments sparked debate between those who feared a chill on future posting and those who felt the public had a right to know.

In a 2009 case, the *Las Vegas Review-Journal* first resisted a subpoena for information about 100 comments, and then cooperated with a narrower version

of the subpoena that requested information about only two of the anonymous commenters on one of its online articles. The ACLU fought against disclosure on behalf of the commenters themselves.

Furthermore, the strength of a potential plaintiff's case can influence a publication's decision whether to fight the subpoena or not. In many states, the party who requested the subpoena faces a challenging legal battle if he or she is unable to present a basic case for defamation against the author of the comments.

States have different standards as far as how much proof a plaintiff must show to compel disclosure of a commenter's identity.

In New Jersey and Delaware, courts have found a strong First Amendment interest in anonymous speech and require the plaintiff to present a basic case of defamation before the identity can be revealed.

Dendrite International v. Doe No. 3,¹³ a New Jersey case, established a five-part test for courts to follow, allowing disclosure if (1) the plaintiff makes efforts to notify the anonymous poster and allow a reasonable time for him or her to respond; (2) the plaintiff identifies the exact statements made by the poster; (3) the complaint sets forth a basic cause of action; (4) the plaintiff presents sufficient evidence for each element of the claim; and (5) the court must balance the defendant's First Amendment right of anonymous free speech against the plaintiff's need for disclosure and the strength of the plaintiff's case.

Other states, such as Virginia, have set a lower bar for plaintiffs, and ordered the release of the identities of anonymous commenters as long as the plaintiff believes in good faith that he or she has been a victim of defamation.¹⁴

Publishers should know their respective state's governing law on disclosure of online identities, if there is one, to determine the standards of proof a plaintiff must show. This will allow for fully informed decision making. Online news sites that want to protect the identities of commenters should seek advice from an attorney, or contact the Reporters Committee.

What to do when you are subpoenaed

Receiving a subpoena does not mean the marshal will be coming to the door to arrest you. It is simply notice that you have been called to appear at a deposition or other court proceeding to answer questions or to supply certain documents.

You may not ignore a subpoena, however. If you fail

to appear at the time and place specified, you could be held in contempt of court, and fined or imprisoned, or both.

If you are subpoenaed, there are certain steps you should take immediately.

Under no circumstances should you comply with the subpoena without first consulting a lawyer. It is imperative that your editor or your news organization's legal counsel be advised as soon as a subpoena is served so a plan of action can be developed.

If you are working independently, call the Reporters Committee for assistance in locating an attorney.

If your state has a shield law, the lawyer must determine whether it applies to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, state courts may have recognized some common law or constitutional privilege that will protect you.

Working with your editor, the lawyer will then recommend a strategy for handling the subpoena, taking into account your news organization's policy governing compliance with subpoenas and revelation of unpublished information or the names of sources.

If a subpoena requests only published or broadcast material, your newspaper or station may elect to turn over these materials without dispute, as a matter of policy. If the materials sought are unpublished, such as notes or outtakes, or concern confidential sources, it is unlikely that your employer has a policy to turn over those materials voluntarily.

Every journalist should be familiar with the news organization's policy for retaining notes and drafts. Follow the rules and do so consistently. If your news organization has no formal policy, talk to your editors about establishing one. Never destroy notes, tapes, drafts or other documents once you have been served with the subpoena.

In some situations, your news organization may not agree that sources or materials should be withheld, and may try to persuade you to reveal the information to the party issuing the subpoena. If the interests of your news organization differ from yours, it may be appropriate for you to seek separate counsel.

Separation orders

Reporters who have been subpoenaed for testimony may be subject to "separation orders" — orders that keep witnesses out of the courtroom when other witnesses are

testifying. These are designed to keep witnesses from hearing and being influenced by the testimony of those other witnesses. When applied to reporters, they prevent them from covering trials or other legal proceedings. A reporter is unlikely to succeed in objecting to a separation order if the subpoena on which the order is based is upheld, although some courts have been willing to limit the order in such cases.¹⁵

Reporters who need to cover a trial and yet have their names placed on the witness list should immediately seek assistance from an attorney or call the Reporters Committee. The order must be challenged as soon as possible, not just when it is enforced.

Sanctions

If a reporter refuses to comply with a subpoena after being ordered by a court to do so, the court may impose a sanction.

The reporter may be held in contempt. Civil contempt can result in a fine or incarceration, which terminates when the reporter divulges the information sought or when the underlying proceeding is completed.

Criminal contempt may be used to punish an affront to the court, such as a reporter's obstruction of court proceedings by refusing to testify. Criminal contempt will result in a fine and/or sentence, but unlike civil contempt, the jail sentence is for a set period of time and does not end if a reporter decides to testify.

Some state shield laws provide that reporters cannot be held in contempt for refusing to testify.

If a reporter is a party to a case, such as a defendant in a libel or privacy suit, and refuses to reveal a confidential source or unpublished information, some courts will rule that the reporter automatically loses the suit.¹⁶ A court also may prohibit the reporter or news organization from introducing evidence gathered from confidential sources. Or, the court may presume as a matter of law that the reporter never had a confidential source, whether or not this is the case. This means that the reporter may lose the suit unless he or she decides to disclose the source.

Newsroom searches

In 1978, the Supreme Court ruled that a warrant may be issued to search a newsroom or a reporter's home if there is reason to believe that evidence of a crime will be found there. In that case, police searched a college newspaper's newsroom for photographs identifying some

demonstrators who had injured policemen.¹⁷

In direct reaction to this ruling, Congress passed the Privacy Protection Act of 1980, which limits the circumstances under which federal, state and local law enforcement officials may obtain warrants to search for journalists' "work product materials" or "documentary materials."¹⁸

"Work product materials" are items created or possessed for the "purposes of communicating such materials to the public," such as drafts of articles, outtakes or notes. "Documentary materials" are "materials upon which information is formally recorded," such as photographs or audio and visual recordings.

The act lists some exceptions. "Work product materials" and "documentary materials" may be seized under a search warrant if there is "probable cause to believe" the reporter has committed, or is committing, a crime to which the materials relate. Also, if the information is necessary to prevent death or serious harm to someone, it may be seized.

"Documentary materials" also may be seized under a search warrant if the advance notice provided when a subpoena is issued would result in the destruction of the materials, or if a previous subpoena has been ignored, all legal remedies to enforce the subpoena have been exhausted and any further delay in the trial or investigation would "threaten the interests of justice."

Additionally, neither "work product materials" nor "documentary materials" are protected from search or seizure if they relate to national security or child pornography.

If law enforcement officials violate any provision of the act, a news organization may sue and receive damages to cover legal fees and actual injury. The minimum amount that will be awarded is \$1,000.

Even though the Privacy Protection Act applies to state searches as well as those conducted by federal authorities, at least nine states — California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas, Washington and Wisconsin¹⁹ — have laws providing similar or even greater protection. Some states require that search warrants for documents be directed only at parties suspected of involvement in the commission of a crime, which generally exempts journalists.

If law enforcement officials arrive at a newsroom or a reporter's home with a search warrant, the journalist should try to delay the search until a lawyer has examined

the warrant.²⁰ If the search proceeds, staff photographers or camera operators should record the scene. Although staff members may not impede the law enforcement officials, they are not required to assist the searchers.

If you can, consult an attorney immediately after the search is over about filing a suit in either state or federal court. It is important to move quickly because you may be able to obtain emergency review by a judge in a matter of hours. If your news organization does not have an attorney, contact the Reporters Committee for assistance in obtaining one.

FISA warrants

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA),²¹ which created a secret spy court with powers to issue secret warrants authorizing officials to perform wiretaps and searches. After the attacks of September 11, the court's powers were increased with the passage of the USA PATRIOT Act. The act expanded several categories of information that may be obtained by the court, and allowed for sharing of information by a broad range of agencies. Proceedings of the FISA court are conducted in secret, and people investigated under its powers are not aware of the investigation.

One concern of the news media is that the FISA could be used by the government to spy on journalists and discover their sources. Under the PATRIOT Act, investigators need show only that national security is a "significant purpose" in order to obtain a FISA warrant. And because proceedings of the FISA court are secret, journalists will have no warning that their sources are being disclosed. Indeed, a journalist whose source is revealed in the course of a FISA inquiry may never find out about the breach.

The PATRIOT Act also allows government officials to obtain an order from the FISA court permitting them to gather from any business all books, documents and other items related to foreign intelligence information. The court cannot grant such an order for the sole purpose of investigating activities protected by the First Amendment. Nevertheless, if a business is subject to such a search, the business will also be served with a gag order prohibiting them from talking about it. The U.S. Court of Appeals in New York (2nd Cir.) held in 2008 that the First Amendment requires that a recipient must be allowed to appeal the demand and that Congress cannot limit the evidence allowed in that appeal — rights that were not guaranteed in the original legislation.²²

This aspect of the PATRIOT Act appears to apply to newsrooms, which potentially could be subject to a search, despite the provisions of the Privacy Protection Act prohibiting such searches. Indeed, Justice Department officials have conceded that newspapers might be subject to a court order requiring production of documents.

Chapter 5

Prior Restraints

A prior restraint is an official government restriction of speech prior to publication. Prior restraints are viewed by the U.S. Supreme Court as “the most serious and the least tolerable infringement on First Amendment rights,” according to the Court’s 1976 opinion in *Nebraska Press Association v. Stuart*.¹ Since 1931, the Court repeatedly has found that such attempts to censor the media are presumed unconstitutional.²

Because the Court found in *Nebraska Press* that the “barriers to prior restraint remain high and the presumption against its use continues intact,” prior restraint orders are rarely upheld. As a result, editorial decisions about publication of information the government deems sensitive are generally left solely to the discretion of news organizations.

One interesting aspect of this area of the law is that while courts have been clear that prior restraints will rarely survive scrutiny even when national security concerns are raised, courts seem to be most willing to allow restraints when the administration of a trial is at issue, or when fair trial rights are implicated.

Fair trials

In the 1976 landmark case *Nebraska Press Association v. Stuart*, the Court addressed the constitutionality of an order prohibiting the media from publishing or broadcasting certain information about Erwin Charles Simants, who was accused of murdering the Henry Kellie family in a small Nebraska town. This case pitted the First Amendment rights of a free press against the defendant’s Sixth Amendment right to a fair trial.

To ensure that Simants received a fair trial, the Nebraska Supreme Court modified the district court’s order to prohibit reporting of confessions or admissions made by Simants or facts “strongly implicative” of Simants.

On appeal, the U.S. Supreme Court struck down the prior restraint order. The Court emphasized that the use of prior restraint is an “immediate and irreversible sanction” that greatly restricts the First Amendment rights of the press. “If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior

restraint ‘freezes’ it at least for the time,” Chief Justice Warren Burger wrote for the Court.

To determine whether the prior restraint order was justified, the Court applied a form of the “clear and present danger” test, examining whether “the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” In applying this test, the Court articulated a three-part analytical framework, which imposed a heavy burden on the party seeking to restrain the press. First, the Court examined “the nature and extent of the pretrial news coverage.” Second, the Court considered whether other less restrictive measures would have alleviated the effects of pretrial publicity. Finally, the Court considered the effectiveness of a restraining order in preventing the threatened danger.

The Court found that the trial judge reasonably concluded that the “intense and pervasive pretrial publicity” in the Simants case “might reasonably impair the defendant’s right to a fair trial.” However, the trial judge did not consider whether other measures short of a prior restraint order would protect the defendant’s rights. The trial judge should have considered changing the location of the trial, postponing the trial, intensifying screening of prospective jurors, providing emphatic and clear instructions to jurors about judging the case only on the evidence presented in the courtroom or sequestering the jury.

The Court also found that the effectiveness of the trial judge’s prior restraint order to protect Simants’ right to a fair trial was questionable. Because the prior restraint order is limited to the court’s territorial jurisdiction, it could not effectively restrain national publications as opposed to publications within the court’s jurisdiction. Moreover, it is difficult for trial judges to draft effective prior restraint orders when it is hard “to predict what information will in fact undermine the impartiality of jurors.” Finally, because this trial took place in a town of 850 people, rumors traveling by word of mouth may be more damaging to the defendant’s fair-trial rights than printed or broadcasted news accounts. In short, the probability that the defendant’s fair-trial rights would be impaired by pretrial publicity was not shown with “the degree of certainty” needed to justify a prior restraint order.

Nevertheless, government officials and private individuals occasionally attempt to stop publication. In *Toledo Blade Company v. Henry County Court of Common Pleas*,³ the Ohio Supreme Court reversed a trial court’s order that prohibited the media from reporting on one defendant’s criminal trial until after the impaneling of a jury

in a second defendant's criminal trial. The trial court had justified its order on grounds that the publicity was likely to prejudice the second defendant's right to a fair trial. In reversing the trial court's order, the Ohio Supreme Court relied on the analytical framework established in *Nebraska Press Association* to conclude that the trial court's order was "patently unconstitutional."

National security

The Supreme Court has recognized that, theoretically, publication of some information may be restrained to protect national security. However, when *The New York Times* and *Washington Post* began publishing the Pentagon Papers, a study regarding U.S. involvement in Vietnam, and the government tried to stop publication, the Supreme Court refused to uphold prior restraints on the newspapers because the government had failed to make a sufficient showing of harm to national security.⁴

A federal district court issued a restraining order when *The Progressive* threatened to publish an article explaining the design of a hydrogen bomb. An appeals court ultimately dismissed the case after the article appeared in another publication.⁵

Courts have recognized that prior restraints may be imposed where the activity restrained presents a clear and present danger or a serious and imminent threat to the administration of justice.⁶ In the earliest incarnation of the "clear and present danger" test, Justice Oliver Wendell Holmes stated that expression could be punished when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁷

The "clear and present danger" test subsequently evolved in *Brandenburg v. Ohio*.⁸ In that case, the Supreme Court held that the advocacy of force or criminal activity may not be penalized unless such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

In 1996, the U.S. Court of Appeals in Washington, D.C., upheld a policy that requires employees of the State Department, the U.S. Information Agency and the Agency for International Development to submit for prepublication review articles, speeches and teaching materials that discuss those agencies or U.S. foreign policy matters. A divided three-judge appellate panel held that because the policy requires only agency review and not agency consent, it is not an unconstitutional restriction on speech.⁹

Law enforcement investigations

Law enforcement officials often tell reporters not to publish certain information about crimes — for example, the names of victims or witnesses, or the place where the crime occurred. Reporters should be skeptical about admonitions not to publish, particularly when such officials have made the information readily available.¹⁰ Unless these restrictions are authorized by a judge who has found a “clear and present danger” to the administration of justice, officials cannot order reporters not to publish lawfully obtained information. The decision to publish in such contexts is a matter of ethical considerations, not legal restraints.

Privacy

Private individuals occasionally try to convince reporters to refrain from publishing information that might be embarrassing. Sometimes these people have sought court orders barring publication, though they are typically unsuccessful. In one celebrated case, Frank Sinatra sought a restraining order to stop author Kitty Kelley from conducting interviews and publishing her “unauthorized” biography of him. He later withdrew his lawsuit.¹¹

Generally, courts are reluctant to issue prior restraint orders, particularly when the justification for them is merely that the material might be libelous or invade someone’s privacy.¹² In December 1994, the U.S. District Court in New York City lifted a temporary restraining order issued two days earlier and denied a request by Paula Jones, who had accused President Bill Clinton of sexual harassment, for a preliminary injunction against *Penthouse* magazine, which printed nude pictures of her in its January 1995 issue. The court ruled that the photographs had a relationship to an editorial questioning her credibility, and that the matter was in the public interest.¹³

The unauthorized publication of sexually explicit images has resulted in a significant amount of litigation. In 1998, a U.S. District Court in California issued a preliminary injunction prohibiting the publication, distribution or other dissemination of a sexually explicit videotape of entertainers Pamela Anderson and Brett Michaels on multiple grounds, including both copyright and privacy theories.¹⁴ In contrast, the U.S. Circuit Court for the Sixth Circuit stayed a U.S. District Court’s injunction prohibiting a website’s publication of nude images of a news reporter. The unpublished decision by the Sixth Circuit stated that the injunction was a prior restraint unlikely to survive constitutional analysis.¹⁵

Information in the public sphere

To the extent information is revealed in open court, it cannot be censored. For example, if jurors are identified in open jury selection proceedings, the court cannot restrain the press from publishing the identity of jurors because such information is part of the public record.¹⁶

In *Arkansas Democrat-Gazette v. Zimmerman*, the Arkansas Supreme Court held that an order prohibiting publication or distribution of the names or pictures of a juvenile defendant, the victim, and their families was an overbroad prior restraint of the press in violation of the First Amendment. Two critical factors influenced the court's decision. First, the juvenile proceedings were open to the public and the media. Second, the identity of the parties was already in the public domain prior to the judge's order. As a result, these factors outweighed the state's interest in confidentiality of the parties. While the judge could prohibit photographs in areas adjacent to the courtroom, she could not prohibit photographs outside the courthouse, including public streets and sidewalks.¹⁷

In *Freedom Communications, Inc. v. Superior Court*¹⁸, the California Court of Appeals overturned a trial court order that prohibited the Orange County Register from reporting on witness testimony in a case in which the newspaper was a party. The appellate court determined that the trial court's order was an unjustified prior restraint under both the First Amendment and the California Constitution. More recently, another California Court of Appeals reached a similar conclusion in an unpublished decision in *Los Angeles Times Communications, LLC v. Superior Court*.¹⁹ The appellate court overturned, as an invalid prior restraint, the trial court's order prohibiting the publication of in-court photographs of a criminal defendant that had been taken with the court's consent.

Corporate information

Corporations sometimes attempt to restrain publication of information about their activities.

Businesses have been able to secure injunctions to protect trade secrets, although courts usually require that there be some special relationship between the company seeking the injunction and the party being enjoined. However, courts repeatedly have ruled that a corporation's mere assertion that publication will put it at a competitive disadvantage is inadequate to overcome the heavy presumption against prior restraints.

For example, in 1994, Supreme Court Justice Harry A. Blackmun stayed an order that prevented the news pro-

gram “48 Hours” from airing the tape of a meatpacking plant it obtained from an employee who wore a hidden camera during his work shift. Justice Blackmun, acting as Circuit Justice for the U.S. Court of Appeals (8th Cir.), wrote that restraining orders on the media are permitted only in exceptional cases where “the evil that would result is both great and certain and cannot be militated by less intrusive measures.” In this case, the argument that the broadcast could result in significant financial harm to the company was too speculative to support a prior restraint. The appropriate remedy would be a subsequent suit for civil or criminal damages, not a prior restraint, he concluded.²⁰

In a more recent example, the New Hampshire Supreme Court reversed a trial court’s order that prohibited a website operator from republishing material related to a chart purportedly containing a mortgage lender’s confidential loan information.²¹ The court ruled that the trial court’s order was an invalid prior restraint because the business’ privacy and reputation concerns did not justify the “extraordinary remedy” of a prior restraint.

With varying outcomes, trial courts have also on occasion issued prior restraints to prohibit the publication of information contained in sealed court records that falls into the hands of reporters. An Indiana appellate court in 1995 upheld a trial court’s order prohibiting a newspaper from publishing judicial records about a third-party business that were supposed to be sealed, but that a reporter had obtained from the court. The appellate court agreed with the trial court’s reasoning that such an order was necessary to “preserve the integrity of the judicial system.”²²

In contrast, the U.S. Court of Appeals in Cincinnati (6th Cir.) overturned orders by an Ohio U.S. District Court prohibiting *Business Week* magazine from publishing information from sealed pretrial discovery documents containing business information, which it had received from an attorney at a law firm involved in the case. The Sixth Circuit ruled that the factual evidence did not justify censoring the news media. The court held that the trial court failed to make any of the requisite findings that irreparable harm to a “critical government interest” would occur if publication was not stopped. Moreover, although temporary restraining orders can be used in many situations to maintain the “status quo” of a case, the court explained, the status quo for the media is to publish news promptly.²³

More recently, a District of Columbia Superior Court withdrew its order prohibiting *The National Law*

Journal from publishing information about the juice company POM Wonderful that was supposed to be sealed, but that a reporter had obtained from the court file. After *The National Law Journal* appealed the order, the company withdrew its request for the prior restraint and the court removed the order.²⁴

Statutory restraints

Some states have statutes that make it a crime to publish the names of rape victims. Journalists who break these laws are theoretically subject to fines and jail sentences.²⁵

However, a Florida statute making it a misdemeanor for the media to identify alleged sexual assault victims violates the federal and Florida constitutions, the Supreme Court of Florida unanimously held in December 1994. The Florida Legislature may not impose automatic liability for publishing lawfully obtained, truthful information about matters of public concern, the court ruled.²⁶

Similarly, an Alabama state judge overturned the conviction and sentence of two television newscasters who were accused of violating a state law that prohibits disclosure of information contained in juvenile records after the station broadcast the identity of a juvenile suspect. The judge said that because the juvenile was previously identified in a public forum, it was not illegal for the station to subsequently broadcast his identity.²⁷ Likewise, the Georgia Supreme Court found a statute prohibiting the news media or other persons from naming or identifying rape victims unconstitutional.²⁸

However, the South Carolina Supreme Court held that a statute that prohibits the publication of rape victims' names was not unconstitutional on its face.²⁹

Although the U.S. Supreme Court has not held that these statutes are unconstitutional as written, it has ruled that states cannot punish journalists for publishing truthful information they have obtained from public records or official proceedings.³⁰

In another case, the U.S. Supreme Court refused to permit a newspaper to be held liable for publication of the name of a rape victim that was inadvertently released by a police department.³¹

A 2004 ruling by the Colorado Supreme Court in a sexual assault case against Kobe Bryant has received significant attention. In *People v. Bryant*,³² the court upheld a trial court's order prohibiting media organizations from publishing inadvertently released transcripts from pre-trial hearings that, pursuant to Colorado's rape shield

law, were closed to the public. Although recognizing the trial courts' order as a prior restraint, the Colorado Supreme Court concluded that the order, if properly narrowed, was justified. The court pointed to the state's rape shield law as reflecting that the state had an interest "of the highest order" in protecting the secrecy of the closed hearing procedure. The court stated that such secrecy was a means of protecting a witness' privacy, encouraging the reporting of sexual assault, and furthered prosecution and deterrence of sexual assaults.

Prior restraints and the Internet

Prior restraints on the publication of Internet content are subject to the same constitutional limitations as restraints on speech in other forums. Court orders that prohibit the publication of content are more likely to be upheld if they occur after a final court adjudication that the communication consists of non-protected speech. For example, in *Evans v. Evans*, the California Court of Appeals struck down a preliminary injunction prohibiting the defendant from posting allegedly private, false and defamatory comments on a website. Relying on state supreme court precedent, the court stated that a narrowly drawn prohibition on publishing false and defamatory comments could be permissible only after a final determination on the merits that the speech at issue was defamatory.³³

The Kentucky Supreme Court reached a similar decision in *Hill v. Petrotech Resources Corporation*. After the defendant made allegedly defamatory statements about the plaintiff in a variety of forums, including on the Internet, the trial court granted a temporary injunction prohibiting the defendant from making further defamatory comments. The state supreme court vacated the injunction as an impermissible prior restraint on speech. The court went on to state, however, that a narrowly tailored prohibition on making further defamatory statements could be permissible if it were issued after a final court determination that the statements at issue were, in fact, defamatory.³⁴

Obscenity and indecency

Obscenity falls outside the protection of the First Amendment. Although absolute bans on publication generally have been declared unconstitutional, the Supreme Court has permitted government regulation of the sale and distribution of obscene materials. The Court has consistently required that those regulations

be narrowly defined to cover materials judged obscene by contemporary community standards.

In November 1997, the U.S. Court of Appeals in New York City (2nd Cir.) held that the Department of Defense could enforce a 1996 law barring sexually explicit magazines and videotapes from being sold or rented on military bases because it was a reasonable attempt to protect “the military’s image and core values.”³⁵

The Supreme Court has decided a number of cases regarding federal statutes that seek to protect minors from pornography. In *Reno v. ACLU*, the Court struck down criminal restrictions on internet speech contained in the Communications Decency Act where less restrictive means existed and the prohibitions were not narrowly tailored to serve a compelling government interest.³⁶ The Court has upheld the criminal prohibition of child pornography, but criminal prohibitions that extend to conduct involving virtual depictions of children engaged in sexually explicit conduct have turned on the specific scope and language of the laws.³⁷

The courts have struck down enforcement of the Child Online Protection Act (“COPA”), which prohibits an individual from knowingly posting material that is harmful to minors on the Web for commercial purposes. In 2002, the Supreme Court held that the COPA did not violate the First Amendment merely by using “community standards” to identify “material that is harmful to minors.”³⁸ But two years later, the Court upheld an injunction on enforcement of the COPA, concluding that the government had not rebutted that less restrictive alternatives to the statute, such as filtering software, exist.³⁹ The District Court subsequently issued a permanent injunction on enforcement of COPA, which was affirmed on appeal.⁴⁰ The Supreme Court has also upheld the Child Internet Protection Act, which ties federal funding for libraries to the use of filtering software.⁴¹

Commercial speech

Advertising and other communications proposing commercial transactions between the speaker and listener are not fully protected by the First Amendment. The U.S. Supreme Court has said that commercial speech may be restrained if it is false, misleading or advertises unlawful activity. Any governmental restraint must advance a substantial public interest and must not be more extensive than necessary to serve that interest.⁴²

The Supreme Court struck down a 1956 Rhode Island law that banned the advertisement of retail liquor

prices in 1996, holding that the state's interest in discouraging alcohol consumption did not justify the broad restriction on truthful commercial speech. In the decision, the Supreme Court not only agreed that commercial speech merited substantial First Amendment protection, it enhanced that protection. According to the high court, blanket bans on commercial speech that deprive the public of accurate price information must be reviewed with "special care" and "rarely survive constitutional review." The court also stated that unless commercial speech regulations target false, misleading or coercive advertising, or require disclosure of information that will help avoid misleading advertising, strict First Amendment scrutiny should apply.⁴³

Restrictions on compensation

Restrictions on receiving compensation for speech have been viewed by the courts as prior restraints on the speech itself.

The U.S. Supreme Court in 1991 struck down the New York "Son of Sam" law that required confiscation of any payments to criminals for telling stories about their crimes.⁴⁴

However, the Supreme Judicial Court of Massachusetts upheld prohibition on the sale of a story imposed as a condition of probation for Katherine A. Power, a fugitive for 23 years before turning herself in to the authorities. It found that her First Amendment rights were not violated because she was not prohibited from telling her story as long as she received no payment for it.⁴⁵

What to do if ordered not to publish

If an individual requests that you not publish certain information, try to determine the motivation for it. For example, is an individual unduly sensitive to what he thinks you might publish? See if you can address those concerns without acquiescing to the demand. Remember, in most of these situations you can refuse the request and decide for yourself what information you will publish.

If you are threatened with prosecution under a statute that supposedly makes publication of the information a crime, ask to see the statute or get enough information so that you can obtain a copy of it yourself. If such a law exists and covers the kind of information you want to publish, consult an attorney about the constitutionality of the law or call the Reporters Committee. Make a reasoned

decision about publication only after you and your editors have considered the legal ramifications of that decision.

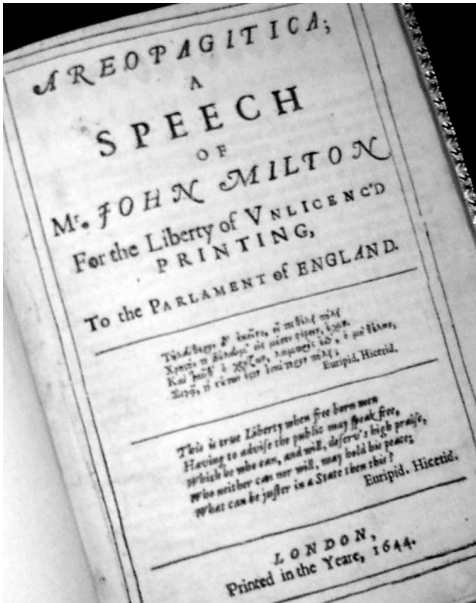
If a judge orders you not to publish, take the order seriously. Ask for a copy of the order and consult your editors immediately.

In these circumstances, three courses of action are open to you: obey the order, obey the order while challenging it, or violate the order as a means of testing its constitutionality. Your choice should be made with a lawyer's assistance.

If you elect to obey the order, file your objection to the order at the earliest opportunity and ask permission to appear with legal counsel to challenge the ruling. If the initial request to vacate the order is denied, or if you are denied the opportunity to be heard on your challenge, an attorney should be prepared to file an appeal for you. It is difficult to represent yourself in such an appeal, particularly because everything must happen quickly. Call the Reporters Committee for assistance in finding an attorney if you do not have one.

If you elect to challenge the order by violating it and publishing the information, the court may hold you in contempt. Even if the order is later found to be unconstitutional, you could be fined or even imprisoned.

Some courts have concluded that it is permissible to challenge obviously unconstitutional prior restraints in this way. Others have rejected this method.⁴⁶ Always consult a lawyer before deciding to publish despite a court order prohibiting it. Even if you ultimately prevail on appeal, you could still be found in criminal contempt and possibly jailed.



A copy of John Milton's *Areopagitica*, published in 1644. Courtesy of the Scheide Library, Princeton University.

Chapter 6

Gag Orders

Gag orders are a form of prior restraint that prohibit parties, lawyers, prosecutors, witnesses, law enforcement officials, jurors and others from talking to the press.¹ Frequently such orders are sought by one party in a case, although judges may issue gag orders on their own initiative.

Judges often call gag orders “protective orders,” and say they are necessary to protect a person’s right to a fair trial, the fair administration of justice or the sanctity of jury deliberations.

Regardless of what judges call them or who initiates them, gag orders interfere with your efforts to gather and disseminate news. Orders prohibiting participants in a case from commenting to reporters or the public also infringe on the First Amendment rights of the individuals gagged.² At least one court has ruled gag orders on trial participants are as serious as those on the press and subject to the same strict test for constitutionality.³

Courts have restrained trial participants from speaking with the press to prevent prejudicing court proceedings.⁴ The U.S. Court of Appeals in New Orleans (5th Cir.) affirmed a gag order prohibiting all trial participants from giving any public comments to the media other than matters of public record in a case involving the elected Louisiana Insurance Commissioner, James Harvey Brown, and the former Governor of Louisiana, Edwin W. Edwards.⁵ The court concluded “that the gag order is constitutionally permissible because it is based on a reasonably found substantial likelihood that comments from the lawyers and parties might well taint the jury pool . . . is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn.”⁶

Courts even have prohibited interviews of jurors after the trial has ended. In 2007, a judge in Galveston, Texas, ordered a jury to not talk to the media about how they would have voted in a civil suit over an explosion at a BP oil refinery after the suit was settled during the trial. The judge speculated that their comments could taint jurors in other civil litigation related to the explosion. At the time, BP faced hundreds of similar lawsuits over the explosion after settling about 4,000 more, according to a *Houston Chronicle* report.⁷ But the Texas First Court

of Appeals reversed the gag order, finding there was no evidence that the “additional, incremental publicity from juror interviews would cause imminent and irreparable harm to the judicial process.”

In *State v. Neulander*, the New Jersey Supreme Court affirmed a decision barring the media from interviewing discharged jurors in the case of Fred Neulander, a rabbi whose first murder trial ended in a hung jury.⁸ The court prohibited media interviews of the discharged jurors on any topic and even prohibited those jurors who wanted to speak to the press from doing so. In affirming the gag order, the state Supreme Court reasoned that media interviews may give insight into the jury’s deliberations, thereby giving an advantage to the prosecution at Neulander’s retrial. However, it limited the duration of the gag order until after the return of the verdict in the second trial. The U.S. Supreme Court declined to review the case.

In 1997, the U.S. Court of Appeals in New Orleans (5th Cir.) held that a U.S. District Court order barring the news media from conducting post-verdict interviews with jurors in a criminal trial without first obtaining the judge’s permission was not unduly vague and did not violate the news media’s newsgathering rights.⁹ The appeals court said that the order was constitutional because it was narrowly tailored to prevent a “substantial threat to the administration of justice.” Specifically, the court noted that the order applied only to deliberations and not to the verdict, and that it applied only to interviews with the jurors and not those with jurors’ relatives or friends.

Orders prohibiting comment by lawyers in a case are another matter. Because the Supreme Court has faulted judges on several occasions for failing to control out-of-court statements by lawyers, trial judges are likely to limit lawyers’ comments in highly publicized cases.¹⁰ Police who investigated a crime may be barred from commenting on evidence as well.¹¹

Several courts have ruled that such orders may prohibit statements on topics such as evidence to be introduced, the merits of the opponent’s case and testimony witnesses are expected to give. A total ban on lawyers’ comments, however, would be unconstitutional.¹²

A state bar’s code of ethics also may limit public statements by lawyers in a case. In 1991, the U.S. Supreme Court ruled in *Gentile v. State Bar of Nevada* that the standard for penalizing speech by lawyers involved in criminal cases can be lower than the standard for punishing speech by the media and the public.¹³ The high court

held that the Nevada rule governing lawyer speech, which prohibits a lawyer from making extrajudicial statements that the lawyer knows or should know “will have a substantial likelihood of materially prejudicing an adjudicative proceeding,” does not violate the First Amendment.

However, restraining the speech of a client’s former attorney is a different matter. In 2001, the U.S. Court of Appeals in New Orleans (5th Cir.) held that a gag order prohibiting a criminal defendant’s former attorney from talking to the press about the case was unconstitutional.¹⁴ The court found that the former attorney’s comments to the press did not “pose a threat to the fairness of the trial or to the jury pool.”

What to do if a court issues a gag order

If a court issues a gag order in a case you are covering, the first thing you should do is obtain a copy. If it is a written order, the court clerk should be able to provide a copy. If not, you may have to pay to have the court stenographer transcribe the judge’s oral directive.

Find out who the order gags and what restrictions it places on the gagged individuals. What is the judge’s justification for issuing the gag? Nuances in the language of the order may greatly affect whether it will be upheld on appeal.

If your sources have been gagged, you will need advice on whether you can challenge the order or whether the person directly affected by it must bring the challenge. Here, too, you will need the help of legal counsel.

In some cases, a judge will lift or modify a gag order when told of the constitutional problems it poses. But a formal appeal may be necessary to protect your ability to cover a court case.

Chapter 7

Access to courts

Courtrooms traditionally have been open to the public, and anyone who wanted to watch a trial could, as long as there was a seat available.

However, when courts recognize reporters' rights to attend proceedings or review court documents, the rights are rarely absolute. Instead, the courts usually apply a balancing test to determine whether the interest in disclosure outweighs any asserted counterbalancing interest in confidentiality. The standard the courts use in striking that balance depends on the source of the right. Courts have found that the media have a right of access to judicial records and proceedings under common law, the First Amendment and state or federal statutes. These methods of access are not exclusive; courts may find a right of access under both the common law and the First Amendment.

Under common law — the traditional court-made law that U.S. courts adopted long ago from English standards — courts have recognized a presumed right of access to criminal and civil court records.¹ However, this common-law right of access is not absolute.² The presumption of open access to judicial records may be rebutted by countervailing interests that weigh against disclosure.³ The U.S. Supreme Court has said that the decision whether to grant access under the common-law right “is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”⁴

Because courts engage in a simple balancing test, gaining access under the common-law right is more difficult than under the First Amendment, where closure must pass a higher level of scrutiny.

In *Richmond Newspapers, Inc. v. Virginia* and other cases that followed, the U.S. Supreme Court established a two-part test to determine whether the press and public have a First Amendment right of access to criminal proceedings.⁵ First, the Court must consider “whether the place and process have been historically open to the press and general public.”⁶ Second, the Court must consider “whether public access plays a significant positive role in the functioning of the particular process in question.”⁷ Since *Richmond Newspapers*, courts have extended

this “history and logic” test to establish a constitutional right of access to criminal and civil court proceedings and records.⁸

When the First Amendment right of access applies, the Supreme Court has held that a presumption of disclosure requires courts to grant access unless specific, on-the-record findings demonstrate that closure is “necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”⁹

Criminal proceedings

In criminal cases, courts issuing closure orders most often point to the defendant’s right to a fair trial by an impartial jury. However, general fear that publicity will jeopardize a defendant’s right to a fair trial is usually insufficient to close a criminal proceeding.¹² In addition, sometimes judges consider closing proceedings in light of privacy interests of witnesses or jurors, or the emotional trauma of testifying in public, particularly in sexual assault cases.¹³

Trial secrecy has been increasing in recent years, prompted by controversial, high-profile trials like those of O.J. Simpson, Theodore Kaczynski, Timothy McVeigh, and, more recently, individuals accused of supporting terrorism.

Until fairly recently, anonymous juries (where information about jurors’ names, addresses, ages or professions is sealed) were rarely used and limited primarily to cases where a credible threat to the safety or well-being of jurors existed. For example, courts have approved the use of anonymous juries in organized crime trials, where a serious risk to jurors is posed by people seeking to influence them or to retaliate after a verdict. Anonymous juries also were used in the trials of Branch Davidian survivors in Waco, Texas, Oliver North, Kaczynski, and the 1993 World Trade Center bombers.¹⁵

But judges are increasingly limiting access to juror information in a wider array of cases, citing privacy concerns. Juror identities were kept secret in criminal cases against Martha Stewart and investment banker Frank Quattrone, but both orders were overturned by the U.S. Court of Appeals in New York City (2d Cir.)¹⁶

Federal courts now often refuse to disclose any information on jurors after a 2001 policy change by the federal courts’ governing body that “documents containing identifying information about jurors or potential jurors” should no longer be available at the court house or online.¹⁷

However, some appeals courts have ruled that the First Amendment gives the public a general right of access to names and addresses of jurors.¹⁸

In January 2010, the U.S. Supreme Court ruled that a Georgia judge could not exclude the public from jury selection because a criminal defendant's right to a public trial includes the juror screening process known as *voir dire*.¹⁹ The Court found that this principle was so well established, particularly through the public's First Amendment right of court access, that it did not need to hear arguments in the case, instead vacating and remanding the Georgia Supreme Court's decision.

In July 2010, the U.S. Court of Appeals in Chicago (7th Cir.) ordered the judge presiding over the corruption trial of former Illinois Gov. Rod Blagojevich to hold a hearing to determine whether juror names should be released before the end of the trial. The appeals court held that U.S. District Judge James Zagel "acted without evidence" when he originally ruled that the jurors in the high-profile trial should remain anonymous until after the trial was completed. However, a verdict was reached before the court reconsidered its order, and the jurors' names were soon released.

Unlike criminal courtroom proceedings, grand jury proceedings have historically been conducted in secret. In May 1998, for example, a federal appeals court in Washington, D.C., affirmed a district court decision denying the media access to court proceedings and documents related to President Bill Clinton's claim of executive privilege regarding the grand jury's investigation of the Monica Lewinsky matter. The court held that the news media do not have a First Amendment right to cover grand jury proceedings, which traditionally operate in secrecy. According to the Court, recognizing a First Amendment right to attend "ancillary" proceedings would "create enormous practical problems in judicial administration."²⁰

The U.S. Supreme Court has never decided whether the public has a constitutional right of access to juvenile court proceedings.²¹ Although juvenile courts were created in the late 19th century as a reform movement that encouraged public openness, juvenile courts were closed to the public for much of the 20th century. As a policy matter, it was believed that youthful offenders should not be stigmatized forever because of one mistake. But high-profile crimes involving minors, such as the March 1998 school shooting in Jonesboro, Ark., have contributed to a reversion in public attitudes about the openness of the juvenile justice system and a youthful offender's right to privacy.²² The rules under which access is allowed vary

by jurisdiction, and usually can be found in state statutes governing juveniles or family courts.²³

Civil courts

The U.S. Supreme Court has never decided whether the public has a First Amendment right of access to civil proceedings. However, most federal appeals courts and state courts have held that civil cases are presumed to be public under the First Amendment.²⁴ Nonetheless, civil litigants often argue that publicity will jeopardize their fair-trial rights. Parties in civil cases also may argue that open proceedings would reveal trade secrets, confidential business information or other private matters. They may argue that the court should close the proceeding or seal documents to prevent competitors or others from acquiring this sensitive information.

Secret settlements in civil cases have also become more common. Often parties to litigation make confidentiality a condition to settlement. This is particularly true in cases where a defendant must pay damages. As a result, cases of great interest to the public are settled secretly and the public never learns the terms of the resolution.²⁵ In response, some jurisdictions have enacted rules that prohibit secret court settlements.²⁶

Issues litigated by private parties often have implications for the general public. Parties in civil litigation involving Enron's collapse, the Catholic Church's priest abuse scandals, Bridgestone/Firestone's allegedly defective tires, and many other controversies had tried to seal important evidence that would let the public know the extent of an important problem. In Minnesota, insurance companies seeking a declaratory judgment that they were not responsible for 3M company's potential liability for damages caused by injuries from silicon-gel breast implants obtained a broad protective order sealing most court documents. Two publishers who challenged the secrecy order were unsuccessful, despite their argument that the public had a legitimate interest in both skyrocketing insurance costs and unsafe consumer products.²⁷

A number of courts also have ruled that the First Amendment creates a right of access to civil court documents, particularly those placed in evidence or filed with the court.²⁸ Correspondingly, the use of pseudonymous civil filings (documents filed under "John Doe" or another pseudonym) has not been allowed in many cases because it represents a fundamental threat to access by denying the public right to know who is using the public courts to resolve a dispute.²⁹

State and federal legislatures also have enacted statutes with specific application to certain kinds of judicial proceedings and records. When a legislature passes a law that governs court access, the statute will delineate the scope of the access right, but it must do so in a way consistent with First Amendment case law and any applicable state constitutional right of access.

Some court rules also govern access to judicial proceedings and records. Federal Rule of Civil Procedure 26(c), for example, permits federal courts to issue protective orders sealing civil discovery materials to prevent “annoyance, embarrassment, oppression, or undue burden or expense,” but only on a finding of “good cause.”³⁰ Similarly, Federal Rule of Criminal Procedure 16(d)(1) allows federal courts to seal criminal discovery materials “upon a sufficient showing.” Most states have identical or similar rules of procedure.

Civil discovery documents not entered as evidence present access problems because they are not part of the official court record. Some federal appeals courts have held that discovery documents filed with the court are presumed public under the Federal Rules of Civil Procedure, rather than the First Amendment.³¹ Many courts do not require parties to file discovery materials, and in those jurisdictions you may have great difficulty gaining access to them.

Courts also have ruled that the media do not have a right of access to copies of videotaped depositions.³²

Several states have adopted rules that are intended to prevent wholesale secrecy of discovery materials filed in civil cases.³³

You may encounter problems gaining access to documents and exhibits used in a case but returned to the parties at the conclusion of the litigation.³⁴ Therefore, do not delay in asking to examine evidence.

The Supreme Court has ruled that the media do not have a First Amendment right to copy exhibits.³⁵ Some courts have read this decision broadly to mean that you do not have a First Amendment right even to examine exhibits, ruling that the right of access to evidence and other documents is based in common law. This makes it much easier for a party advocating secrecy to overcome a media request for access.

Cameras and recording equipment

The U.S. Supreme Court held in 1981 that states may adopt rules permitting cameras and recording equipment

in their courts.³⁶ Since then, all 50 states have done so, but the rules vary widely. In some states visual and audio coverage is permitted in all types of court proceedings that are public, and in others such coverage is permitted only in appellate courts.

The Judicial Conference of the United States, which makes policy and rules for the federal courts, allows federal circuit courts to permit cameras in appellate arguments. Only two circuits, the Second Circuit in New York City and the Ninth Circuit in San Francisco, have voted to allow camera recording of oral arguments. In 1999, the American Bar Association endorsed the idea of camera access to the U.S. Supreme Court.

Bills to allow cameras in federal trial and appellate courts on an experimental basis have been introduced repeatedly in Congress, but have never passed.

The Judicial Conference of the United States announced in September 2010 a pilot project to allow cameras in some federal district courtroom proceedings. The conference said that only civil cases will be included in the program. Although details of the program were still being developed at the end of 2010, participation in the program was to be at the discretion of the trial judge, with the parties to the court proceedings having the opportunity to veto cameras. The cameras would be set up and operated by court personnel, however; the new policy bars recordings by others, including the news media.

An experiment with camera access was previously conducted from 1991 to 1994 by the Judicial Conference, but was not made permanent.

For detailed information about visual and audio coverage of courts in a particular state, contact the Reporters Committee.

You have a right to oppose secrecy

The U.S. Supreme Court's decisions make clear that a judge considering closing a judicial proceeding must follow certain procedures to ensure that secrecy will not infringe upon the public's First Amendment rights.

The judge must hold a hearing on the need for secrecy, and allow the media and others to argue against closure. If a compelling interest such as the criminal defendant's fair trial right is at stake, the judge must consider alternatives to court secrecy, such as questioning prospective or seated jurors concerning their exposure to prejudicial information, or sequestering the jury. The judge also must consider changing the venue of the

trial, bringing in jurors from another part of the state, or postponing the trial until the effects of publicity have diminished.

A judge who determines that no alternative will work also must determine that secrecy will protect the party's interest and must tailor the closure order to protect that interest without unduly restricting public access.

Finally, the judge must present written findings supporting the closure decision. The U.S. Supreme Court has held that this is necessary so that an appeals court can evaluate the propriety of the closure.³⁷

What you should do

Advanced knowledge and planning is very important in court closure cases. Try to anticipate a closure. Preventing closure may be easier than convincing a judge to reopen a closed hearing. Find out whether any party in the case has filed or plans to file a closure motion. If so, consult your editor and determine whether your news organization's lawyer should oppose the motion immediately. If you are an independent reporter, call the Reporters Committee for help.

But if a judge unexpectedly orders you to leave a hearing that to that point had been public, you may have to take immediate action.

- If you know that your news organization is prepared to send a lawyer into court to argue against courtroom secrecy, politely ask the judge if you may speak for a moment.

- Once the court acknowledges you, tell the judge that your news organization objects to the closure and would like an opportunity to argue against it. Ask for a brief recess so that you can arrange for a lawyer to come to court to argue your case. Telling the judge the name of the lawyer who will appear may bolster your credibility. Ask that your objection be made part of the court record. Realistically, you cannot rely on obtaining more than a few hours' delay. Often judges will refuse to halt the case, but may agree to listen to arguments when your lawyer arrives.

- If the judge will not let you speak and orders the courtroom cleared, do not refuse to leave. If you stand your ground or shout your objection you may be arrested or cited for contempt.

- Leave the courtroom. Write a brief note to the judge explaining that your news organization wants to oppose the closure and that you will attempt to contact

a lawyer immediately. Ask a court officer to give the note to the judge. Contact your organization about getting a lawyer involved, or call the Reporters Committee for assistance.

If you learn that a secret court proceeding is in progress or has already been held, try to determine:

- Who sought closure and on what grounds: to protect fair trial rights, trade secrets or other confidential information or privacy.
- The nature of the proceeding: civil or criminal, whether it is a trial, pre- or post-trial hearing or appeal.
- Whether the court held a hearing on closure and, if so, what findings the judge made justifying secrecy.
- Whether the proceeding is still going on. If possible, consult your editor about challenging the closure, or contact the Reporters Committee.

If you decide to seek access to the proceeding, or to a transcript if the proceeding has concluded, the simplest and most direct approach is to request a meeting with the judge. Pointing out the procedural requirements mandated by the U.S. Supreme Court may be sufficient to convince the judge to reconsider the closure.

In addition to requesting access to future proceedings, you should ask the judge to make available transcripts of past proceedings and copies of any documents that may have been introduced as evidence.³⁸ You might be able to convince the judge to give you the transcript because you were deprived of access to a hearing that should have been public. Be prepared to pay for it.

On the other hand, if the judge has decided to go forward in secrecy, you will need assistance from a lawyer. The U.S. Supreme Court and other courts have said that the media may intervene in a criminal or civil case for the limited purpose of asserting their First Amendment rights.³⁹

In addition to filing a motion to intervene, your lawyer might file a motion seeking a stay of further proceedings in the underlying case until the access issue is resolved.

If the judge denies the motion to intervene or, after hearing argument, continues holding closed proceedings, you may want to consider an appeal. A lawyer will be able to advise you on the best method of obtaining expeditious review of the decision. Contact the Reporters Committee if you or your news organization does not have an attorney.

Chapter 8

Access to places

Whether a reporter wants to cover a demonstration on the courthouse steps, a crime that occurred in someone's home or the execution of a condemned inmate, the first hurdle to overcome is gaining access to the scene of the event.

A reporter's success may depend on the kind of property to which access is sought.

News events often occur in public forums — property that is publicly owned and open to the general public, such as city parks or sidewalks where demonstrations take place. But government property that is not generally open to the public as a forum — such as courthouses, jails, government offices and city halls — is called “nonpublic forum public property.”

Private property generally presents more difficult access problems than public property. In most situations, the property owner cannot be forced to allow a reporter to cover an event or interview an individual on the premises. However, some courts have drawn distinctions between private property used for a private purpose, such as a person's home, and private property used for a public purpose, such as a shopping center. Some states treat the latter as a type of public forum.

Journalists' right of access

Although the U.S. Supreme Court has said news-gathering deserves some First Amendment protection, it has never defined clearly the scope of that protection, nor restrictions that may be placed upon reporters' activities.

Most courts have ruled that the First Amendment provides journalists no greater right of access to property than that enjoyed by the public. Therefore, when an event occurs on nonpublic forum public property or private property, reporters may not have the right to enter if the general public is not usually allowed in.

Generally, a court contemplating denying access to nonpublic forum public property must weigh the public interest in obtaining information against competing interests. A minority of courts recognize that if the First Amendment right to publish depends upon the ability to gather news, the media's ability to inform the public

is diminished when the right to gather news is impeded.

Although state and local governments may not limit or deny the public or the media access to public forums, they may impose reasonable time, place and manner restrictions on activities taking place on public property. For example, a city government reasonably could grant a parade permit that restricted a group from marching through the business section of town at rush hour.

But these restrictions must be content neutral, be narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.

Government agencies generally succeed in limiting media access to nonpublic forum public property where they showed that newsgathering would interfere with the normal operation of facilities. In addition, new security measures since September 11, 2001, often require background checks and security screening of reporters covering public facilities such as state capitols and city halls.

Access to prisons and prisoners

The media have a right of access to report on prisons in general. But prison officials' arguments that granting journalists interviews with specific inmates might allow some prisoners to gain "a disproportionate degree of notoriety and influence among their fellow inmates" or might affect prison security or other legitimate penological concerns have persuaded the U.S. Supreme Court to rule repeatedly that the media do not have a right to insist on interviewing specific inmates.¹

But just as the media do not have rights greater than the general public, they cannot be denied access that is granted to the general public. If prisoners are allowed to add whomever they choose to their visitor lists, for example, prisons cannot stop them from including members of the news media on those lists. They may, however, forbid journalists to use cameras, recording devices and writing implements if other visitors are not allowed to use them.

The Supreme Court decisions giving prisons discretion to deny media interviews arose in situations where the general public, including the media, were permitted to visit prisons to witness the operation of the facility and where the prisoners had the right to talk to family members or friends about the conditions in the prison. The Court's decisions are based on the assumption that such access satisfies the public's interest in the operation of a governmental institution. If this level of access to

prisoners is curtailed, the balancing tests could be applied differently.

A prisoner's right to talk to the media is more well-established than the journalist's right to talk to a prisoner. The Supreme Court has ruled that prisoners have First Amendment rights that must be taken into account.² Access issues can thus best be addressed where the one seeking the interview right is the prisoner.

Even though courts have rejected a First Amendment right to interview specific prisoners, most states have statutes or prison rules allowing for some type of access. They usually grant the warden or other prison official authority to deny interview requests under specific circumstances. For example, some of these rules permit only journalists employed fulltime by news organizations to conduct interviews.

Federal prison rules are fairly restrictive, although many journalists have been able to schedule interviews with particular prisoners. However, a federal statute bars interviews with federal death-row inmates.

Some states have adopted strict policies limiting or barring special interviews with prisoners. California decided to ban most face-to-face interviews with specific prisoners in 1996, and a number of other states placed additional limits on interviews soon after.

Journalists who regularly cover prisons should obtain a copy of the state's department of corrections regulations. Most states' regulations indicate whom to speak with about access to prisoners, and should indicate the grounds for denial of access. Local prison rules, policies or customs may not be consistent with the state law. Ask the official who denied the request for specific reasons for the denial under the regulation.

If an interview is denied, reporters may be able to overcome official resistance by contacting the inmate through the inmate's lawyer and asking to be put on the prisoner's visitor list, or at least a list of those to whom the prisoner can communicate with by phone or mail. Be aware, however, that in many states, prison officials may legally eavesdrop on conversations between inmates and reporters and read inmates' mail.

Journalists may be able to appeal denials within the state prison system. Procedures should be spelled out in the regulations. However, courts are quick to defer to prison authorities' decisions to restrict access in the name of institutional security. Arbitrary, discriminatory or unjustified denials are more likely to be overturned by a court.

Executions are undeniably newsworthy events and present another access problem for journalists. A majority of states that allow capital punishment have statutes that specify how many witnesses may attend executions, who may select witnesses and whether reporters must be or may be included. However, one federal appellate court has held that there is no First Amendment right to witness executions.³

No states allow the use of photographic or recording equipment at executions.⁴ In fact, a federal judge in California ordered that the only known videotape of an execution in the United States be destroyed.⁵

Rules governing federal executions allow limited access to prisoners during the week before their execution.⁶ The prisoner, the warden of the facility and the director of the Federal Bureau of Prisons must approve visits by reporters during this time. At the execution itself, media access is left to the discretion of the warden, but the number of media representatives may not exceed 10.

Police press guidelines

Law enforcement investigators often restrict media access to crime scenes. Journalists who defy their orders may be charged with interference, disorderly conduct or criminal trespass. If convicted, they risk fines or imprisonment.

Journalists who obey police orders and withdraw from the scene later may file complaints or even lawsuits against the police department, but the opportunities to cover those newsworthy events will have passed.

Some police departments and media organizations have devised written guidelines outlining rules for media access to crime scenes and procedures for issuing press passes for access to nonpublic areas or emergency scenes.

Police departments with established press-pass systems are not allowed to decide arbitrarily who will receive passes and who will not. If a department denies a press pass, it must give the reporter reasons for the denial and a chance to appeal.⁷

In recent years, some reporters have been swept up in mass arrests during protests. Other reporters and photographers have been injured or fined while covering protests. Journalists often are surprised to learn that they don't have a First Amendment right to wander wherever they please at a demonstration. What a reporter considers aggressive reporting is often an officer's idea of disorderly conduct. Photojournalists are particularly susceptible to

arrest. In the past when a journalist was arrested at a news scene, quick-thinking editors and media lawyers often were able to get the charges dismissed. Police, prosecutors and judges were willing to recognize they were only doing their jobs. That is not as likely to happen in today's criminal justice climate.

Here are some common sense tips that the Reporters Committee has gathered over the years from media and criminal defense lawyers that may help prevent an arrest, or at least get you out of jail faster.

- Carry your credentials with you at all times. Don't trespass onto property that is clearly private or marked with a police line.

- Don't take anything from the crime scene — you'll be charged with theft.

- If a police officer orders you to do something, even if it seems unreasonable or ridiculous or interferes with your job, do it — unless you're willing to live with the consequences of being arrested.

- Don't call the arresting officer names or get into a shouting or shoving match.

- If you're covering a demonstration or other event likely to result in arrests, keep \$50-\$100 cash in your pocket to purchase a bail bond.

- If you're able, give your notes or film to another journalist who can get them back to your newsroom promptly.

- Always keep a government-issued photo ID (in addition to a press pass) in your pocket. It may speed up your release from custody.

- Editors and news directors who routinely send reporters and photographers to cover stories likely to result in arrests should have phone numbers of criminal lawyers and bail bondsmen in major cities. Also, know the name and phone number of the police department spokesperson, who may be able to help.

Access to public buildings and schools

Journalists also may have problems gaining access to cover events in public buildings, including public auditoriums and sports arenas that have been leased for nongovernmental functions. When municipally owned property is operated in a commercial rather than governmental capacity, the media have no special right of access beyond that afforded to the general public.

For example, when the city of Hartford, Conn.,

rented its civic center to the promoter of a figure skating championship, a U.S. District Court rejected a television station's claim that its First Amendment right to gather news was infringed because the promoter gave ABC television the exclusive right to cover the competition.⁸

However, a federal judge in Cleveland ruled that a state Democratic organization holding a convention in the city's civic center could not discriminate among journalists by admitting some and not others. The judge said that a private body leasing a government facility had the same constitutional obligations as the government.⁹

Standards governing access to public school buildings differ by state. Generally, public school property is treated as nonpublic forum public property, and regulations that restrict access but are designed to minimize interference with normal school activities would be constitutionally permissible.

No state laws bar the media from school grounds outright, but individual school districts may have adopted regulations limiting access to school property. Occasionally, reporters covering events on school property have been arrested for trespassing. Some districts have adopted more liberal policies that allow reporters access as long as they do not disrupt educational activities. In June 1996, the California Attorney General's office issued an advisory opinion giving school administrators the authority to deny media access to school grounds if their presence "would interfere with peaceful conduct of the activities of the school."¹⁰

Access to election polling places

Several states have exit-polling laws that prohibit reporters from interviewing voters within specified distances of voting places. But a federal court found the Washington state exit-polling law unconstitutional because it had been passed specifically to prevent the media from projecting the outcome of elections.¹¹ A Minnesota judge struck down an exit-poll statute forbidding reporters to question voters about ballot issues as a content-based restriction on speech about governmental affairs.¹² Although Florida's Supreme Court said the state generally had the power to deny access to polling places in order to prevent disruptions, the court found that officials had not substantiated their claims that exit polling actually disrupted voting.¹³

A Nevada federal court granted media a permanent injunction against a Nevada statute that banned exit polling within 100 feet of polling places on election days,

finding the law unconstitutional.¹⁴ State government attempts to outlaw exit polling have also been stricken down by courts in Florida, Minnesota, Ohio and South Dakota.

Access to private property

Reporters usually will need permission of the property owner or public officials before entering private property, even to cover a news event such as a demonstration, a natural disaster, an accident or a criminal investigation.

Whether you have to ask for permission depends largely on court decisions in your state. When an event is newsworthy, some courts have ruled, consent to enter will be “implied” if the property owner is “silent” or does not expressly order a reporter to keep out.¹⁵ But other courts have said that consent to enter private property may never be implied.

CBS News settled a federal civil rights claim in February 1994 brought after a network camera crew accompanied a Secret Service agent on a raid in a private apartment. An appellate court, finding that the agent could not reasonably believe he had the right to authorize the crew to accompany him, let the case against the agent continue. The court held that a family’s right to be protected from a federal agent bringing unauthorized persons into their home was “clearly established.”¹⁶

The U.S. Court of Appeals in San Francisco (9th Cir.) held in 1997 that a CNN news crew worked so closely with the Fish and Wildlife Service during a raid on a ranch that it had become joint state actors engaged in the execution of the service’s search warrant. The ruling was appealed to the U.S. Supreme Court, which in May 1999 ordered the Ninth Circuit to reconsider its ruling in light of the court’s finding that the law was unclear at the time of the raid. On remand, the Court of Appeals held in November 1999 that although federal agents violated the Fourth Amendment by permitting media to accompany them during the search, agents were entitled to assert a qualified immunity defense, because the right was not clearly established at the time of the search. Members of media, however, were not entitled to assert that defense. CNN then settled the case with the ranchers in May 2001.¹⁷

In 2010, the Biography Channel and its parent company faced federal lawsuits over alleged civil rights violations that occur during police ride-along programs. The suits are over a show called “Female Forces” that follows female officers with “brains, beauty and a badge” as they patrol the suburbs of Chicago. In one of the cases, a U.S.

District Court judge in Chicago ruled the cable network may have violated a woman's civil rights by broadcasting her likeness and identity during an episode of the reality series, violating her Fourth Amendment protection against unreasonable search and seizure.¹⁸

Reporters should consult their news organization's lawyer or the Reporters Committee about local precedent on the question of "implied consent" when neither property owners nor officials object to entry. Some occupants of private property may give consent, but their permission may be inadequate. A tenant may be able to give consent only to enter the portion of the property rented, not the entire building.

In situations where reporters have been expressly forbidden access to private property, courts have ruled that the First Amendment does not grant immunity from arrest and prosecution to reporters who commit illegal acts while gathering news.¹⁹

Access to shopping malls

Private property that is open to the public, such as shopping malls, may be treated the same as public forums.²⁰ In 1980, the Supreme Court said that state constitutions may be interpreted to provide greater protection for expression, and therefore newsgathering, than the U.S. Constitution. It upheld a state's right to provide a broader right to engage in expressive activity in a shopping mall, even at the expense of the owner's property interest.²¹

Since the Court's decision, several state appellate courts have ruled on questions of freedom of expression in shopping malls. In 1994, the New Jersey Supreme Court ruled that shopping malls have taken the place of downtown districts as areas for free-speech activities. The court allowed leafleting by activists, but ruled that private property owners may impose restrictions on the time, place and manner of protests.²²

At least two state high courts have ruled that there is no constitutional right of access to shopping malls. In March 1999, the Minnesota Supreme Court held that neither the state nor the federal constitution allowed picketers to protest in a mall that was created partially with public money because no "state action" is involved in operating the mall. In July of the same year, the Georgia Supreme Court determined that the state constitution does not create "a constitutional right of access to private property," and thus malls can ban soliciting or leafleting in their common areas.²³

However, even the states that have recognized First Amendment interests in activities at shopping malls have not ruled directly on reporters' rights to gather news in such places.

What to do if you are denied access

- If you are denied access to a place where a news event has occurred, you should determine whether the place is a public forum (such as a city street or park), a nonpublic forum public property (such as the county courthouse or jail) or privately owned property.

- Find out who has denied access to you and the grounds for denial.

- If the property is publicly owned and the restriction appears to be discriminatory, consider seeking a court order requiring that you be granted access or ordering officials not to deny access in similar situations in the future.

- If the property is privately owned, and the restriction was imposed by someone other than the owner, it may be invalid.

- If you are ordered to leave by the property owner, do so and contact your editor or news organization's lawyer. Independent reporters may contact the Reporters Committee. Disobeying an order to keep out may result in your arrest, a fine or a lawsuit by the owner.

- If police in your area have press relations guidelines, find out what they say. If police issue press passes and grant access only to reporters who have them, obtain a pass.

- Establish a "plan of attack" for dealing with access problems before they develop, providing names of legal advisers to be called and police officials and other contacts who may be able to facilitate access to the area.

Civil remedy for denials of access

Though the opportunity to gather news may already have passed, journalists may be able to sue the official denying access in civil court for violating their First Amendment rights. These civil rights claims, brought under federal law 42 U.S.C. § 1983, allow a plaintiff to seek damages for exclusion and a court order preventing further exclusion. Bringing a civil suit positions a journalist as a plaintiff rather than as a criminal defendant who disobeyed official instructions to stay away from a crime scene or out of a courtroom.

The purpose of a "Section 1983" claim is to prevent

civil rights violations by government officials. The right to sue a federal official for civil rights violations — called a *Bivens* action — has been implied from the Constitution itself.²⁴ Whether denying access is a First Amendment violation takes into account both history and the role of public access.²⁵ If the location is one that has always been open to the press, such as a courtroom, the likelihood increases that denying access also denies a constitutional right. In addition to historical access, the importance of newsgathering is balanced against the reason access has been denied.

A Section 1983 claim can be brought only against a government official acting “under the color” of law, but this doesn’t mean an official must be on duty. A newspaper publisher brought a successful Section 1983 action against off-duty sheriff deputies who attempted to buy all copies of an election-day newspaper criticizing their favorite candidates.²⁶ This attempt to regulate or sensor the news violated the speaker’s constitutional right to communicate and the audience’s right to receive the information.

A civil rights action is also appropriate to recover seized property and money damages when state officials or officers at the scene of breaking news seize journalists’ notes, film or video.

Chapter 9

Freedom of information acts

Reporters gain useful insights into government operations at the local, state and federal level by examining government records or attending government meetings. The working documents and proceedings of an agency can, for example, indicate how the school board will implement budget cuts, why the state highway commission abandoned plans to run a new highway along a particular route, or what a federal task force discovered about the mortality rate in a community near an abandoned toxic waste site.

Whether it involves probing police misconduct, scrutinizing how local governments spend taxpayer money, or gathering information on school bus drivers' traffic records, open records and meetings laws are a powerful oversight tool for journalists and citizens.

All states, the District of Columbia and the federal government have enacted open records or "freedom of information" laws that guarantee access to government documents.

The laws are amended regularly and, in recent years, there has been an effort to address access to electronic records in many jurisdictions. For example, the federal Electronic Freedom of Information Act Amendments of 1996 mandated that the federal government's electronic records are public to the same extent as paper counterparts. Changes in agency regulations and court rules also are occurring because so many records are now maintained in electronic format.

The 2007 amendments to the federal Freedom of Information Act established the Office of Government Information Services. OGIS was created to help resolve FOIA disputes between requesters and government agencies by providing free, non-binding dispute resolution services. The 2007 amendments also clarified the definition of "representative of the news media" to specifically include freelance journalists, alternative media and those who electronically disseminate news for purposes of determining fee reduction benefits.

Open meetings or "sunshine" statutes give the public the right to attend the meetings of commissions, councils,

boards and other government bodies. Some states permit electronic meetings so long as public access to the meetings is assured.

Open records and meetings laws vary from jurisdiction to jurisdiction.¹ Reporters should familiarize themselves with their local statutes and federal laws.

Freedom of information laws

Although the U.S. Supreme Court has recognized a First Amendment right of access to government records in limited situations and a few states have enshrined a right of access in their state constitutions, statutes and the common law are more frequently invoked to create a presumption of openness in government records.²

The jurisdiction of the agency determines which freedom of information law applies. State open records laws cover most state agencies. In some states, nongovernmental entities that receive public funds or perform a governmental function also are subject to the disclosure laws.

Executive branch agencies of the federal government are covered by the federal Freedom of Information Act.³ The law does not apply to other entities that receive federal funds.

No government — state or federal — maintains a centralized system of access to information, so you must direct your requests to the agency in possession of the documents you seek. Although a growing number of states and counties have contracted with private companies to provide electronic access to records, the agency or local government generally remains responsible for complying with access laws.

Most open records laws are based on the presumption that everything is public, unless specifically exempted. Some states specify certain categories of information that always are public. Many exceptions to public access are subject to agency discretion, so you always can try to convince officials that it would be in the public's interest to release the requested information. In most states, only a few specifically designated types of records are required to be kept secret.

The number and kinds of exemptions vary from state to state, but state and federal laws usually have exemptions for:

- **Personal privacy:** Some states have specific exemptions for personnel, medical and similar files. In other states more general exemptions for “privacy” apply.

- **Law enforcement and investigative files:** These may be exempt across the board, or may resemble the federal statute, which permits information to be withheld only when some specified harm to the investigation or an individual involved would result from disclosure.

- **Commercially valuable information:** These exemptions usually protect from disclosure information provided by private companies to the government, such as commercially sensitive or trade secret information in licensing or contract applications.

- **Pre-decisional documents:** These exemptions are designed to allow staffers to debate alternatives frankly and openly before an agency reaches a final decision. Final agency action, however, rarely can be withheld from the public, and pre-decisional materials are sometimes available once the agency makes its final decision.

- **National security:** These exemptions are intended to protect from disclosure those documents that if released could potentially harm security interests. At the federal level, these are often documents containing “classified” information.

- **Attorney-client communications and attorney work product:** Exemptions generally exist to protect communications between legal counsel and government entities and attorney “work product” consisting of legal opinions or analysis.

Other common exceptions at the state level cover information relating to government acquisition of real estate, library circulation records, civil service examinations and answer keys, and student records.

Federal law includes additional exemptions for information relating to banking or financial institutions, and oil and gas wells. Under the federal and all state laws, legislatures may enact specific statutes exempting additional classes of documents from public access laws.

For instance, the federal Driver’s Privacy Protection Act forced state legislatures to restrict access to information maintained by their state motor vehicles department except in certain specified circumstances. The U.S. Supreme Court ruled that the federal law does not unconstitutionally infringe on the states’ right to govern.⁴

Another federal statute that exempts certain records from disclosure is the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). HIPAA protects personal health information kept by insurance companies and medical providers. Information related to a person’s physical or mental condition, the types of health care provided and payment information is confidential.

Finally, the Family Educational Rights and Privacy Act (“FERPA”) is a federal privacy law that protects student educational records from disclosure. It was initially designed to protect student grades and school disciplinary records but is often interpreted broadly by educational institutions to apply to a variety of records that in some way may refer to a student.

In many states, citizens may simply ask to inspect and copy records during regular business hours. In others, and in federal agencies, requesters must put their requests in writing. Although many states will honor oral requests, making your request in writing is often the only way to trigger your statutory rights. Whether your request is oral or written, be sure to cite to the relevant open records law. This helps the custodian of the record who processes your request to better understand what you want and give your request serious consideration.

You may have to pay for the copies of records you receive. A deposit also may be required before the records custodian will process a large request. Some states allow agencies to charge for the time it takes their employees to locate the documents, in addition to the actual copying costs. Under the federal law and some state laws, reporters are entitled to partial or full fee waivers, especially if their requests will directly benefit the public. The federal law entitles reporters to an automatic waiver of all search fees and the first 100 pages of copying fees. Ask for the waiver in the initial records request and list your reporting credentials to document your eligibility for the waiver. Although many statutes establish fee schedules that charge commercial requesters a higher fee, newsgathering generally is not considered to be a commercial use of the information.

If your request is denied, insist that the agency official cite the specific statutory exemption justifying the withholding. Most states require agencies to separate exempt information from non-exempt material. Therefore, you may get a document in which certain information has been blacked out. Once again, agencies must justify these deletions by referring to specific exceptions in the public records law or to some other statute. If the agency offers to release a portion of the requested information, you may accept partial access and resolve the remaining issues subsequently.

The physical form of the record is generally not an issue; computerized data should be accessible as well as paper records.⁵ Although government bodies generally are not required to create new documents, records custodians usually — but not in all states — are required to

search electronic databases in response to a request. If the document exists in electronic form, the custodian usually is also required to make it available to the requester in the electronic format in which it is maintained

Response times vary by jurisdiction. Federal agencies have 20 days in which to respond to a records request. In practice, however, this deadline is almost never met. Under the 2007 amendments to FOIA, agencies that do not respond to a request within 20 days cannot assess search fees nor can they assess duplication fees to members of the news media. The 20-day time limit can be extended in some circumstances such as when the agency requests more information from the requester, if the agency needs clarification on the request or the request is particularly voluminous.

In a few states and under the federal law, if your initial request is denied, you must appeal to a higher official within the agency. In other states you must appeal to a special FOI appeals commission. Under federal law, OGIS is best utilized after a requester has exhausted all remedies under an administrative appeal. In all states and at the federal level, you also have the right to file a lawsuit in court to enforce your rights to obtain government information. Some states allow the state's attorney general to bring a suit against the records custodian to enforce compliance with the law. In some states and at the federal level, if your lawsuit is successful you may be entitled to reimbursement for attorneys' fees and litigation costs.

Sunshine laws

All states, the District of Columbia and the federal government have open meeting laws, often referred to as "sunshine laws," requiring agency officials to hold certain meetings in public. These laws do not necessarily ensure that members of the public will be allowed to address the agency, but they do guarantee that the public and the media can attend the meetings.

The ability to record a meeting, either through audio or visual recording has generally been viewed as implicit in sunshine laws if not explicitly written into the state law. For example, Utah and Oklahoma statutorily permit the recording of meetings.⁶ Similarly, states like New York and New Jersey have recognized a right to recordings through judicial decisions.⁷ Other states have no provisions guaranteeing the right to recording meetings, but sometimes the practice is generally allowed anyway if it does not disrupt the proceedings.

At the federal level, these laws cover only agencies

with collegial, multi-member leadership (such as commissions) and federal advisory committees. State laws apply to a variety of commissions, boards and councils. Generally, sunshine laws guarantee public access to meetings only when a quorum of a group meets to discuss public business. Chance social or ceremonial gatherings of agency officials usually do not fall within the scope of these laws. However, merely having food at a meeting does not make it a social gathering if the agency is meeting to discuss public issues and make decisions.⁸

Some states have addressed the issue of whether electronic communications would constitute a meeting subject to open meetings laws mandates. For example, using e-mail or telephone conversations to circumvent state open meetings laws is a violation of the law in Alabama and Louisiana. Utah, Florida and Texas are among those additional states that have established legal procedures and limitations on when and how electronic meetings can occur.⁹

Sunshine laws usually require agencies to give advance notice of all meetings, even emergency ones, and to publish or post agendas in advance, listing items to be discussed. Usually, agencies must keep minutes and/or transcripts of all meetings, even those that agencies can legally close to the public.

Every state allows agencies to conduct certain discussions in closed or “executive” sessions. However, agencies usually must refrain from formal action unless in public session. The kinds of meetings the agencies may close vary somewhat from state to state. Most — but not all — laws permit them to conduct the following discussions in secret:

- **Personnel matters** — particularly where the agency is firing, hiring or disciplining an individual employee (in some cases, the employee has the right to request a public hearing).
- **Collective bargaining sessions.**
- **Discussions with agency attorneys.**
- **Discussion of the acquisition or sale of public property.**

Meetings of specialized agencies frequently are closed under special legislation. For instance, meetings of parole boards often are not public. Open meetings statutes usually specify the procedures agency officials must follow to close a meeting. In some states, votes to close meetings must take place in open session. In others, simply giving notice of the intent and reasons for holding

a closed meeting is sufficient.

As under freedom of information laws, the public and media may seek redress in court for violations of open meeting laws. In some states, actions taken in violation of the open meetings law are nullified, requiring the agency to take the action again in an open meeting. In other states, government officials may be liable for criminal or civil fines, or recall, for deliberate violations.

This discussion provides only a brief outline of these statutes. If you need further assistance concerning the state or federal law, the The Reporters Committee for Freedom of the Press will help you without charge.

The Reporters Committee publishes “Federal Open Government Guide,” which explains the law and how to use it. It is available at www.rcfp.org/fogg. The Reporters Committee has also compiled a comprehensive guide to open meetings and records laws in the 50 states and the District of Columbia, including analysis of the statutes and cases interpreting them. The Open Government Guide is available as a compendium of guides to all states or individually by state. It also is available at www.rcfp.org/ogg.

Chapter 10

Copyright

What is copyright infringement? Consider these examples:

- A newspaper reporter's article on an important town council meeting makes the front page. A local radio announcer, without attributing the article to the reporter or the newspaper, reads the lead and several other lines verbatim on his morning news report.
- The editor of a weekly community newspaper reads a magazine article about a local personality and decides to publish it in the newspaper's next edition. She makes sure to affix the copyright notice on the article and to acknowledge that the article originally appeared in the magazine, but she never seeks the magazine's permission to use it.
- A website copies a photo from an article subject's Facebook page to illustrate a story about that person without seeking her permission.

In these cases, the radio announcer, the weekly editor and the website operator infringed the rights of the copyright owners of the original works and may be liable for damages.

The 1976 Copyright Law gives copyright protection to creative works — such as the newspaper article, magazine article and freelance article in the above examples — at the moment of their creation. If someone uses a copyrighted work without permission, as the radio announcer, weekly newspaper editor and magazine publisher have, the copyright owner can sue for copyright infringement. Journalists need to know how to protect their works and how to avoid infringing someone else's copyright.¹

What can be copyrighted

The Copyright Law grants copyright protection only to “original works of authorship fixed in a tangible medium of expression.” A work does not have to be new or highly creative to qualify as an original work of authorship. It simply must owe its origin to a particular author.

The law also states that a fact is not an original work of authorship. Facts owe their origin to the thing or person that makes them happen. For example, if a reporter

wrote a newspaper article about a building fire, she could not copyright the facts about the fire because those facts do not owe their origin to her.

Facts discovered through research, no matter how new and amazing, also do not owe their origin to the researcher. However, the ways facts are recorded — style, choice and arrangement of words — are copyrightable. For example, although an author could not copyright an idea for a new foreign policy strategy, she could copyright her expression of that idea in a newspaper article.

An article containing pre-existing material or data can qualify as an original work of authorship if the material and data are “selected, coordinated or arranged” in such a manner that the end product owes its origin to the author. For example, an article about a federal law that includes quotations and facts from the Congressional Record would be copyrightable if the new arrangement of this pre-existing material constituted an original work of authorship.

A copyrightable work must be produced in a format that can be perceived, reproduced and communicated over time. Newspapers, magazines, photographs and most other forms of media, including the Internet, easily satisfy these criteria. Radio and television news programs are recorded on paper, tape or in digital form, and thus are fixed in a tangible medium of expression.

For example, the U.S. Court of Appeals in San Francisco (9th Cir.) has found that a news service that videotapes news events with its own cameras and licenses broadcast stations and networks to use its “raw” footage during their news programs owns the copyright for the tapes.²

How to protect a copyrighted work

In 1998, President Bill Clinton signed into law the Copyright Term Extension Act³ and the Digital Millennium Copyright Act.⁴

The 1998 Copyright Term Extension Act extended the duration of the copyright period for 20 years for works protected under copyright on or after Oct. 27, 1998. Works generally are now protected for the author’s life plus 70 years. If the work is made for hire, or is an anonymous or pseudonymous work, the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Works that have fallen into the public domain prior to the act’s implementation date do not receive additional

protection. The new legislation also restored copyright protection for foreign artists and authors who have copyrights in their home countries, but whose copyright had lapsed in the United States.

In 2003, the U.S. Supreme Court considered a challenge to the CTEA and found the act to be constitutional. In *Eldred v. Ashcroft*, a group of publishers who used copyrighted works that had moved into the public domain questioned the constitutionality of the CTEA. They claimed it violated both the First Amendment and the Copyright Clause of the Constitution. The Court dismissed these claims, holding that “copyright’s limited monopolies are compatible with free speech principles,” and that Congress has the right to extend the terms of copyrights.⁵

The DMCA made several changes to copyright law, especially in the areas of digital technology. Title I of the act makes it illegal to circumvent copyright protection technology, such as that used by digital versatile disks, or DVDs. This prohibition, however, does not trump fair use or other traditional defenses to copyright infringement. Additionally, the new provision is not intended “to diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.”⁶

The title also establishes rules for the use and misuse of Copyright Management Information. As defined in the Act, CMI includes information about a work, its author, and the terms and conditions for its use. The act prohibits publication or distribution of CMI that is known to be false. Additionally, removal or alteration of CMI is illegal. Broadcasters or cable systems will not be liable if they did not intend to engage in this activity or if avoiding the practice would pose technical or financial difficulties.⁷

Although both laws make substantial changes to the 1976 law, the fundamentals of copyright protection remain the same.

No formal registration with the Copyright Office or other action is required to secure a copyright. Copyright is secured automatically when a work is fixed in a copy for the first time.⁸ However, registration with the Copyright Office is required before one can bring a lawsuit in federal court to protect owners’ rights. The copyright owner cannot collect damages for copyright infringement merely because she placed a copyright notice on a work. Registering the work with the Copyright Office also makes it easier for people to find out who owns

the work and where they can reach the owner to obtain permission to use it.

For works published on or after March 1, 1989, inclusion of a copyright notice is optional. Use of notice is recommended, however, because if the work is infringed, the defendant will not be able to claim that he is an “innocent infringer.”

The copyright notice traditionally has three parts: the word “Copyright,” or the letter C in a circle or the abbreviation “Copr.”; the year of the first publication; and the name of the copyright owner. This copyright notice will ordinarily protect the work for a specified period of time.

To register a work, the Copyright Office recommends using eCO, its online submission process. If that is not possible, paper forms can be obtained from the same website or directly from the Information and Publications Section, Copyright Office, Library of Congress, 101 Independence Ave., S.E., Washington, D.C. 20599. Send the completed registration form, the applicable fee and two complete copies of the work to the Register of Copyrights at the Library of Congress. It is also a good idea to record any transfer of ownership of the copyright with the Register of Copyrights. Online forms, printable forms and extensive copyright information are available online from the Library of Congress’ copyright website at www.copyright.gov.

Regardless of whether an author registers a published work, two copies must be deposited with the U.S. Copyright Office within three months after a work has been “published.” Failure to do so will not affect copyright protection, but the Copyright Office could charge a hefty fine if a written demand for the copies is ignored.

Copyright ownership rights

A copyright owner has the exclusive rights to:

- Reproduce the copyrighted work,
- Prepare a derivative work, such as a motion picture, based upon the work,
- Distribute copies of the work to the public,
- Display the work to the public, for example, by means of a film or slide,
- Perform the work publicly or through digital audio transmission.

The copyright owner can transfer any of these rights to another person or entity.

Who owns the work

A journalist does not always own the copyright in his or her original work. Copyright ownership can hinge on an employment relationship. The U.S. Supreme Court has held that copyright ownership depends on whether the work was prepared as an employee or an independent contractor. An employee's work is considered "work for hire" and copyright belongs to the employer; an independent contractor's work is owned by the independent contractor. Unless there is an express, written agreement to the contrary, a freelancer is considered an independent contractor and is presumed to hold the copyright.⁹

Ownership questions can arise in a variety of situations. Investigative journalists won a victory when a federal appellate court blocked an attempt to use copyright ownership principles to squelch undercover reporting. When reporters working as deli clerks videotaped conditions inside a grocery chain's stores, the grocery chain sued, claiming that it owned the copyright to the videotapes made during the investigation. The tapes were works for hire because the reporters were employed by the chain while they surreptitiously conducted the investigation, it claimed. Both the federal trial court and appellate court rejected the claim on the grounds that investigative reporting was beyond the scope of the reporters' employment with the chain.¹⁰

The Creative Commons alternative

Online publishers whose uses of copyrighted works do not qualify as "fair uses" have another method of using parts of others' works. Alternative copyright schemes exist that are legal copyright agreements because they are more like private contractual agreements in which authors limit their rights voluntarily and allow for greater use of copyrighted works. Through the system of "Creative Commons," a creator can opt to reserve certain rights while granting other rights to the users of the works.

This copyright format signifies that some but not all rights are exclusively reserved to the copyright owner. Users of the Creative Commons copyright can allow unlimited use of their material, as long as certain provisions are met. Some of the licenses, for example, may require attribution any time a work is used or may forbid the use of a work for commercial purposes.

A work's creator can choose from one of 11 different copyright options. Users then receive put the Creative Commons copyright symbol on their sites and link to Creative Commons' site. When someone clicks on the

symbol, it refers them to the type of license that was selected.

The licensing process may appear simple, but the Creative Commons copyright is still a completely legal one. Many people adopt a Creative Commons license to show support for the sharing of information but still reserve some control. Information about this approach can be found at creativecommons.org.

Hot news

News media content creators sometimes seek legal redress from those who use portions of their timely reporting under the “hot news doctrine.”

Established in 1918 in the case *International News Service v. Associated Press*,¹¹ the hot news doctrine arose when AP alleged that INS was obtaining AP stories from early edition newspapers and then copying or rewriting the stories to sell to other publishers. The Supreme Court rejected AP’s argument that it had property rights to the news but said that a competing news service could be prevented from taking another news service’s original content “until its commercial value as news ... has passed away.”

Though “hot news” lawsuits are far less common than copyright or trademark suits, they have been increasing with internet reporting and linking. The law on this doctrine varies from state to state.

In New York, a court found that such suits can be brought in the state when a five-part test is met: “(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.”

Internet sites that post content from other services have been the target of hot news lawsuits, particularly in U.S. District Court in New York.

A federal judge in New York in February 2009 refused to dismiss a lawsuit by The Associated Press that claimed a competing news service, All Headline News Corp., misappropriated its news content by drafting stories based on AP reports.¹² The suit was settled a few months later, with AHN agreeing to pay an undisclosed amount.

Three financial services firms sued the website *theflyonthewall.com* over its use of their market research. A federal judge in New York ordered the website to wait two hours before publishing the information while the markets were open,¹³ and the case was being considered by the U.S. Court of Appeals in New York City (2nd Cir.) at the end of 2010. News media organizations weighed in on the side of upholding the hot news doctrine, while website companies like Google and Twitter opposed it in briefs before the court.

Financial news service *Briefing.com* settled a lawsuit with Dow Jones & Co. in November 2010 after the website admitted to hot news violations by systematically republishing time-sensitive headlines and articles from Dow Jones. Dow Jones filed a lawsuit in April in the U.S. District Court in New York after it discovered *Briefing.com* copied and republished more than 100 news articles and 70 headlines within minutes of their publication on the Dow Jones Newswires during a two-week period.¹⁴

How to avoid copyright infringement

Copyright infringement can be embarrassing, costly and criminal. Under the Digital Millennium Copyright Act, circumventing copyright protection systems such as signal scramblers or encryption technology is now a criminal offense.

The best way to avoid violating a copyright is simply to obtain the author's permission before using that expression of ideas or facts. If you cannot get the author's permission, restate the ideas in your own words.

Avoid using large segments of someone else's expression verbatim — this could be a blatant copyright infringement. The radio news announcer who broadcasts stories from the local newspaper word for word is asking to be sued.

Not every unauthorized use of a copyrighted work is a copyright infringement. The statute considers some limited uses to be "fair uses," such as news reporting, commentary, criticism, research, teaching and scholarship. The Supreme Court found in 1994 that the commercial parody of the classic rock and roll song "Oh, Pretty Woman" by the rap group 2 Live Crew may be protected as a fair use under the Copyright Law.¹⁵

However, no use is presumptively "fair." Courts examine four factors in deciding whether a specific use is a "fair use":

- *The purpose and character of the use*, including whether the use is commercial or of a non-profit, educational nature.

- *The nature of the copyrighted work*. Uses of expressive, as opposed to factual, works are less likely to be considered fair uses, as are uses of unpublished works.

- *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*. Here the court will consider the qualitative as well as the quantitative use. If the user excerpts 200 words from a 10,000-word book, but those 200 words constitute the heart of the book, this may not qualify as fair use.

- *The effect of the use upon the potential market for or value of the copyrighted work*. If the challenged use adversely affects the potential market for the copyrighted work, the use is not fair.

The Supreme Court in 1988 let stand a ruling that use of unpublished diaries and letters under the premise of research or news reporting may impair the future value of those writings. Such works are protected by a prepublication copyright. Further, there is a presumption that use of unpublished works is not fair use, the lower court concluded.¹⁶

Posting an entire document online may not constitute fair use if done for purposes other than comment, criticism or news reporting. In a 1996 decision, a federal district court held that a former church member violated the church's copyright when he posted documents — which contained church doctrine, normally available only to paying members of the church — wholesale on the Internet with virtually no additional editorial comment. However, the church's suit against a newspaper that published an article including excerpts of posted materials was dismissed because the newspaper's reporting was in the public interest and it made selective and limited use of the material.¹⁷

In November 2010, The U.S. District Court in New York ordered Gawker Media to remove extensive excerpts (as many as 21 pages by one account) of former U.S. vice presidential candidate and Alaska Gov. Sarah Palin's unreleased book from its website. Gawker complied and did not appeal.

Using hyperlinks that direct a user to another's news article or online posting is generally not considered an infringing use, unless the link was made knowing that the linked-to material was itself infringing and with the intent of inducing people to follow the link and infringe copyright.¹⁸

Legal action to protect a copyright

If a copyright has been infringed, the owner may sue the infringer in federal court, seeking an injunction against future violations of the copyrights. The owner may recover actual damages, which are losses plus the infringer's profits from use of the copyrighted work. Or, any time before a court issues a final judgment, the owner can elect to receive a set amount in damages as defined in the copyright statute, in lieu of actual damages. The amount of statutory damages can range from \$200 to \$150,000, based on a court's determination of several factors, including whether the infringement was intentional.

Endnotes

Chapter 1: Libel

1. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
2. See, e.g., *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998).
3. See, e.g., *Khawar v. Globe International, Inc.*, 965 P.2d 696 (Cal. 1998), *modified*, No. S054868 (Cal. 1998), *cert. denied*, 526 U.S. 1114 (1999).
4. However, in at least one state, Rhode Island, truth is not a defense when the statement was made with malicious motives. R.I. Const. art. I, § 20; R.I. Gen. Laws § 9-6-9 (1998). In 2009, a federal appellate court interpreting Massachusetts state law held that when the speaker has “ill will,” true statements about a private figure can be libelous. *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009).
5. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
6. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).
7. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).
8. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).
9. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).
10. States that require proof of malice for private-figure plaintiffs are Alaska, Colorado, Indiana, Louisiana and New Jersey.
11. *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).
12. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007), *aff’d in part, rev’d in part, vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008).
13. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).
14. See, e.g., *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564 (Cal. 1999) (holding that speech made in connection with an “official proceeding” is made in connection with a “public issue” for purposes of the anti-SLAPP statute); *Lafayette Morehouse, Inc. v. The Chronicle Publishing Co.*, 44 Cal. Rptr. 2d 46 (Cal. Ct. App. 1995) (holding that the anti-SLAPP statute protects newspaper from meritless libel suit), *cert. denied*, 519 U.S. 809 (1996).
15. *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 292 F.3d 1192 (9th Cir. 2002).
16. The states with product disparagement statutes are Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota and Texas.
17. See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998), *aff’d*, 201 F.3d 680 (5th Cir. 2000); see also *Burleson Enterprises, Inc. v. American Honda Motor Co., Inc.*, No. 2:97-cv-398 (N.D. Tex. filed Oct. 22, 1997); *Agricultural General Co. v. Ohio Public Interest Research Group*, No. 97 CVC07-7367 (Ohio Ct. of C.P. filed July 31, 1997).

18. See *Garrison v. Louisiana*, 379 U.S. 64 (1964). For more recent cases, see *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003); *In re I.M.L.*, 61 P.2d 1038 (Utah 2002).
19. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Chapter 2: Invasion of Privacy

1. *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905).
2. *But see, e.g., Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998) (finding protectable privacy interest held by relatives of people whose autopsy photographs were distributed in the community).
3. Cal. Civ. Code § 1708.8 (1998); H.R. 97, 106th Cong. (1st Sess. 1999).
4. Restatement (Second) of Torts § 652B cmt. b, illus. 1 (2010).
5. See *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998).
6. *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942).
7. *Foretich v. Lifetime Cable*, 777 F. Supp. 47 (D.D.C. 1991).
8. *Doe v. Sherman Publishing Co.*, 593 A.2d 457 (R.I. 1991).
9. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The Court did not specifically identify what such a “state interest of the highest order” would be, but found that the general interest in encouraging rape victims to come forward was not sufficient in this case.
10. *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202 (3d Cir. 1991).
11. *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).
12. See, e.g., *Polydoros v. Twentieth Century Fox Film Corp.*, 965 P.2d 724 (Cal. 1998), *aff’g* 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997).
13. See, e.g., *Wendt v. Host International*, 125 F.3d 806 (9th Cir. 1997) (holding that actors from television series could sue owner of airport bars featuring robots displaying likenesses to their characters from the series).
14. *Benavidez v. Anheuser-Busch, Inc.*, 873 F.2d 102 (5th Cir. 1989).
15. See *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999) (ordering magazine to pay \$1.5 million in actual damages for publishing actor’s electronically altered photograph as part of an article on new spring fashions and authorizing punitive damages in addition to actual damages), *rev’d*, 255 F.3d 1180 (9th Cir. 2001); see also *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002), *cert. denied*, 537 U.S. 1029 (2002).
16. *Brinkley v. Casablanças*, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981).
17. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); see also *WDLA Corp. v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612 (S.D. Ohio 1999) (refusing to award punitive damages in case against magazine found to have committed fraud in the pursuit of news), *aff’d*, 202 F.3d 271 (6th Cir. 2000).
18. *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 808 (1999), *remanded to* 188 F.3d 1155 (9th Cir. 1999) (en banc).

Chapter 3: Surreptitious Recording

1. Wire and Electronic Communications Interception and Interception of Oral Communications, 18 U.S.C. §§ 2510—2522 (1999).
2. Cal. Penal Code §§ 631, 632; Conn. Gen. Stat. § 52-570d; Fla. Stat. Ann. § 934.03; 720 Ill. Comp. Stat. 5/14-1 to 5/14-6; Md. Code Ann., Cts. & Jud. Proc. § 10-402; Mass. Ann. Laws ch. 272, § 99; Mich. Comp. Laws § 750.539c; Mont. Code Ann. § 45-8-213; Nev. Rev. Stat. Ann. § 200.620, for a statutory interpretation, see *Lane v. Allstate Insurance Co.*, 969 P.2d 938 (Nev. 1998) (holding that Nevada wiretap statute requires all-party consent), N.H. Rev. Stat. Ann. § 570-A:2; 18 Pa. Cons. Stat. Ann. §§ 5703, 5704; Wash. Rev. Code § 9.73.030.
3. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).
4. Broadcast of Telephone Conversations, 47 C.F.R. § 73.1206 (1989).
5. Ala. Code §§ 13A-11-31, 13A-11-32; Ark. Code Ann. § 5-16-101; Cal. Penal Code § 632, see also *People v. Gibbons*, 263 Cal. Rptr. 905 (Cal. Ct. App. 1989); but see *Wilkins v. NBC, Inc.*, 84 Cal. Rptr. 2d 329 (Cal. Ct. App. 1999), Del. Code Ann. tit. 11, §§ 1335, 1336; Ga. Code Ann. § 16-11-60 to 16-11-64; Haw. Rev. Stat. § 711-1111; Kan. Stat. Ann. § 21-4001, see also *State v. Martin*, 658 P.2d 1024 (Kan. 1983), Me. Rev. Stat. Ann. tit. 17-A, § 511; Mich. Comp. Laws Ann. § 750.539d; Minn. Stat. § 609.746; N.H. Rev. Stat. Ann. § 644:9; S.D. Codified Laws § 22-21-1; Utah Code Ann. §§ 76-9-401, 76-9-403, 76-9-702.7.
6. Ala. Code §§ 13A-11-31, 13A-11-32; Del. Code Ann. tit. 11, §§ 1335, 1336; Ga. Code Ann. § 16-11-60 to 16-11-64; Haw. Rev. Stat. § 711-1111; Kan. Stat. Ann. § 21-4001; Me. Rev. Stat. Ann. tit. 17-A, § 511; Mich. Comp. Laws Ann. § 750.539d; Minn. Stat. § 609.746; S.D. Codified Laws § 22-21-1; Utah Code Ann. § 76-9-402.
7. See, e.g., Kan. Stat. Ann. § 21-4001(a)(4); Me. Rev. Stat. Ann. tit. 17-A, § 511.

Chapter 4: Confidential Sources and Information

1. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).
2. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington and Wisconsin. New Mexico and Utah courts recognize a privilege through court rules, not state statutes.
3. *Branzburg v. Hayes*, 408 U.S. 665 (1972).
4. *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (rejecting a reporter's privilege, at least when the source is not confidential). In 2007, the Seventh Circuit stated explicitly what it stated more subtly in *McKevitt*: "There isn't even a reporter's privilege in

- federal cases.” *United States Department of Education v. National Collegiate Athletic Ass’n*, 481 F.3d 936 (7th Cir. 2007).
5. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *superseded by* 438 F.3d 1141 (D.C. Cir. 2006) (per curiam).
 6. *See, e.g., Florida v. Davis*, 720 So.2d 220 (Fla. 1998); *Minnesota v. Turner*, 550 N.W.2d 622 (Minn. 1996).
 7. *See, e.g., Colorado v. Thill*, No. 98-cr-621 (D. Colo. Feb. 5, 1999) (order granting motion to exclude evidence regarding reporter’s telephone records obtained from third parties); *Philip Morris Cos., Inc. v. ABC, Inc.*, 23 Media L. Rptr. 1434 (Va. Cir. Ct. 1995) (order protecting reporters’ records held by third parties).
 8. *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).
 9. *Mortgage-Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (N.H. 2010).
 10. *Too Much Media, LLC v. Hale*, 993 A.2d 845 (N.J. Super. Ct. App. Div. 2010), *appeal docketed*, 3 A.3d 1224 (N.J. 2010).
 11. *Cohen v. Cowles Media*, 501 U.S. 663 (1991).
 12. Richard Perez-Pena, *Unmasking the Commenters*, N.Y. Times, Apr. 12, 2010, at B1, *available at* 2010 WLNR 7526919.
 13. *Dendrite International v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).
 14. *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, at *1 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds*, 542 S.E.2d 377 (Va. 2001).
 15. *See, e.g., United States v. Greer*, No. 2:95-cr-72 (D. Vt. Apr. 18, 1997) (order barring reporter from hearing testimony of particular witness); *Connecticut v. Kelly*, No. CR-86-0052961T (Conn. Sup. Ct. Mar. 18, 1997) (order closing courtroom to press and public); *Indiana ex rel. Labalme v. Madison Circuit Court*, No. 48500-9702-OR-155 (Ind. Mar. 4, 1997) (order declining to overturn separation order keeping reporter out of murder trial).
 16. *Ayash v. Dana Farber Cancer Institute*, 30 Media L. Rep. 1825 (Mass. Super. 2001).
 17. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), *reh’g denied*, 439 U.S. 885 (1978).
 18. 42 U.S.C. §§ 2000aa.
 19. *See* Cal. Penal Code § 1524(g); Conn. Gen. Stat. §§ 54-33i and j; 725 Ill. Comp. Stat. 5/108-3(b); Neb. Rev. Stat. § 29-813(2); N.J. Stat. Ann. § 2A:84A-21.9; Or. Rev. Stat. § 44.520(2); Tex. Code Crim. Proc. Ann. art. 18.01(e); Wash. Rev. Code § 10.79.015(3); Wisc. Stat. Ann. § 968.13(1)(d).
 20. *See Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir. 1996) (holding search warrants issued with “reasonable belief” that an exception to the Privacy Protection Act applies are proper).
 21. 50 U.S.C. §§ 1801-1811 (1978).
 22. *Doe, Inc. v. Mukasey*, 549 F.3d 861 (2nd Cir. 2008).

Chapter 5: Prior Restraints

1. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
2. *Near v. Minnesota*, 283 U.S. 697 (1931); *see also*, *New York Times v. United States*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
3. *Toledo Blade Company v. Henry County Court of Common Pleas*, 926 N.E.2d 634 (Oh. 2010)
4. *New York Times v. United States*, 403 U.S. 713 (1971).
5. *United States v. Progressive*, 467 F.Supp. 990 (W.D. Wis.), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).
6. *Wood v. Georgia*, 370 U.S. 375, 385 (1961).
7. *Schenk v. United States*, 249 U.S. 47 (1919).
8. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
9. *Weaver v. USLA*, 87 F.3d 1429 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 2407 (1997).
10. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989).
11. *Sinatra v. Kelley*, No. WECO 82-657 (Cal. Sup.Ct., filed Sept. 21, 1983).
12. *In re Providence Journal*, 820 F.2d 1342 (1st Cir. 1986), *cert. denied*, 485 U.S. 693 (1988); *see also*, *Schlessinger v. Internet Entertainment Group*, No. 98-8627 AHM, (Cal. Dist. Ct. W. Div. 1998) (website owner not restrained from publishing nude photos of syndicated radio therapist because the pictures had been viewed about 14,000 times on the site and it would be impossible to order a recall).
13. *Jones v. Turner*, 23 Media L. Rep. 1122 (S.D.N.Y. 1994). *But see Pitt v. Playgirl Inc.*, BC 178 503 (Cal. Sup. Ct. La. Co. 1997) (ordering *Playgirl* magazine to discontinue distribution of its magazine containing nude photos of actor Brad Pitt).
14. *Michaels v. Internet Ent. Group, Inc.*, 5 F. Supp.2d 823 (C.D. Cal. 1998). Notably, a different judge in the same court ruled that separate defendants were not liable for publishing private, sexually explicit photographs involving Pamela Anderson. *See Lee v. Penthouse Int'l Ltd.*, 25 Med. L. Rep. 16, 1997 WL 33384309 (C.D. Cal. 1997).]
15. *Bosley v. WildWetT.com*, 32 Med. L. Rep. 1641, 2004 WL 1093037 (6th Cir. 2004) (unpublished).
16. *State v. Neulander*, 801 A.2d 255 (N.J. 2002), *cert. denied Philadelphia Newspapers, Inc. v. New Jersey*, 123 S.Ct. 1281 (2003).
17. *Arkansas Democrat-Gazette v. Zimmerman*, 20 S.W.3d 301 (Ark. 2000).
18. 83 Cal. Rptr. 3d 861 (Cal. App. 2008)
19. No. B226377, 2010 WL 3260056 (Cal. App. Ct. Aug. 19, 2010)
20. *CBS Inc. v. Davis*, 510 U.S. 1315 (1994).
21. *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (N.H. 2010)
22. *Howard Publ'ns., Inc. v. Lake Michigan Charters, Ltd.*, 649 N.E.2d 129 (Ind. App. 1995). By an evenly-split vote, the Indiana supreme court declined to hear the appeal. *Howard Publ'ns., Inc. v. Lake Michigan Charters, Ltd.*, 658 N.E.2d 582 (Ind. 1995).

23. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996).
24. *POM Wonderful v. ALM Media Props.*, No.2010 C.A. 005533 (D.C. Super. 2010)
25. Fla. Stat. Ann. § 794.03 (1998); Ga. Code Ann. § 16-6-23 (1998).
26. *Florida v. Globe Communications Corp.*, 648 So.2d 110 (Fla. 1994).
27. *Alabama v. Ozbirn*, CC-93-143 (Dist. Ct. Franklin Cty., Ala., dismissed, Feb. 3, 1994). *But see* Ga. Code Ann. 15-11-60(g) (1) (1998) (stating that the name or picture of any child under the jurisdiction of the juvenile court for the first time shall not be made public by any news media upon penalty of contempt of court).
28. *Dye v. Wallace*, 553 S.E.2d 561 (Ga. 2001).
29. *Dorman v. Aiken Communications*, 398 S.E.2d 687 (S.C. 1990).
30. *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975).
31. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).
32. *People v. Bryant*, 94 P.3d 624 (Col. 2004)
33. *Evans v. Evans*, 76 Cal. Rptr. 3d 859 (2008). The court also stated that a prior restraint on publishing private information required a demonstration of compelling or “extraordinary” circumstances.
34. *Hill v. Petrotech Resources Corp.*, __ S.W.3d ___, 2010 WL 4146616 (Ky. 2010)
35. *General Media Communications Inc. v. Cohen*, 131 F.3d 273 (2nd Cir. 1997), *cert. denied*, 118 S.Ct. 2694 (1998).
36. *Reno v. ACLU*, 521 U.S. 844 (1997)
37. *Compare Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding that provisions of the Child Pornography Prevention Act of 1996 criminalizing virtual depictions of children that appear to be engaged in sexually explicit conduct were unconstitutional because they prohibit a substantial amount of protected expression) *with United States v. Williams*, 553 U.S. 285 (2008) (upholding the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, which criminalized the pandering and solicitation of child pornography and purported child pornography).
38. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).
39. *Ashcroft v. ACLU*, 542 U.S. 656 (2004)
40. *See ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009)
41. *United States v. American Library Ass’n, Inc.*, 539 U.S. 194 (2003)
42. *See, e.g., Central Hudson v. Public Serv. Comm’n*, 447 U.S. 557 (1980); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).
43. *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).
44. *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105 (1991); *accord Bouchard v. Price*, 694 A.2d 670 (R.I. 1997) (holding that the state Criminal Royalties Distribution Act, a “Son of Sam” law, violates the First Amendment because its focus on profits derived from expressive activity was unrelated to

the state's interest in transferring the proceeds of crime from criminals to victims).

45. *Massachusetts v. Power*, 650 N.E.2d 87 (Mass. 1995).
46. *In re Providence Journal*, 820 F.2d 1354 (1st Cir. 1987) (letting stand lower court ruling striking down contempt finding against editor for violating prior restraint order as means of testing its constitutionality); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) (upholding contempt finding against editor and paper for violating court order not to publish even though order was found to be unconstitutional).

Chapter 6: Gag Orders

1. Gag orders also may refer generally to prior restraint orders that prohibit the press from publishing certain information. See Chapter 5: Prior Restraints.
2. See e.g., *Montana ex rel Missoulian v. Montana Twenty-First Judicial Court*, 933 P.2d 829 (Mont. 1997) (holding that a trial court violated the federal and state constitutions by gagging trial participants and sealing documents without making factual findings that such restrictions were necessary to protect the defendant's fair trial rights).
3. *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992).
4. See e.g., *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. order issued Oct. 27, 1997) (restraining litigants and counsel from discussing the timing and substance of discovery and identifying persons from whom discovery is sought); *United States v. McVeigh*, 964 F. Supp. 313 (D.Colo. 1997) (upholding trial court order restricting access and prohibiting all out-of-court comments by trial participants).
5. *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).
6. *Id.* at 423.
7. *In re Hearst Newspapers Partnership, L.P.*, 241 S.W.3d 190, 36 Media L. Rep. 1297 (2007)
8. *State v. Neulander*, 801 A.2d 255 (N.J. 2002), cert. denied *Philadelphia Newspapers, Inc. v. New Jersey*, 123 S.Ct. 1281 (2003).
9. *United States v. Cleveland*, 128 F.3d 267 (5th Cir. 1997), cert. denied sub nom *In re: Capital City Press*, 523 U.S. 1075 (1998). But see *Contra Costa Newspapers, Inc. v. Superior Court*, 61 Cal. App. 4th 862 (1998) (holding that a trial court cannot issue a "blanket" order prohibiting the press from contacting jurors who have been discharged from their duties).
10. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).
11. See *United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (striking order preventing attorneys and law enforcement officials involved in World Trade Center bombing case from speaking to the media; stating that courts may impose restrictions when necessary to protect the integrity of the judicial system, but holding that the order in *Salameh* was not narrowly tailored).
12. See *Levine v. United States Dist. Court*, 764 F.2d 590 (1985), reb'g denied, 775 F.2d 1054 (9th Cir. 1985).
13. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).
14. *United States v. Scarfo*, 263 F.3d 80 (3d Cir. 2001).

Chapter 7: Access to Courts

1. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing a common law right of access to judicial records and documents); *United States v. Amodeo*, 44 F.3d 141 (2d Cir. 1995) (recognizing common-law right of access to documents filed with court that relate to performance of judicial function and aid judicial process); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 662 (3d Cir. 1991) (finding a common law right of access to documents submitted with summary judgment motion); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (1988) (same); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-67(1984) (finding a common law right of access extends to civil court records); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1179 (1983) (recognizing “strong common law presumption in favor of public access to court proceedings and records”).
2. *Nixon*, 435 U.S. at 598.
3. *Republic of Philippines*, 949 F.2d at 662.
4. *Nixon*, 435 U.S. at 599.
5. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).
6. *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1, 8 (1986).
7. *Id.*
8. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trials); *Press Enterprise v. Superior Court* (“*Press Enterprise I*”), 464 U.S. 501 (1984) (criminal jury selection); *Press Enterprise II*, 478 U.S. 1 (1986) (criminal preliminary hearing); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (sentencing hearings); see *infra* fn. 22.
9. *Press-Enterprise I*, 464 U.S. 501 (1984) (holding that order sealing transcript of *voir dire* - the questioning of potential jurors - in trial involving rape and murder of teenage girl violated First Amendment) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)).
10. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
11. *New Jersey Media Group Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 58 U.S. 1056 (2003) (No. 02-1289).
12. See, e.g., *Ex parte Consolidated Publishing Co.*, 601 So.2d 423 (Ala. 1992).
13. See *Reid v. Superior Court*, 64 Cal. Rptr. 2d 714 (1997) (holding that a trial judge cannot prohibit contact between a defendant’s lawyers and investigators and the prosecution’s witnesses solely to protect their privacy, rejecting the trial court judge’s conclusion that “embarrassment” to witnesses justified denying the defense access to them).
14. *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997).
15. The trend toward anonymous juries shows no sign of abating. In December 1996, the Los Angeles Superior Court adopted a policy of juror anonymity in all criminal trials, relying on a

- state civil procedure rule that requires the names of jurors to be sealed following the verdict in a criminal trial. Memorandum on Juror Confidentiality (L.A. County Super. Ct. Dec. 3, 1996).
16. *ABC v. Stewart*, 360 F.3d 90 (2d Cir. 2004); *U.S. v. Quattrone*, 402 F.3d 304 (2d Cir. 2005).
 17. “Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files,” available at <http://www.privacy.uscourts.gov/crimimpl.htm> (undated).
 18. See, e.g., *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).
 19. *Presley v. Georgia*, 130 S.Ct. 721, 78 USLW 4051, 38 Media L. Rep. 1161 (U.S., Jan. 19, 2010).
 20. *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998).
 21. See, e.g., *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994) (holding that federal courts may grant access to juvenile proceedings and records on case-by-case basis, under Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42); *United States v. Three Juveniles, Globe Newspaper Co.*, 862 F. Supp. 651 (D. Mass. 1994), *aff’d* 61 F.3d 86 (1st Cir. 1995) (holding that the Federal Juvenile Delinquency Act creates a presumption that juvenile court proceedings and records will be closed to the public).
 22. See *Providence Journal v. Rodgers*, 711 A.2d 1131 (R.I. 1998) (the Rhode Island Supreme Court finds that court policy sealing all documents in child molestation cases is too broad). See also New York Uniform Rules of Family Court § 205.4 (1997) (statute which presumptively opens juvenile courts to the public); Md. R. Civ. P. 11-104(f), 11-121(a) (1998) (court rules in Maryland which guarantee that information about juvenile proceedings will be made available to the public before they take place).
 23. The Reporters Committee publishes “Access to Juvenile Courts,” a guide to state laws regarding juvenile courts.
 24. See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (preliminary injunction hearing); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984) (hearing on motion to dismiss); *In re Iowa Freedom of Info. Council*, 724 F.2d 658 (8th Cir. 1984) (contempt hearing); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (pre- and post-trial hearings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (vacating the district court’s sealing of documents filed in a civil action based on common law and First Amendment right of access to judicial proceedings); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (stating that “though its original inception was in the realm of criminal proceedings, the right of access [to judicial proceedings] has since been extended to civil proceedings because the contribution of publicity is just as important there,” for proposition that “the right of access belonging to the press and the general public also has a First Amendment basis”); *Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647, 648-50 (S.D. Tex. 1996) (concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).

25. See, e.g., *United States v. Town of Moreau*, 979 F. Supp. 129 (N.D.N.Y. 1997) (denying a newspaper's request for access to settlement conferences and related documents under seal in a federal environmental lawsuit against General Electric).
26. See, e.g., South Carolina Dist. Court Rule 5.03.
27. *First State Insurance Co. v. Minnesota Mining & Manufacturing Co.*, No. C4-97-1872 (Minn. Feb. 26, 1998) (petition for review denied); see also *Procter & Gamble Co. v. Bankers Trust*, 78 F.3d 219 (6th Cir. 1996) (where a trial judge had given the parties broad authority to voluntarily seal any documents they chose, the court criticized the trial judge's expansive protective order by noting that he had not engaged in the requisite inquiry prior to closing court documents to the public).
28. See, e.g., *Stone v. University of Maryland Medical Sys. Corp.*, 948 F.2d 128 (4th Cir. 1991) (documents filed as exhibits in civil court actions may be subject to the First Amendment right of access); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (First Amendment right of access to documents introduced in civil cases); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (limited First Amendment right of access to filed discovery documents); *Barron v. Florida Freedom Newspapers*, 531 So.2d 113 (Fla. 1988).
29. See *Reznick v. Hofield*, 282 Ill. App. 3d 1078, *appeal denied*, 169 Ill. 2d 565 (1996) (holding that absent exceptional circumstances, parties must identify themselves in court documents and that privacy interests outweigh the public's access rights only in "exceptional" circumstances); *Doe v. Shakur*, 164 F.R.D. 359 (S.D.N.Y. 1996) (refusing to allow a victim of sexual assault to prosecute a civil suit for damages under a pseudonym because "fairness requires that she be prepared to stand behind her charges publicly"). *But see Doe v. Nat'l Railroad Passenger Corp.*, No. 94-5064, 1997 U.S. Dist. LEXIS 2620 (E.D. Pa. Mar. 11, 1997) (upholding sealing of rape victim's name because the crime is a "serious violation of a person's body as well as dignity" and in a civil case, the proceedings did "not appear to involve issues of a public nature").
30. In 1995, the Judicial Conference of the United States struck language from a proposed amendment to Rule 26(c) that would have allowed courts to seal civil documents at the request of both parties.
31. See, e.g., *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988).
32. See *Jones v. Clinton*, 12 F. Supp. 2d 931 (E.D. Ark. 1998) (holding that the videotape of President Clinton's deposition in Paula Jones' lawsuit against him would remain under seal, although a transcript would be released); *United States v. McDougal*, 103 F.3d 654 (8th Cir. 1996) (holding that district court did not abuse its discretion by finding that media do not have common law or First Amendment right of access to copies of President Clinton's videotaped deposition in Whitewater trial).
33. See, e.g., Tex. R. Civ. P. Ann. 76a; N.C. Gen. Stat. § 132-1.
34. See, e.g., *In re Agent Orange Product Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 945 (2d Cir. 1987); *Public Citizen v. Liggett*, 858 F.2d 775 (1st Cir. 1989), *cert. denied*, 488

- U.S. 1030 (1989) (access to discovery documents filed with the court granted under Fed. R. Civ. P. 5(d)).
35. *Nixon v. Warner Communications*, 435 U.S. 589 (1978) (holding that common-law right of access does not require disclosure of Nixon tapes played before jury during criminal trial of aides charged with obstructing Watergate investigation).
 36. *Chandler v. Florida*, 449 U.S. 560 (1981).
 37. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Gannett v. DePasquale*, 443 U.S. 368 (1979).
 38. See, e.g., *United States v. Kaczynski*, 154 F.3d 930 (9th Cir. 1998) (affirming the media's right of access to a redacted psychiatric report of convicted "Unabomber" Theodore Kaczynski; the court reasoned that the public's interest in the disclosure of the report outweighed Kaczynski's right to privacy).
 39. See, e.g., *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994).

Chapter 8: Access to Places

1. *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post*, 417 U.S. 843 (1974).
2. *Turner v. Safley*, 482 U.S. 78 (1987)
3. *California First Amendment Coalition v. Calderon*, 150 F.3d 976 (9th Cir. 1998).
4. *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1976).
5. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994).
6. 28 C.F.R. § 26.4 (1998).
7. *Sherrill v. Knight*, 596 F.2d 124, 129 (D.C. Cir. 1977).
8. *Post-Newsweek Stations Inc. v. Traveler's Insurance Co.*, 518 F.Supp. 81 (D.Conn. 1981); see also *D'Amario v. Providence Civic Center Authority*, 783 F.2d 1 (1st Cir.) (rev'd and remanded), 639 F.Supp. 1538 (D.R.I. 1986) (complaint dismissed).
9. *National Broadcasting Co. v. Association of State Democratic Chairs*, 14 Med.L.Rep. 1383 (N.D. Ohio 1987).
10. Cal. A.G. Op. No. 95-509 (1996).
11. *Daily Herald v. Munro*, 838 F.2d 380 (9th Cir. 1988).
12. *CBS Inc. v. Growe*, 15 Med.L.Rep. 2275 (D. Minn. 1988), see also *National Broadcasting Co. v. Cleland*, 697 F.Supp. 1204 (N.D. Ga. 1988), *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988), *National Broadcasting Co. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988), *Journal Broadcasting of Kentucky v. Logsdon*, No. C88-0147-L(A) (W.D. Ky. Oct. 24, 1988), *National Broadcasting Co. v. Karpan*, N. C88-0320-B (D. Wyo. Oct. 21, 1988), *Charleston Television Inc. v. Charleston County Election Commission*, No. 88-CP-10-4860 (S.C. Sup. Ct. Nov. 7, 1988).
13. *Firestone v. News-Press Publishing Co.*, 538 So.2d 457 (Fla. 1989).
14. *ABC Inc. v. Heller*, 35 Med. L. Rep. 1038 (D. Nev. 2006).
15. *Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976); see also *Wood v. Ft. Dodge Messenger*, 13 Med.L.Rep. 1610 (Iowa Dist.Ct. 1986).
16. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994).

17. *Hanlon v. Berger*, 129 F.3d 505 (9th Cir. 1997); *remanded by U.S. Supreme Court*, 525 U.S. 981 (1998), *as decided on remand*, 188 F.3d 1155 (9th Cir. 1999).
18. News Media Update, “Biography Channel faces lawsuits over aired ride alongs,” May 21, 2010, available at <http://www.rcfp.org/newsitems/index.php?i=11440>
19. *Stabl v. Oklahoma*, 665 P.2d 839, *cert. denied*, 464 U.S. 1069 (1984).
20. *Marsh v. Alabama*, 326 U.S. 501 (1946).
21. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *see also Lloyd Corp. Ltd. v. Wiffen*, 307 Ore. 674 (1989).
22. *New Jersey Coalition Against War in the Middle East v. JMB Realty*, 650 A.2d 757 (1994).
23. *Minnesota v. Wicklund*, 589 N.W. 2d 793 (Minn. 1999); *Cabill v. Cobb Place Associates*, 519 S.E.2d 449 (Ga. 1999).
24. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).
25. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *See also Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
26. *Rossignol v. Voorbaar*, 316 F.3d 516 (4th Cir. 2003).

Chapter 9: Freedom of Information Acts

1. The Reporters Committee has compiled a comprehensive guide to open meetings and records laws in the 50 states and the District of Columbia, including analysis of the statutes and cases interpreting them. The Open Government Guide is available as a compendium of guides to all states or individually by state. It also is available at www.rcfp.org/ogfg/indexs.php.
2. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). For example, Florida, Louisiana, Montana, New Hampshire, North Dakota and Tennessee are among those states whose constitutions recognize a right of access to government or court documents.
3. 5 U.S.C. § 552 (2003). The Reporters Committee publishes “Federal Open Government Guide,” which explains the law and how to use it. It is available at www.rcfp.org/fogfg/index.php.
4. 18 U.S.C. §§ 2721 - 2725 (2010); *Reno v. Condon*, 528 U.S. 141 (2000).
5. The Reporters Committee publishes a separate guide, “Access to Electronic Records,” updated in Winter 2008. It is available at www.rcfp.org/elecaccess.
6. Utah Code Ann. § 52-4-203(5) (2010), 25 Okl.St. Ann. § 312(C) (2010). Both of these statutes allow for the recordings of meetings as long as the meeting is not disrupted.
7. *People v. Ystueta*, 418 N.Y.S.2d 508 (Dist. Ct., Suffolk County, June 5, 1979) (by-law prohibiting tape recording of meeting violated open meetings law); *Maurice River Board of Education v. Maurice River Teachers Ass’n*, 455 A.2d 563 (Ch. 1982), *aff’d* 475 A.2d 59 (App. Div. 1984) (finding there was a right to videotape the meeting, subject to limited restrictions).
8. *Ohio ex rel. Plain Dealer Publishing Co. v. Barnes*, 527 N.E.2d 807 (1988).

9. The Alabama Open Meetings Act explicitly says that “[e]lectronic communications shall not be utilized to circumvent any of the provisions of this chapter.” Ala. Code § 36-25A-1(a) (2010). Louisiana’s Attorney General has stated that the use of telephones to circumvent in-person attendance at government meetings would be violation of the open meetings law, La. Op. Att’y Gen 93-137. Utah establishes specific requirements for electronic meetings, including when an electronic meeting will not be allowed and how to allow public participation. Utah Code Ann. § 52-4-207 (2010). A Florida Attorney General Opinion permits the use of e-mails communications so long as the communications are not related to issues requiring council action. Fl. Op. Att’y Gen. 2001-20 (2001). In Texas, the Attorney General held e-mail exchanges subject to the Open Meeting Act’s definition of deliberation. Tex. Op. Att’y Gen. JC-0307.

Chapter 10: Copyright

1. 17 U.S.C. § 101 *et seq.* (1976) (1976 Copyright Law governs works created on or after Jan. 1, 1978).
2. *Los Angeles News Service v. Tullio*, 973 F.2d 791 (9th Cir. 1992).
3. Pub. L. No. 105-298 (Oct. 27, 1998), *amending* 17 U.S.C. § 101 *et seq.* (1998).
4. Pub. L. No. 105-304 (Oct. 28, 1998), *amending* 17 U.S.C. § 101 *et seq.* (1998).
5. *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). The Copyright Clause grants Congress the power “to promote the progress of science and useful arts, by securing for *limited times* to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const., Art. I, § 8, cl. 8 (emphasis added).
6. 17 U.S.C. §§ 1201(a), 1201(c)(1), 1201(c)(4).
7. *Id.* at § 1202(e)(1).
8. Consult Copyright Office Circular 1, “Copyright Basics.”
9. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
10. *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 946 F.Supp. 420 (M.D.N.C. 1996), *affirmed*, 1997 Copyright L. Rep. P27,673 (4th Cir. June 19, 1997).
11. *International News Service v. Associated Press*, 248 U.S. 215 (1918).
12. *Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454 (2009)
13. *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp.2d 310 (S.D. N.Y. 2010)
14. News Media Update, “Website admits copyright, ‘hot news’ violations,” Nov. 17, 2010, available at <http://www.rcfp.org/newsitems/index.php?i=11633>
15. *Campbell v. Acuff-Rose Music Inc.*, 114 U.S. 1164 (1994).
16. *Salinger v. Random House*, 484 U.S. 890 (1988).
17. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).
18. *See Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 WL 1887522 (C.D. Ca., March 27, 2000).

