Free Speech and the First Amendment for Cons and Festivals

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This article is part of a series of book excerpts The Pop Culture Business Handbook for Cons and Festivals, which provides the business, strategy, and legal reference guide for fan conventions, film festivals, musical festivals, and cultural events.

The First Amendment to the U.S. Constitution contains one of the most powerful and elegant restrictions of governmental power ever crafted by those who wield such power:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

Embedded in this single sentence are five or more discrete limitations on the power of the federal government. The Fourteenth Amendment to the U.S. Constitution had the additional effect to make these laws apply directly to the people rather than merely reserving these powers to state governments, which was the original purpose of the Bill of Rights. This chapter focuses only on the rights and protections derived from "abridging the freedom of speech, or of the press." The rights of assembly, petition, religious free exercise, and religious establishment are beyond the scope of this book and rarely relevant for Con planning.

Restrictions on speech and press used to be common under the laws of England, Europe, and much of the world. Such laws required every newspaper, printing house, and theater to receive and maintain an operating license approved by the government. Those licenses were subject to termination if the government did not approve of the content created under the license. In response, one of the earliest and clearest meanings of the free speech clauses of the First Amendment protected a newspaper from any attempt by a government to impose a license requirement, injunction, or other form of prior restraint on publishing.

Since that time, the protection provided by the First Amendment has been interpreted much more broadly. First Amendment protection has expanded from protecting newspapers from prior restraint in 1931 to including motion pictures in 1952 and video games in 2011. According to the Supreme Court, no category of publisher or media content is outside of First Amendment protection.

A. Basics of the First Amendment

The First Amendment prohibits any governmental body from regulating the content of speech unless that speech falls into one of a narrow list of disfavored forms of speech. There are two lists of types of disfavored speech. First, there is one short list of types of speech that are not protected by the First Amendment at all. Next, there is another list of speech that is protected, but more narrowly

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than general speech. All speech outside those two lists is considered general speech and receives the fullest protection of the First Amendment.

The list of categories of speech that receives no First Amendment protection include child pornography and obscene (not merely pornographic) material; certain defamatory speech; fighting words, true threats, and incitement to commit imminent lawless action; perjury, blackmail, solicitation to commit crimes, fraud, and similar criminal acts committed through communication; and false commercial speech. Different experts will vary on how they construct this list, which highlights the complexity of understanding how the courts struggle to explain the nuances of First Amendment jurisprudence.

Perhaps one of the most famous explanations on the limits of free speech comes from Justice Oliver Wendell Holmes in 1919. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[1] This example illustrates the type of harm that the law will not protect. Similarly, all child pornography is illegal because the act of creating the content is the source of the harm. In blackmail, the harm comes from the statement as much as the potential that the threat is carried out. As adjudicated by the Supreme Court, these harms outweigh the prohibition on regulating speech. Over the past century, the scope of First Amendment protection has grown and as a result, the list of categories of speech adjudicated as outside the scope of First Amendment protection has narrowed considerably.

Moving past the speech that has no First Amendment protection, there is a second category of speech that falls into the category of limited First Amendment protection. Two examples of this are pornography and commercial speech, such as advertising. For both of these categories, the government can balance the potential for harm resulting from the speech against the speech rights of the publisher. As a result, municipalities can put limits on where adult movie theaters and bookstores are located, the government can require disclaimers in advertising, and the government can justify complex regulatory systems for television advertising under the FCC or disclosures of financial interests in social media under FTC regulations.

In a similar manner, the laws governing copyright and trademark are designed to accommodate free speech interests through fair use and other rules, so there is rarely a direct clash between First Amendment interests and the protection of copyright and trademark interests. These situations do occur occasionally, however, and courts continue to struggle to find the correct balance between these complex systems of laws.

For other categories of speech, the regulations must generally be content-neutral to be permitted, and they must be designed to have used the least restrictive means available to achieve the government's goal. A content neutral law is one in which government has not adopted the law or regulation because it disagrees with the message being conveyed. Valid content-neutral regulations are generally known for their regulation of the time, place, or manner of the speech. They are permitted, but only to the extent they remain neutral regarding the content or viewpoint of the speech being regulated.

Public parks, for example, must allow for all potential users to have the same opportunity to use the park for rallies and events. Closing hours, however, are a content-neutral restriction on speech that provide the ability to maintain park safety and assure that the neighbors are not disturbed by park

[1] Schenck v. United States, 249 U.S. 47, 52 (1919) ("It does not even protect a man from an injunction against uttering words that may have all the effect of force."). The "clear and present danger test" derived from this case has since been superseded by the test of incitement to commit imminent lawless action.

events late at night. In public amphitheaters, municipal ordinances can set sound limits to protect the surrounding neighborhood, but they could not restrict the use of the facility to certain genres of music. The sound ordinance is content-neutral while the genre rules would value one type of speech over another.

B. Defamation as an Example of the First Amendment's Role on State Law

The law of defamation provides a good example of how state law and constitutional law interact with one another. An image, statement, or other publication is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[2] Another, earlier articulation of defamation is that a publication is defamatory if it held one out for hatred, ridicule, or contempt.

Laws of defamation are state laws and vary somewhat from state to state. For a statement to be defamatory it must be a false statement of fact, made regarding the person who is bringing the lawsuit, published to at least one third party (other than the subject of the statement), that causes serious harm to the person or to the person's reputation.

Defamation made through speech is called slander, while defamation in print or in a permanent form is called libel. These rules apply only to a living person. Once someone has died, statements made about the dead person cannot be brought by heirs or family members.

In the landmark case of *New York Times v. Sullivan*, the Supreme Court stepped in to stop a defamed public official from winning a case worth millions of dollars against the New York Times. The Supreme Court found that for a state or federal court to award such damages, there had to be additional First Amendment protections, particularly when the statements were made about a public official.

Under the decision, to be consistent with the First Amendment, a claim for defamation against a public official could only succeed where the plaintiff proved "actual malice," a term meaning knowledge of falsehood or reckless disregard for the truth.[3] The courts later extended this rule to public figures, individuals who are famous or otherwise in the public eye, or through their stature have the ability to use the media to refute falsehoods without resort to courts.

By setting the minimum standards for legal disputes involving defamation, the Supreme Court interpreted the First Amendment to create a shield around speech when used by people to publish facts about others. False speech has little value, but to protect the speakers and avoid the risks of undue punishment, public figures and public officials can only recover if the publisher of the false speech was knowingly wrong or reckless in the publication.

The Supreme Court further extended this principle to non-public figures as well. So long as the published information covers a matter of public concern, then the publisher of that information cannot be found to have committed defamation unless the publication was at least negligent. If the publisher took reasonable care to produce the information, then even wrong factual information published about someone will not support the claim of defamation. As long as the publisher exercised the degree of caution and concern an ordinarily reasonable person would use in similar circumstances, then the factual inaccuracies will not result in liability.

Both the concept of negligence and the concept of public concern are somewhat vague and fact specific. Matters of public concern are often described as those matters that are newsworthy. The

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[2] RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977).

[3] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.")

Supreme Court "has said that speech is of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[4] This is a very broad category that tends to exclude only truly personal information or private matters.

The constitutional framework surrounding defamation highlights that speech adjudicated as defamatory is unprotected speech. But the safeguards built into the legal system demonstrate a strong First Amendment preference under the law to promote speech about matters of public interest. Defamatory speech is a much narrower category than harmful speech. Speech about someone else remains subject to First Amendment protections unless it meets the legal definition of defamation as that definition applies to the particular situation.

C. Inapplicability of the First Amendment to Private Activities

As noted above, the First Amendment constrains the government's ability to regulate most types of speech. The constitutional limit applies to governments only. This limitation is often overlooked in the context of free speech debates. A movie theater can decide which movies to play and a dance club can select the music to perform. As private, non-governmental parties, they are not restricted in any manner by the First Amendment. Newspapers, cable systems, YouTube, Facebook, and Tumblr are all free to select which content to print, and they can be as open or restrictive as they choose in reprinting the content of their customers.

The relationship between the private companies and their customers is governed primarily by contract. While certain laws protect members of the public from discrimination and require reasonable disability accommodation, these laws have nothing to do with the speech these individuals wish to promote.

The Con organizer has wide discretion in what types of speech will be permitted at the Con. If the Con is an adults-only music festival, then there is little need for a dress code. On the other hand, if the Con is a family-oriented comic book convention, then the Con should likely have a dress code on its website and reserve the right to exclude costumes that are inappropriately revealing or offensive to the general public. A state-run park cannot bar the Ku Klux Klan from obtaining a marching permit, but a privately-operated Con can choose to bar that costume as offensive to the general public.

Most Cons utilize a more common restriction on speech. They limit the distribution of flyers and the hanging of posters to those who have purchased tables to be vendors, presenters, or those who have received special permission to hang their signs or distribute literature. This enables the Con to manage the aesthetics of the event and assure its vendors that there are benefits to purchasing booths or advertising.

A Con should consider the type of environment that it wants to maintain and develop policies to enforce those rules. As a non-governmental entity, it is free to establish those rules. It is rare that the Con will be required to use its policies to police conduct from attendees, but when such a situation arises, the early planning will greatly help defuse a difficult situation and assure the Con maintains the environment it promised its fans.

D. Application to the Con in Public Venues

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[4] Snyder v. Phelps, 562 U.S. 443, 444 (2011) quoting San Diego v. Roe, 543 U.S. 77, 83–84 (2004).

A Con that chooses to operate at a public venue may find there are certain operations and restrictions that occur differently than in a privately-owned venue. The restrictions of the First Amendment should stop a municipal landlord from inquiring into the content of the Con. For example, if a theatrical producer wished to stage the musical Hair, a municipal theater could not refuse to rent out the facility based on the musical's treatment of sex, masturbation, or rape. A private theater house, however, could choose whether or not it wanted to book such a show. As noted in the explanation of content-neutral regulations regarding time, place, and manner, a publicly-owned venue can enforce rules about nudity, noise levels, and commercial activities.

If the Con has given permission for any professional filming of events at the Con, the filming rights may also trigger additional reviews that require a different filming permission process for the public venues than for private venues. Because public venues are concerned that all parties are treated equally, in a neutral manner, the issuance of a film permit for the on-sight documentary team may be treated as a film-permitting request rather than just an ancillary activity for the Con. Every venue is different, but Con organizers should plan ahead and provide sufficient time to address the additional concerns that may arise in a public venue.

E. Role of Cons in Promoting Free Speech

Although the Con is free to establish its own speech policies, the Con organizers may also wish to recognize the opportunity they have to promote free speech and public discourse. The many types of events covered in this book share that common attribute – they all promote speech and culture. Whether the event is about music, literature and publishing, comic books, games, or fantasy art, these events all have the literary world of music, art, and publishing as their essential driver. The performers, vendors, and attendees all share this common interest in self-expression and communal gathering.

Like pop-up universities, the Con creates a temporary world in which the shared experience and the empowerment of individual self-expression collide. As advocates of speech and creativity, the Con organizers have an opportunity to empower this activity while also assuring that it occurs in a safe, supportive environment.

Like the time, place, and manner regulations adopted by municipalities to ensure that their public spaces operate fairly and efficiently, the Con organizers should consider the importance of the competing speech interests of the performers, vendors, and attendees when organizing the event. Fortunately, most of this is usually self-organizing. Attendees want to hear the speakers at panels or the artists on the stage. It does not take a large staff of ushers to handle most situations.