



The First Amendment of the US Constitution explains your editorial freedom as it applies to television cable casting on Public Access, however over the years, *statutory law, case law, state & local laws* and *contract law* have defined broad & narrow categories of speech that is **NOT ALLOWED**.

Commercial Content Guidelines

The use of the Public Access facilities and channel(s) must be for non-commercial purposes. Access facilities or time on the Access Channel(s) shall **not** be used for the following: Advertising material that in whole or in part, enacts a *call-to-action* or *demonstrative selling* of products, services. No comparatives or contrasts with other products or services, and no prices. The direct solicitation or appeals for funds or other things of value for any and all purposes (possible **exceptions** non-profit or charitable agencies registered in New Hampshire). MCAM supports the entrepreneurial spirit, but use of the public funds for commercial gain is not allowed.

Copyright FAQs

Essential Rule: If you did not create it, you don't own it, therefore you can't use it.

- **What is intellectual property?**
Intellectual property is a legal concept under which we manage the protection and use of products of the human mind (as opposed to the human hand). Generally, movies, music, books, magazines, art or any physical, documented representation of unique thought is probably protected by copyright law.
- **Is copyright law the same for words, pictures, movies, music and software?**
Yes, for the most part. Sure, it's easy to download and reproduce materials that you might find on the Web, but that doesn't make it lawful.
- **Is it hard to get a copyright?**
No, it's easy. Under U.S. law, anything original and creative - yes, even your diary, memos, personal correspondence - is protected by copyright. This protection is automatic, from the moment you create something, whether on paper or electronically.
- **If I see something and it doesn't have a copyright notice, does that automatically mean I can use it?**
No. A copyright notice is not required in order to have copyright protection. It is true that many things are not protected by copyright.
- **If I use somebody's work without permission but give credit to the author or publisher, am I still infringing on copyright?**
Probably. Giving credit is great, but nothing in the copyright law says that it somehow absolves you of infringement. If you are infringing, giving credit won't help you!
- **What about Fair Use?**

Sec. 107. US Copyright Code - Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors

Defamation

Elements of Libel and Slander

I. WHAT IS DEFAMATION? Libel is written, slander is oral.

Defamation consists of the following:

- (1) a defamatory statement;
- (2) published to third parties; and
- (3) which the speaker or publisher knew or should have known was false.

What is a "defamatory" statement?

1. A statement which causes harm to reputation.

A statement is defamatory if it "tends to injure the plaintiff's reputation and expose the plaintiff to public hatred, contempt, ridicule, or degradation

2. Defamation *Per se*

Some statements are so defamatory that they are considered defamation *per se*; and the plaintiff does not have to prove that the statements harmed his reputation. The classic examples of defamation *per se* are allegations of serious sexual misconduct; allegations of serious criminal misbehavior; or allegations that a person is afflicted with a loathsome disease.

3. What Constitutes Injury to Reputation?

The plaintiff must establish proof of damage to reputation in order to recover any damages for mental anguish. However, a court will not dismiss a defamation action merely because the plaintiff already has a bad reputation. Rather the statement upon which the defamation claim is based should relate to the same matters upon which the prior bad reputation was founded, or to substantially similar matters.

4. The defendant knew or should have known that the communication was false

Defamation allows recovery for unfair damage to reputation. As a consequence, if true statements are made about a person which damage their reputation, they cannot maintain a lawsuit. Virtually all states require that the alleged defamatory statement be false before a defamation action may proceed. Truth is a complete defense to a defamation claim

1. Public Officials/Public Figures: Actual Malice must be proven.

The First Amendment requires that a defamation plaintiff prove actual malice or reckless disregard of the truth when the plaintiff is a public official or public figure. This is a much higher burden of proof for a public figure plaintiff. Instead of showing objectively that a "reasonable person" knew or should have known the defamatory statement was false, a public figure plaintiff must prove the intent of the defendant was malicious, or that they acted with reckless disregard for the truth. This allows the defendant to prove its good faith intent and efforts as a defense.

2. Actual Malice and Falsity must be Shown by "Convincing Clarity."

Where the plaintiff is a public official, he must prove actual malice or reckless disregard of the truth with "clear and convincing proof".

3. Who is a Public Figure?

Public Figure. A "public figure" is a person who is publicly prominent, so much so that discussion or commentary about that person amounts to a "public concern." However, such persons are not necessarily public figures for any purpose: status as a public figure may only extend to the particular area in which they are publicly prominent.

- (1) Involuntary Public Figure: become public figure through no purposeful action of their own, including those who have become especially prominent in the affairs of society;
- (2) Always Public Figures: those who occupy position of such persuasive power and influence that they are deemed public figures for all purposes;
- (3) Public Figures on Specific Issues: "those who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

The Opinion Defense.

The First Amendment protects statements of opinion, as distinct from statements of fact, against claims of defamation. However, the test is not the author's mere characterization of the statement as "opinion." A statement is an opinion when:

- (1) the statement addresses matters of public concern;
- (2) the statement expressed in a manner that is not provably true or false; and
- (3) the statement cannot be reasonably interpreted as intended to convey actual facts about a person.

In addition, the U.S. Supreme Court articulated some standards to assist in determining whether a statement is intended to convey an actual fact about a person, or not:

- (1) is the language loose, figurative, or hyperbolic, which would negate the impression that the speaker was seriously maintaining the truth of the underlying facts?
- (2) Does the general tenor of the article negate the impression that the speaker was seriously maintaining the truth of the underlying fact? and
- (3) is the connotation sufficiently factual to be susceptible of being proved true or false.

Privacy

(non-defamation) Privacy is defined as the "right to be let alone"

Elements of Invasion of Privacy

1. Unreasonable intrusion upon seclusion (our "expectation of privacy" can given greater relevance based on out location: such as
 - a. **Inside your home:** high expectation of privacy
 - b. **In your car:** less privacy
 - c. **Walking down Elm St.:** even less expectation of privacy
 - d. **Being video taped at MCAM:** extremely limited expectation of privacy
2. Public disclosure of non-newsworthy facts
3. False light
4. Misappropriation of name or likeness

Indecency & Obscenity Content

The Federal Communications Commission regulations concerning safe harbor or safe haven concern only indecent programming, which is defined by the FCC as follows: “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.

Indecent programming contains patently offensive sexual or excretory references that do not rise to the level of obscenity.

Indecent programming may, however, be restricted in order to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience”. Bearing in mind that it has not necessarily been established that these rules apply to cable access TV, but only to broadcasters.

The FCC traditionally refers complaints about programming under these rules back to the municipality that regulates the access center. Most municipalities have adopted the FCC standards on obscenity and indecency and enforce local community standards for PEG cablecasts.

MCAM does not preview or review public access programming, and will never exert "prior restraint" on a public access program. Producers are expected to act responsibly and alert MCAM staff to programming that may be inappropriate for younger viewers. MCAM reserves the right to restrict cablecast programming with excessively violent material, offensive language, nudity, or sexually explicit material.

The time will be determined by MCAM staff, generally after 11:00 pm, and before 5:00 am, in order to preserve a safe haven for viewing by “all audience members”.

Types of restricted content:

Mild Adult: intended for mature audiences only: may be aired between the hours of 11pm to 5am. This category of programming intended for adult audiences may include infrequent profanity, mild violence, and brief frontal nudity of a non-sexual or non-erotic nature. This category is similar to what viewers are generally accustomed to seeing in stronger MPAA* PG-13 rated material, and some mild R rated material, or on some network broadcast and cablecast television (TV-14 or TV-MA) after 11pm.

Strong Adult: intended for mature audiences only that may include constitutionally protected “indecent” speech: may be aired between the hours of 1am to 4am. This category includes any uses of ultra profane language or depictions of nudity that is persistent or otherwise goes beyond brief or infrequent uses. This category is similar to what viewers are generally accustomed to seeing in stronger MPAA* R, NC-17 and X rated material, or in some cable TV pay-channels or pay-per-view channels.

When it comes to controversial (not illegal) content in programming, the response should be to encourage more speech, as opposed to enforcing silence. Furthermore, MCAM is forbidden by law from censorship, or content control. MCAM encourages anyone who disagrees with a program to produce counter-programming presenting an opposing point of view, or otherwise responding to the program in question.

Illegal or Obscene Programming: the courts have determined that material that is so-called “XXX” or “hardcore” pornography is legally obscene and is not permitted to be cablecast on public access. At no times may such constitutionally unprotected material be cablecast on the channel. Producers of such material may be subject to prosecution. Information about any lottery, gift enterprise, or similar scheme offering prizes gained by lot or chance or any whole or partial list of prizes awarded by lottery, gift enterprise or similar scheme is prohibited. (Violation of this rule is subject to criminal liability under federal law, Title 18, U.S.C. Sec. 1304.) For example, a program violates this if it is connected with a valuable prize awarded to any person selected by lot or chance, if the winner is required to furnish anything in exchange for the prize, or if the winner is required to buy or have any product from a sponsor of the program. Material which is intended to defraud the viewer or designed to obtain money by false or fraudulent means is prohibited.

LOCAL Restrictions or “Community Standards” are part of John Hasnas' *The Myth of the Rule of the Law* paper (1995). He explains that legally, there are many ways to interpret laws. He gives many examples and comes up with the conclusion that national standards are trumped by community standards because community standards are more explicit and exact.

The **Miller test** is the United States Supreme Court's test for determining whether speech or expression can be labeled obscene, in which case it is not protected by the First Amendment to the United States Constitution and can be prohibited.

The Miller test was developed in the 1973 case *Miller v. California*. It has three parts:

- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the **prurient** interest, **PRURIENT; legal application, sick, morbid or shameless.**
- Whether the work depicts/describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law,
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The third condition is also known as the *SLAPS test*. The work is considered obscene only if all three conditions are satisfied.

For legal scholars, several issues are important. One is that the test allows for community standards rather than a national standard. What offends the average person in Tulsa, Oklahoma may differ from what offends the average person in San Francisco. The relevant community, however, is not defined.

Another important issue is that Miller asks for an interpretation of what the "average" person finds offensive, rather than what the more sensitive persons in the community are offended by, as obscenity was defined by the previous test, the **Hicklin** test, stemming from the English precedent: The test asks "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences." If yes, then such was declared to be obscene.

Because it allows for community standards and demands "serious" value, some worried that this test would make it easier to suppress speech and expression. They pointed out that it replaced a stricter test asking whether the speech or expression was "utterly without redeeming social value"--a much tougher standard than "serious" value. As used, however, the test generally makes it difficult to outlaw any form of expression. Much pornography has been successfully argued to have some artistic or literary value.

Some critics of obscenity law argue that the existence of Miller proves that federal obscenity laws are in fact not defined, and thus unenforceable and legally dubious.

In practice, pornography showing genitalia and sexual acts is not normally obscene according to the Miller test. For instance, in 2000 a jury took only a few minutes to clear Larry Peterman, *Movie Buffs* video store owner in Provo, Utah, which had often boasted of being one of the most conservative areas in the US. Researchers had shown that guests at the local Marriott Hotel were disproportionately large consumers of pay-per-view pornographic material, obtaining far more material that way than the store was distributing

Chaplinsky V. State of New Hampshire

Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942) was a case decided by the Supreme Court of the United States, in which the Court articulated the fighting words doctrine, a limitation of the First Amendment's guarantee of freedom of speech.

Walter Chaplinsky, a Jehovah's Witness, had said to a Rochester NH town marshall who was attempting to prevent him from preaching: "You are a God-damned racketeer" and "a damned Fascist" and was arrested. The Court upheld the arrest and stated:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Decided 3/9/1942 Supreme Court Vote 9-0 Note Court announces "two-tier" theory of the First Amendment. Since Chaplinsky was handed down, the Court has never sustained a conviction for "fighting words" in expression directed at a public official.