

OSCE Human Dimension Seminar, May 13-15, 2013

Media Freedom Legal Framework

Session 2 – National frameworks for media freedom – best practices

Basic Framework

The United States takes seriously our international law obligations and our OSCE commitments regarding freedom of expression.

The United States has extremely strong constitutional protection for freedom of expression, including for members of the media. Very little government regulation of expression is allowed and except for a few narrow categories, permissible restrictions are content neutral – by that I mean that we do not censor, criminalize, or prohibit speech based on its content.

The U.S. Constitution's protection of freedom of expression embodies the notion that an individual's ability to express himself or herself freely – without fear of government punishment – produces the autonomy and liberty that promote democratic processes and accountable governance.

Allowing citizens and members of the media to openly discuss topics of public concern results in a more transparent and representative government, greater tolerance, and a vigorous, resilient society. History has shown that curtailing free expression by banning speech does not advance democracy. Just the opposite. The drafters of the U.S. Constitution recognized that when governments forbid citizens from talking about certain topics, it often forces those citizens to discuss such topics secretly. By allowing individuals to openly express their opinions – no matter how much the government and other citizens may disagree with them – the First Amendment promotes transparency, healthy public debate and societal development.

Uninhibited public debate forces ideas into the intellectual marketplace where they must compete with the ideas freely expressed by other individuals. The suppression of ideas has never changed any minds. But the competition of ideas over time can result in inferior or offensive ideas giving way to better ones. This rationale underpins US case law that provides robust protections for freedom of expression for all individuals, including those working for media organizations.

The First Amendment to the U.S. Constitution provides that, "Congress shall make no law abridging the freedom of speech." Although the First Amendment refers specifically to Congress, the U.S. Supreme Court has held that freedom of speech is also protected from state infringement, and similarly from interference by federal executive branch officials. As with the other liberties guaranteed by the Constitution's Bill of Rights, freedom of speech is protected from government interference and also from actions by private individuals so closely associated with government officials that their action may be described as state action.

The freedom of speech protected by the First Amendment has been given a broad reading in its application by the courts. Perhaps the most obvious purpose of the First Amendment is to prevent the government from restricting expression "because of its message, its ideas, its subject

matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated." Regan v. Time, Inc., 468 U.S. 641 (1984).

The First Amendment also limits content-neutral or incidental infringements on speech and speech-related activities, subjecting them to an assessment of whether the regulation furthers a substantial government interest not related to the suppression of speech and whether the regulation is narrowly tailored to accomplish that interest. O'Brien v. United States, 391 U.S. 367 (1968).

In keeping with our open, democratic society, the United States government strongly agrees that there is great public benefit to the freer and wider dissemination of information of all kinds, including a full range of ideas, views and reporting, and a diversity of media outlets. Our Constitutional protections on freedom of speech also encompass certain rights to seek and receive information.

The First Amendment provides protections for these rights through its special concern for freedom of the press, which is protected from prior restraint (that is, censorship in advance of publication) in the absence of proof of direct, immediate, irreparable, and substantial damage to the public interest. New York Times, Inc. v. United States, 403 U.S. 713 (1971).

Members of the media, and the public as a whole, have been held to have the right to gather information concerning matters of public significance. For example, the public generally has a right of access to observe criminal trials, in part because such access is viewed as essential to the exercise of the rights to speak and publish concerning the events at trial. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (plurality). This has been supplemented by a number of laws promoting access to government information, such as the Freedom of Information Act, 5 U.S.C. section 552, the Government in the Sunshine Act, 5 U.S.C. section 552b, and the Federal Advisory Committee Act, 5 U.S.C. App. 2.

In December 2009, President Obama launched a government-wide initiative on Transparency and Open Government, directing federal departments and agencies to take specific actions to implement the principles of transparency, participation, and collaboration in order to "create an unprecedented and sustained level of openness and accountability in every agency." This effort entails steps to expand access to government information by making it available online in open formats. The President further directed that "with respect to information, the presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions)."

While the U.S. Supreme Court has suggested that the First Amendment encompasses "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences", and upheld government requirements of fairness and diversity in broadcasting, Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), it has stopped short of suggesting that there is a constitutional right of access to the broadcast media, and has never extended a guaranteed right of access or fairness doctrine to the print media. Let me emphasize, the Supreme Court stopped short of guaranteeing right of access not out of a desire to restrict access, but because a

“[g]overnment-enforced right of access inescapably dampens the vigor and limits the variety of public debate.” *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (internal quotation marks omitted). The Federal Communications Act of 1934 (“FCA”) established the Federal Communications Commission (“FCC”) for the purpose of regulating interstate and foreign communications by wire and radio. Essentially the FCC is responsible for an equitable and efficient distribution among various users of the available radio frequency spectrum for non-government communications. The constitutional underpinning for the regulation of electronic media is based on the scarcity of available spectrum and the need for an orderly system of interstate communication.

Private sector users of this spectrum, e.g. radio and television stations and interstate telephone companies, are licensed by the FCC. Applicants for such licenses must demonstrate certain legal, technical and other qualifications. The FCA generally restricts the granting of such licenses to U.S. citizens or entities controlled by U.S. citizens. Additionally, there are ownership restrictions as to the overall number of licenses that may be held by one person or corporation and in some instances where such licenses may be operated. Potential licensees must also show that the frequencies applied for will be used in a technically compatible manner with those already in operation.

A fundamental concept of the regulation of electronic media in the U.S. is that use of the radio spectrum is not owned per se by licensees. Licenses are issued for a set period of time after which licensees must seek renewal of their authorizations and demonstrate that the license has been used in the public interest. Licenses may, and have been, revoked in instances where it has been shown that the licensee violated provisions of the FCA or regulations promulgated pursuant to the FCA.

Mass media outlets such as radio and television stations are free to determine the nature and content of programming aired. The federal government may not censor the programming of any such outlet with certain extremely limited exceptions, e.g. the broadcasting of obscene programming is specifically prohibited by the FCA. Additionally, the Act requires that licensees grant equal time to candidates for federal elective office.

Restrictions

Given the previous discussion about the need for minimal government intrusion in freedom of expression, in the US most restrictions are content neutral and do not discriminate based on the viewpoint of the speaker.

There are very few permissible restrictions based on content and they are extremely carefully drawn regulations or restrictions that focus on the content of the speech including those related to defamation, commercial speech, obscenity, or incitement to imminent violence.

Content neutral restrictions generally may only incidentally burden expression to promote non-speech interests. For example, a law regulating the distribution of handbills may be intended to reduce litter, rather than suppress expression. Such regulations are permitted if they are content-neutral and promote a substantial governmental interest by the least intrusive means. Similarly,

laws may regulate the time, place, or manner of speech if they are not attempts to censor content or unduly burdensome to expression.

Defamation

In the United States, defamatory speech is a false statement of fact that damages a person's character, fame or reputation. I repeat, defamatory speech must be a false statement of fact; statements of opinion, however insulting they may be, cannot be defamation under U.S. law. Under U.S. defamation law, there are, however, different standards for public officials and private individuals. Speakers are afforded greater protection when they comment about a public official, as opposed to a private citizen. In 1964, the U.S. Supreme Court ruled that public officials could prove defamation only if they could demonstrate "actual malice," that is, that the speaker acted with knowledge that the defamatory statement was false or "with reckless disregard of whether it was false or not."¹

This decision was later extended to cover "public figures," in addition to public officials.² For the private concerns of private individuals, though, the standard for proving defamation remains lower.³ Defamation of private individuals can be established if the statements were false and damaged the person's reputation without showing actual malice. Generally, only individuals, not groups, can be defamed.

Even where courts find defamation, they generally do not impose criminal punishment. Instead, courts may require the speaker to publish a correction to the defamatory statement and/or to financially compensate the victim.

Commercial Speech & Obscenity

Commercial speech, is entitled to somewhat lesser protection than non-commercial speech, and may for example be regulated to avoid presenting false or misleading information to consumers. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). Obscenity, is entirely excluded from First Amendment protection. But obscenity, which is defined as patently offensive representations of sexual conduct without serious literary, artistic, political, or scientific value, must be regulated in a manner consistent with due process. Miller v. California, 413 U.S. 15 (1973).

Incitement to Imminent Violence

Speech may be restricted if the government can establish that 1.) it is intended to incite or produce lawless action, 2.) it is likely to incite such action, and 3.) such action is likely to occur imminently. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). This is a very high standard, which courts have rarely found to have been met. General advocacy of violence, such as writing on a website that violent revolution is the only cure to society's problems, does not constitute incitement to imminent violence.

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion).

For example, in 1969, a Ku Klux Klan member delivered a speech in Ohio in which he advocated “revenge” (sic) against Jews and African Americans.⁴ The U.S. Supreme Court struck down a statute prohibiting his speech because it criminalized speech that was not “directed at inciting or producing imminent lawless action” and was not “likely to incite or produce such action.”⁵

Similarly, if a person burns a U.S. flag at a protest, and a counter-protestor becomes upset and physically attacks someone in retaliation, the flag burner’s expression likely would be protected by the First Amendment because it was not intended to incite violence.

In contrast, if a speaker belonging to a particular ethnic group calls on an angry mob to imminently and specifically physically attack someone of a different ethnic group to prove his group’s superiority, and someone from that mob immediately physically attacks someone from that different ethnic group, the speaker’s speech likely would not be protected by the First Amendment because it was intended to incite imminent violence and was likely to incite such violence.

Speech may also be restricted based on its content if it falls within the narrow class of “true threats” of violence. A true threat is a statement that a reasonable recipient would take to mean that the speaker, or people working with the speaker, intends to commit physical harm against the recipient. For example, since 9/11, the United States has prosecuted various email, telephone, letter, and other threats made against Arab and Muslim Americans. A man in Texas was sentenced to 18 months in prison for emailing a bomb threat to a mosque. In sum, our national laws and regulations are consistent with our obligations under international law and our OSCE commitments. Our national legal framework is designed not just to ensure, but also to facilitate, the exercise of freedom of expression by all, including members of the media .

⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

⁵ *Id.* at 447.