Dangerous Talk: Speech and the Law

Prepared By:

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Gary enjoys working with creative people including entrepreneurs, small business owners, people who create new technology, and artists. His practice includes:

- Computer/Internet Law & Litigation
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A. First Amendment Freedom of Speech

1. Constitutional Provisions

The right of freedom of speech and the press derives from both the federal and state constitutions.

a) U.S. Constitution

The concept of freedom of speech and the press is so fundamental to American culture that it guaranteed in the first amendment to the United States Constitution.

> **1st Amendment - Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances**
>
> Congress shall make no law ... abridging the freedom of speech, or of the press; ...

The provision was extended to the States by the 14th amendment to the constitution. The 14th amendment is interpreted to apply the bill of rights protections to state action.

> **14th Amendment - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement**
>
> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b) Washington Constitution

Most states also guarantee freedom of speech and the press. The state of Washington has a constitutional provision that also guarantees the right of free speech.

> **Article 1, §5. Freedom of Speech**
>
> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

2. Applies only to government action

These constitutional provisions limit the government's right to abridge free speech. The first amendment to the U.S. constitution applies to the federal government. The fourteenth amendment applies the first amendment to state and local governments as well.

But there is no provision requiring private citizens to grant freedom of speech. For example, a private theater can refuse to book the musical "hair", but a publicly owned theater can not.[1]

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[1] *Chattanooga Memorial Auditorium, Chattanooga, Tennessee, Southeastern Promotions Limited v. Conrad*, 420 U.S. 546 (1975).

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It used to be clear that the government could not condition giving a benefit to someone upon that person giving up his or her constitutional right of free speech.

For example, during the McCarthy era, California tried to prohibit anyone who advocated the overthrow of the United Sates government or supported a foreign government from claiming an exemption from any state tax. The U.S. Supreme Court held this to be unconstitutional restraint of free speech.

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty" its denial may not infringe speech. ... The denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is "frankly aimed at the suppression of dangerous ideas."

But lately the court have appeared to back off from this position. Compare the more recent case of *Rust v. Sullivan*,[2] where the U.S. Supreme Court upheld a ban on private health facilities that received any federal funding from discussing abortion or giving abortion counseling. In fact there are now many regulations limiting what schools and private health facilities who receive federal funding can say about abortion and birth control.

3. Speech is broadly defined

The freedom applies to all forms of speech. For example, dancing, even nude dancing, is protected free speech.[3]

The right of expressive association is considered speech. People may associate with each other for expressive purposes. For example, the state of Alabama may not force the NAACP to reveal its membership list.[4] But consider, during the McCarthy era, could Congress force a person to answer "are you now or have you ever been a member of the Communist Party?" The United States Supreme Court answered yes.[5] What about questions concerning membership in political organizations favorable to terrorist groups, such as al Qaida?

4. But not all speech is protected

Certain categories of free speech are not protected by the courts. There is no specific provision in the constitution carving out any exceptions. There is simply overwhelming general public opinion in support of exempting certain types of speech.

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[2] *Rust v. Sullivan*, 111 S.Ct. 1759, 500 US 173 (1991). See also *United States v. American Library Association* __ US __ (2003).

[3] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S.Ct. 2456, 2459-60, 115 L.Ed.2d 504 (1991, a 4-4-1 decision. See also *O'Day v. King Cy.*, 109 Wash.2d 796, 749 P.2d 142 (1988).

[4] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[5] *Barebblatt v. US.*, 360 U.S. 109 (1959).

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a) Obscenity in general

Governments may prohibit speech that is obscene. Speech is obscene when,

- The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, and
- The work depicts or describes in a patently offensive way (under contemporary community standards) sexual conduct specifically defined by the applicable state law, and
- The work taken as a whole lacks serious literary, artistic, political or scientific value.

But speech that is merely indecent may not be prohibited. Indecent speech is speech that is patently offensive by contemporary community standards and deals with sex and/or excretion, but does not qualify as obscene speech.

In Washington, there is state law, RCW 9.68 Obscenity and Pornography, that prohibits the distribution of obscene materials, and prohibits the public display of "Sexually explicit material", which the Act defines as:

> any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals; Provided however, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

The concept of applying different standards in different communities is rapidly being eroded by changes in technology and the economy. It used to be that a local community could control what access its citizens had to pornographic material. If you wanted to access pornography, you went to the magazine rack at your local drug store, or to your local adult book store or your local adult movie theater. That was about it. A community that wanted to limit the types of materials that were available at these sources could easily do so. But today, varying levels of pornography are available everywhere. It is readily available on cable television and arguably on regular television as well; as well as on nationally syndicated radio talk shows. Large national chain bookstores, such as Barnes and Noble, carry books that would be considered obscene not that long ago. You can rent dirty movies at your local video rental store or by mail-order and watch them in the privacy of your own home. Just about anything is available on your home computer through the Internet. Does it still make sense in today’s environment to talk about local community standards?

It is also difficult to justify an exception for obscene materials at all. There is no evidence that possession or distribution of obscene material directly harms anyone. People who defend the law state that obscene material taken as a whole has a tendency to exert a corrupting and debasing impact leading to antisocial behavior. This type of influence is bad for society and justifies the ban. But there is a lot of speech that tends to lead to antisocial behavior that is not banned (i.e. violence on television).

As a practical matter, both of these problems are being dealt with by the courts by making rulings that are constantly narrowing the range of material that they will find obscene.

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b) Child pornography

Governments may also ban child pornography. The test for whether speech is child pornography is less stringent than the test for obscenity in general. Speech is unprotected if it visually depicts children below the age of majority performing sexual acts or lewdly exhibiting their genitals.[6]

See also RCW 9.68A Sexual Exploitation of Children, which, as its name suggests, limits speech related to the sexual exploitation of children.

Although all obscene material may be prohibited, there seems to be agreement that speech related to child pornography is entitled to even less protection that other forms of obscene speech. For example, the mere possession of obscene material may not be banned,[7] but the mere possession of child pornography can be banned.[8] The argument is that while obscene material merely leads to antisocial behavior, child pornography necessarily involves the victimizing of children in its production.

c) Criminal and other harmful activity

Speech that incites criminal activity or is directly harmful to others is not protected. There is no one universal list of prohibited speech. Here is one useful list.

- Speech that advocates crime, or furthers a criminal effort. Generally the speech must be 1) directed to inciting or producing 2) imminent lawless action 3) and is likely to incite or produce such action.[9]
- Speech that interferes with a war effort.
- Speech that threatens someone with violence or other illegal conduct.
- Speech that contributes to an illegal conspiracy (i.e., a communist conspiracy or a Osama bin Laden/al-Qaida conspiracy).

d) Speech owned by others

People can be prevented from using speech content that they do not own. You can not read a recent book or play a favorite record on the radio without getting permission or paying a royalty.

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[6] *Ferber v. New York*, 458 U.S. 747 (1982).

[7] *Stanley v. Georgia*, 394 U.S. 557 (1969).

[8] *Osborne v. Ohio*, 495 U.S. 103 (1990).

[9] *Brandenbug v. Ohio*, 395 U.S. 444 (1969).

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e) False statements of fact

You can not make false statements of fact. For more on this topic, see the defamation section below.

f) Speech that is merely offensive is protected

Speech can not be banned simply because it offends. For example flag burning is protected free speech.[10]

> A principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.
>
> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Another example of protected speech is cross-burning.[11]

5. Different types of speech are entitled to different degrees of protection

Some forms of speech are entitled to lesser levels of protection and can therefore be regulated. Commercial speech (especially commercial advertising) is deemed to have less protection.

On the other hand, religious speech and news reporting are usually granted a higher level of protection.

6. Time place and manner restrictions

All forms of speech can be controlled as to time, place and manner, i.e. banning loud music in residential neighborhoods after 11:00 pm., or making it a crime to yell "fire" in a crowded theater, unless there really is a fire.

The government can regulate conduct which incidentally impacts freedom of speech (no nude dancing or suggestive photographs in drinking establishments,[12] or within ten feet of customers[13]).

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[10] *Texas v. Johnson*, 491 U.S. __, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

[11] *RAV v. City of St. Paul*, 505 U.S. __, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

[12] *Geoff Manasse v. Washington State Liquor Board.*

[13] *DCR, Inc. v. Pierce County*, 92 Wn.App. 660. 964 P.2d 380 (1998).

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The government is permitted to limit the types of speech that can be broadcast on public television and radio. (The FCC may restrict radio airplay of George Carlin's routine “the seven dirty words”.[14])

B. Defamation, Libel, and Slander

1. Generally

The concept of defamation as a common law right to sue someone for damaging your reputation has been around since at least the 16th century. But it was not a well defined concept until recently. The first major U.S. federal case to enunciate this principle was *New York Times Co. v. Sullivan*[15] in 1964.

Defamation is a false statement, maliciously or knowingly made to injure someone, usually through ridicule and damage to that person's reputation. Libel is written defamation. Slander is oral defamation.

2. The requirements of defamation

Defamation requires:

1) a false statement concerning another person.

2) an unprivileged communication to a third party

3) fault amounting to

> for public officials and figures - actual malice (actual knowledge that the statement is false or reckless disregard for the truth or falseness of the statement)
>
> for private figures - negligence (what a reasonably prudent person would do, acting under the same or similar circumstances)

4) damages

3. Expanding on the concepts

True statements can not be defamatory, because they are not false. For the same reason, opinions are not defamatory.

An opinion is just someone's personal opinion. By its very nature it cannot be true or false. If you think someone is ugly, that is what you think. You are not saying they are or are not ugly. You are saying that in your opinion they are ugly. That is not a true or false statement, it is your opinion.

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[14] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[15] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This was followed by a series of important cases, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

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But there are limits to how far opinion is protected. See for example, Chief Justice Rehnquist's statement in *Milkovich v. Lorain Journal*:

> If a speaker says, "In my opinion, John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if he states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as such damage to reputation as the statement, "Jones is a liar."[16]

There are various ways a person can be a public official or public figure. First, some people in high level government jobs are public officials by the nature of the position they hold. They are a public official the entire time that they hold that position, and if the position is high enough, they remain public officials even after they retire from that position. A former president of the United States is still a public figure until he or she dies, by the nature of the public office he or she held.

Second, people can be public figures for all purposes by the nature of their position in society. These are people who occupy positions of pervasive power and influence.

And third, people can be public figures for the purposes of specific issues. These are people who have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved.

Although damages must be shown, and the burden of proof is normally on the party asserting he has been harmed, most courts are willing to accept that defamatory remarks cause some amount of damage, even if the actual amount can not be proved.

C. Rights of Privacy and Publicity

1. Privacy

There are two types of rights of privacy, a public right to keep the government from interfering with your private life, and a private right to prevent other individuals from invading your privacy. Most of the attention in the press has been with preventing government action.

a) Government action

The concept of a right of privacy was probably first enunciated in an article in the Harvard Law Review in 1890 by Samuel Warren and Louis Brandeis, entitled "The Right to Privacy". The courts were very slow to adopt this concept. They finally did so in three major cases, first in 1965 acknowledging a married couple's right to obtain contraceptives,[17] then in 1969 finding a

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[16] *Milkovich v. Lorain Journal*, 497 U.S. 1, 18-19 (1990)

[17] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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person had a right to posses pornography in his or her home,[18] and finally in a very well known case, in 1973 affirming a woman's right to an abortion.[19]

These cases base their decisions on the U.S. Constitution. But there is no single section in the U.S. Constitution that mentions privacy. Rather, the courts find a privacy concept implied in the first fourteen amendments when read together (often referred to as a zone of privacy), and in certain sections of these amendments, such as the 14th amendment's due process clause, and the 4th amendment's limits on the rights of states to gather evidence.

The Washington State constitution has one provision that relates directly to privacy.

> Section 7. Invasion of Private Affairs or Home Prohibited
>
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

b) Private Action

Most states allow for a private action for invasion of privacy. There is a common law right of privacy in Washington. This right has been described as:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[20]

The right to privacy is a general term that includes four separate actions that can infringe on someone's rights:

a) intrusion upon a person's seclusion or solitude, or into his private affairs (i.e. eavesdropping in a private place, using a ruse to obtain information, theft)

b) public disclosure of private facts about the person

c) publicity which places a person in a false light in the public eye (publication of unprivileged information which is false, very similar to defamation)

I.e. a sexually suggestive caption in a men's magazine attributed to "Marion, taxi driver, New Albany, Mississippi" could be false light or libel when there was only one woman taxi driver in New Albany.

d) appropriation of a person's name or likeness for personal advantage (this has grown in recent years into a separate cause of action referred to as the right of publicity)

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[18] *Stanley v. Georgia,* 394 U.S. 557 (1969).

[19] *Roe v. Wade*, 410 U.S. 113 (1973).

[20] Restatement (2d) of Torts § 652B (1977) as cited in *Doe v. Gonzaga Univ.*, 99 Wn.App. 338, _992 P.2d 545_ (2000), affirm in part, reversed in part by *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 24 P.3d 390, 154 Ed. Law Rep. 963 (2001).

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In Washington, there have not been many cases that address the right of privacy.[21] There is a state statute, RCW 9.73 Privacy, Violating Right of, but it deals entirely with illegal interception and recording of private communications. In Washington, as in many but not all states, it is illegal to audio record a conversation without the permission of everyone being recorded. Oddly, it is not illegal to record video only.

In 1998 a new statute was enacted to prevent voyeurism. RCW 9A.44.115 makes it illegal to take photographs of someone where they have a reasonable expectation of privacy, in public or in private, for the purpose of arousing or gratifying the sexual desire of any person.

There is a doctrine that there is no right of privacy for activities that are conducting in "open view". The term "open view" is not well-defined. Clearly, conduct conducted in open sight is in "open view.". But if the conduct can only be seen by the use of advanced electronic equipment, is that still in "open view?" The answer is not clear. What if the activity can be seen through the lens of an ordinary camera. Then it is probably in plain view. There is no reasonable expectation of privacy. But what if the activity can only be seen by a camera with a professional high powered zoom lens? The answer is not so clear. Powerful zoom lenses are becoming more common on ordinary consumer cameras. Does that change our concept of what is private and what is not? What about the use of night vision equipment?

My favorite case on this subject comes from the Woodstock movie. For those of us old enough to remember, in the movie about the original Woodstock festival there is a scene where a man and a woman are running through a field of tall grass, peeling off all of their clothes, and falling down together presumably to make love. One of the stage cameras had been turned around and the operator used his high powered zoom to capture this scene which actually took place far from the stage in a field where no one else was around.

Well it turns out that a man had gone to the Woodstock festival but his wife could not make it. He came home and raved to her about how wonderful the festival was. When the movie about the festival came out he insisted that they go see it together. There they were sitting in the movie theater watching the movie when up popped the image of him running through the field with some other young woman. The wife divorced him. He sued the movie producers. The court held that he had no expectation of privacy.

In a more recent case, actress Jennifer Aniston was sunbathing topless in her own backyard surrounded by a fence. A photographer standing on the public sidewalk found that if he stood in one particular spot, using a high powered zoom lens, he was able to get a picture of her which he intended to sell to some off-beat magazine. She threatened to sue. I believe he backed down and withdrew the picture. But it would have made for an interesting case.

A very similar situation arose even more recently when someone took pictures of English Prince William's wife Kate Middleton sunbathing topless on a beach. The pictures are grainy and were clearly taken from far away with a very powerful telephoto lens. I am not aware of any legal action, but public outrage has caused most publishers to either not publish the photos or take them down if they have already been published.

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[21] See *Reid v. Pierce County*, 136 Wash. 2d 195, 204, 961 P.2d 333 (1998), *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 580 P.2d 246 (1978), *State v. Clark*, 129 Wn.2d 211 (1996), *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

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Nowadays, satellite images are readily available on any personal computer. For example, many aerial details can be seen by using Google Maps. Does that change our reasonable expectation of privacy? An environmental group took a series of aerial photographs of the California coast, including the yard and house belonging to Barbra Streisand. She had chosen to live in a house set far back from the highway to maintain her privacy. She sued for invasion of privacy (and other claims) and lost. That type of photography is now readily available in Google Maps. Does that mean that we no longer have any right to privacy in our backyards?

Is there any privacy protection for garbage placed in garbage cans? The courts are not consistent in their treatment of this issue. Generally, if the garbage cans are on the person's property and placed in what seems like a private area, then they are private. If they are placed near or on a public way, they are not protected. See *California v. Greenwood,* 486 U.S. 35 (1988). But this is not true in every state. In Washington an individual has an expectation of a right of privacy even if the garbage can is placed on a public way, such as a sidewalk or an alley. See *State of Washington v. Boland*, 115 Wn.2d 571, 88 P.2d 1112 (1990).

2. Publicity

The right of publicity is the right to use someone's name or likeness for commercial, advertising or trade purposes. This right is based on state law and varies considerably from state to state. Some states recognize a common law right of publicity. Other states have specific laws creating a right of publicity. Some states do not recognize this right at all. In some states that recognize the right, this right expires with the death of the person. In other states it does not.

The trend has been towards more state laws protecting the right of publicity and to have the right survive after the death of the person.

In Washington, there is a right of publicity statute that went into effect on June 11, 1998, RCW 63.60. It creates a right of publicity: "Every individual or personality, as the case may be, has a property right in the use of his or her name, voice, signature, photograph, or likeness. . ." The rights lasts for ten years after the death of an individual, and 75 years after the death of a personality. A personality is defined as anyone whose publicity rights have commercial value at the time of their death.

The issue of whether there is a common law right of publicity in Washington has not been decided directly by the courts. The cases decided so far suggest that this right probably does not exist in Washington.[22] Since there is now an actual statute, this issue only matters for acts committed prior to the enactment of the statute.

In most states, this right does not extend to written works about that person. This exception is sometimes based on a claim that the first amendment right of free speech is more important than the right of publicity in individual cases or a text about a person is not really exploiting that person's name or likeness.

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[22] See *Joplin Enterprises v. Allen*, 795 F.Supp. 349 (W.D. Wash. 1992).

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D. Liability for Effects of Speech

Generally, the person speaking is not liable for the effect of his or her speech on others. In the following cases, the speaker was held not liable.

Zamora v. Columbia Broadcasting System[23] (15 year old boy claimed CBS, NBC and ABC aired so much television violence that he became desensitized to real-life violence and therefore shot his 83 year-old neighbor.)

Olivia N. v. National Broadcasting Company[24] (mother of Olivia N claimed that NBC was negligent in airing a movie "Born Innocent" which portrayed the graphic rape of a young girl by several other young girls, and which apparently inspired four teenage girls to rape 9-year old Olivia with a beer bottle four days later.)

Bill v. Superior Court[25] (plaintiff who was shot after seeing a "gang movie" Boulevard Nights claimed that the movie producer was negligent in failing to warn her that the movie would attract viewers prone to violence.)

Vance and Roberson v. Judas Priest (Parents sued Judas Priest after two teenage boys attempted suicide after drinking beer, smoking marijuana and listening intensely to a Judas Priest album. One of the boys died, the other was seriously and permanently injured. The survivor claimed they were inspired to commit suicide by Judas Priest.)

But in very rare cases the speaker can be held liable when the consequences are foreseeable and the harm to society clearly outweighs the freedom of speech aspects of the case. There is no hard and fast rule that can be applied. A common rule of thumb is "would an ordinary person be greatly offended by the speaker's conduct.

But the cases are not consistent. In two nearly identical cases, Soldier of Fortune magazine printed adds in which mercenaries offered their services. In both cases the mercenary was hired by a magazine reader to kill someone. In both cases the intended victim survived and sued the magazine. In one case the magazine was held liable. In the other case there was no liability.[26]

E. Other Publications by this Author

The following publications are available for free download at the Law Offices of Gary Marshall website on the resources page at http://www.marshallcomputer.com/resources.html.

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[23] *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979).

[24] *Olivia N. v. National Broadcasting Company*, 26 Cal.App.3d 488, 78 Cal.Rptr. 88 (1981).

[25] *Bill v. Superior Court*, 187 Cal.Rptr. 625 (1982).

[26] See *Norwood v. Soldier of Fortune Magazine*, 651 F.Supp. 1397 (E.D. Ark. 1987) and *Eimann et. al v. Soldier of Fortune Magazine*.

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Electronic Rights and the Writer (pdf file):A guide to the ever changing world of electronic rights for writers. The Publishing Market is increasingly turning to electronic distribution on the Internet, computers, E-books, cell phones, iPads and other types of mobile electronic devices. In a way this is the new wild west for writers. Because it is a market that is expanding rapidly and changing all the time, the rules regarding electronic rights are also changing all the time.

Also check out Gary Marshall's Technology Law Blog at http://marshall2law.com/.

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