

Censorship, Copyright, and Incitement

Rodrigo Zamith

University of Massachusetts Amherst

First Amendment Protections

- Journalists generally cannot be stopped from publishing even highly problematic information
 - But they may still face legal risks **after publication**
- The First Amendment also allows journalists (and those they quote) to advocate for unlawful ideas and behaviors (to a certain extent)
- Journalists may also include copyrighted material in their reports, provided they're making 'fair use' of them

Censorship of Libelous Material

- Supreme Court has historically demonstrated **strong aversion to government censorship of journalism**
 - What we think of as censorship is legally called **prior restraint**
- **Near v. Minnesota (1931):**
 - Government may not bar publication except in extreme cases
 - Reveals military information that places troops at risk
 - Involves certain obscenity
 - Directly incites “acts of violence”
- However, plaintiffs may still sue **after** publication (and potentially receive more damages when the harm can be demonstrated)

Censorship of State Secrets

- **New York Times Co. v. United States (1971)**
 - Also known as the “Pentagon Papers” case
 - Court has a heavy presumption against prior restraint and the government carries a **heavy burden** to justify it
 - Prior restraint permissible only when publication would result in **inevitable, direct, and immediate peril** to the nation
- These decisions only apply to government censorship; journalistic outlets (private companies) may freely censor their journalists
 - Journalists may also engage in self-censorship for fear of alienating sources or their audiences

Copyright and Journalism

- Facts cannot be copyrighted but the ways in which whose facts are expressed can be copyrighted
 - It is illegal to simply copy and paste a competitor's work
 - Attribution is not enough, either
- Portions of copyrighted work may be republished without permission if it is 'fair use' based on a four-part test:
 - Purpose and character of use
 - Nature of the copyrighted work
 - Amount and substantiality of portion
 - Effect on market for or value of work

Incitement and Inflammatory Speech

- Speech or publication that advocates for illegal conduct is protected unless that advocacy is **likely** to incite **imminent** lawless action
 - Abstract advocacy protected; specific calls to action less so
- **Brandenburg v. Ohio (1969):**
 - Inflammatory speech (and publication) is protected unless two criteria are met:
 - The speech is “directed to inciting or producing imminent lawless action”
 - The speech is “likely to incite or produce such action”

Key Takeaways

- The bar for preventing something from being published is incredibly high but journalists may still face legal charges after publication
- Facts cannot be copyrighted, but the ways in which journalists (and others) express those facts can be copyrighted
- Speech and publication may advocate for lawless behavior, so long as that advocacy is abstract, or unlikely to produce imminent lawlessness