

Mass Media Law
Texas Tech University School of Law
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Eric E. Johnson
Visiting Associate Professor of Law

<http://ericejohnson.com>
Office: 318E
Phone: 806-742-3990 x226
E-mail: eric.e.johnson@ttu.edu

SYLLABUS

1. LEARNING OUTCOMES: I intend for this class to provide meaningful training for the practice of law in the context of the media industry, including both transactional and litigation practice. By the end of the course, you should have a command of the principal legal doctrines that concern mass media, knowledge of some basic industry vocabulary, some understanding of the job of a journalist, and an appreciation for how the law effects journalism and media. Note that the relevance of what we will learn will go well beyond the mass-media realm. The knowledge and skills you acquire here will be applicable to legal practice more broadly.

The following is a non-exclusive list of specific learning outcomes for this course:

1. Have a basic level of media-lawyer literacy such that you could productively and immediately step into a role as an attorney supporting the general counsel of any newspaper, broadcast station, network, or other mass-media entity, or supporting an experienced outside counsel representing the same as clients.
2. Broadly know and be able to apply the principal doctrines of federal and state law relating to freedom of speech and press, access to government information, broadcast regulation, advertising regulation, the journalist-source relationship, defamation and other torts encountered in the newsgathering and publication contexts, and copyright issues as encountered by a news operation.
3. Be able to write a letter asserting a demand, on behalf of a mass-media client, on the government for access to records or proceedings.
4. Be able to put together a first draft of a letter on behalf of a mass-media client defending a legal claim common in the mass-media context.
5. Be able to advise a mass-media client of the level of risk associated with common exigencies related to publication, broadcasting, and newsgathering, particularly those of the type presented in class.

6. Be able to provide legal analysis in the context of a media dispute such that you could confidently and appropriately advise your client on next steps.

2. SUBJECT MATTER AND COURSE DESIGN: Unlike torts, antitrust, income taxation, or many other law-school subjects, “mass media law” is not a body of law, *per se*. It is a professor- or lawyer-crafted grab bag that draws together law from across a range of disciplines. What gives the subject coherence is not the law itself, but a particular range of parties and problems. The term “mass media law” generally refers to the law relevant to the print and broadcast media, with an emphasis on newsgathering and journalism. It also includes analogous forms of internet communications that distribute non-interactive content to a large audience, which includes blogs, news websites, and app-based versions of periodicals. (By way of comparison, when people say “entertainment law,” they are usually referring to the law relevant to film/TV production, recorded music, and live theatre, with an emphasis on Hollywood dealmaking.)

The organization of a course in this vein requires careful thinking. Because of its artificiality and lack of inherent coherence, Mass Media Law cannot be organized in the same kind of simple scheme that a common-law subject can be. We cannot, for instance, begin with *prima facie* elements, work through defenses, and then finish up with remedies. Also, it does not work well to merely organize the course around a series of recurrent problems faced by mass media law practitioners, because one first needs to have some foundational background knowledge about the industry (newspapers, television stations, etc.) and a solid footing in several areas of generally applicable law (constitutional law, torts, communications regulation, intellectual property, civil procedure, and more).

While the emphasis of the course is on substance, and thus will take the bulk of our time, we will also make room for complimentary skills training. In particular, we will learn some of the rudiments of journalistic writing, and we will hone our skills in writing letters of the sort media lawyers must draft. In doing so, we will have the opportunity to better understand the business and journalistic sides of media, and we will have a chance to apply what we’ve learned in terms of substantive content.

In order to make the most efficient use of class time and to best allow each class to build upon what has come before, I have designed the course with a two-track, multi-tiered structure. In one track, we will learn substance. In the other track, we will learn skills. These tracks will proceed not serially, but simultaneously. As we advance through the skills track, we will make use of substance we have learned along the way. Also, as we advance through the substance track, we will see opportunities for employing our gathering set of skills.

The substance track will consist of three tiers, presented in *seriatim*. In Tier 1, we will tackle industry basics, learning not about law, but about the context for the law. In Tier 2, we will go about learning the blackletter law that is generally applicable in the mass-media context, including constitutional law, torts, and some intellectual-property doctrine. Our learning of this law will be informed by our understanding of media-industry basics learned in Tier 1. In Tier 3, we will apply the industry knowledge and general knowledge we have learned in the first two tiers to a selection of specific contexts in which legal issues arise, including especially leading-edge dilemmas faced in the contemporary media. To summarize, the substance track goes business-topic-by-

business-topic (Tier 1), then legal-topic-by-legal-topic (Tier 2), then problem-by-problem (Tier 3).

In the skills track, we will proceed through units on journalistic writing (Part 1) and then on legal letter writing (Part 2). The units in the skills track are ordered and timed to compliment the substance track. The skills track will make use of in-class exercises and homework assignments, including assignments that must be e-mailed to me.

As this structure probably suggests, this course will not lend itself well to a study plan of passively attending lecture and then waiting until the end of the semester to buckle down and learn the material. Keep up! Do all the reading when it is assigned, make the most of the exercises and homework, and participate actively in class throughout the semester.

In addition to the multi-tracked organizational structure of the course, note as well that there will be various modes through which you will receive course content. Research shows that such a multiform mode of teaching aids learning. Thus, in class, I will be making use of a mixture of blackboard writing, slideshows, lectures, handouts, etc.

You will find the general course outline at the end of this syllabus. An evolving chart of assignments will be found on the course website.

3. CLASS WEBSITE: The central repository for class materials and information is the class website. It is not password protected. Go to ericejohnson.com and find the link on the upper left. The direct URL is: http://www.ericejohnson.com/courses/media_13/

Certain materials not distributed publicly will be made available through the course's MyTechLaw site.

4. MATERIALS:

There is one required text for this course that is sold as a printed book:

The Associate Press Stylebook and Briefing on Media Law. 2012 Edition.
Spiral-bound. ISBN: 978-0-917360-56-5

In addition, you will need to use materials edited by me and made available online. First is a set of materials called *Mass Media Law Compendium*, which will be downloadable in discrete sections published as pdf documents. Other materials will be distributed online, either through the class website or through the course site on MyTechLaw.

Study aids: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting, including, for instance, treatises and commercial outlines. I mention this explicitly because some professors discourage outside sources. I do not. As far as I am concerned, the more you learn about mass media law, the better. I personally have found that study aids can be a great way of gaining a basic understanding of the blackletter law in a subject. One word of caution, however: You may find that such study aids will not function well as exam preparation. In my view, the best way to make use of study aids, if you are going to, is to use them *before* we cover the coordinate subject matter in class. That way, the study aid can help you learn the course content, which is your ultimate goal. Using a study aid at the end of the semester – especially in a class organized and structured as this one – is, I think,

likely to be a waste of time. Of course, it's up to you to decide for yourself. If you do use study aids, I would appreciate your letting me know your experience with them—whether good or bad.

5. ASSIGNED READING: In each class I will announce the reading assignment for the next class meeting, and I will post reading assignments on the Chart of Assignments online (linked to from the class webpage). I take care to craft reading assignments so that they are not unduly burdensome. In return, I ask that you do the reading conscientiously. How should you tackle the reading? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. “With interest” means you should be having thoughts going through your head such as, “Mmmm, interesting!” “Ah ha! That makes sense!” or “What is wrong with this judge?!?!?”

One way to approach the reading, suggested by Professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ...” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, and true to statute and precedent. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

6. ADDITIONAL OPTIONAL READING: In addition to the assigned reading for class, you might find it interesting to do some optional extra reading from blogs and online news sources. Doing so will allow you to engage with the material in a way that is highly relevant and topical, leveraging your imagination to solidify what you have learned and prime you for what comes next. I may post some links to such sources on the class webpage.

7. GRADING:

7-1. Your grade will primarily be based on your exam performance. The exam is discussed below. Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading her or his exam. You may not waive anonymity. Self-identification on the exam or otherwise culpably destroying anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action under the Honor Code.

7-2. Within the parameters of the law school’s policy, I will factor classroom performance and attendance into final grades. Law school policy allows adding or subtracting one letter-grade increment to or from the otherwise-calculated final grades. By my use of this method, I anticipate that some students’ exam grades will be increased upward, many will remain unchanged, and others may end up being adjusted downward.

Reasons for a positive effect of class participation on the overall course grade may include habitual preparedness and engagement, volunteering in discussions, advance volunteering to be called on, diligent work on exercises, contributing to a wiki-based course outline, and otherwise making a substantial contribution to the class and the learning enterprise. Reasons for a negative effect of class participation on the overall

course grade will include exhibiting poor performance or visible disengagement in the classroom, excessive absence, tardiness, and being unprepared for class.

You should not worry unduly about the quality of your responses to questions in class. As long as you do the reading and give it honest effort when speaking in class, you will not be marked down. Law school, like all other educational environments, is a place to learn, and that necessarily implies that it is a place to fumble and make mistakes. I do not ask questions and conduct discussion as a way of judging you, I do it as a way of challenging you and helping everyone to learn. So put aside your fears and engage in the conversation. (More is said about expectations for class participation and classroom conduct in Section 9, below.)

8. COMMUNICATIONS AND OFFICE HOURS:

8-1. You may e-mail me at eric.e.johnson@ttu.edu. I will get back to you, but note that I do not read e-mail on an hour-by-hour basis, nor am I always able to do so a day-by-day basis either. Substantive questions about the law are far more efficiently handled verbally, so instead of e-mailing, please save those questions for chatting with me in person, such as after class or in my office. And before you ask a procedural question, I would be appreciative if you would check first to see if the answer is in this syllabus. Please note that if you miss class, you should ask other students for information you may have missed, such as reading assignments. Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line. Doing so is, after all, good practice for real-world lawyering.

8-2. If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

8-3. My office is 318E. My office number is 806-742-3990 x226.

8-4. Dedicated office hours:

11:00–11:30 a.m. Wednesday through Friday

8-5. Open door policy:

I invite you to feel free to visit outside of office hours on an impromptu basis. You will usually find me in my office on class days between 11:00 a.m. and 2:00 p.m., as well as after 3:00 p.m. If for some reason I can't talk, I'll let you know. (There's no harm in dropping by to ask.)

8-6. Appointments:

I am very happy to make appointments. To make an appointment please send me an e-mail with some suggested times.

8-7. At least once during the semester, I hope you will come by my office to introduce yourself, even if you have no questions and nothing to discuss. That's not a requirement, just a request. But it would be nice to be able to chat informally with everyone at least once. So please consider making time at some point during the semester.

9. IN THE CLASSROOM:

9-1. Classroom Conduct Rules:

(a) Do nothing that might disrupt class or distract your fellow students.

- (b) Refrain from eating in class. Also refrain from chewing gum audibly or with your mouth open.
- (c) Refrain from any use of a digital device that could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, distracting images, moving images (video), animation or flashing graphics, or any kind of indecent content.
- (d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to e-mail and text messaging. (2) You may not engage in any web publication or any live-updating/realtime digitally enabled network communications with anyone at all, including, but not limited to, live chat, IM, Facebook (including, but not limited to, Facebook groups), Twitter, and Google Plus. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade and may be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with University information-technology staff for technical support purposes. Bottom line: Keep the discussion in class, where it is productive and benefits all.

9-2. Your participation in classroom discussion should be meaningful and appropriate. Raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. Your classroom participation should be appropriate – not too little, not too much. On occasion, there are students who raise their hand too often and take up too much of the class's time. And in nearly every class, there are people who sit passively and rarely, if ever, contribute to classroom discussion. Try not to fall into either extreme.

9-3. I am grateful for students to volunteer in advance for class discussion. If you volunteer in advance, I'll assume that you are game for particularly challenging questions. If you would like to volunteer in advance for the entire semester, please send me an e-mail (to eric.e.johnson@ttu.edu) with the subject line "Mass Media Law Volunteer for Semester". If you do that, you can then opt-out on specific days if you would like. If you would like to volunteer in advance for a particular class, you can let me know in person before class begins, or you could e-mail me at eric.e.johnson@ttu.edu, with "Mass Media Law Volunteer" in the subject line. I can't guarantee that I will call on you in such an event, but I will appreciate your offer nonetheless.

9-4. Even if you don't volunteer in advance, I'll expect you to be ready to participate meaningfully if called on. If you cannot participate in this way for a particular class, for whatever reason (and there's no need to tell me why), please tell me

before class, in person, so that I can avoid calling on you. Reasonable requests of this sort are entirely understandable and will not adversely affect your grade.

9-5. Be aware that I plan to make an audio recording of each class meeting. These recordings are for my use, and, unfortunately, I will not be making them available during the semester for absent students. No one is permitted to make an audio or video recording of class without my express, written permission.

10. ABSENCES AND TARDINESS:

10-1. Attendance in class is an essential component of the educational experience, and the accreditation standards of the American Bar Association mandate that schools “require regular and punctual class attendance” and enforce attendance policies.

10-2. Attendance will be taken by means of a grid sheet with boxes to initial for individual days. It will be your responsibility to make sure you have initialed in the box for the day. You may not mark the sheet on behalf of another person, even if that person is in attendance. You may not permit another person to mark the sheet on your behalf. Also, you may initial the box for the instant date – that is, you may not make a mark indicating your attendance for any other date, even if you were in attendance on that date. Such forgery would be in violation of the law school’s Honor Code and will be dealt with accordingly.

10-3. In accordance with the policy reflected in the Student Handbook, Part II.I., I intend presumptively to exclude from the course and final exam any student accumulating nine absences or more, whether for illness, interviews, activities, etc. If an extreme situation for which you are not at fault takes you over that limit, we can talk to the Dean or the Associate Dean of Academic Affairs about whether the circumstances warrant your staying enrolled. Note that coming to class late may be counted as an absence for purposes of course and exam exclusion, as may leaving early. This syllabus constitutes your warning that you are subject to exclusion on this basis. Keep track of your own absences. Do not expect to receive an independent warning from me if you draw close to your allowed absences.

10-4. If extended illness or a personal situation requires missing more than a few classes, I encourage you to talk to me so that we can try to work through the situation.

10-5. If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supersedes the law school’s or university’s policies.

11. ACCOMODATIONS:

11-1. Disability: Any student who, because of a disability, may require special arrangements in order to meet course requirements should contact the Associate Dean for Academic Affairs Jarod Gonzales as soon as possible to make any necessary arrangements. Students should present appropriate verification from Student Disability Services during the Associate Dean’s office hours. Please note that classroom accommodations cannot be provided until verification from Student Disability Services has been submitted. For additional information, you may contact the Student Disability Services office in 335 West Hall or 806-742-2405.

11-2. Observance of a Religious Holy Day: Texas House Bill 256 requires institutions of higher education to excuse a student from attending classes or other

required activities, including examinations, for the observance of a religious holy day. The student shall also be excused for necessary time to travel. An institution may not penalize the student for the absence and must allow for the student to take an exam or complete an assignment from which the student is excused. No prior notification of the instructor is required.

12. EXAMINATION:

12-1. I will not discuss the exam on an *ex parte* basis. (See Section 8-2.)

12-2. Exam format:

(a) This class will have a final exam requiring a written response, and four hours in which to write it. Despite the four-hour duration of the exam session, I plan to write a “three-hour” exam, that is, an exam that could, in my judgment, be thoroughly and competently answered in three hours. Thus, you should have some breathing room. Note that I will not use any questions on the written portion that have been used on any other prior exam.

(b) The exam will be administered on an open-book basis. You may bring with you any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session.

(c) Your response on the exam will be limited by word count. There may be one general word limit, or particular word limits for particular portions of the exam. You will be responsible for constraining your response to the applicable word limit, even if you are providing a handwritten exam. All word limits are “hard” and will be strictly enforced. No overage at all is permissible.

(d) I may provide a more specific description of the examination at a later time.

12-3. My old exams for the course in “Media & Entertainment Law,” should be quite useful to you in studying for and thinking about the exam. Note, however, that the subject matter of that course was somewhat different than this one – since this course will have no entertainment content and more media. So don’t be alarmed if those exams seem to call for knowledge you haven’t gained in this class. You will find the old exams in my Exam Archive, which is publicly accessible online. There’s a link on [ericejohnson.com](http://www.ericejohnson.com/exam_archive.html) (http://www.ericejohnson.com/exam_archive.html). Later in the semester I will have more to say about how I recommend preparing.

13. COURSE OUTLINE: The planned organization of the course is below. The structure is subject to minor adjustment, including the possible omitting of some topics, if time constraints demand. Note that neither “units” nor “modules” correspond to class days. Some days we will cover multiple units or modules. Some units and modules will take multiple days each. For a day-to-day chart of assignments, see the evolving Chart of Assignments, available from the course webpage.

Skills Track:

Part 1: Journalistic Writing

Unit 1: Copyediting: Punctuation

Unit 2: Copyediting: Style

Unit 3: Newspaper Writing

Unit 4: Broadcast News Writing

Part 2: Letter Writing

Unit 5: FOIA Letter

Unit 6: Response to a Nastygram

Substance Track:

Tier 1: Journalism and Media Industry Basics

Module 1: Television and Radio

Module 2: Newspapers and Magazines

Module 3: Internet

Module 4: The Business of News

Module 5: Journalistic Ethics

Tier 2: Generally Applicable Law in Media Contexts

A FRAMEWORK FOR THINKING ABOUT MEDIA FREEDOM

Module 6: Theory and History of Media Freedom

Module 7: First Amendment Analytical Structure

MEDIA ACCESS TO GOVERNMENT

Module 8: First Amendment Rights of Access

Module 9: Statutory Rights of Access

CORE FREE-PRESS/FREE-SPEECH ISSUES

Module 10: First Amendment and Incitement

Module 11: First Amendment Limits on Injunctions and Prior Restraints

Module 12: First Amendment Limits on Taxation

CONTENT REGULATION AND PARTICULAR MEDIUMS

Module 13: First Amendment, Questions of Medium, and Access to Media

Module 14: Regulation of Broadcasting

Module 15: Regulation of Commercial Speech and Advertising

NEWSGATHERING

Module 16: Enforceability of Promises to Sources

Module 17: Reporter's Privilege

Module 18: Subpoenas and Newsroom Searches

Module 19: Tort Liability in Newsgathering

Module 20: Eavesdropping, Wiretapping, and Long-Lens Laws

PUBLICATION

Module 21: Gag Orders and Fair Trials

Module 22: Defamation: Overview

Module 23: Defamation: First Amendment Analysis

Module 24: Defamation: Defamatory Meaning

Module 25: Defamation: Of and Concerning the Plaintiff

Module 26: Defamation: Slander Per Se, Libel Per Quod, Libel Per Se

Module 27: Defamation: Falsity

Module 28: Defamation: Privileges

Module 29: False Light, Disclosure, and Outrage Torts

Module 30: Copyright: Overview

Module 31: Copyright: Idea/Expression Distinction

Module 32: Copyright: Fair Use

Module 33: Publicity Rights, Appropriation, and Misappropriation Torts

Module 34: Procedural Law

Tier 3: Some Specific Contexts

Module 36: Paparazzi and Gossip Rags

Module 37: Wikileaks and Contemporary National Security Issues

Module 38: Blogging

Module 39: Journalists and Social Media

14. FEEDBACK: If you have feedback for me – suggestions, ideas, commendations, or criticisms, please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that.

Good luck. I hope you enjoy the course.

– EEJ

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