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Fourth Circuit Rules Company Challenging Statements on a Government Website Cannot Litigate Anonymously or in Secret

On April 16, 2014, the U.S. Court of Appeals for the Fourth Circuit reversed a lower court's decision to allow a company that was suing a government agency to keep a negative report about one of its products out of a public electronic database to litigate its case in secret. *Company Doe v. Public Citizen, et al.*, 2014 BL 106323, No. 12-2209 (4th Cir. April 16, 2014). Several consumer advocacy groups objected to a district judge's ruling which allowed the suit to proceed under seal and let the company litigate under a pseudonym. Their attempt to intervene in the company's case against the government was denied, and they appealed the decision to the Fourth Circuit, as well as the substantive rulings in the case. The Fourth Circuit's decision has been hailed as a victory for openness in courtroom proceedings and for consumers' access to information about manufacturers.

The Consumer Product Safety Commission (CPSC), a federal agency created by the Consumer Product Safety Act of 1972, has maintained an electronic database identifying reports of harm associated with consumer products since March 2011. Congress required the CPSC to create the database under the Consumer Product Safety Improvement Act of 2008. CPSC must publish reports within 20 business days of receiving them, even if the information in the report is not confirmed. The agency must remove materially inaccurate information. The website, saferproducts.gov, includes a disclaimer that "CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database on SafeProducts.gov, particularly with respect to information submitted by people outside of CPSC." Manufacturers may review, object, and respond to complaints posted in the database. See 15 U.S.C. § 2055 *et seq*. The case was the first legal challenge to CPSC's implementation of the database.

Company Doe sued the CPSC in October 2011 in the U.S. District Court for the District of Maryland in Greenbelt for an injunction to keep a report about one of its products out of the CPSC database. The company sued under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and the Fifth Amendment. The company also filed a motion to seal most of the records in the case and to litigate under a pseudonym. The CPSC opposed this motion. Several consumer groups who were not initially parties in the case, Public Citizen, Consumer Federation of America and Consumers Union, objected to the motion as non-parties pursuant to the court's local rules. On July 31, 2012, U.S. District Court Judge Alexander Williams granted summary judgment for Company Doe on the Administrative Procedure Act claim and enjoined publication of the report. The court also granted Company Doe's motion to seal the case and litigate under its pseudonym. *Company Doe v. Tenenbaum*, 8:11-cv-02958-AW (D.Md. Oct. 22, 2012). The decision was not made public until Oct. 22, 2012, and was itself heavily redacted.

Williams wrote that although he was mindful of the First Amendment principles at stake and that the "law favors access to judicial records," the case warranted secrecy. "The challenged report is materially inaccurate, injurious to Plaintiff's reputation, and risks harm to Plaintiff's economic interests," he wrote. He opined that the CPSC and consumer groups' arguments failed because "they presume that the public has an interest in the subject matter of this suit." He concluded that the CPSC must "show some semblance of promise to promote public safety," and the report in the case "flunk[ed] this test for a number of reasons," which were unclear due to the redactions in the opinion. The court agreed to let Company Doe litigate under pseudonym because "the revelation of Plaintiff's identity would yield the very cynosure of the underlying litigation." The redacted decision from the district court is available online at http://www.citizen.org/documents/Company-Doe-v-Tenenbaum-Revised-Memorandum-Opinion-Redacted.pdf.

After the district court decision, the consumer advocacy groups moved to intervene in the case on Aug. 7, 2012. The district court denied the motion three months after it was filed, and the groups appealed the district court's opinion on Sept. 28, 2013. In their brief, the groups noted that the U.S. Supreme Court recognized a right of access to judicial proceedings in criminal trials under the First Amendment in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). They stated that lower courts have since applied First Amendment protections to civil proceedings, including the Fourth Circuit in *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988). The consumer groups argued that the public interest in judicial proceedings "is especially acute in this case" because the case represents the first time a company has challenged a report in the CPSC's consumer product safety database. "Without knowing the facts underlying the court's analysis, it is impossible for the public to evaluate

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the court's conclusions or understand the scope of its decision and its implications for the future functioning of the government system for informing the public about reports of unsafe consumer products," the brief argued. The consumer groups noted that the proceedings can only be sealed if there is a compelling interest that "heavily outweighs the public interest in transparency." Here, they argued, Company Doe's interest in "protecting corporate reputation" did not justify sealing the records or proceeding with an anonymous plaintiff.

The Fourth Circuit reversed the district court's decision to seal the court proceedings and to allow the plaintiff company to litigate under a pseudonym on April 16, 2014. "[W]hether in the context of products liability claims, securities litigation, employment matters, or consumer fraud cases, the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company," Judge Henry F. Floyd wrote for the unanimous panel. The court also disagreed with the district court's holding that the case needed to proceed under seal to safeguard the right Company Doe sought to vindicate. "The relief Company Doe secured by prevailing on its claims was the right to keep the challenged report of harm removed from the online database. That remedy is distinct from the right to litigate its claims in secret and to keep all meaningful facts about the litigation forever concealed from public view," Floyd wrote. "Neither the CPSIA [Consumer Product Safety Improvement Act] nor the Administrative Procedure Act confers upon district courts carte blanche to conduct secret proceedings, and, more importantly, the Constitution forbids it." The court took particular care to point out that the district court should not have litigated the case for nine months in secret without ruling on the motion to seal the case. "The district court's nine-month delay in ruling on the sealing motion ostensibly was based upon its belief that the merits of Company Doe's claims were 'inextricably intertwined' with the issues of sealing. But the public right of access under the First Amendment and common law is not conditioned upon whether a litigant wins or loses," the court wrote, and concluded that the court should have ruled more quickly on the motion to seal the case.

COVER STORY

One aspect that the appellate court emphasized as an abuse of discretion was the district court's sealing of the court docket in the case. Docket sheets list the parties to a case, the case number and information, and include documents and decisions filed in the case. Courts post these docket sheets on the Internet. The Fourth Circuit held that the district court had "effectively shut out the public and the press from exercising their constitutional and common-law right of access to civil proceedings" by "sealing the entire docket sheet during the pendency of the litigation." The court noted that in this case, there was a "more repugnant aspect" to sealing the docket sheet because "no one can challenge closure of a document or proceeding that is itself a secret."

As to the district court's decision to allow Company Doe to litigate under a pseudonym, the Fourth Circuit noted that there are exceptional circumstances when a party to a case does not have to be disclosed. These cases, the court emphasized, should be rare. The court concluded that Company Doe sought to litigate under a pseudonym "merely to avoid the annoyance and criticism" involved with litigation. This interest did not overcome the public's interest in learning the identity of parties to litigation. "In allowing Company Doe to proceed anonymously, the district court gave no explicit consideration to the public's interest in open judicial proceedings. As we have explained, the public interest in the underlying litigation is especially compelling given that Company Doe sued a federal agency," the court explained.

Company Doe had argued that the consumer groups did not have standing to sue because they were not members of the news media seeking to report on the case. "[T]he right of access is widely shared among the press and the general public alike, such that anyone who seeks and is denied access to judicial records sustains an injury," the opinion stated. The court concluded that the district court abused its discretion in its rulings on the sealing and pseudonymity orders, and remanded the case to the district court to unseal the entire record.

> "The point is there's another irreparable harm here, and that irreparable harm is to the press and the public."
>
> **— Professor Jane Kirtley,**
> **Silha Center Director and**
> **Silha Professor of Media Ethics and Law**

Judge Clyde H. Hamilton concurred in the judgment. He stated that Company Doe failed to meet its burden of showing that a compelling government interest would be furthered by granting the motion to seal. He emphasized that the district judge "faced a difficult task" in balancing Company Doe's interests against the First Amendment interests. "Had Company Doe supported its motion to seal with expert testimony establishing a high likelihood that denying its motion to seal would cause it to suffer substantial and irreparable economic harm, the disposition of the present appeal, in my view, would be completely different." In Hamilton's view, "common sense" dictated that Company Doe would face economic harm due to the unsealing of the court records. "In the electronically viral world that we live in today," he wrote, Company Doe may never recover its reputation and "to say that the free flow of ideas will save Company Doe is naïve." He concluded that the majority opinion should have acknowledged the difficulty of the decision the district court faced, stating that the district judge's "heart was in the right place."

Several business groups filed amicus briefs supporting Company Doe. Cary Silverman, a partner at Shook, Hardy & Bacon representing these groups, told Reuters the decision "could result in needlessly alarming people about things that are not true, and harming the reputations of businesses" Silverman added, "From a policy perspective, it is in the interests of businesses and consumers to make sure that information being released about the safety of products is accurate."

Ami Gadhia, senior policy counsel for Consumers Union, said for an April 16, 2014 story on ConsumerReports.org that the Fourth Circuit's decision was a victory for consumers. "If a company sues to keep its name out of the complaint database, it can't use the courts to hide its identity from the public," Gadhia said. "The decision also underscores the importance of this critical database, which was created for people to report unsafe products after a flood of recalls for dangerous toys, faulty cribs and other hazards." Scott Michelman, a lawyer for Public Citizen, said in an interview for an April 16, 2014 Reuters story. "It's a big victory both for open access to judicial records and for consumers, in terms of the viability of the CPSC database."

Some have emphasized that the case is important because it provides a right of access to civil proceedings. The Supreme Court has only recognized a First Amendment right of access in the criminal context. Professor Jane Kirtley, director of the Silha Center for the Study of Media Ethics and Law at the University

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Supreme Court Strikes Down Campaign Finance Limits on Total Contributions by Individuals

CAMPAIGN FINANCE

In a 5 to 4 decision, a majority of the U.S. Supreme Court ruled on April 2, 2014 that limits on the total amount an individual can contribute to all federal political candidates, parties and committees violated the First Amendment. *McCutcheon v. Federal Election Com'n*, 134 S. Ct. 1434 (2014). The case challenged the Bipartisan Campaign Reform Act of 2002 (BCRA) which imposed two types of limits on campaign contributions: "base limits," which cap the amount an individual may contribute federal candidate or committee, and "aggregate limits," which cap the amount an individual may contribute in total to all candidates or committees. Political contributor Shaun McCutcheon and the Republican National Committee argued that aggregate limits restricted his ability to contribute more than $123,200 during the 2013-14 federal election cycle, thereby violating his First Amendment right to speak through his contributions.

Chief Justice John Roberts wrote for a four justice plurality, finding that because political donations constitute highly protected political speech, and the government had not proven that the aggregate limits were narrowly tailored to prevent corruption, the restrictions violated the First Amendment. Four justices dissented, arguing that the law should be upheld because Congress designed aggregate limits to address the compelling interest of electoral corruption and the limits properly served that end. Justice Clarence Thomas concurred with the plurality's decision that the aggregate limits were unconstitutional, but wrote separately to contend that all limits on political contributions or spending are unconstitutional.

The plurality emphasized that there is "only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." This assertion relied on the Court's 2010 holding in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), which construed the government's legitimate interest in addressing corruption narrowly. In that case, the Court found that "Congress may target only a specific type of corruption—'*quid pro quo*' corruption." (For more on *Citizens United*, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue of the Silha *Bulletin*.) This *quid pro quo* includes only attempts to directly exchange money for political action. Efforts to use political donations to gain influence over public officials or to gain more direct access to them would not fit into this definition of *quid pro quo* corruption. Therefore, the plurality found, Congress cannot act to limit an individual's ability to use money to influence politicians, or the appearance that this is occurring, so long as it does not constitute *quid pro quo* corruption. Chief Justice Roberts wrote, "No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field' or to 'level electoral opportunities' or to 'equaliz[e] the financial resources of candidates.'"

The Court found that the government had failed to establish that the aggregate limits served to limit corruption in any more than a "speculative manner" and, moreover, that the aggregate limits were an overbroad restriction on political speech. The government argued that the law prevented donors from contributing to committees, which can then funnel those donations to a particular candidate, circumventing the individual candidate donation maximum. However, the Court concluded that there is a lesser risk of corruption or its appearance when large donations must go through an intermediary, rather than directly to the candidate. Additionally, the Court explored the possibility of a donor using this strategy to funnel money to a single candidate greatly exceeding the contribution limits but found the government's fear to be "highly implausible." In fact, the Court explained that because the *Citizens United* decision made it possible for a donor to spend unlimited amounts on an independent expenditure in support of that same candidate, "it is hard to believe that a rational actor" would bother to funnel his donations through the channels the government fears.

The plurality argued that Congress could use other tools to target corruption that impose a lesser burden on speech, especially disclosure requirements. "Disclosure requirements burden speech," Chief Justice Roberts wrote, "but—unlike the aggregate limits—they do not impose a ceiling on speech." The Court pointed out that the Internet has increased the possibilities for making campaign finance disclosure information accessible to the public. For this reason, the Court concluded that although previous decisions found that disclosure constituted only a partial remedy for corruption, Congress could now regard it as "a less restrictive alternative" to aggregate

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Company Doe, *continued from page 3*

of Minnesota, told Bloomberg BNA for the April 18, 2014 edition of its "The United States Law Week" newsletter that she was "blown away" by the scope of the decision and its recognition of First Amendment and common law rights to access docket sheets and proceedings in civil cases. Kirtley said that unsealing the docket sheets in the case was especially significant because access to dockets sheets has been closed in some "unfortunate incidents" in the past. Having access to docket sheets "explicitly in the civil context I think is tremendously important," Kirtley said. (For more on secret court dockets, see "Media Reports Raise Questions over Court Records Access" in the Winter 2008 edition of the Silha *Bulletin*.) Kirtley told Bloomberg BNA that "the point is there's another irreparable harm here, and that irreparable harm is to the press and to the public." Michelman told Thomson Reuters' "The Knowledge Effect" blog for a Jan. 13, 2013 story that if the Fourth Circuit let the opinion stand, and the possibility of "mere reputational harm" could justify the sealing of case records, there would be "a lot more opinions with little black boxes covering key facts and key legal analysis — a result that would be a big step backward for transparency and democracy." Calling the appellate decision an "unwavering endorsement of open courts," Alison Frankel, litigator and writer for Thomson Reuters and WestlawNext's Practitioner Insights, praised the Fourth Circuit's decision in an April 16, 2014 post for Reuters. She said it was appropriate that the court "underscored the public's right to know because the case that prompted its ruling implicates the government's discretion to protect public safety."

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limits. The plurality also pointed out that allocating funds to a candidate in excess of the individual donation limits could violate current "earmarking" rules, which restrict donors from, for instance, directing a political committee to route their contribution to a chosen candidate. Roberts argued that strengthening these rules could allow Congress to target corruption without significantly burdening speech.

Justice Stephen Breyer's dissent, joined by Justices Ginsburg, Sotomayor and Kagan, challenged the plurality's factual assertions and legal analysis, noting that the Supreme Court had upheld aggregate limits in the foundational campaign finance case *Buckley v. Valeo*, 424 U.S. 1 (1976). The dissent concluded, "Taken together with [*Citizens United*], today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."

The dissent challenged three premises on which Breyer argued that the plurality's conclusions are based. First, Breyer wrote that the plurality's assertion that "'[s]pending large sums of money in connection with elections' does not 'give rise to…corruption" relied on an incorrectly narrow understanding of corruption. The dissent argued that the plurality had narrowed the concept of corruption to include essentially only the taking of bribes, which the *Buckley* Court found did not adequately "deal with the reality or appearance of corruption." Breyer argued that the Court's precedents, with the possible exception of *Citizens United*, define corruption to include not just "*quid pro quo* bribery, but [also] privileged access to and pernicious influence upon elective representatives."

Second, the dissent attacked the plurality's factual premise that the aggregate limits do not prevent individuals from contributing money to candidates in excess of the base limits. To the contrary, Breyer explored several hypothetical scenarios in which donors could circumvent the limits and argued that the difficulty of prosecuting such crimes made the aggregate limits essential to enforcing campaign finance laws.

Finally, the dissent disputed the plurality's conclusion that the law is not sufficiently tailored because of the alternatives to the aggregate caps, such as disclosure and stronger earmarking rules. "[T]he alternatives the plurality mentions were similarly available at the time of *Buckley*," and thus that case's reasoning and approval of aggregate limits should control. "The result," Breyer wrote, "is a decision that substitutes judges' understandings of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform."

> "The *McCutcheon* decision is less about free speech than about giving those few people with the most money the loudest voice in politics."
>
> **— *The New York Times* Editorial Board**

Justice Thomas concurred in the judgment, arguing that the plurality's reasoning applied not only to the aggregate limits, but base limits as well. Thomas wrote that any limitation on political contributions or expenditures is constitutionally impermissible and should be struck down. In this case, Thomas believed the Court should "overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail."

The decision has been widely discussed and criticized by political actors. Deputy White House Press Secretary Josh Earnest said in an April 2, 2014 press briefing that the Obama administration was "disappointed" by the decision, and agreed with Justice Breyer "when he said that taken together with *Citizens United*, 'today's decision eviscerates our nation's campaign finance laws.'" Senator John McCain (R-Ariz.), a co-author of BCRA, also expressed disappointment. McCain stated in an April 2, 2014 press release that the ruling may be "the latest step in an effort by a majority of the Court to dismantle entirely the longstanding structure of campaign finance law erected to limit the undue influence of special interests on American politics." McCain also argued that "as a result of recent Court decisions, there will be scandals involving corrupt public officials and unlimited, anonymous campaign contributions that will force the system to be reformed once again." Senate Minority Leader Mitch McConnell (R-Ky.), whose attorneys were allowed to make oral arguments before the court based on an *amicus* brief filed in support of McCutcheon, defended the decision in an April 2, 2014 press release. "Let me be clear for all those who would criticize the decision: It does not permit one more dime to be given to an individual candidate or a party—it just respects the Constitutional rights of individuals to decide how many to support."

The public debate over the decision has largely mirrored the disagreement in the Supreme Court over the central premise of the case: Was *McCutcheon* about a law that promoted democratic values by limiting corruption or restricted those values by limiting political participation? The *New York Times* Editorial Board wrote in an April 2, 2014 editorial that the decision will "effectively nullify[] the per-candidate limit," and will allow individuals to contribute up to $3.6 million per election cycle. The Board argued "[T]he *McCutcheon* decision is less about free speech than about giving those few people with the most money the loudest voice in politics." George Mason University Law Professor David Bernstein argued in an April 2, 2014 post for the *Washington Post's* "The Volokh Conspiracy" blog that Justice Breyer's dissent reflected decades-long efforts by progressives to restrict freedom of speech. Bernstein argued that "almost all of the leading opinion-making areas of American life, are dominated by liberals." Thus, he wrote, liberal activists have targeted campaign finance because "[t]he one place where the playing field is more or less level is in campaign spending. Limit campaign spending, and left-leaning opinion-makers utterly dominate American political discourse."

Al-Jazeera America's Jill Filipovic, in an April 5, 2014 article, proposed one response to the McCutcheon decision: publicly financed elections. Filipovic argued that the Supreme Court's campaign finance jurisprudence, culminating with *McCutcheon*, requires reformers "to stop this vicious cycle at its source, by upending the campaign financing system." One public financing proposal, supported by the Brennan Center for Justice at New York University School of Law, would encourage smaller donations by using public funds to amplify the influence of small donors. For example, a $50 citizen donation could multiplied by five, using public funds to make it worth $300 to the candidate. Filipovic concluded that after *McCutcheon*, "[t]o get political leaders who are responsive to the public, rather than just the wealthy, requires a public financing system."

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D.C. Circuit Strikes Down FCC "Net Neutrality" Rules

On Jan. 14, 2014, the U.S. Court of Appeals for the D.C. Circuit struck down provisions of a 2010 Federal Communications Commission order, commonly known as "net neutrality" rules. *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014). The rules are part of the FCC order *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010), which regulated how broadband Internet service providers could manage Internet traffic. Net neutrality is the idea that Internet providers should be required to treat all Internet traffic the same, and the order promoted this by dictating that broadband providers like Verizon could not block or discriminate between legal online content, except for reasonable management purposes. The FCC had previously stated that "pay for priority" arrangements, which the Commission feared would restrict the openness of the Internet by allowing large content providers like Netflix or Google to pay broadband providers to obtain preferential treatment for their content, would generally be banned by the "Open Internet" order. The court struck down the anti-blocking and anti-discrimination rules as exceeding the statutory authority of the FCC.

FCC

Verizon challenged three elements of the Open Internet order: disclosure, which requires broadband providers to affirmatively disclose Internet speed, usage terms and management practices; anti-blocking, which prevents broadband providers from blocking lawful content except for reasonable management reasons; and anti-discrimination, which prevents non-mobile broadband providers from giving preference to certain content except for reasonable management reasons (while still allowing discrimination by mobile Internet providers). Verizon argued that the FCC exceeded its statutory power under the 1996 Telecommunications Act because these provisions regulated cable broadband providers like Verizon as common carriers. "Common carrier" is a legal term which generally describes private businesses that serve the public and fulfill a basic service. Classic examples include railroads and public utilities. The Telecommunications Act defines "telecommunication carriers" as common carriers. By virtue of this definition, the FCC can exert broad regulatory power over companies categorized as "telecommunications carriers." However, the FCC had previously categorized cable broadband providers as "information-service providers" rather than "telecommunication carriers." The Telecommunications Act grants the FCC less authority to regulate broadband providers when defined as "information-service providers" rather than "telecommunications carriers."

Circuit Judge David Tatel, writing for a three judge panel, ruled that the FCC had the statutory capability to regulate broadband providers. (For more on the D.C. Circuit's rulings on FCC net neutrality rules, see "D.C. Circuit Strikes Down Net Neutrality Measure" in the Winter/Spring 2010 edition of the Silha *Bulletin*). However, because it had previously classified cable broadband providers as "information-service providers" rather than "telecommunication carriers," it exceeded its statutory powers by imposing common carrier regulations on the broadband providers such as Verizon. Circuit Judge Tatel wrote that "[g]iven that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such." The defining characteristic of common carrier regulations is that they require a company to provide services to any member of the public without discrimination or variance in terms. The court struck down the anti-blocking and anti-discrimination provisions as per se common carrier obligations, but upheld the disclosure requirements because they were not the type of obligations that may be imposed only on common carriers. FCC Chairman Tom Wheeler issued a Feb. 19, 2014 statement in response to the D.C. Circuit's decision, stating FCC would not appeal the decision, but rather would seek to promote net neutrality through means left open by the opinion.

> "Openness is the Internet's heart and nondiscrimination is its soul, and infringements on either of these features undermines [*sic*] the spirit and intent of net neutrality."
>
> **— Sen. Edward Markey (D-Mass.)**

Some legal analysts have understood the decision as allowing for the very same "net neutrality" provisions to be upheld if the FCC reclassifies broadband providers as "telecommunication carriers," allowing for common carrier regulations. Attorneys Chip Yorkgitis, Henry T. Kelly and Steven A. Augustino of law firm Kelley Drye wrote in a Jan. 16, 2014 post on the firm's "Client Advisory" blog, "Although the Court's decision eliminates much of the FCC's net neutrality rules, it also provides a roadmap for the FCC, should the FCC choose, to impose regulations intended to preserve an open Internet."

In a Jan. 15, 2014 editorial, The *New York Times* Editorial Board called the decision "discouraging," arguing that it would "hurt smaller businesses or start-ups that cannot afford to pay for preferential treatment." The Board argued, "Ideally, Congress would pass a law prohibiting broadband companies from discriminating or blocking content," but in the meantime "it's important for the [FCC] to reclassify broadband as a telecommunications service."

Though many net neutrality advocates have disagreed with the decision and its implications, in a Jan. 27, 2014 article, the Electronic Frontier Foundation's (EFF) April Glaser argued that proponents of open Internet policy should be encouraged by the decision. Although the EFF "strongly supports" net neutrality, the precedent of upholding the FCC's Open Internet order would have given it "pretty much boundless clearance to regulate the Internet." Because the FCC argued that it had the authority to regulate broadband providers despite their classification as "information-service providers," that power could logically apply to all other Internet content providers. Glaser argued that by regulating broadband providers based on their inclusion in a category that also included virtually all Internet content providers, the FCC would have usurped authority to regulate all Internet traffic. "Handing the problem [of net neutrality] to a government agency with strong industry ties and poor mechanisms for public accountability" could create "more problems than [it would] solve." Glaser concluded that net neutrality has no "easy solution" but that "any effort to defend net neutrality should use the lightest touch possible, encourage a competitive marketplace, and focus on preventing discriminatory conduct by [broadband providers], rather than issuing broad mandatory obligations."

Broadband providers have publicly downplayed the impact of the decision. Verizon announced in a Jan. 14, 2014

press release that it "remains committed to an open internet" and that the "decision will not change consumers' ability to access and use the Internet as they do now." However, according to a Jan. 28, 2014 *Huffington Post* report, during the Sept. 9, 2013 oral arguments before the D.C. Circuit Court, an attorney for Verizon stated in regard to pay for preference arrangements, "I'm authorized to state from my client today that but for these rules we would be exploring those types of arrangements."

Comcast, which in February 2014 acquired competitor Time Warner Cable, making it the largest American broadband provider, agreed to anti-blocking and anti-discrimination provisions as conditions of its 2011 acquisition of NBC Universal. According to a Feb. 13, 2014 Comcast press release, "[t]he FCC's Open Internet protections will be extended to" all Comcast and Time Warner subscribers, "irrespective of whether the FCC re-establishes such protections for other industry participants." According to this policy, over 30 million subscribers to Comcast or Time Warner broadband will continue to have Internet governed by Open Internet Regulations. The Open Internet conditions on Comcast are set to expire in 2018.

FCC Considers Proposal Allowing Pay-For-Preference Internet Agreements

According to April 23, 2014 reports by *The New York Times* and *Wall Street Journal*, the FCC is planning to propose new net neutrality rules that would allow content providers to pay Internet Service Providers (ISPs) for preferential treatment of their content. The *Times* reported that the FCC proposal would now allow so-called Internet "fast lanes," in which large companies can pay for their content to flow more quickly to consumers, while the majority of internet traffic would remain in the "slow lanes." The proposal would continue to prevent blocking of lawful content and ISPs would be required to disclose the terms for which they offer preferential treatment. The *Times*' Edward Wyatt stated in that article that the proposal would be "likely to eventually raise [Internet] prices as the likes of Disney and Netflix pass on to customers whatever they pay for the speedier lanes."

Although the full proposal has not been released to the public, FCC Chairman Tom Wheeler attempted to address criticism in an April 24, 2014 blog post entitled "Setting the Record Straight on the FCC's Open Internet Rules" on the FCC blog. "Wheeler," appointed to lead the FCC last year after heading two telecommunications industry interest groups, argued that the FCC had not changed its open Internet goals and that "the proposal would establish that behavior harmful to consumers or competition by limiting the openness of the Internet will not be permitted." He argued that the three core principles of open Internet, anti-blocking, anti-discrimination and disclosure, would be preserved by the proposal. Anti-discrimination, the principle threatened by the existence of the Internet fast lanes, would be protected by requirements that "ISPs may not act in a commercially unreasonable manner to harm the Internet, including favoring the traffic from an affiliated entity." Wheeler stated that those claiming the proposal would "result in anti-competitive price increases for consumers" were incorrect, as that "is exactly what the 'commercially unreasonable' test will protect against. Although Wheeler said in a Feb. 19, 2014 statement that the D.C. Circuit's decision left the FCC the power to reclassify ISPs and exert broad regulation authority over them, the April proposal sought to regulate within the confines set out by the court. The FCC commissioners will review the proposal and Wheeler hopes to have enforceable rules in place by the end of 2014.

> "We have said repeatedly that the Obama administration's net neutrality rules are a solution in search of a problem."
>
> **— Reps. Fred Upton (R-Mich.) and Greg Walden (R-Ore.)**

Although Wheeler portrayed the proposal as in line with the previous FCC policies, others argued that it represented a substantial shift. Sen. Al Franken (D-Minn.), a strong proponent of net neutrality who had supported Wheeler's Feb. 2014 statements on the issue, told *MinnPost*, a Minneapolis-based non-profit news website, that the new proposal was a "deeply disappointing and very troubling" change of course. "Chairman Wheeler's proposal would fundamentally change the open nature of the Internet, and I strongly urge him to reconsider this misguided approach," Franken told *MinnPost* for an April 26, 2014 article. Sen. Edward Markey (D-Mass.) saw the proposal as an attack on net neutrality principles. "Openness is the Internet's heart and nondiscrimination is its soul, and infringements on either of these features undermines [*sic*] the spirit and intent of net neutrality," Markey said in an April 24, 2014 statement. "The Internet's rules of the road must not open up fast lanes to those who can pay, leaving others stuck in traffic."

Michael Weinberg, Vice President of Internet interest group Public Knowledge, argued in an April 23, 2014 statement that the proposal, including the "commercial reasonableness" standard, would destroy the free market competition of the internet. "The FCC is inviting ISPs to pick winners and losers online," Weinberg said. "The very essence of a 'commercial reasonableness' standard is discrimination." Weinberg concluded that "The DC Circuit Court opinion made it clear that the only way to achieve net neutrality is to reclassify internet access as a telecommunications service." Slate technology writer Marvin Ammori argued that for the purpose of promoting net neutrality, "the rules on paper are bad, and their enforcement will be even worse." Because of the vague and complex nature of enforcement under the proposal, the FCC "would need a small army of telecommunications lawyers and economists to bring a case under the new rules."

Opponents of net neutrality argued that the rules were still too restrictive. "We have said repeatedly that the Obama administration's net neutrality rules are a solution in search of a problem," Reps. Fred Upton (R-Mich.) and Greg Walden (R-Ore.) said in a joint April 24, 2014 statement. "The marketplace has thrived and will continue to serve customers and invest billions annually to meet Americans' broadband needs without these rules."

As the *Bulletin* went to press, the White House had not commented explicitly on the still-unreleased proposal. At an April 24 press conference, an Obama administration spokesman told *Politico* that the administration continued to support net neutrality and would monitor the FCC's developments, but declined to discuss the FCC proposal specifically.

Alex Vlisides
Silha Research Assistant

Federal Communications Commission Cancels Study of Newsroom Operations After Outcry that the Study Would Invade Editorial Decision-Making

On Feb. 28, 2014, the Federal Communications Commission gave up its plan to go forward with a study of newsroom operations scheduled to begin this spring. The Multi-Market Study of Critical Information Needs (CIN) study was intended to gain insights into whether news outlets are covering stories that meet citizens' "critical information needs." Questions in the study focused on how television and radio stations make editorial decisions, attracting criticism that the agency's actions would chill the First Amendment rights of journalists.

FCC

The FCC proposed the CIN study with the goal of determining whether the news media are meeting the information needs of the public. This effort is part of a report the FCC must make to Congress every three years about encouraging greater diversity of ownership among media companies in keeping with Section 257 of the Communications Acts of 1934, 47 U.S.C. § 257. The FCC was primarily concerned with whether citizens receive adequate information or need more information in eight broad areas: emergencies and risks, health and welfare, the environment, education, transportation, economic opportunities, civic information, and political information. The proposed study was sparked by a July 2012 literature review of newspapers, websites, radio stations, and television stations conducted by the University of California Annenberg School for Communication & Journalism and the University of Wisconsin-Madison Center for Communication and Democracy on behalf of the Communication Policy Research Network. The content analysis concluded that the FCC should conduct research into whether and how citizens' information needs were being met. The literature review is available online at http://www.fcc.gov/blog/review-literature-regarding-critical-information-needs-american-public.

The FCC announced its plan for a survey of critical information needs with a pilot study of six newsrooms in Columbia, South Carolina on Nov. 1, 2013, with the hope that the study would prove viable and could eventually be expanded nationally. The study had three parts: 1) surveys, interview and focus groups with members of the public to determine their information needs, 2) a content analysis of news outlets to see if the information matched the public's needs, and 3) a "media market census" that would "determine whether and how FCC-regulated and related media construct news and public affairs to determine" information needs, including a voluntary questionnaire that leaders in newsrooms would answer about how they perceive the public's information needs. The study's original research design is available online at http://transition.fcc.gov/bureaus/ocbo/FCC_Final_Research_Design_6_markets.pdf.

> "Given the widespread calls for the Commission to respect the First Amendment and stay out of the editorial decisions of reporters and broadcasters, we were shocked to see that the FCC is putting itself back in the business of attempting to control the political speech of journalists."
>
> — Rep. Fred Upton (R-Mich.)

The third component, the survey that inquired about newsroom decision-making processes, drew criticism from political actors and First Amendment advocates who argued that the FCC asking about editorial decision-making could chill journalists' speech or influence their choices about what to publish. The criticism originated within the agency. The majority of the FCC's commissioners are currently Democrats. One of the two Republican commissioners, Ajit Pai, was critical of the study from the outset. He wrote an opinion piece in *The Wall Street Journal* on Feb. 10, 2014 criticizing the study for studying "perceived station bias." He argued that it would be inappropriate and a possible infringement on news creators' First Amendment rights for the FCC to inquire about what stories they choose to cover and why. In particular, he was concerned about the coercive power the FCC could have over broadcast radio and television stations because the agency is responsible for the renewal of licenses for those entities. "The government has no place pressuring media organizations into covering certain stories," Pai wrote.

Rep. Fred Upton (R-Mich.), chair of the House Committee on Energy and Commerce, and several members of the Committee's Communications and Technology subcommittee expressed concern about the study in a Dec. 10, 2013 letter to FCC Chairman Tom Wheeler. The letter began by discussing the 1987 demise of the FCC's Fairness Doctrine, a policy that required holders of broadcast licenses to present controversial public issues in a balanced way and which was criticized as an unconstitutional infringement of broadcasters' First Amendment rights. "Given the widespread calls for the Commission to respect the First Amendment and stay out of the editorial decisions of reporters and broadcasters, we were shocked to see that the FCC is putting itself back in the business of attempting to control the political speech of journalists," the letter read. "It is wrong, it is unconstitutional, and we urge you to put a stop to this most recent attempt to engage the FCC as the 'news police.'" The letter demanded an explanation of the study's methods and choices and asked Wheeler to suspend the study and complete its work in a manner consistent with the Constitution. Wheeler responded to Upton in a letter on Feb. 14, 2014. Wheeler stated that "[t]he Commission has no intention of regulating political or other speech or journalists or broadcasters by way of this Research Design, any resulting study, or through

any other means." He outlined the study's overall purpose of promoting diversity of media ownership within the FCC's statutory mandate, and emphasized that the FCC planned to adapt the study in response to concerns about how it was to be conducted. Upton's letter is available online at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20131210FCC.pdf. Wheeler's response letter is available online at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140214FCCresponse.pdf.

From Feb. 10, 2014 onward, criticism of the study continued to build. Chip Babcock, partner with Jackson Walker L.L.P., wrote in a post on the firm's Media Law Group blog, "Via ePostcard," that the study would be "a government sponsored and funded program inquiring of the press about what they cover and why, and many of the targets were television and radio stations which are regulated by that agency." Babcock concluded, "It is hard to imagine a program more offensive to the First Amendment." Mike Cavender, president of the Radio Television Digital News Association, wrote in a Feb. 19, 2014 post that the study was "clearly an overreach by the Commission." He argued that "even the concept of a study like this is enough to chill every journalist and every station which prides itself on journalistic independence."

Conservative blogs expressed outrage at the study's scope. "The Right Scoop," a conservative blog, noted in a Feb. 19, 2014 post that "[t]he Obama administration's FCC wants to send 'investigators' into newsrooms in order to 'study' how newsers decide what news to cover, how they pick their stories," calling the effort "chilling." Bryan Preston, a conservative blogger for PJ Media, agreed that the study was "chilling" and was concerned by the possibility of the FCC suggesting any topics for news coverage in a Feb. 20, 2014 post.

> "The concept of a study like this is enough to chill every journalist and every station which prides itself on journalistic independence."
>
> **— Mike Cavender, President, Radio Television Digital News Association**

Lewis Friedland, professor in the School of Journalism and Mass Communication at the University of Wisconsin-Madison, one of the contributors to the FCC's original literature review of critical information needs, wrote a commentary on the *Washington Post*'s "The Monkey Cage" blog on Feb. 28, 2014. He noted that studies of news content and standards similar to what the FCC proposed have been conducted in the mass communication field for decades. "That said, it was probably a mistake to include one in this study, only because FCC sponsorship could (and might) raise the appearance of a possible conflict," Friedland wrote. He concluded that the study should move away from questions about editorial decision-making in newsrooms "because it clears away the red herring of government control of newsrooms and allows us to focus on the real question: whether the information needs of Americans are being met." He contended that a study on whether information needs are being met is still important and the FCC needs high-quality research in this area "before making critical decisions on newspaper-broadcast cross-ownership that could further reduce the production of local community information, or allowing the expansion of national cable concentration and greater control of local broadband markets that, for most Americans, are poorly performing, overpriced duopolies."

The FCC suspended the study on Feb. 21, 2014. A week later, the FCC announced it was canceling the study altogether. In a Feb. 28, 2014 statement, the FCC announced it "will reassess the best way to fulfill its obligation to Congress to identify barriers to entry into the communications marketplace faced by entrepreneurs and other small businesses." As the *Bulletin* went to press, the FCC has yet to announce how it will proceed with its statutorily-required study of media ownership.

Cassie Batchelder
Silha *Bulletin* Editor

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U.S. Supreme Court Grants Statutory Immunity For Reports of Security Threats to TSA in First Libel Case Decided in 23 Years

DEFAMATION

The United States Supreme Court decided on Jan. 27, 2014 that an airline could not be denied statutory immunity from a defamation suit without a determination that statements made by an airline employee to Transportation Safety Administration (TSA) officials about one of its pilots were materially false. *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S.Ct. 852 (2014). Further, the Court examined the actual statements at issue in the case and concluded they were not materially false. This was the first defamation case the Court has agreed to hear since 1991.

In December 2004, former Air Wisconsin pilot William Hoeper failed to pass a flight proficiency test for the fourth time. Following the test, Hoeper allegedly became angry and "blew up" at the administrators of the test, according to court documents. Hoeper was set to leave on a flight from Dulles International Airport outside Washington, D.C. to Denver after failing the test. Patrick Doyle, a manager with Air Wisconsin who was involved with Hoeper's testing, reported to the TSA that he believed Hoeper could be dangerous and potentially armed, as Hoeper was a licensed Federal Flight Deck Officer (FFDO), a pilot authorized to carry a gun on a plane. According to court documents, Doyle made two statements to the TSA: "[Hoeper] was an FFDO who may be armed. He was traveling from [Dulles to Denver] later that day and we were concerned about his mental stability and the whereabouts of his firearm;" and "Unstable pilot in FFDO program was terminated today." TSA officials detained Hoeper at Dulles and released him after finding no gun. The airline company had not yet terminated Hoeper's employment, although he was subject to termination for failing the test. Air Wisconsin later fired Hoeper, who sued his former employer for libel in state district court in Denver in December 2005.

Air Wisconsin argued that the Aviation and Transportation Security Act (ATSA) of 2001 (49 U.S.C. § 44941) granted it immunity from Hoeper's suit because the statute shields airline employees from civil actions by people who airline employees report may be potential security threats, unless they did so "with actual knowledge that the [report] was false, inaccurate, or misleading," or "with reckless disregard as to the truth or falsity of that [report]." This language parallels the standard created in *New York Times v. Sullivan*, 376 U.S. 254 (1964), requiring actual malice, meaning certain libel plaintiffs must prove that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity.

The state trial court found that Doyle had acted with actual malice when he warned TSA officials about his concern for Hoeper's "mental instability" and that he might be carrying a firearm. It awarded Hoeper $1.4 million in actual and punitive damages in May 2008. Both the Colorado Court of Appeals for the Fourth Division and the Colorado Supreme Court upheld the trial court's judgment. The divided Colorado Supreme Court held in March 2012 that statements made to the TSA were not protected opinion, but rather "implie[d] knowledge of facts which le[d] to the conclusion that Hoeper was so mentally unstable that he might constitute a threat to others on his flight. These facts are … provable as false." *Air Wisconsin Airlines Corp. v. Hoeper*, 320 P.3d 830 (Colo. 2012). The majority argued that Doyle's statements insinuated that Hoeper was likely to become violent and use his firearm on an aircraft because he had been terminated, when in fact "he had not been terminated by the time" officials had alerted the TSA. Therefore, the majority held that Doyle made his statements with "clear and convincing evidence" of actual malice, thereby precluding Air Wisconsin from immunity under the ATSA. The Colorado majority offered the hypothetical that "Air Wisconsin would likely be immune under the ATSA if [it] had reported that Hoeper was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and 'blew up' at the test administrators, and that he was an FFDO pilot." In other words, Doyle could have reported these facts to the TSA, but he defamed Hoeper by falsely reporting that he already had been terminated and insinuating that his termination would have put him in such a "mental state" that he would become a violent threat to an aircraft.

The Supreme Court granted the writ of *certiorari* to hear the case in June 2013. The case attracted significant attention from free speech advocates prior to the argument because of its potentially broader implications for defamation law. A number of media organizations submitted an *amicus* brief to the Supreme Court supporting Air Wisconsin's position, including Advance Publications, the American Society of News Editors, the Association of American Publishers, Courthouse News Service, the Digital Media Law Project, Hearst Corporation, the Media Law Resource Center, the National Press Club, the National Press Photographers Association, National Public Radio, the Newspaper Association of America, the Online News Association, the Radio Television Digital News Association, the Reporters Committee for Freedom of the Press, the Society of Professional Journalists, and the *Washington Post*.

The brief argued that the language of the ATSA incorporates Sullivan's actual malice standard. Further, the brief argued that the Colorado Supreme Court erred in not considering whether the statements were materially false. The Supreme Court should consider the truth of the statements at issue, the brief contended, and concluded that the Court should find them substantially true. The brief expressed concern that the denial of statutory immunity to Air Wisconsin would undermine Sullivan's actual malice standard because the Colorado Supreme Court misapplied the standard when it suggested that "statements may be made with actual malice, even if they are substantially true." The brief emphasized the actual malice standard's importance in First Amendment jurisprudence and news reporting, particularly in breaking news situations when the facts are not fully fleshed out. "The role of a robust press is not just to tell us the facts, but to tell us why those facts are important," the *amici* wrote. The *amici* said that they "operate in situations where information is fluid and

constantly changing, and time is of the essence in keeping the public updated with accurate and timely information." The brief concluded by urging the Court "to hold that in order to deny immunity under the ATSA's actual malice standard, a court must make a determination of substantial falsity consistent with First Amendment principles" and asked the Court to find that Air Wisconsin's statements were substantially true. The brief is available online at http://www.rcfp.org/sites/default/files/air-wisconsin-merits.pdf.

The Court heard oral arguments on Dec. 9, 2013 and issued its decision on Jan. 27, 2014. Justice Sonia Sotomayor delivered the opinion of the Court and was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito. Justice Antonin Scalia filed an opinion concurring in part and dissenting in part, in which Justices Thomas and Kagan joined. Justice Sotomayor wrote that the ATSA immunity exception is premised on the *New York Times v. Sullivan* standard, so the ATSA also requires material falsity. She noted that Congress used terms of art in drafting ATSA, including the actual malice standard, and so these terms of art should be given their understood meaning in reading the statute. She concluded, "The actual malice standard does not cover materially true statements made recklessly, so we presume that Congress did not mean to deny ATSA immunity to such statements."

Sotomayor's opinion also emphasized the meaning of material falsity, relying on *Masson v. New Yorker*, 501 U.S. 496 (1991), which held that when comparing the literal truth with the allegedly defamatory statements at issue in a case, courts must decide whether there would be a "different effect on the mind of the reader" between the two. The Court concluded that "the identity of the relevant reader or listener varies according to context." It compared typical defamation claims to the ATSA context. "In determining whether a falsehood is material to a defamation claim, we care whether it affects the subject's reputation in the community. In the context of determining ATSA immunity, by contrast, we care whether a falsehood affects the authorities' perception of and response to a given threat." Thus, in the ATSA context, the audience to the statements is a "reasonable security officer" and courts should consider whether there is difference in how the officer would respond to a possible security threat based on the literal truth of the situation compared to the report.

The Court next concluded that a jury's findings as to a statement's material falsity are reviewable by an appellate court. On that basis, the opinion considered the substance of the statements that Air Wisconsin's employee made about Hoeper and found that they were not materially false. The Court decided that the Air Wisconsin employee did not need to qualify his statement that Hoeper was an FFDO who might have been armed by stating that he did not have any reason to think Hoeper was armed. Requiring such precise wording, the Court concluded, would defeat the purpose of granting immunity for reports of security issues to TSA and force individuals making reports in fast-moving, potentially threatening situations to edit their statements. Further, the Court held it was immaterial that Hoeper had not technically been fired at the time of the report because the termination was looming. Finally, the Court examined the employee's statement that the airline was concerned about Hoeper's "mental stability" after he "blew up" and concluded that this statement was not materially false, and the Court would not eviscerate statutory immunity for an imprecise statement as long as the "gist" of the statement was accurate.

The Court also referred to the importance of the national security goals underlying ATSA. "All of us from time to time use words that, on reflection, we might modify," Justice Sotomayor wrote. "If such slips of the tongue could give rise to major financial liability, no airline would contact the TSA (or permit its employees to do so) without running by its lawyers the text of its proposed disclosure—exactly the kind of hesitation that Congress aimed to avoid."

In his partial dissent, Justice Scalia agreed that the majority applied the right legal standard. However, he argued that a jury could find the Air Wisconsin supervisor's statements were made with actual malice. "A jury could find that Hoeper did nothing more than engage in a brief, run-of-the-mill, and arguably justified display of anger that included raising his voice and swearing, but that did not cause anyone, including the person on the receiving end of the outburst, to view him as either irrational or a potential source of violence," Scalia wrote.

Lauding the decision as "major victory for air carriers, and the safety of air travel as a whole," Barry S. Alexander and Jonathan M. Stern, attorneys with Schnader Harrison Segal & Lewis LLP, wrote in a post for Mondaq on Feb. 2, 2014. "The Court's decision . . . indicates the Court's understanding of the deference that must be given to those who must act or report quickly in the face of a potential danger to air travel," they wrote. The Regional Airline Association agreed in a Jan. 27, 2014 statement. "The Regional Airline Association and our airline members are gratified the US Supreme Court strongly affirmed that airlines and their employees must report security threats without fear of potential legal ramifications. The ability for airline professionals to recognize potential threats and report them to the appropriate authorities is fundamental to the culture of safety and security we have developed over the years, and we are relieved to see these protections upheld."

In a Jan. 28, 2014 post on his personal blog, Jean-Paul Jassy, First Amendment lawyer and founding partner of Jassy Vick Carolan LLP, applauded the Supreme Court's holding in the case. In particular, he noted his "pleasant" surprise with the Supreme Court's conclusion that appellate courts should reviews juries' decisions about whether a statement is materially false and that the Court found that the statements here were not materially false.

The case is of particular relevance in offering a new way to get defamation claims dismissed, Holland & Knight partners Charles D. Tobin, Jerrold J. Ganzfried, and Judith Nemsick wrote in a Jan. 28, 2014 post on the firm's website. The Court's language "focus[ing] on the precise audience for the statements breaks new ground and does not appear to be limited to ATSA cases." The importance of analyzing the audience creates one more step for plaintiffs making defamation claims. They argued, "In this era of increasingly niche social media, website, and legacy media publications and broadcasts, the *Air Wisconsin v. Hoeper* decision may provide more opportunities for the early dismissals of defamation claims."

Brett Johnson contributed to the reporting of this story.

Cassie Batchelder
Silha *Bulletin* Editor

Virginia Court Orders Yelp to Identify Authors of Allegedly Defamatory Reviews

ONLINE SPEECH

On Jan. 7, 2014, the Virginia Court of Appeals ruled that Virginia law required social reviewing website Yelp.com to reveal the identities of anonymous online reviewers to a business claiming it was defamed by the reviews. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 62 Va. App. 678 (Va. Ct. App. 2014). Hadeed Carpet Cleaning alleged that Yelp reviews of its business contained false and defamatory statements. Pursuant to its defamation claim, Hadeed subpoenaed Yelp for the names of the authors of seven reviews which described Hadeed's poor service. The court ruled that the reviews were "commercial speech," and that Hadeed's right to reputation trumped the reviewers' right to anonymous speech.

Hadeed argued that the authors of the reviews had represented themselves to be customers of Hadeed by writing personal reviews of the business, but Hadeed could not verify in its records that the reviewers were actually former customers. Based on this, Hadeed alleged that the reviews were false and defamatory, because if the reviewers were not customers, they falsely claimed to have received poor service. Hadeed did not claim that the business practices criticized in the reviews were false, but rather that because the reviewers may have falsely represented themselves as customers, the reviews were libelous. Hadeed argued that it was entitled to a court order for Yelp to identify the reviewers so that it could pursue its defamation claim. Yelp refused to comply with the subpoena or a later trial court order to reveal the names, and was held in civil contempt. *Hadeed Carpet Cleaning, Inc. v. John Doe # 1*, 2013 WL 7085181 (Va. Cir. Ct., Nov. 19, 2012). Yelp appealed this contempt finding to the Virginia Court of Appeals, arguing that the lower court violated the First Amendment rights of the anonymous reviewers by ordering their identities revealed without a sufficient showing that Hadeed's claims against the anonymous defendants were valid.

The Virginia Court of Appeals upheld the order to identify the reviewers. Judge William Petty wrote in the majority opinion that neither the Virginia statute that governs "unmasking" anonymous speakers nor the application of the statute by the lower court had violated the First Amendment. The opinion took note of the well-established First Amendment right to speak anonymously, including on the Internet.

> "Many state and federal courts require actual evidence of a valid claim to be presented prior to disclosure of an individual's identifying information. For now, Virginia appears to disagree, as the court there chose the empty speculations of a business owner over the First Amendment rights of Virginia citizens."
>
> **— Aaron Schur**
> **Yelp Senior Director of Litigation**

Petty concluded, however, that the reviews constituted commercial speech, a category to which courts provide lesser constitutional protection. The court held, "Where, as here, speech constitutes an 'expression related solely to the economic interest of the speaker and its audience,'" restrictions on that speech are due a lower level of judicial scrutiny. The reviewer's right to speak anonymously "must be balanced against Hadeed's right to protect its reputation."

The question of what protection the First Amendment provides to anonymous speakers from being "unmasked" in civil suits was one of first impression for the Virginia courts. In Virginia, Code § 8.01-407.1 governs when anonymous speakers can be "unmasked." In addition to other elements, § 8.01-407.1 requires a showing that "(a) communications made by the anonymous communicator are or may be tortious or illegal or (b) the plaintiff 'a legitimate, good faith basis to contend that such party is the victim'" of actionable conduct. Yelp argued that this standard violated the First Amendment by allowing anonymous speakers to be identified based on unsupported allegations.

Yelp argued that the court should instead apply a standard which requires plaintiffs to make a showing of facts "sufficient to defeat a summary judgment motion." Many state courts have required such a showing out of concern that "unmasking" anonymous speakers without a showing that the claim could likely survive to trial would violate the speakers' First Amendment rights. Although the standard varies between states, the Virginia court recognized that "the case law has coalesced around the basic framework" of this standard. However, the court upheld the less demanding standard defined by § 8.01-407.1. The court found that because it could not "identify a clear, palpable, and free from doubt" constitutional violation, the Virginia statute must control.

The court concluded that Hadeed satisfied the standard in this case. The court found, "Hadeed discovered that it could not match the seven Doe defendants' reviews with actual customers in its database." Based on this, Hadeed had a "legitimate, good faith belief that the Doe defendants were not former customers, and therefore, their reviews were defamatory."

Judge Haley dissented, arguing that Hadeed had not satisfied the requirements of § 8.01-407.1. "Nowhere… has Hadeed claimed that any of the substantive statements are false," wrote Judge Haley. "Rather, Hadeed maintains, these communications may not have been customers, and, if they were not, the substantive statements may be tortious." Judge Haley found that this "self-serving argument" was not sufficient to overcome the defendants' right to speak anonymously. (For more on rights of anonymous speakers online, see "Defamation Lawsuits Pose Threat to Journalists as Online Communication Complicates First Amendment Analysis" in the Spring 2012 edition of the Silha *Bulletin* and "Recent Cases Put Online Defamation in the Spotlight" in the Winter/Spring 2013 edition of the *Bulletin*.)

Yelp, *continued on page 13*

Bloggers Gain First Amendment Victories But Still Face Issues in Online Journalism

Bloggers achieved a significant victory when the United States Court of Appeals for the Ninth Circuit held on Jan. 17, 2014 that First Amendment protections in defamation lawsuits extend to bloggers. In April 2014, a Florida appellate court held that bloggers were entitled to pre-suit notices for defamation suits under Florida law. Although the victories are welcome news to online content producers everywhere, the jailing of an Alabama blogger has raised questions and concerns among free speech advocates. Online speakers may still have obstacles to overcome before courts fully recognize that First Amendment protections apply to them.

ONLINE SPEECH

Ninth Circuit Recognizes First Amendment Protections for Bloggers

On Jan. 17, 2014, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled that bloggers receive the same First Amendment protections as institutional media in defamation lawsuits. *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014).

The case involved a dispute between Kevin Padrick, a principal with Obsidian Finance, a firm that advises financially troubled businesses, and Crystal Cox, a self-described investigative blogger. In 2008, Obsidian began working with Summit Accommodators, which was considering filing for bankruptcy. A bankruptcy court appointed Padrick as Chapter 11 trustee once Summit filed reorganization paperwork. Shortly thereafter, Cox began posting accusations of criminal activity carried out by Padrick and Obsidian in their work with the Summit bankruptcy on several different websites, including "obsidianfinancesucks.com." After sending a cease-and-desist letter that Cox did not comply with, Padrick and Obsidian filed a defamation suit in U.S. District Court for the District of Oregon.

The district court held that only one blog post could be interpreted as containing a statement of fact, and could proceed to trial. *Obsidian Finance Group, LLC v. Cox*, 812 F. Supp. 2d 1220 (D. Or. 2011). The remaining blog posts were considered constitutionally protected opinions because they did not contain provable statements of fact. Cox also claimed protection under Oregon's journalist's shield law, but District Judge Marco A. Hernandez held that she did not meet the definitions of who can receive protection as laid out by the state statute. (For more information on Cox's shield law claims, see "Defamation Lawsuits Pose Threat to Journalists as Online Communication Complicates First Amendment Analysis" in the Spring 2012 issue of the Silha *Bulletin*).

Cox also made First Amendment arguments that the liability standards should be governed by the Supreme Court's decision in *Gertz v. Robert Welch, Inc*, 418 U.S. 323 (1974). In *Gertz*, the Supreme Court held that a private plaintiff needs to show only negligence to recover actual damages from a media defendant. But a plaintiff can only recover presumed or punitive damages upon a showing that a media defendant acted with "actual malice," meaning that the statements were made with knowledge of falsity or reckless disregard of the truth. *Gertz v. Robert Welch, Inc.* Cox argued that, under *Gertz*, Padrick and Obsidian carried the burden of proving her negligence in order to recover actual damages for defamation. Cox also argued that Padrick and Obsidian must show that she acted with actual malice to receive presumed damages. Judge Hernandez dismissed these arguments, stating that Cox had not proven that she was a journalist. Therefore, the protections of Gertz did not apply to her.

Cox also contended that Padrick and Obsidian were public figures. Under the *New York Times v. Sullivan* and the *Gertz* rulings, public figures are required to prove actual malice before they may recover any type of damages. *New York Times v. Sullivan*, 376 U.S. 254 (1964). The district court judge once again dismissed this argument, stating that Padrick and Obsidian had not made themselves public figures by becoming involved with a public controversy. Rather, Cox had created the controversy.

Bloggers, *continued on page 14*

Yelp, *continued from page 12*

In a Jan. 10, 2014 post on Yelp's official blog, Senior Director of Litigation Aaron Schur condemned the decision as contrary to First Amendment rights and out of step with the protections accorded to anonymous speakers in other jurisdictions. Schur stated that "many state and federal courts require actual evidence of a valid claim to be presented prior to disclosure of an individual's identifying information. For now, Virginia appears to disagree, as the court there chose the empty speculations of a business owner over the First Amendment rights of Virginia citizens." Schur also stated that Yelp plans to appeal the decision to the Virginia Supreme Court.

Paul Levy, an attorney at the advocacy group Public Citizen who represented Yelp, questioned the premise of Hadeed's suspicion that the reviews were false in an interview with *The Atlantic*. "They don't say that the substance is false," Levy told *Atlantic* reporter Rebecca Rosen for a Jan. 10, 2014 article. "They say, well, we can't be sure this person is a customer. No one with this pseudonym from this city is in our customer database. Well, of course! It's a pseudonym. They haven't shown anything that really would lead any person to believe that this isn't a customer."

Jonathan Frieden, of Reston, Va. law firm Odin, Feldman and Pittleman, P.C., wrote in a Jan. 31, 2014 article for the *National Law Review* that the reasoning of the decision has the potential to make it significantly easier to identify anonymous online speakers. "Essentially, any business with a negative Yelp review may be able to subpoena Yelp's records as long as the business has the wherewithal to show merely that the reviewer cannot be identified in the business' database," he wrote.

An April 2, 2014 article in the *Wall Street Journal* profiled Hadeed's struggle in the aftermath of the negative reviews. Reporter Angus Loten wrote that Hadeed's business had fallen by almost 30 percent from the previous year. Loten concluded that if the case is heard by the Virginia Supreme Court, "many businesses that live and die by online reviews [will be] rooting for the owner of a small, suburban carpet cleaner."

Alex Vlisides
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Bloggers, *continued from page 13*

At the conclusion of the trial, a jury returned verdicts in favor of Padrick and Obsidian. Cox moved for a new trial, which the district court denied. Cox then appealed to the Ninth Circuit Court of Appeals, arguing that the district court had ruled incorrectly on the liability standards and Padrick's and Obsidian's public figure status. Padrick and Obsidian filed a cross-appeal contending that the jury should have considered their defamation claims relating to the other blog posts.

In a unanimous decision, the Ninth Circuit panel reversed the district court's judgment against Cox. The court held that *Gertz's* liability rules were not limited only to situations that involved traditional media defendants. The opinion by Judge Andrew Hurwitz explained that although the Supreme Court has never ruled that the *Gertz* standard applied to others besides institutional media, the Court's language in the opinion also did not limit the ruling to institutional media alone. Hurwitz wrote, "[the Supreme Court] has repeatedly refused in non-defamation contexts to accord greater First Amendment protection to the institutional media than to other speakers," citing several cases in which the high court declined to create a distinction between members of the press and the general public.

As a result, the court agreed with other circuits that "the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers." The court also noted that trying to create a distinction between institutional media and other communicators was very difficult. Therefore, the court said that the key First Amendment factor under *Gertz* in defamation cases was not the identity of the speaker. Rather, "the public-figure status of a plaintiff and the public importance of the statement at issue" are the key First Amendment considerations. Through this rationale, Cox, as a blogger, was entitled to the same liability standards that traditional forms of media received under the First Amendment.

In addition to determining that *Sullivan* and *Gertz* protections apply to the general public, the appeals court also rejected the argument that *Gertz* was limited to defamation cases involving matters of public concern. Hurwitz wrote that even if *Gertz* was limited to such a situation, Cox's blog posts concerned public matters qualifying for protection. However, the appellate court rejected Cox's argument that Padrick and Obsidian became public officials because a bankruptcy court appointed them to oversee Summit's affairs and provided compensation to them. The court also held that Cox's remaining blog posts were clearly opinions. The panel concluded its decision by granting Cox's request for a new trial.

Several First Amendment advocates and advocacy organizations praised the Ninth Circuit's ruling. UCLA law professor Eugene Volokh, who represented Cox during the appeals process, told Associated Press reporter Jeff Barnard for a Jan. 17, 2014 article that the decision "makes clear that bloggers have the same First Amendment rights as professional journalists." Volokh also noted that the decision followed similar court rulings that granted First Amendment protections to other writers and book authors, although this ruling appeared to be the first to grant protection to bloggers. In the same article, Gregg Leslie, the legal defense director for the Reporters Committee for Freedom of the Press (RCFP), said the ruling confirmed the fact that *Gertz* was "not a special right to the news media." Rather, it applied to everyone. "So it's a good thing for bloggers and citizen journalists and others," Leslie said.

In a Jan. 24, 2014 commentary, First Amendment Center President Ken Paulson called the Ninth Circuit's ruling a "landmark decision." Paulson noted that given the growing financial constraints on traditional news media, many bloggers had taken on the role of the watchdog of people with power. The Ninth Circuit's holding that bloggers deserve the same protections as traditional media was "something worth celebrating." On the same day, Jim Rosenfeld, Ambika K. Doran and Jeremy A. Chase, attorneys with the firm Davis Wright Tremaine LLP, called the decision "a major win for individuals who blog, share, tweet, and otherwise publish their views online." The attorneys explained that the panel's language provided First Amendment protections to all speakers regardless of affiliation with institutional media. As a result, the attorneys said, "an individual blogger, website operator or social media users speaking publicly on the Internet enjoy the same First Amendment protections from defamation claims as traditional media publishers."

Nevertheless, some observers have noted that the case may not be a total victory. In a Jan. 17, 2014 post, Digital Media Law Project director Jeff Hermes wrote that although the court rightly decided the case, he was concerned that the court's statements seemed to suggest that the reason Cox's speech was protected in some blog posts was because few people could reasonably believe that content on blogs. Hermes wrote that such assumptions about online content could devalue factual speech in the name of protecting it. "Respecting speech means evaluating it on its merits, instead of assuming that it has none," he said.

In his Jan. 17, 2014 article, Barnard reported that Steven Wilker, an attorney for Padrick, wrote in an email statement that the court found that "there was no dispute that the statements [in Cox's blog posts] were false and defamatory." Wilker also explained that further options were being considered.

Blogger Entitled to Pre-Suit Notice under Florida Law

In an April 11, 2014 decision, the Florida Fifth District Court of Appeal in Daytona Beach held that a blogger should be considered a publisher under a Florida law requiring a plaintiff to notify a publisher of defamatory information before filing a defamation suit. *Comins v. VanVoorhis*, 2014 WL 1393081 (Fla. Dist. Ct. App. April 11, 2014). The case arose after Christopher Comins' involvement in a May 2008 shooting of a dog that received significant media attention. Along with the media coverage, a witness posted a video of the shooting on YouTube. Comins was later charged with misdemeanor animal cruelty. Blogger Matthew VanVoorhis learned about the incident and wrote a post about the shooting based on the media reports and YouTube video. Commenters on the blog posted death threats to Comins as well as his personal and business contact information. An attorney for Comins sent VanVoorhis a letter requesting that he delete the blog post or the death threats and contact information. Comins later filed a defamation suit against VanVoorhis in a Florida trial court for Orange County in May 2009.

VanVoorhis filed a motion for summary judgment arguing that Comins had not served a pre-suit notice identifying the information that was deemed false and defamatory. Florida law requires plaintiffs to notify a newspaper, periodical, or "other medium" of statements that they believe are false and defamatory in specific articles or broadcasts at least five days in advance of filing a civil action for slander or libel. Fla. Stat. § 770.01 (2008). The trial court granted VanVoorhis' motion for summary judgment because of Comins' failure to comply with requirements of pre-suit notice. Comins appealed the trial court's ruling, arguing that the law's pre-suit notice requirements applied only to media defendants, which did not include VanVoorhis' blog.

In a unanimous decision, the Fifth District Court of Appeal of Florida rejected Comins' argument that VanVoorhis was not entitled to pre-suit notice and affirmed the trial court's decision to grant summary judgment. In determining what constitutes an "other medium" under Florida defamation law, the court stated that it must examine "whether the blog is operated to

further the free dissemination of information or [*sic*] disinterested and neutral commentary or editorializing as to matters of public interest." Under this standard, the court determined that although it was "not prepared to say that all blogs and bloggers would qualify" for the law's protections, VanVoorhis' blog was considered an "other medium" under the Florida law. In the court's view, VanVoorhis' blog deserved protection under the pre-notice statute because it was "an alternative medium of news and public comment."

In an April 17, 2014 commentary, Robert L. "Rob" Rogers III, an attorney with the law firm Holland & Knight, called the decision a "win for independent news gatherers and publishers in Florida." Rogers wrote that although the language of "other medium" was relatively unique to Florida's law, bloggers in other states with pre-suit notice laws could point to the case as a precedent for the recognition of similar protections.

Blogger Jailed for Five Months for Refusing to Remove Content

On March 26, 2014, Roger Shuler, the publisher of "Legal Schnauzer," a blog that is self-described as "one couple's fight against injustice," was released after being jailed on contempt of court charges. The charges against Shuler arose after he refused to take down content from his blog that was at issue in a defamation suit filed against him. His release came when his wife removed the posts in question after Shuler had spent five months in jail.

On Jan. 12, 2014, Campbell Robertson reported in *The New York Times* that Shuler, who used his blog to criticize public officials, had written posts suggesting that Robert Riley Jr., the son of former Alabama Governor Bob Riley, had impregnated a lobbyist and paid for an abortion. Both Riley and the lobbyist filed defamation suits in the Alabama state court in Shelby County against Shuler and his wife, Carol, and sought an injunction against the posts. *Riley v. Shuler*, 58-CV-2013-00236 (Cir. Court of Shelby County, Ala. 2013). The judge issued a temporary restraining order that prohibited the Shulers from posting defamatory content about Riley and the lobbyist. The order also required the Shulers to remove the posts at issue in the defamation suit. The court issued a preliminary injunction with similar stipulations. *Riley v. Shuler*, 58-CV-2013-00236 (Cir. Court of Shelby County, Ala., Oct. 1, 2013) available online at http://www.scribd.com/doc/174165240/Rob-Riley-Injunction. The judge also sealed the court records. Shuler ignored the orders and was subsequently arrested on civil contempt charges. *Riley v. Shuler*, 58-CV-2013-00236 (Cir. Court of Shelby County, Ala., Oct. 7, 2013) available online at http://www.scribd.com/doc/176691465/Rob-Riley-Order-Contempt.

In a Nov. 14, 2013 hearing, a judge ruled that Shuler could not post any further content about Riley or the lobbyist that involved an affair, abortions or payoffs.

> "If Shuler did wrong, then there are recourses in civil court . . . .But the government should not throw people in jail for expressing themselves."
>
> **— David Cuillier, President, Society of Professional Journalists**

The judge ordered that Shuler must remove any offending posts. *Riley v. Shuler*, 58-CV-2013-00236 (Cir. Court of Shelby County, Ala., Nov. 14, 2013) available online at http://legalschnauzer.blogspot.com/2013/11/nov-14-court-hearing-in-legal-schnauzer.html. The judge also unsealed the court records, but Shuler remained jailed because the offending content remained on his blog. On April 1, 2014, Kent Faulk reported for AL.com, the Alabama Media Group website, that a judge ordered Shuler's release after Carol Shuler made good faith efforts to remove material about Riley and the lobbyist. The judge also stated that the permanent injunction from the November 14 ruling remained in effect.

Many commentators have raised First Amendment concerns over the Alabama court's injunction against and jailing of Shuler. Faulk reported that the American Civil Liberties Union (ACLU) of Alabama had filed a friend-of-the-court brief in support of Shuler. The ACLU's Nov. 1, 2013 brief argued that the court's use of a temporary restraining order and an injunction was an unconstitutional prior restraint. The brief also argued that the judge's sealing of records went against well-established First Amendment precedents of court openness. On Nov. 6, 2013, the RCFP wrote a letter to the district judge in support of Shuler. In the letter, Executive Director Bruce Brown wrote that "the process by which the court made that determination [to grant a preliminary injunction] seem[ed] problematic." Brown also wrote that the decision amounted to a prior restraint.

Some commentators have criticized Shuler's approach to confronting officials on his blog as well as his behavior toward the court. Robertson's reporting for *The New York Times* characterized Shuler's blog as "a hothouse of furious but often fuzzily sourced allegations of deep corruption and wide-ranging conspiracy" that were "frequently salacious." Ken White, an attorney and writer for legal blog "Popehat," criticized Shuler in a Nov. 17, 2013 post for calling the court "a joke" and stating that it had no jurisdiction over him during the November 14 hearing. White suggested that Shuler's actions could help create a precedent for future plaintiffs seeking injunctions. Nonetheless, White told Robertson in *The New York Times* story, "I think you can say what the court is doing is unconstitutional and troublesome and also that Shuler is his own worst enemy." In a Jan. 14, 2014 commentary for *Salon*, Natasha Lennard took issue with *The New York Times*' description of Schuler. "The characterization of the blogger as a gossip-monger with himself somewhat to blame for his predicament does disservice to the gravity of Shuler's situation," Lennard wrote.

In an April 2, 2013 article after Shuler's release, Faulk reported that Shuler told him that he "was thankful to be out of jail," but that he viewed the injunction as "a classic prior restraint." In an April 8, 2014 article by Al Jazeera America reporter Wilson Dizard, Shuler said his recent experience could have a "chilling effect on Web communication in general." Other commenters also noted the possible First Amendment problems that the Shuler case raised. In the same article, Society of Professional Journalists President David Cuillier told Dizard that Shuler's case was an "extremely dangerous" development. "If [Shuler] did wrong, then there are recourses in civil court," Cuillier said. "But the government should not throw people in jail for expressing themselves." Dizard also reported that Kurt Opsahl, a senior attorney with the Electronic Frontier Foundation, a digital rights advocacy group, said that Shuler's case "was an aberration in the justice system that should not become a trend."

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News Coverage of Transgender Individuals Raises Ethical Reporting Issues

MEDIA ETHICS

Several recent incidents involving journalistic coverage of transgender people have presented questions about ways to ethically treat transgender subjects. Recent controversies have included a journalist "outing" a transgender woman, news organizations' refusals to refer to transgender women by their preferred gender identities, and media focus on transgender issues that have typically remained private. Chelsea Manning's Aug. 22, 2013 announcement that she was a transgender woman, the outing of Dr. Essay Anne Vanderbilt by writer Caleb Hannan on Grantland, a sports and pop culture website affiliated with ESPN, and the problematic language journalists have used when discussing transgender women CeCe McDonald and Janet Mock, have garnered criticisms from trans-advocacy organizations and members of the journalistic community. Advocacy organizations have also called upon news organizations to be more considerate in coverage of transgender people.

Government Document Leaker Comes Out as Transgender Woman

In a written statement to NBC's "Today" show, Chelsea Manning announced that she was female on Aug. 22, 2013. The day before, Manning was sentenced to 35 years in prison for leaking more than 700,000 classified government documents to Wikileaks. (For more information on the Manning case, see "Manning Sentenced to 35 Years in Prison for Leaks" in the Summer 2013 issue of the Silha *Bulletin*, "Judges Rebuke Government on Leaks Prosecutions" in the Summer 2011 issue, "The Obama Administration Takes on Leakers; Transparency May Be a Casualty" in the Spring 2012 issue, and "Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror" in the Winter/Spring 2013 issue.)

In the statement, Manning wrote that she felt that she was a woman since childhood. She also said that she wished to begin hormone therapy soon. Manning's statement requested that others "refer to me by my new name and use the feminine pronoun." Manning signed the letter as Chelsea E. Manning. Manning's defense lawyer, David Coombs, also appeared on the "Today" show to discuss her decision to come out. During the course of the trial, part of Manning's defense was that she her struggle with her gender identity influenced her decision to leak classified documents.

Manning's announcement immediately created issues for news organizations. Christine Haughney, a media reporter for *The New York Times*, wrote on Aug. 22, 2013 that "the debate over how to refer Private Manning exploded in newsrooms, comments, blogs and Twitter." Haughney reported that the vice president of communication of GLAAD (formerly the Gay and Lesbian Alliance Against Defamation), Rich Ferraro, encouraged news organizations to use Manning's preferred pronouns. That same day, Natalie DiBlasio of *USA Today* reported that several news outlets, such as *The Huffington Post*, MSNBC, and Slate, all began using feminine pronouns for Manning. Meanwhile, other prominent news organizations like the Associated Press, *The New York Times* and National Public Radio continued to use the masculine pronoun for a short time. Andrew Beaujon, media reporter for journalism think tank Poynter Online, wrote on Aug. 27, 2013 that these three organizations began using Chelsea Manning as well as feminine pronouns.

> "The misgendering of transgender people contributes to ignorance."
>
> **— Andy Birkey, Writer for The Colu.mn**

On Sept. 4, 2014, GLAAD criticized several media outlets in a press release on the organization's website. The organization said media reporting on Manning had improperly focused on sex reassignment surgeries, published articles that suggested news organizations struggled with how to refer to Manning rather than using Manning's preferred name and pronouns, and made derogatory comments that were offensive to all transgender people. GLAAD, along with several other transgender-equality organizations, called on journalists "to improve [their] reporting and accurately reflect the lives of transgender people."

Grantland Makes Multiple Mistakes in Covering Transgender Woman

On Jan. 15, 2014, Grantland published "Dr. V's Magical Putter" by Caleb Hannan. The feature story focused on Hannan's investigation into a golf putter invented by Essay Anne Vanderbilt, also known as Dr. V. The initial focus of the story was about whether the golf club was as effective as Vanderbilt claimed it to be. Vanderbilt claimed that her training as a physicist and background with military research allowed her to design a superior club. Upon fact-checking Vanderbilt's background, Hannan discovered that she had fabricated many of her educational and professional credentials. He also learned that Vanderbilt was a transgender woman. The story then began to focus more specifically on Vanderbilt's life and history, much of which she refused to discuss. Hannan also described revealing Vanderbilt's lack of professional and educational credentials as well as outing her to at least one of her associates. The story took a tragic turn when Vanderbilt committed suicide during the course of the story's production, which Hannan also reported. Hannan concluded that only Vanderbilt could have provided explanation for this "strange story." Hannan's full story about Vanderbilt on Grantland can be found at http://grantland.com/features/a-mysterious-physicist-golf-club-dr-v/.

Although some early responses to the story were positive, much of the reaction was critical of the story's tone and Hannan's coverage of Vanderbilt. Several commenters criticized Hannan and the Grantland editors for their lack of awareness and understanding of the challenges transgender people face. In a Jan. 20, 2014 post on GLAAD's website, Nick Adams, associate director of communications for the organization, criticized Hannan for using "male pronouns to refer to Dr. V. once he discover[ed] she [was] transgender, and d[id] not acknowledge that he ha[d] done anything inappropriate." Adams also noted the problems with outing a transgender person because of the high rates of discrimination, violence and suicide that transgender individuals regularly face. Tracy Moore, a contributor to "Jezebel," a women's interest blog owned by Gawker Media, wrote in a Jan. 18, 2014 post that Hannan failed to consider the ethical implications of revealing Vanderbilt as a transgender woman, especially because Vanderbilt did not want her gender identity revealed. Critics

also attempted to draw direct links between Hannan's reporting, the impending publication of the story, and Vanderbilt's suicide. Moore's post was titled, "Trans Woman Commits Suicide Amid Fear of Outing by Sports Blog."

Journalists criticized the story's structural approach and Hannan's writing. Marc Tracy of *The New Republic* wrote in a Jan. 19, 2014 commentary that "this was a reporter entering a story with fundamentally flawed, not to mention bigoted, premises and letting those premises guide his reporting and his writing-a problem magnified since Hannan and his reporting are an essential part of the story." On the same day, Josh Levin, executive editor of *Slate*, suggested that one of the major pitfalls with Hannan's story was the linking of Vanderbilt's gender identity and the deceptions about her credentials. "Dr. V is a con artist and a trans woman," wrote Levin. "Hannan, though, conflates those two facts, acting as though the latter has some relation to the former. It seems that, in his view, they both represent a form of deceit."

Washington Post columnist Gene Weingarten both defended and criticized the story in a Jan. 20, 2014 commentary. Weingarten wrote that Hannan was not responsible for Vanderbilt's death as many people had suggested. Weingarten also defended Hannan's work because Vanderbilt only began to object to coverage when she believed that she would not be portrayed in a positive light. Weingarten argued that subjects do not get to dictate the direction of journalist's stories. Weingarten criticized the story's tone, however, describing it as "curiously cool, even callous." Weingarten suggested that Hannan should have spent more time addressing Vanderbilt's suicide and the possible role that Hannan played in it. Additionally, Weingarten suggested that Hannan's excitement of learning about Vanderbilt's gender identity as "callow and even naïve."

The backlash to the story about Vanderbilt ultimately led to Bill Simmons, Grantland's editor-in-chief, posting a link to a public apology on Jan. 20, 2014 on the Web page of the original story. The apology was also accompanied by a link to an op-ed piece from Christina Kahrl, a transgender baseball writer for ESPN.com and member of GLAAD's board of directors. Simmons' lengthy apology documented the process of how the story developed and admitted to several mistakes. The biggest mistake, Simmons wrote, was that no one on Grantland's staff suggested that a member of the transgender community read the story before it was published. Simmons said that Grantland's lack of awareness of transgender issues caused many of the story's problems. Kahrl's editorial criticized Hannan for revealing to others that Vanderbilt was a transgender woman. Kahrl wrote, "By any professional or ethical standard, that wasn't merely irrelevant to the story, it wasn't his information to share." More broadly, Kahrl criticized Grantland for failing to focus only on "debunking those claims to education and professional expertise" that were associated with the putter. The information about Vanderbilt's gender identity should not have been part of the story's agenda, she argued.

> "Journalists should focus on deeper stories of courage, struggle, and other experiences that make up a transgender person's full human experience."
>
> **— National Center for Transgender Equality**

ESPN's ombudsman, Robert Lipsyte, also criticized Grantland's publication of the Vanderbilt story. On Jan. 27, 2014, Lipsyte wrote that the initial concept of the story had the potential to be a classic, but ultimately it failed for a number of reasons. "The story lacked understanding, empathy and introspection – no small ingredients," Lipsyte wrote. "More reporting would have helped. It was a story worth telling, if told right. And aside from its humane shortcomings, I still don't like it as a piece of writing."

Coverage of Other Transgender Individuals Highlight Additional Issues

On Jan. 13, 2014, Minneapolis *Star Tribune* reporter Paul Walsh wrote about CeCe McDonald's release from prison. According to court documents, in June 2011, a group that included McDonald, a 26-year-old transgender woman, had been involved in an altercation outside a bar after several men and women yelled racial and homophobic slurs. During the altercation, a person slashed McDonald's face with a piece of glass. After being cut, McDonald stabbed a man from the other group with a pair of scissors. The man died at the scene of the fight. McDonald was charged with second-degree murder but pleaded guilty to second-degree manslaughter. She was released from prison on Jan. 13, 2014, after serving 19 months of a 41-month sentence.

In the story, Walsh used McDonald's birth name, placed CeCe in quotes, and described McDonald as "a man in transition to being a woman." In a Jan. 16, 2014 post, Andy Birkey, a writer for The Colu.mn, a non-profit LGBT media organization in Minnesota, criticized the *Star Tribune* for being the only news organization that put quotes around McDonald's name. Birkey also wrote that the newspaper "took pains not to use a pronoun for Cece [sic]." Birkey noted that the *Star Tribune* had a history of avoiding using pronouns in relation to McDonald's gender. "The misgendering of transgender people contributes to ignorance," wrote Birkey.

In a separate incident on Feb. 4, 2014, Piers Morgan hosted Janet Mock on his CNN show. Mock, a prominent transgender activist and writer, joined Morgan to promote a new book and discuss her life as a transgender woman. During the course of the interview, Morgan repeatedly referred to Mock as "formerly a man." The on-screen title cards during the interview said Mock "was a boy until age 18." Morgan spent time asking Mock questions about coming out as a transgender woman to her boyfriend. Immediately after the interview on Feb. 4, Mock posted criticisms of Morgan's approach on Twitter, including the label of "was a boy until 18." Mock wrote, "I was not 'formerly a man.' Pl[ease] stop sensationalizing my life and misgendering trans women." Shortly after Mock's tweets, Morgan posted on Twitter that several people accused him of "transphobia." He also expressed irritation at the negative response he had received. Morgan invited Mock back to his show on Feb. 5, 2014 to discuss their previous interview. In the second interview, Mock highlighted several of the problems with Morgan's questions from the previous night. Her criticisms included Morgan's consistent references to "being a boy" and the use of inaccurate background materials about her life. The videos of the interviews are available online at http://piersmorgan.blogs.cnn.com/2014/02/05/author-janet-mock-returns-to-piers-morgan-live-for-a-second-interview/.

Fair and Ethical Reporting on Transgender People

The spate of problems related to journalists' coverage of transgender people raise the question of how to treat transgender people appropriately in the course of reporting. Journalists, journalism organizations, trans-advocates and trans-

Transgender, *continued on page 18*

Reporters Testing School Security Draw Attention to the Ethics of Investigative Tactics

MEDIA ETHICS

School shootings, such as those that occurred at Columbine High School in Littleton, Colo. in 1999, Virginia Polytechnic Institute and State University (also known as "Virginia Tech") in 2007 and Sandy Hook Elementary in Newtown, Conn. in 2012, have led some reporters to test school security practices. Attempts by investigative reporters in New York, Missouri, Minnesota, and North Dakota to disclose flaws in school security practices by entering schools in apparent violation of school rules and, in some cases, city and state laws, have raised questions regarding the ethical ramifications of such coverage.

In the first incident, Jeff Rossen, a NBC "Today" show national investigative correspondent, attempted to enter five unnamed schools in December 2013, and was asked for identification at four of them. In those instances, he was not allowed to approach children or to enter classrooms. At one of the four schools, he was allowed to enter the building only after requesting permission, and was escorted directly to the principal's office. At another, a guard stopped him outside the school and asked him for identification. However, at the fifth school, Rossen walked the halls for two minutes, passing several classrooms and even asking a teacher for directions. His presence in the school was not challenged until he reached the main office. The Rossen report is available online at http://www.today.com/video/today/53798866#53798866.

In a separate incident, New York's WNBC reporter Jonathan Vigliotti attempted to enter ten different New York City schools, and was challenged at only three of them. At one of the seven schools, Vigliotti managed to get past a metal detector, wander the hallways, and enter a gymnasium full of children. He was eventually approached by a guard who reportedly stated, "Wow. I thought you were a teacher."

After watching the "Today" show story about school security, an unidentified parent in Fargo, N.D., called Valley News Live, the local news department shared by KVLY-TV (NBC) and KXJB-TV (CBS), expressing concern about school safety. In response, reporter Mellaney Moore was assigned to investigate security in local schools. On Dec. 11, 2013, Moore entered elementary schools in Moorhead, Minn., and Fargo and West Fargo, N.D. in an effort to uncover flaws with the schools' security systems.

According to a story posted on valleynewslive.com later that day, Moore had first entered an elementary school in Fargo where she passed the front desk, but was not stopped or questioned. At the second school, she encountered no challenge to her presence, and was even asked by a faculty member, "Are you looking for the kindergarten wing or the first grade wing?" who offered to direct her to "any classroom." According to the story, the faculty member did not ask Moore who she was, why she was there, or whether she had signed in at the front desk. Moore entered the third school, S. G. Reinertsen Elementary School in Moorhead, Minn., where she recorded images of common areas, classrooms and "a tour of the school's library." "One can't even imagine what could have happened," Moore wrote. The Valley News Live story is available online at http://www.valleynewslive.com/story/24198666/how-secure-are-area-elementary-schools.

According to a supplementary report filed by Detective Joel Voxland of the Moorhead Police Department, Moore entered S. G. Reinertsen Elementary School's Door #1 in Moorhead on Dec. 11, 2013, at 1:38 pm, carrying a concealed camera, and passing by signs reading, "Notice. All parents and visitors must use Door #1 and register with the office pursuant to MN State Statute 609.605." The statute addresses misdemeanor trespassing, with Subd. 4 dealing particularly with trespassing on school property. Moore walked past the front desk without registering. Voxland noted that surveillance footage of the event shows staff member Kathy Martinez sitting at her desk, but facing away from the entrance and speaking with another staff person. As Moore passed by Martinez's desk, Voxland stated that Moore "looks away from the front desk and puts her left hand to her head and face. It is unknown if Moore is intentionally trying to obstruct her face or if she is adjusting her hair. . . Moore does not appear to make any attempt to acknowledge the staff members at the front desk." Voxland stated that Moore left the building nine minutes after she entered, at 1:47 pm. Voxland's report is available online at http://media.mwcradio.com/mimesis/2014-01/31/School.pdf.

Because Moore entered all three schools without first registering with school officials, she faced misdemeanor charges of violating of city ordinances in Fargo, City of Fargo Ordinance 10-0320, and West Fargo, West Fargo Ordinance 12-0705, and Minnesota state law, MN State Statute 609.605. On Jan. 30, 2014, Inforum, a North Dakota news website,

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Transgender, *continued from page 17*

advocacy organizations have provided guidelines and advice. On Jan. 22, 2013, *Time* published an opinion piece online by Fallon Fox that was directed to news editors and journalists. Fox, a transgender mixed martial arts fighter, suggested that media organizations need to become educated on transgender issues and take transgender sensitivity training to avoid the mistakes that Grantland made. In a Nov. 11, 2013 article on the Poynter Institute website, Lauren Klinger, a staff member, suggests that journalists not request before and after photos or ask about transgender people's medical transition process, and use the name the person gives them. Klinger's full list is available online at http://www.poynter.org/how-tos/229120/nine-ways-journalists-can-do-justice-to-transgender-peoples-stories/.

The National Center for Transgender Equality (NCTE) provides a fact sheet online on ways journalists can respectfully cover transgender people and issues. NCTE encourages journalists to follow the Associated Press Style Book (2011 Edition) as well as *The New York Times* Style Book (2005). The organization also recommends that journalists avoid focusing on medical treatments for transgender people. Rather, NCTE proposes that journalists focus on "deeper stories of courage, struggle, and other experiences that make up a transgender person's full human experience." GLAAD also provides a media reference guide on its website. The guide provides a glossary of transgender terms, as well as terms that the organization considers problematic and defamatory. GLAAD also provides guidance to journalists for transgender names, pronoun usage and descriptions. GLAAD's media reference guide is available online at https://www.glaad.org/reference.

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reported that Valley News Live had struck a deal with school officials in Fargo and Moorhead stipulating that Moore could not be assigned school stories for the next 90 days, but that Valley News Live could continue to cover public schools, including investigative reports, so long as reporters followed all state and local laws. The school districts also agreed to provide access "to all media outlets as the law requires."

In a third incident on Jan. 23, 2014, an unidentified St. Louis KSDK NewsChannel 5 reporter visited five schools in eastern Missouri, also in an effort to cover security in local schools. At two of the schools, Bellerive Elementary in Creve Coeur, Mo. and Becky-David Elementary in St Charles, Mo., the reporter did not immediately identify himself and was vague when school officials questioned him. When he did finally identify himself as a reporter with KSDK, school authorities called the television station to verify his statement. The reporter then left the premises.

But at Kirkwood High School in Kirkwood, Mo., the reporter entered the school and walked the halls unescorted for approximately five minutes before asking directions to the office, according a *Webster-Kirkwood Times* article on Jan. 24, 2014. When he reached the office, he gave his name and phone number, and asked to speak to the school resource office about school security. He also asked a secretary for directions to the restroom and then left the office, but went in a different direction from the restroom. The secretary noted that he did not follow her instructions and called the school resource officer, thinking that the reporter was not who he claimed to be, and his story was a "ruse to access the building," Kirkwood Superintendent Tom Williams told the *Webster-Kirkwood Times*.

Kirkwood School District spokesperson Ginger Cayce told the *Webster-Kirkwood Times* that the school resource officer tried to call the cell phone number the reporter had left at the main desk, but was only able to access his voicemail, which stated that he was a reporter. Cayce called Channel 5 four times in an effort to verify that the reporter was actually employed at the station, but the news desk refused to answer her. "They would not tell me anything," Cayce told the *Webster-Kirkwood Times*. "I told them we would have to go into lockdown if we couldn't verify this, so that's what we had to do."

The lockdown began at 1 pm. Students and teachers were instructed to turn out lights and remain in their classrooms. Forty minutes later, when school officials received confirmation of the reporter's identity and his affiliation with Channel 5, the lockdown was lifted. Channel 5 released a statement saying, "NewsChannel 5 will continue to be vigilant when it comes to the safety of our schools and your children within," according to the *Times Record News* of Wichita Falls, Texas, in a Jan. 19, 2014 article.

But some parents believe such measures by journalists cross a line. Jeff Goff, whose daughter attends Kirkwood High School, told the *Times Record News* that he had called the school and was told by a woman who answered his call that the lockdown was due to a "journalistic report. "[D]o you know what you just put us through?" Goff reportedly told the woman. "There's a guy (a police officer) with an automatic rifle standing in front of the school!"

KSDK anchor Mike Bush later issued an apology, saying, "In doing this school security story, we didn't live up to our own standards, and the standards you deserve as viewers. We can't change the past, but our promise to you is that we will make every effort to make sure nothing like this will happen in the future." The broadcast segment is available online at http://www.ksdk.com/video/3078423837001/1/NewsChannel-5-apologizes-to-the-community.

These incidents have raised ethical concerns regarding reporters testing school security. Jen Wilton, the mother of two boys at Kirkwook High School, stated in a March 16, 2024 *New York Times* story by John Eligon that KSDK "certainly didn't do me any service," she said. "[I]t terrified my kids and a lot of other kids." Eligon wrote that critics claim that investigative stories on school security do not paint an accurate picture, serve no public good, and too often mean that the news organizations become part of the story, as happened in the case of Mellaney Moore. Furthermore, it may be dangerous for journalists to enter schools that are now on heightened alert after events like those at Sandy Hook Elementary, Virginia Tech, and Columbine High School. Bob Steele, a journalism ethics professor at DePauw University, told Eligon that reporters must weigh the risks of going undercover because it could result in a school security officer "pull[ing] out a gun."

Ken Trump, a former freelance investigative reporter who is now the president of National School Safety and Security Services, a for-profit private consulting firm specializing in school security located in Cleveland, Ohio, wrote in a March 18, 2014 article on his organization's website that "when reporters with hidden cameras can walk through unlocked school doors and past school employees who fail to greet and/or challenge them, there is a legitimate safety issue—and in turn, a legitimate news story. . . . If someone can walk through unlocked doors and past adult school employees without being stopped, there is a problem with school security—period." Trump did, however, agree with Steele that if reporters do decide to do such investigative reports, they need to have a plan in place "to avoid creating panic."

Al Tompkins, the senior faculty for broadcasting and online at the Poynter Institute, wrote in a Oct. 9, 2006 Poynter Institute blog post (updated on March 3, 2011), that investigative reporting concerning school security "reaffirms the false notion that . . . kids are really in danger in school when they're not," and with recent updates to school security, schools are often "already the single safest place for your child anyway." He advised journalists to ask themselves a set of questions before going undercover for an investigative story on school security. Tompkins's questions include: How will the journalists' intrusion affect the students? What kind of disruption could be caused? What legal concerns should the newspaper or television/radio station have about trespassing on school property? What has the journalist done to ensure there will not be a violent confrontation that could result in someone, including the journalist or children, being harmed? Tompkins's article is available online at http://www.poynter.org/latest-news/als-morning-meeting/78701/tuesday-edition-reporters-testing-school-security/. Tompkins further advised journalists to consult Steele's guidelines for using hidden cameras when reporting, available at the Poynter Institute's website at: http://www.poynter.org/uncategorized/2114/high-standards-for-hidden-cameras/, and Steele's guidelines for covering stories testing systems such as school or airport security, available online here: http://www.poynter.org/latest-news/everyday-ethics/talk-about-ethics/743/guidelines-for-testing-stories/.

Elaine Hargrove
Silha Center Staff

Native Advertising Creates Ethical Challenges for News Organizations in Digital Environment

In the increasingly digitized media environment, advertisers have begun using new advertising formats in an attempt to get messages in front of consumers. One of these new forms is called native advertising. Native ads tend to blur the line between the content of a website and the advertisement itself. This lack of distinction has raised ethical concerns among media observers when native ads have appeared on the websites of traditional news organizations. Historically, news organizations drew bright lines between news content and advertising. Media observers' criticisms of several mainstream news organizations' use of native advertising have helped place the ethical questions into context.

MEDIA ETHICS

The Ethical Problems of Native Advertising

A native ad is online advertising that is designed to match the form and content of the website in which the ad is placed. Native advertisements can take on various forms such as promoted content or content recommendation links. Other types of native advertisements are similar to advertorials, which are advertisements that mimic the form of editorial content. The design of the native ad is intended to blur the lines between the content of the website and the content of the advertisement, which theoretically makes the ad more appealing to the consumer. Typically, native ads are designated as "sponsored content," but the distinction can often be unclear. *Forbes* media and technology contributor Benjy Boxer reported in a Sept. 10, 2013 article that native advertisements are becoming more popular among online publishers because of the high rates that publishers can charge for ad placement.

Although native ads may be a unique way to gain consumers' attention and are a valuable source of revenue for media companies, several ethical questions have been raised about the use of such ads on news organizations' websites. In a Feb. 25, 2014 op-ed for *The Guardian*, Bob Garfield, co-host of WNYC's On the Media, explained that one of the primary problems with native advertising is its lack of distinction from journalistic news material. "Basic publishing ethics dictate that the fake articles be printed in clearly different type fonts and column widths, be enclosed by borderlines and be identified prominently as advertising," wrote Garfield. "By contrast as native advertising is most often practiced… publishers allow their advertisers to run content strikingly similar in look and style to the real editorial." Garfield wrote that native advertising becomes problematic because the ads are rarely labeled as advertising. Rather, the ads use words such as "sponsored content" or "from around the web." "The result is not merely deceiving to readers," Garfield explained. "[I]t bespeaks a conspiracy of deception among publishers, advertisers and their agencies." Garfield also noted that several major news organizations had adopted the use of native advertising, including *The New York Times*, the *Washington Post*, *The Economist*, *Forbes*, *The Huffington Post*, *Time*, and Yahoo.

Other commentators have explained that the problems of blurred lines between advertising and news are not simply about journalism ethics. Many news consumers may have trouble distinguishing between the different types of content. In a Dec. 15, 2013 story for the *Columbia Journalism Review*, Tracie Powell reported that David J. Franklyn, director of the McCarthy Institute for Intellectual Property and Technology Law at the University of San Francisco School of Law, said that many news consumers either ignore native advertising labels or do not understand what they mean. Powell reported that Franklyn surveyed 10,000 people in the United States and abroad. "When people are presented with a story that looks like a story, they think it's a story," said Franklyn. "What we've found is that there is deep confusion about the difference between paid and unpaid content." Powell reported Franklyn's research from a December 2013 Federal Trade Commission (FTC) workshop that focused specifically on native advertising.

As *The New York Times*' Edward Wyatt reported in a Dec. 4, 2013 story, the Federal Trade Commission (FTC), a federal agency charged with protecting consumers from deceptive advertising practices, convened the workshop because it was becoming increasingly concerned about native advertising practices. FTC Chairwoman Edith Ramirez stated at the workshop that although getting advertising messages to consumers was important, the ads should not mislead consumers. "By presenting ads that resemble editorial content, an advertiser risks implying, deceptively, that the information comes from a nonbiased source," said Ramirez. Consumer advocates also expressed concern at the FTC workshop. Wyatt reported that advocacy group Public Citizen's President Robert Weissman said that there is confusion surrounding the labels used for different forms of advertising. "[T]he word 'advertisement' tells people what is being done to them…the whole point of the word 'sponsored' is to avoid calling it what it is," he said.

At least one association of media organizations has recognized the potential ethical problems that native advertising can cause. In October 2013, Lucia Moss of *Adweek* reported that the American Society of Magazine Editors (ASME) updated its editorial guidelines to reflect news organizations' increasing use of native advertising. Sid Holt, CEO of ASME, told Moss that several editors were not certain about how to handle native ads. "[Editors] were asking, is this an acceptable form of advertising, how are we going to distinguish it." The guidelines called for magazines to clearly label advertising content, include links to an explanation that marketers created the content, and make distinctions between the fonts and graphics of editorial content and native advertising.

Perhaps recognizing potential ethical issues and possible government regulation, some advertising and public relations organizations have issued guidelines for the use of native ads. In July 2013, Edelman, the world's largest public relations firm, released a report about the use of native advertising for public relations. The report's author, Steve Rubel, chief content strategist for Edelman, suggested an ethical framework for native advertising that included principles of disclosing that content is sponsored, amplifying media rather than replacing it, and separating the internal corporate divisions that attempt to earn media coverage and that develop news media partnerships. Rubel noted that "this initial framework will initiate an ongoing, rich and public dialogue about the ethics of sponsored content and new norms."

On Dec. 4, 2013, the Interactive Advertising Bureau (IAB), a non-profit trade association comprised of media and technology companies that sell online advertising, released "The Native Advertising Playbook." The publication was the result of a task force that included the participation of more than 100 IAB member companies. The "Playbook" called for disclosure that a native ad was paid content. The IAB recommended that advertisements use language that is large and visible in the content that is visible enough for a

consumer to realize they are reading paid content. Although, the document acknowledged that "it is not possible to recommend a single, one-size-fits-all disclosure mechanism" because of the different forms native ads can take.

News Organizations' Use of Native Advertising Sparks Ethics Conversations

News organizations' decisions to use native advertising have placed the spotlight on concerns over native advertising. In January 2013, *The Atlantic* was criticized for publishing and then pulling sponsored content about the Church of Scientology. The content titled, "David Miscavige Leads Scientology to Milestone Year," explained that the organization opened 12 new Scientology churches worldwide. The format appeared similar in form, layout, and tone as other content that appeared on *The Atlantic*'s website. The article did contain small yellow box stating, "Sponsor Content" above the article's title. In a Jan. 15, 2013 post, Julie Moos, director of journalism think tank Poynter Online, wrote that several *Atlantic* writers immediately distanced themselves from the advertisement on Twitter. Additionally, Moos explained that several journalists raised questions about the moderation of comments on the sponsored content because the comments seemed to only be supportive of Scientology. *The Atlantic* acknowledged that their marketing team was moderating the comments. In a Jan. 30, 2013 post for Poynter Online, Digital Media Fellow Jeff Sonderman wrote that *The Atlantic* revised its sponsored content guidelines to focus more on transparency after the controversy. .

The recent decision by *The New York Times* to employ native advertising has also intensified the concerns surrounding native advertising. On Jan. 8, 2014, *The New York Times* launched a redesign of its website. Among other significant changes to the layout and style, the *Times* began using native advertisements throughout its website. Prior to the redesign launch, *Times*' Ravi Somaiya reported on Dec. 19, 2013 that *Times* publisher Arthur Sulzberger, Jr. attempted to ease concerns in a letter to all of the *Times*' employees. Somaiya reported that Sulzberger wrote there was going to be a "strict separation between the newsroom and the job of creating content for the new native ads." Sulzberger acknowledged that native advertising could be controversial but that it was need to "restore digital advertising revenue to growth," reported Samaiya. In the same story, *Times*' Executive Vice President of Advertising Meredith Kopit Levien said that all of the ads would only appear digitally, contain design cues to distinguish the ads from news content, and be created by advertising staff.

> "The great risk to the *Times* and to other publishers who are being even less careful . . . is that what they're ultimately doing is bartering the trust that they have spent decades or centuries to build."
>
> **— Bob Garfield,**
> **Co-host of WNYC's "*On the Media*"**

One of the first native ads appearing on the *Times*' website was from computer and technology company Dell. As described by Ryan Chittum in a Jan. 10, 2014 commentary for the *Columbia Journalism Review*, the ad was placed in an advertising spot separate from the news section with a disclaimer of "PAID POST." The ad itself contained a disclaimer at the top that said, "PAID FOR AND POSTED BY DELL." The Dell logo was also contained in a blue bar that ran across the top of the screen. Additionally, Chittum reported that the ad contained smaller and different font than a *Times* story and the byline used the Dell logo to credit a Dell employee as the author.

Chittum praised the *Times*' approach to native advertising. "It's all about the disclosure, and the *Times* has done that well here," wrote Chittum. He wrote that the clear messages that advertisers paid for the content would prevent reader confusion. More importantly, Chittum wrote that the *Times* was not allowing search indexes to identify the URLs of the native advertisements. "That means these ads won't get intermingled with *NYT* results in search results," wrote Chittum.

Several other commenters responded critically to the *Times*' decision to employ native advertising, though. In a Jan. 8, 2014 interview with Amy Eddings on WNYC, Garfield said that the use of native ads on the *Times* website was "dispiriting, to say the least, and probably really horrifying." Garfield explained that the *Times* was being careful with its approach to native advertising but expressed concern that it could be compromising readers' trust. "The great risk to the *Times* and to other publishers who are being even less careful…is that what they're ultimately doing is bartering the trust that they have spent decades or centuries to build," said Garfield.

Andrew Sullivan questioned the *Times*' advertising decision in a Jan. 9, 2014 post on his blog, "The Dish." "Especially after [the *Times*'] great pay-meter success, why sacrifice something so special as the integrity of the *NYT* for what cannot be big bucks?" wrote Sullivan. "[Y]our ability to look at a random *NYT* page on the web and know for sure it's not a gussied-up ad will slowly atrophy. As, I fear, will whatever reputation for integrity journalism has left." Silicon Valley culture reporter Tom Foremski of ZDnet, a business and technology news website, was also critical of the native advertising on the *Times* website in a Jan. 9, 2014 story. He suggested that the *Times* sold its trust for short-term profits. "Selling trust is foolish because it's not a renewable commodity," wrote Foremski.

Foremski's discussion was not limited to the *Times* alone. He also warned about the use of native advertising more generally. "The expanding use of native advertising will accelerate the demise of the media industry," wrote Foremski. "Newspapers and marketers need to come to their senses and stop this practice now." The debate surrounding the use of native advertising demonstrates that as they continue to search for new forms of advertising revenue, news organizations will need to keep in mind the ethical challenges that native advertising can create.

Casey Carmody
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Copyright Decisions Demonstrate the Perils of Posting and Using Visual Content Online

COPYRIGHT

Two recent decisions by federal courts emphasize the copyright complications that can arise when media entities post visual content online. In the first case, the U.S. Court of Appeals for the Ninth Circuit ordered Google to take down the "Innocence of Muslims" video after an actress sued Google claiming she had a right to control her performance under the Copyright Act and was not aware at the time the film was shot that it would be offensive to Muslims. In the second case, *Morel v. Getty Images*, *et al.*, a jury in the United States District Court for the Southern District of New York in Manhattan awarded a photographer $1.22 million in statutory damages after several media organizations posted and distributed online a photograph which he took in Haiti after the 2010 earthquake without attributing it to him. The two cases highlight the importance of understanding copyright in the online context. They also raise questions about the distribution of copyrighted content going forward.

Ninth Circuit Sides with Actress in "Innocence of Muslims," Orders Google to Remove Video From YouTube

On Feb. 26, 2014 in a 2-1 decision, the United States Circuit Court of Appeals for the Ninth Circuit ordered Google to remove a controversial video, "Innocence of Muslims," from YouTube. *Garcia v. Google*, *Inc.*, 743 F.3d 1258 (9th Cir. 2014). An actress in the video, Cindy Lee Garcia, claimed that her performance in the film was dubbed over after filming to offend Muslims in a manner that was unknown to her and to which she did not consent. She argued she owned the copyright in her individual performance and that Google infringed her copyright by refusing to remove it from YouTube. The Ninth Circuit's ruling has sparked controversy about the "moral rights" of artists and implicates significant free speech principles. As the *Bulletin* went to press, the Ninth Circuit was considering whether to grant Google's petition for a rehearing of the case *en banc*.

In July 2012, a man named Nakoula Basseley Nakoula, who has since changed his name to Mark Basseley Youssef, uploaded two videos to YouTube which he claimed were trailers for the film "Innocence of Muslims." The videos were offensive to many Muslims and sparked international outrage, including protests and demands from the international community for Google to take the video down. Google chose to block the video in Egypt and Libya, and had to block the video in Indonesia, Saudi Arabia, Malaysia, India, and Singapore under those countries' censorship laws. The video was also involved in controversy because it was initially tied to the Sept. 11, 2012 attack on the U.S. embassy in Benghazi, Libya. (For more on the arguments to remove the video, see "Activists, U.S. Government Advocate Removal of User-Generated Content" in the Summer 2013 issue of the Silha *Bulletin*.)

After the video appeared online, several of the actors who appeared in the film announced that they were misled into performing in the film. They said they responded to casting calls posted by Sam Bacile, Youssef's alias, in July 2011. The casting calls for the film stated the film was to be called "Desert Warrior" and it would portray battles occurring after a comet struck Earth. After the actors filmed their scenes, they argued the filmmakers dubbed over the film without their knowledge, turning it into a short video that expressed strong anti-Muslim sentiments. Police later arrested Youssef and he pled guilty to four probation violations for lying to his probation officer and using aliases on Nov. 7, 2012.

Garcia sought to remove the film from YouTube after an Egyptian cleric issued a fatwa calling for the killing of anyone involved with "Innocence of Muslims." Garcia had a minor role in which she appeared on screen for five seconds and was paid $500. In the dubbed version of the film, she appears to ask, "Is your Mohammed a child molester?" Garcia issued Digital Millennium Copyright Act (DMCA) takedown notices to Google and YouTube on Sept. 24 and 25, 2012, arguing the video violated her copyright in her performance. Google and YouTube refused to take the video down. On Sept. 26, 2012, Garcia filed a complaint in the United States District Court for the Central District of California for a temporary restraining order to have the film removed from YouTube, alleging direct and indirect infringement of copyright under 17 U.S.C. § 106. She argued Google and YouTube violated her copyright in her performance by maintaining its presence online against her will. She also made claims against the film's producers, who never responded to the complaint. The district court denied Garcia's request because it found that she was unlikely to succeed in her copyright claims because she had granted the producers an implied license to use her performance in the film. *Garcia v. Google*, *et al.*, No. 2:12-cv-08315-MWF-VBK (C.D.Cal. 2013). She appealed the denial to the Ninth Circuit.

Writing for the 2-1 majority, Chief Justice Alex Kozinski held on Feb. 26, 2014 that Garcia had a copyright interest in her performance in "Innocence of Muslims" and ordered Google to remove the video from YouTube. *Garcia v. Google*, *Inc.*, 743 F.3d 1258 (9th Cir. 2014). Kozinski concluded that Garcia's performance satisfied the standard for a copyrighted work because it "evince[d] 'some minimal degree of creativity . . . no matter how crude, humble or obvious' it might be" (citing *Feist Publ'ns*, *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)). He noted that her performance met the minimum requirement for creativity even though her voice was dubbed over because even pantomimes qualify for protection. Kozinski wrote that because her performance added her own "body language, facial expression and reactions to other actors and elements of the scene," she had a copyright interest in her individual performance. He acknowledged that this conclusion demonstrates that "any analysis of the rights that might attach to the numerous creative contributions that make up a film can quickly become entangled in an impenetrable thicket of copyright." He stated that the issue of copyright interests rarely reaches this "thicket" because most films are governed by contracts, the work for hire doctrine or implied licenses. He then turned to an analysis of whether Garcia's performance qualifies as a work made for hire, or, alternatively, whether Garcia had granted the filmmaker an implied license to use her performance.

Kozinski wrote that Garcia's performance in "Innocence of Muslims" was not a work for hire and thus Garcia retained the copyright in her performance. A work is made for hire if it is "prepared by an employee within the scope of his or her employment" or if it is "specially ordered or commissioned for use . . . as a part of a motion picture . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101. There was no written instrument to qualify the performance as a work for hire under the second part of the definition. Kozinski also concluded Garcia was not Youssef's employee. Garcia was hired

only for a specific task that lasted for three days and Youssef did not provide any traditional benefits of employment. Kozinski emphasized that Youssef was not in the "regular business" of filmmaking because, if that was the case, "every schmuck with a videocamera becomes a movie mogul."

Kozinski also found that Garcia had granted Youssef an implied license in this case, agreeing with Google that Garcia auditioned for her role, performed it, and expected the film to be released. The majority also found that the license should be construed broadly because any "narrow, easily exceeded license could allow an actor to force the film's author to re-edit the film" or "prevent the film's author from exercising his exclusive right to show the work to the public." Kozinski wrote that a narrow implied license would mean that "actors could leverage their individual contributions into *de facto* authorial control over the film." In this case, however, Kozinski concluded that Youssef's use of Garcia's performance "differs so radically from anything Garcia could have imagined when she was cast that it can't possibly be authorized by any implied license she granted Youssef." Kozinski noted that Youssef had to lie to obtain Garcia's performance, and concluded that situations where a performance would be used so wildly beyond the actor's expectations are rare, but Garcia had presented just such a case and so was likely to succeed on the merits of her claim.

To succeed in her request for a preliminary injunction, the court noted Garcia needed to show that she would suffer irreparable harm if the infringement were allowed to continue. Garcia argued that the ongoing infringement and fatwa, subjecting her to death threats, constituted irreparable harm. The court concluded the harm was "real and immediate" based on the "ongoing and serious" threats against Garcia's life and security precautions she had been forced to take, including relocating both her home and business and that she would have to continue to take security requirements in the future. Google argued that the harm occurred based on her performance in the film, not YouTube's continued hosting of it, and so her copyright claim was not the cause of the harm. The court disagreed, finding that "[t]aking down the film from YouTube will remove it from a prominent online platform—the platform on which it was first displayed—and will curb the harms of which Garcia complains." The court concluded that Garcia was likely to succeed on her copyright claim and ordered the preliminary injunction, requiring Google to remove the film from YouTube.

After the Feb. 26, 2014 opinion was released, news outlets learned that the court had instructed Google to take the video down from YouTube and prevent any uploading of the video in advance of the opinion in a secret order on Feb. 19, 2014. Google filed a motion to stay the order on Feb. 20, 2014, and the court denied this motion on Feb. 21, 2014, explaining that "[t]he order of February 19, 2014, was issued in advance of the opinion to prevent a rush to copy and proliferate the film before Google can comply with the order." Professor Eugene Volokh questioned the order in a Feb. 27, 2014 post on his blog, "The Volokh Conspiracy," which is hosted by the *Washington Post*. "[E]ven short speech restrictions have, for good reasons, been seen as raising substantial First Amendment questions, and the questions are made more substantial by the newsworthiness of the event—the removal of an extremely controversial video—that YouTube (and its parent, Google) was barred from talking about," Volokh wrote. In his April 16, 2014 post on "Technology & Marketing Law Blog," Santa Clara University Professor Eric Goldman called the secret gag order "a procedural move we don't normally see in our democratic republic."

> "This opinion is spiritually related to the efforts towards 'a right to forget.' That entire movement is an assault on our notions of historical developments and how we learn from history."
>
> **— Professor Eric Goldman, Santa Clara University School of Law**

After the opinion was published, Google filed an emergency motion to stay the order pending a rehearing *en banc* on Feb. 27, 2014, arguing that forcing Google to remove the video would "produce devastating effects" for free speech principles. Google argued in its motion that "under the panel's rule, minor players in everything from Hollywood films to home videos can wrest control of those works from their creators, and service providers like YouTube will lack the ability to determine who has a valid copyright claim." The harms to free speech would be grave, Google argued, "because the panel's order will gag [Google, YouTube and the public's] speech and limit access to newsworthy documents." Google's motion is available online at http://www.shadesofgraylaw.com/media/Garcia-Mot-to-Stay.pdf. The Ninth Circuit denied this emergency motion on Feb. 28, 2014, with one small change from the prior order: it did not "preclude the posting or display of any version of 'Innocence of Muslims' that did not include Cindy Lee Garcia's performance."

On March 6, 2014, a judge on the Ninth Circuit made a *sua sponte* request for the entire Ninth Circuit to vote on whether the full court should rehear the February 28 order to deny a stay of the panel's order. The panel voted not to reconsider the stay on March 14, 2014. Google, however, filed a petition for a rehearing *en banc* asking the court to reconsider the Feb. 26 opinion on March 12, 2014. *Amicus* briefs were due on April 15, 2014 to the Ninth Circuit, which will now consider whether to rehear the entire case *en banc*. Nine groups filed *amicus* briefs in support of Google's petition for a rehearing *en banc*. The Ninth Circuit has created a page online at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000725 that collects all of the documents in the case.

The U.S. Copyright Office refused to register separately Garcia's copyright in her performance on March 6, 2014. The letter to Garcia's attorney refusing the registration stated that "[f]or copyright registration purposes, a motion picture is single integrated work." The letter explained that authorship in a motion picture only includes "production, direction, camerawork, editing and script." Because Garcia did not own the copyright in the entire motion picture and her "contribution was limited to her acting performance," the Office refused to "register her performance apart from the motion picture." The U.S. Copyright Office's letter is available online at http://www.shadesofgraylaw.com/media/00039731.pdf.

The Ninth Circuit's opinion has stirred up widespread debate. Goldman focused in a Feb. 27, 2014 post of his "Technology & Marketing Law Blog" on the free speech issues with Kozinski's opinion. Goldman concluded that Judge Kozinski reached his decision because of the case's "bad facts," calling the opinion "a textbook example of judicial activism, i.e., coming up with newly manufactured legal doctrines to find a remedy for a victim." Of significant concern to Goldman were the case's implications for speech as a record of history. "We cannot fully appreciate the Benghazi attacks or other anti-American

Copyright, *continued on page 24*

Copyright, *continued from page 23*
attacks that may be attributable to the video, or the fatwa against Garcia, or even this opinion without seeing the video itself," he wrote. "This opinion is spiritually related to the efforts towards a 'right to forget.' That entire movement is an assault on our notions of historical developments and how we learn from history."

Corynne McSherry, intellectual property director for the Electronic Frontier Foundation, agreed that the court gave short shrift to the First Amendment concerns in the case in a Feb. 26, 2014 post for EFF. She explained that although the court correctly noted that "the First Amendment does not protect copyright infringement," the court ignored the fact that "the standards for this kind of injunction—a classic prior restraint—are particularly high." She concluded that "[b]ased on nothing more than a tenuous (at best) copyright claim, the court has ordered a service provider to censor a video that has been the subject of considerable debate and comment, with only the most cursory analysis of the speech harms it will cause."

Others have criticized the opinion's implications for copyright law, reflecting the U.S. Copyright Office's denial of Garcia's registration. In his Feb. 26, 2014 story, TechDirt's Mike Masnick wrote that the decision to interpret an actor's performance as "independently copyrightable from the film" is "preposterous" because a motion picture itself has always been perceived as one work, not divided into its individual performances.

Some believe the court made the right decision. Eugene Volokh wrote in a Feb. 26, 2014 post on his blog that "Garcia's performance is an independent work of authorship," just like "a recorded performance of a song is an independent work of authorship on the singer's part, though the singer didn't write the song." Volokh did argue, however, that Google should have asserted a fair use argument under 17 U.S.C. § 103. "The work is of important historical significance, and viewing it may be necessary to thoroughly understand the controversy related to the work," Volkh wrote. "Garcia's performance is only a small part of the work."

Federal District Court Finds in Favor of Photographer in Case of Twitter Posting by Getty Images

On Nov. 22, 2013, after four years of litigation, a federal jury sitting in Manhattan awarded photographer Daniel Morel $1.22 million in damages after several media organizations posted images he took online and distributed them to other organizations. Morel alleged that these organizations' uses infringed his copyrights in the photos, and the jury agreed, finding two companies that distributed the images liable for willful copyright infringement and violations of the Digital Millennium Copyright Act. The case has attracted attention from photojournalists in particular because it pits these journalists against organizations that use and distribute photographs.

Daniel Morel, a photographer living in Port-au-Prince, Haiti, took photos during the aftermath of the earthquake that struck the country in January 2010. He posted some of these photos online using TwitPic, a service that posts images to a user's Twitter account, on Jan. 12, 2010. A Twitter user named Lisandro Suero then reposted Morel's photos on his own Twitter page, claiming they were his. Agence-France Presse (AFP), a company that distributes photos to clients who pay licensing fees, found the photos that Suero posted and began to distribute them to its customers, including Getty Images (Getty) under a reciprocal rights agreement. AFP and Getty use computer systems that examine the metadata of photos they receive to collect byline information. In this case, the metadata from the images Suero had posted did not provide Morel's information. Clients who used the incorrectly-attributed images included the *Washington Post*, ABC, CBS, TBS, and *The New York Times*. The next day, AFP employees began to question the attribution to Suero. They determined Morel was the actual copyright holder and issued a correction for the captions of the images. This correction also re-sent the corrected images from AFP's system to Getty's system. However, Morel had a relationship that exclusively licensed his photos to Corbis, another photo licensing service. Corbis discovered that AFP and Getty were licensing Morel's images on Jan. 13, 2010, and asked Getty to remove the infringing photos. Getty claimed it removed the photos from its client-facing website and AFP issued a notice to its subscribers on Jan. 14, 2010 to remove any photos attributed to Daniel Morel. However, images taken by Morel and attributed to Suero remained online for several weeks.

> "Based on nothing more than a tenuous (at best) copyright claim, the court has ordered a service provider to censor a video that has been the subject of considerable debate and comment, with only the most cursory analysis of the speech harms it will cause."
>
> **— Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation**

On March 26, 2010, AFP filed a complaint for a declaratory judgment, asking the District Court for the Southern District of New York to find that it had not infringed Morel's copyrights in his photos. In response, Morel filed counterclaims against AFP, Getty, CBS, ABC, TBS, and the *Washington Post*, arguing that the entities willfully infringed his copyrights under the Copyright Act, 17 U.S.C. §§ 106. Morel alleged that AFP and Getty also violated the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202(c)(3) because the captions for the images included false and altered copyright management information that represented that they, not Morel or Corbis, owned the images. The DMCA, in relevant part, protects the integrity of copyright ownership information and penalizes inaccurate reporting or alterations to copyright ownership information.

On cross-motions for summary judgment decided on Jan. 14, 2013, U.S. District Court Judge Alison Nathan granted Morel's motion for summary judgment, finding that AFP and the *Post* were liable for copyright infringement, and denied AFP's motion for summary judgment. AFP argued that it had an implied license to use Morel's images because he posted them on Twitter. *Agence France Presse v. Morel*, 934 F.Supp.2d 547 (S.D.N.Y. 2013). AFP contended that it was a third-party beneficiary to Twitter's terms of service and that those terms provided a license to use the images. The court concluded that Twitter's terms of service provided for "some re-uses of content posted on Twitter," such as retweeting images posted to Twitter. However, the court decided that the Twitter terms of service did not provide users with a general license to use the information anywhere, even outside Twitter. That Morel posted the images on Twitter did not grant AFP and Getty the right to use them commercially. Judge Nathan also found that Morel sufficiently pled facts to support his claims for the DMCA violations, finding that the incor-

rect captions on the photos suggesting that Getty or AFP owned the rights to the photos conveyed information about copyright ownership that was false. *Agence France Presse v. Morel*, 934 F.Supp.2d 547 (S.D.N.Y. 2013).

The case proceeded to trial against AFP and Getty to determine whether the infringement was willful and whether the defendants violated the DMCA. The other defendants, including the *Washington Post*, CBS, and ABC had previously settled with Morel for undisclosed amounts. Under the Copyright Act, 17 U.S.C. § 504(c)(1), a copyright owner can recover up to $30,000 per infringement for any infringement of his or her work. However, if a jury finds the infringement to be willful, meaning the infringer knew or should have known that the copyright was being infringed, the maximum statutory damages increase to $150,000 per infringement under 17 U.S.C. § 504(c)(2). On the issue of willful infringement, AFP and Getty argued that their employees made innocent mistakes by using the images tweeted by Lisandro Suero, the Twitter user who posted Morel's photographs and falsely represented that they were his, and that the blame should fall on Suero. Damages for violations of the DMCA can reach a statutory maximum of $25,000 per violation. 17 U.S.C. § 1203(c)(3)(B).

At the conclusion of trial, on Nov. 22, 2013, a jury awarded Morel $1.22 million in damages against AFP and Getty. *Agence France-Presse v. Morel*, No. 10-02730 (S.D.N.Y., Nov. 22, 2013). This damages award represented the maximum statutory damages allowed for the infringement of eight photographs at issue. David Walker, a reporter for Photo District News Online, the online version of a magazine that covers news and business information, including copyright and other intellectual property issues, for professional photographers, spoke with one of the jurors in the case, Janice Baker, for a Nov. 26, 2013 story. Baker said she believed AFP and Getty's infringement was "obviously willful . . . because they didn't check on the author of the photographs," and that she was convinced that the infringement was willful after hearing email evidence Morel's attorney presented that several of Getty's employees knew very quickly after the photos were posted that they belonged to Morel, not Suero. The jury also concluded that Getty and AFP were liable for violations of the DMCA due to the incorrect captions on the images.

AFP and Getty filed post-trial motions for either judgment as a matter of law or a new trial to overturn the jury verdict on Jan. 7, 2014. They argued that the evidence did not support a finding of willful infringement and that the award of $1.22 million was grossly excessive. They noted that the damages award significantly exceeded the market value of the photos. Morel's lawyers filed a response to this motion, arguing that the large damages award was appropriate because penalties for copyright infringement should, for deterrence purposes, cost more than complying with the law would have cost the infringer. Morel attorneys' contended in the motion, "In AFP's view, the giant photo agency should be allowed to take whatever it wants from the Internet and later pay whatever it thinks is appropriate if the copyright holder fails to respond promptly to a request for permission to license." As the *Bulletin* went to press, the parties were awaiting a ruling on these post-trial motions.

> "The *Morel* decision underscores the importance of exercising caution when using content found online (particularly on social media websites), and of training staff at all levels to direct communications alleging copyright infringement or other claims to counsel."
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> **— Louis J. Levy and S. Jenell Trigg, Attorneys, Lerman Senter LLC**

After the verdict, Morel told Photo District News Online for its November 26 story, "I hope the internet is going to be a little safer now for all artists, all photographers." Getty Images's general counsel John Lapham told the *British Journal of Photography* for a Nov. 24, 2013 story, "I think it's fair to say that we we're disappointed with the amount." He added, "At Getty Images, we're very interested in the proper attribution of all of our images, and we've spent the last three years improving our systems and our processes to prevent this type of error from happening again . . . .We have a lot of images coming in every single day, and we've learned a lot from this case."

Reactions to the jury verdict have suggested that the case offers important lessons about the use of photographs online. Goldman wrote in a Nov. 25, 2013 post on his "Technology & Marketing Law Blog" that "photos are a huge liability trap on the Internet." He noted that although it appears to be common practice for individuals to copy photos from the Internet, "there are very few circumstances where republishing someone else's photo without permission isn't infringement, and the transaction costs of defending any such lawsuit almost always exceeds the upfront license fees." He advised Internet users to "be careful copying and republishing any photo on the Internet, wherever sourced." Mickey Osterreicher, attorney for the National Press Photographers Association, told Photo District News Online that the verdict sends infringers a message—"The lesson is: Ask for permission." Louis J. Levy and S. Jenell Trigg, attorneys with Lerman Senter LLC's Washington D.C. office, wrote in a Feb. 21, 2013 post for Martindale.com that the decision "underscores the importance of exercising caution when using content found online (particularly on social media websites), and of training staff at all levels to direct communications alleging copyright infringement or other claims to counsel."

Cassie Batchelder
Silha *Bulletin* Editor

NSA Surveillance Practices Prompt Reforms and Legal Challenges Throughout All Government Branches

SURVEILLANCE

Since the first leaks by former NSA contractor Edward Snowden were reported in June 2013, all three branches of the U.S. government have faced ongoing questions regarding intelligence surveillance practices. The revelations have informed the public about the scope of surveillance and the degree to which citizens are tracked even without suspicion of wrongdoing. The controversy over these issues has forced the Obama administration to reevaluate its use of some of the most controversial aspects of its surveillance programs, Congress to consider reforms to the laws that authorize them and courts to evaluate the legality of some surveillance methods. (For more on the content of and reaction to the Snowden leaks, see "Snowden Leaks Continue to Reveal NSA Surveillance Programs, Drive U.S. and International Protests and Reforms" in the Fall 2013 issue of the Silha *Bulletin* and "Snowden Leaks Reveal Extensive National Security Agency Monitoring of Telephone and Internet Communication" in the Summer 2013 issue of the *Bulletin.*)

Obama Administration Announces Revised Domestic Surveillance Policies

On March 27, 2014, President Obama officially announced the administration's proposals to reform the National Security Agency's (NSA) bulk data collection practices. Obama first announced reforms to the NSA bulk telephony metadata programs in a Jan. 17, 2014 speech. The metadata program gave the NSA access to millions of Americans' phone metadata, which includes the telephone numbers, call times and duration for all incoming and outgoing calls. Obama announced two immediate changes to NSA policies about searching, or "querying," the metadata. First, NSA analysts seeking to query the communication metadata associated with a telephone number will no longer have the authority to query the metadata based only on a "reasonable, articulable suspicion," which had previously been the standard. Instead, Obama stated that, except in emergencies, analysts would be required to get approval from a Foreign Intelligence Surveillance (FISA) Court for telephone numbers they query.

Second, Obama stated that NSA analysts querying data would now be limited to telephone numbers within two "hops," rather than three, of the number being queried. A hop is an intelligence term for the step between a phone being targeted and any phone that communicates with it. When an analyst queries a number, she receives a list of all numbers that have called or been called by that number. If the individual had been in contact with, for instance, 500 people, those 500 numbers are considered within one hop. Similarly, all numbers that have called or been called by any of any of those 500 numbers are within two hops, and all numbers that have been called by any of those numbers are within three hops. The NSA had faced criticism for the three-hop policy because a query for one telephone number could give the NSA analysts access to the metadata of tens or even hundreds of thousands of people. Thus, the change would decrease the number of different people's metadata available through each query. According to Slate's Fred Kaplan, in a Jan. 17, 2014 article, NSA analysts "almost never" used the third hop when querying metadata, but the change could nonetheless limit the potential for future abuse. According to a March 27, 2014 White House press release, a FISA Court approved these changes to the program on Feb. 5, 2014.

> "The enactment of the President's proposals would strike a much better balance between the interests of liberty and security."
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> — **Geoffrey Stone, Professor, University of Chicago Law School**

In the January 17 speech, Obama also announced further reform proposals for which the administration would seek Congressional approval. He promised more specific proposals before the March 28, 2014 deadline for FISA Court approval for the metadata program, which must be reapproved every 90 days. In a March 27, 2014 press release, the White House outlined its proposal to seek changes to existing law governing the collection program. The proposal would remove the government's ability to maintain a massive database of metadata records by collecting the records in bulk from communications companies. Instead, companies would maintain the records and the government could require the companies to produce specific records by obtaining a FISA Court order. According to a March 24, 2014 article in *The New York Times*, companies would not be required to maintain records for any longer than the 18 months already required by federal law but when served with a court order, would be required to supply updated records on an ongoing basis. Obama instructed the Department of Justice to seek another 90 day reauthorization of the current program to allow time for Congress to pass a reform bill.

In a March 25, 2014 press conference, Obama characterized the reforms as addressing civil liberties issues surrounding metadata collection and surveillance while continuing to give law enforcement powerful tools. "Overall, I am confident that it allows us to do what is necessary in order to deal with the dangers from the terrorist attack, but does so in a way that addresses some of the concerns that people had raised," he said. Obama stressed that the proposal must to be passed into law, saying "I'm looking forward to working with Congress to make sure that we go ahead and pass the enabling legislation quickly, so that we can get on with the business of effective law enforcement."

The administration adopted some of the reforms proposed in a Dec. 12, 2014 report, by a panel appointed by the president to evaluate the executive's surveillance practices. The panel recommended sweeping changes to NSA surveillance, including over 40 specific proposals to the president for changes on issues from bulk collection to the composition of the FISA Courts. On the issue of metadata collection, the panel found that the bulk collection program was "not essential to preventing attacks" and recommended eliminating the NSA's ability store massive databases of the American's metadata. Geoffrey Stone, a University

of Chicago Law Professor, a member of the review panel and 2006 Silha Lecturer, argued in a March 27, 2014 article for "The Daily Beast" that the President had adopted the most important reforms recommended by the panel and "the enactment of [the President's] proposals would strike a much better balance between the interests of liberty and security." (For more information about Stone's Silha lecture, see "Geoffrey Stone Predicts First Amendment will Protect Journalists from Prosecution at 21st Annual Silha Lecture" in the Fall 2006 issue of the Silha *Bulletin*).

Some have argued that the administration's decision to seek congressional restrictions on programs largely designed by executive orders was a form of political cover. "If Congress approves, then the president can say that the task is done, the Constitution restored, let's look forward again and not backward," foreign affairs writer Peter van Buren wrote in a March 27, 2014 article on the reforms for *The Huffington Post*. Van Buren continued, "If Congress does not vote for the reforms or changes them, well, anything from there forward is their fault." Senator Rand Paul (R-Ky.) also argued that the president should take stronger executive action. "He unilaterally instituted this program without congressional authority, I think he could unilaterally stop the program if he were serious about it," Paul said in a March 25, 2014 interview with *Politico*. Elizabeth Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice, said in a March 27, 2014 Brennan Center press release, "The very fact that the president's plan requires legislation means he has something in mind other than simply ending the [metadata collection] program."

A March 25, 2014 editorial by *The New York Times* Editorial Board also urged the President to take greater unilateral action while pointing out the many remaining unknowns about the reforms. For instance, the editorial asks, "What standard of suspicion does the government need to meet to persuade a judge?" The editorial stated that some administration officials said under the proposal, a court order would require the same "reasonable, articulable suspicion of terror ties now used by the N.S.A. when examining phone records," and that standard of proof is "unacceptably weak."

There are competing proposals in Congress for bills to reform domestic surveillance and data collection. On March 25, 2014, House Intelligence Committee Chairman Mike Rogers (R-Mich.) and Ranking Member C.A. Dutch Ruppersberger (D-Md.) introduced the FISA Transparency and Modernization Act of 2014 (FISA TMA), H.R. 4291. According to a March 25, 2014 Intelligence Committee press release in support of the bill, it would "end NSA bulk telephone metadata program while preserving counterterrorism capability." The bill would stop bulk collection of records by restricting the government from acquiring "records of any electronic communication without the use of specific identifiers or selection terms." In other words, the government would not be able to obtain all user metadata from companies in bulk but rather only pursuant to specific requests. Similar to Obama's proposals, the bill would require the government to go to private companies to acquire specific records and would not require companies to keep the records longer than the 18 months currently required.

According to a March 27, 2014 *U.S. News* article, Rep. Ruppersberger described the bill as "'very, very close' to the White House proposal—with the key difference being Obama's preference for court approval before the records are taken." Instead, the FISA TMA bill does not require the government to seek the approval of a court before records are collected from a phone company. Under the bill, government could demand the records from companies based on a "reasonable and articulable suspicion" that the records relate to foreign intelligence gathering. After the government has obtained the records, it would need to submit its reasoning for the suspicion to a FISA court. If the court rejects the basis for the request, the government would be required to then purge those records.

Others have criticized the bill for purporting to offer reform while in fact legitimizing several of the most criticized aspects of the program. Rep. James Sensenbrenner (R-Wis.) said in a March 25, 2014 statement that the FISA TMA "is a convoluted bill that accepts the administration's deliberate misinterpretation of the law. It limits, but does not end, bulk collection."

On Oct. 29, 2013, Sensenbrenner, one of the authors of the PATRIOT Act, and Sen. Patrick Leahy (D-Vt.) proposed a different surveillance reform bill, H.R. 3361/S. 1599, the USA FREEDOM Act. The bill would, as Obama proposed, require a specific court order for the government to acquire metadata records. The bill would also create a FISA court Special Advocate to provide a more adversarial presence in such cases and would propose to restrict the scope of and increase transparency regarding national security letters, which are secret requests for information by intelligence agencies, which recipients cannot tell anyone about. (For more on congressional proposals for surveillance reform, see the section titled "Congress Proposes Surveillance Reform" within "Snowden Leaks Continue to Reveal NSA Surveillance Programs, Drive U.S. and International Protests and Reforms" in the Fall 2013 issue of the Silha *Bulletin*).

In a March 25, 2014 statement, technology advocacy group Electronic Frontier Foundation endorsed the USA FREEDOM Act, arguing the changes to the telephone metadata program "are important, but are only a relatively small piece of the NSA's surveillance." The group argued for more comprehensive surveillance reform, stating "Given all the various ways that the NSA has overreached, piecemeal change is not enough." The bill has also been endorsed by groups such as the ACLU and Center for Democracy and Technology.

U.S. District Courts Disagree on Constitutionality of NSA Metadata Program

Two U.S. district courts have ruled on challenges to the metadata collection program and come to different conclusions about its legality. On Dec. 16, 2013, Judge Richard Leon of the U.S. District Court for the District of Columbia granted a preliminary injunction against the NSA telephony metadata collection, finding that the program violated the Fourth Amendment protection from unreasonable search and seizures. *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). An injunction requires a finding that the plaintiffs have a substantial likelihood of success on the merits of the case, which in this case meant that the plaintiffs had a reasonable expectation of privacy in their telephone metadata. Judge Leon found that the collection of "what phone numbers were used to make and receive call, when the calls took place, and how long the calls lasted" violated plaintiff's reasonable expectation of privacy, and warrantless collection thus violated their Fourth Amendment rights. (For more on legal challenges to the metadata collection program, see the section title "Supreme Court Rejects Challenge to FISA Court Decision Approving NSA Surveillance" within "Snowden Leaks Continue to Reveal NSA Surveillance Programs,

Surveillance, *continued on page 28*

Surveillance, *continued from page 27*
Drive U.S. and International Protests and Reforms" in the Fall 2013 issue of the Silha *Bulletin*).

The government argued that the Supreme Court established in *Smith v. Maryland*, 442 U.S. 735 (1979), that a citizen did not have a reasonable expectation of privacy in the numbers dialed from his or her phone. In *Smith*, police had collected the numbers without a warrant using a pen register. The Supreme Court held that Smith had no reasonable expectation of privacy because he voluntarily communicated the information to the telephone company and could reasonably anticipate that it would store the data in its records. However, Judge Leon found that "present-day circumstances—the evolutions in the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies" had so significantly changed from the past that *Smith* did not control. Leon analogized to a recent Supreme Court case holding that pervasive, long-term surveillance of personal information, even information in which a citizen may not have a reasonable expectation of privacy, can violate the Fourth Amendment. In *United States v. Jones*, 132 S. Ct. 949 (2012), the Supreme Court ruled that although citizens do not have a reasonable expectation of privacy in their location while traveling on public roads, attaching a GPS device to a suspect's car and tracking all vehicle movements for nearly a month did violate the citizen's reasonable expectation of privacy. (See "Warrantless GPS Tracking Violates Fourth Amendment; White House Defends Warrantless Surveillence" in the Winter/Spring 2012 issue of the Silha *Bulletin*.) By analogy, Judge Leon found that although *Smith* held that a citizen does not have a reasonable expectation of privacy in their telephone metadata as to a limited, short-term search, the continuous and indiscriminate collection of all telephone metadata constituted a qualitatively different Fourth Amendment issue. Judge Leon also found that modern cell phone usage meant that telephone metadata "'reflects a wealth of detail about … familial, political, professional, religious and sexual associations' … that could not have been gleaned from a data collection in 1979." Thus, the metadata program violated citizens' reasonable expectation of privacy.

In order to grant the preliminary injunction, Judge Leon also had to find that the program's violation of citizens' reasonable expectation of privacy was not reasonable. He found that the suspicionless metadata collection was of the very kind the Fourth Amendment was meant to guard against. "I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying it and analyzing it without judicial approval," Judge Leon wrote. In addition to emphasizing the scope of the collection, Leon questioned the intelligence value of the metadata collection program. "I have significant doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism." Judge Leon noted that although the government argued the program was needed for time-sensitive investigations, it did "not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack."

> "I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying it and analyzing it without judicial approval."
>
> **— Judge Richard Leon,**
> **U.S. District Court for the District of Columbia**

Because Judge Leon found a substantial likelihood that the plaintiff's Fourth Amendment rights were violated, the preliminary injunction was granted. However, because of the important national security interests implicated in the case, the decision was stayed pending appeal. On January 3, 2014 the government filed for appeal and as the *Bulletin* went to press, the appeal was pending before the United States Court of Appeals for the Washington D.C. Circuit.

On Dec. 29, 2013, the District Court for the Southern District of New York ruled in a very similar challenge that the NSA telephony metadata program was constitutional and consistent with intelligence statutes in *American Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013). District Judge William Pauley ruled that although metadata "can reveal a rich profile of every individual as well as a comprehensive record of people's associations with one another … the Government's bulk telephony metadata program is lawful." Judge Pauley denied the ACLU's motion for a preliminary injunction and granted the government's motion to dismiss. The decision, released less than two weeks after Judge Leon's ruling, confronted essentially the same legal issues, even citing repeatedly to Dec. 16, 2013 opinion, but ultimately disagreed with Judge Leon's constitutional analysis.

Unlike Judge Leon, Judge Pauley regarded *Smith* as controlling precedent. The opinion emphasized that although technology had changed since that decision, "*Smith*'s bedrock holding is that an individual has no legitimate expectation of privacy in information provided to third parties," and the Supreme Court has never overruled that decision. Judge Pauley distinguished Jones, finding that although "five justices appeared to be grappling with how the Fourth Amendment applies to technological issue," the majority did not overrule *Smith*, but rather based the decision on the fact that the government had performed a physical search by placing a GPS device on the suspect's car. He also found that the records at issue did not belong to the plaintiffs. The metadata is "created and maintained by the telecommunications provider," meaning that the individual does not have a right to privacy over that information.

Judge Pauley did not recognize a legal distinction between the short-term collection of telephony metadata by a police department in 1979 and the long-term, indiscriminate collection of telephony metadata by the NSA in 2014. "The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search." Although the social and technological realities of metadata collection had changed, Judge Pauley ruled that the Supreme Court ruling in *Smith* compelled the finding that the Fourth Amendment had not been violated.

The ACLU also raised a constitutional challenge not at issue in *Klayman*. The ACLU argued that indiscriminate collec-

tion of metadata infringes on citizens' First Amendment protected rights to freely associate, as knowledge of government surveillance of all telephone activity would chill citizens' desire to make phone calls for which they desired to be anonymous. Judge Pauley ruled that this claim was too speculative to constitute a burden on First Amendment rights. The government's policies allow the metadata to be searched only based on a reasonable, articulable suspicion of a connection to terrorist activity. Intelligence workers may then examine associations between the search target's number and three degrees of separation or "hops" from that number. Judge Pauley concluded that the ACLU's First Amendment claim relied on "speculative fear" that the government would review the ACLU's metadata and identify the parties, and therefore the burden on First Amendment rights was not substantial.

Judge Pauley concluded by reemphasizing the balance of interests at stake in the case. "The effectiveness of bulk telephony metadata collection cannot be seriously disputed," he wrote, citing three instances in which the government had made use of the data in investigating alleged terrorist activities. Meanwhile, "[e]very day, people voluntarily surrender personal and seemingly-private information to trans-national corporations, which exploit that data for profit. Few think twice about it, even though it is far more intrusive than bulk telephony metadata collection." Judge Pauley rejected the statutory and constitutional claims against the telephony metadata programs and dismissed the case. On Jan. 2, 2014, the ACLU filed an appeal with the U.S. Court of Appeals for the Second Circuit.

EU High Court Strikes Down Metadata Collection

As the debate over the legality and propriety of bulk metadata collection continues to rage in the United States, the European Union high court found a similar EU program to be invalid. On April 8, 2014, the Court of Justice of the European Union (CJEU) struck down the 2006 European Data Retention Directive that required member state governments to collect and retain telephone metadata for between six months and two years in order to give law enforcement and intelligence access to that data. Case C-293/12, *Digital Rights Ir. v. Minister for Comm'ns, Marine and Natural Res.*, ECLI:EU:C:2014:238 (April 8, 2014), available at http://curia.europa.eu/juris/documents.jsf?num=C-293/12. The Directive was passed in the wake of the 2004 Madrid subway bombings and 2005 London bombings to give law enforcement and intelligence officials greater investigatory tools.

> "The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search."
>
> **— Judge William Pauley, U.S. District Court for the Southern District of New York**

The court found that "the directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data." The decision focused on the indiscriminate nature of collection and the lack of oversight governing access to the records. While recognizing the potential law enforcement value of the metadata, the CJEU found that the procedures in place disproportionately threatened privacy in service of law enforcement interests. More specifically, the court found that the collection "taken as a whole, may provide very precise information on the private lives of the persons whose data are retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, activities carried out, social relationships and the social environments frequented." The court left open the possibility that the data could be accessed so long as governments were required to seek prior approval "carried out by a court or by an independent administrative body."

Because of the structure of EU law, the decision does not invalidate the metadata retention laws of each member state. Instead, courts and legislatures in each country will be free to repeal or retain the laws as they see fit. The CJEU's decision means that there is no longer an EU Directive requiring those laws to be in place. Before the ruling, German, Romanian and Czech courts had already struck down their country's data retention laws.

Privacy advocates have hailed the decision as an important step towards preventing mass metadata collection in the EU and beyond. In an April 8, 2014 press release, the UK-based advocacy organization Open Rights Group applauded the court for vindicating two fundamental rights, "the right to respect for private life and to the protection of personal data," and said it would explore a challenge to the UK data retention law. German Green Party politician Malte Spitz told technology news site Ars Technica that the decision reflected research demonstrating the very revealing potential of metadata collected under these laws. "This data retention affects everyone's personal life, that your whole digital life is monitored without a concrete reason," Spitz said.

In an April 16, 2014 letter to the White House, a coalition of advocacy groups including the Electronic Privacy Information Center and the Electronic Frontier Foundation urged the President to recognize the Court of Justice's decision and take steps to account for the privacy concerns expressed by the court in U.S. data collection policy. The groups argued that CJEU's factual findings about the privacy implications of metadata contributed to growing authority finding that the *Smith v. Maryland* decision, which underlies the legal justification for U.S. metadata collection, fails to account for modern threats to privacy. The letter told the White House, "While we fully recognize that the [CJEU]'s judgment is based on different laws and different traditions, we believe that the opinion is central to your ongoing work on Big Data."

Alex Vlisides
Silha Research Assistant

Spring Symposium Examines the Legacy of *New York Times v. Sullivan*, Honors Donald M. Gillmor

SILHA CENTER EVENTS

Leading defamation expert and Senior Judge for the United States Court of Appeals for the Second Circuit Robert D. Sack said that the entire modern understanding of American defamation law has been built upon the United States Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Sack's remarks were part of his keynote address at "How Far from Near? 50 Years of *New York Times v. Sullivan* in Minnesota and Beyond: A Symposium Honoring the Legacy of Silha Professor Emeritus Donald M. Gillmor." The School of Journalism and Mass Communication and the Silha Center for the Study of Media Ethics and Law co-sponsored the event held on April 23, 2014 at the University of Minnesota's Cowles Auditorium.

The symposium considered the significance of two landmark Supreme Court cases, *Near v. Minnesota*, 283 U.S. 697 (1931), and *New York Times v. Sullivan*. *Near* was the first case to establish the long-standing First Amendment principle that prior restraints on publication are presumptively unconstitutional. *Sullivan*, decided in 1964, established that public officials suing for defamation must prove that a defendant acted with actual malice—knowledge that a statement is false or made with reckless disregard for the truth—before they are able to recover damages. The event consisted of a panel of media scholars and a panel of media attorneys and journalists discussing the lasting impact on the journalism field and the understanding of freedom of the press both in the United States and abroad. The event concluded with Sack's speech discussing the historical importance of the Sullivan decision.

Gillmor, who passed away in February 2013, was the founding director of the Silha Center. He received his Ph.D. in mass communication from the University of Minnesota in 1961 and joined the University's faculty in 1965. Gillmor was named the first Silha Professor of Media Ethics and Law in 1990. He held the position until his retirement from the University in 1998. Gillmor was internationally known as a leading expert on issues of media law and ethics. His distinguished career included authoring the seminal media law textbook *Mass Communication Law: Cases and Comment* (with Jerome A. Barron), which was in its 6th edition in 1998 and is widely used by students and scholars in the field. Gillmor's achievements included numerous publications and awards, and he left a legacy as a dedicated educator.

In her opening remarks, Silha Professor of Media Ethics and Law Jane Kirtley noted that the significance of *Near* and *Sullivan* was the Supreme Court's decision to limit the role of government in determining truth in public discourse. "The question of what is truth is a very old and often very unsolvable question," Kirtley said. "I think here in the United States we have a real aversion to the notion of the government telling us what the truth is."

The symposium's first panel, "Beyond First Amendment Exceptionalism: The Multiple Legacies of *Near* and *Sullivan*," was moderated by former Gillmor student Everette E. Dennis, dean and CEO at Northwestern University in Qatar and professor of journalism and communication studies at Northwestern University in Evanston, Ill. The panel featured former Gillmor students, including University of Wisconsin-Milwaukee Associate Professor David S. Allen, University of Wisconsin-Madison James E. Burgess Professor of Journalism Ethics Robert Drechsel, Washington State University Associate Professor Elizabeth Blanks Hindman, and Indiana University-Bloomington Professor Emeritus Herbert A. Terry.

The panel first discussed the important connections between *Near* and *Sullivan*. Allen explained that both cases highlight the important role of dissent in a democratic society. Drechsel noted that the two decisions "both make a strong statement about political speech and protecting political speech." Blanks suggested that *Sullivan* also ushered in a new era of media ethics. "If you look at the discussion the court has… they're talking about ethics," Blanks Hindman said. "[The Justices] argue that the press needs to be accountable."

The panel emphasized the historical context of the case during the civil rights movement in the 1960s. The *Sullivan* case arose out of an advertisement in *The New York Times* that criticized Montgomery, Ala., officials' treatment of civil rights protestors. Terry said, "I've always interpreted *Sullivan*, primarily, as a civil rights case rather than as a First Amendment case." Allen noted that *Sullivan*'s lawsuit also included several African-American ministers from Alabama whose names were attached to the advertisement. Allen suggested that one reason that the clergymen are often forgotten is because the *Sullivan* decision's language does not say much about them but focuses primarily on *The Times*.

Drechsel also emphasized the backgrounds of the parties in both *Near* and *Sullivan*. In the *Near* case, which challenged a Minnesota statute that allowed prior restraints on publications government officials deemed to be public nuisances, the defendant publisher Jay Near could not afford to pursue the costly appellate process for his case. Drechsel said that the case made it to the Supreme Court only because Colonel McCormick, the publisher of the *Chicago Tribune*, helped Near to secure legal counsel and paid the costs of the appellate process. Without McCormick's intervention, *Near* could have simply been a little known case decided in Minnesota rather than the significant First Amendment victory for the press, he said.

The media scholars noted that the legacy of *Sullivan* extended worldwide. Terry suggested that the protection for speech and press that the two cases provide makes the United States unusual. "We are kind of unique in believing that the best way to protect the individual freedom of speech and of expression is to keep the government out," Terry said. He added, however, that he thought it was becoming harder to justify to people in other countries why the United States would protect false speech, as *Sullivan* does. Dennis observed that "an interesting aspect of the *Sullivan* case is the enormous admiration that people have for that ability of media to navigate around public officials to realize there isn't going to be seditious treatment as is [the case in] many other countries."

Marshall H. Tanick, partner at law firm Hellmuth & Johnson, moderated the event's practitioners panel, "Time after *Times*: Defamation Law (and Privacy, Too) in Minnesota." The panel included several journalists and practicing attorneys: John Borger, a partner at law firm Faegre Baker Daniels LLP; Gary Gilson, former executive director of the Minnesota News Council; Barbara L. Jones, managing editor for *Minnesota Lawyer*; Jack Sullivan, attorney at law firm Best & Flanagan LLP; and Patrick Tierney, partner at law firm Collins, Buckley, Sauntry & Haugh.

The practitioners examined the impact of the *Sullivan* decision and its progeny on practicing law and journalism, as well as the intersection of the two fields. Borger said, "*Sullivan* returned the law of defamation to the kind of free-for- all roots [of free expression] that the Framers had in mind."

Attorney Sullivan, a former journalist, noted that the decision released newsrooms from fears of threats of libel actions which could chill publication. "I spent thirteen years in newsrooms, and I don't know if I can recall a conversation that revolved around whether we could do something or whether we were going to be sued if we did do something," Sullivan said.

By contrast, Tierney, who often represents defamation plaintiffs, said that pursuing defamation claims is extremely difficult after *Sullivan*. "I tell my clients on day one, especially in a case with the requirement of constitutional malice, that [winning the case] is never better than a 50-50 shot," Tierney said. The panel also pointed out that the *Sullivan* requirement of actual malice can allow lawyers to question the thought-processes of reporters in court. Tanick explained that he will often subject reporters to intense questioning during a pre-publication review of a story to show how difficult it can be for reporters to defend themselves in defamation cases. Jones also noted that an editor for *The New Yorker* had to undergo 30 days of questioning in a deposition during a defamation lawsuit.

Tanick concluded the discussion by asking a provocative question: should the *Sullivan* decision be overruled? Borger and Sullivan argued that after 50 years, the ruling was ingrained in the work of lawyers and journalists. Tierney conceded that he thought the *Sullivan* decision was good, but added that cases resulting from the decision have created problems for pursuing even meritorious defamation suits. Jones said that *Sullivan* was absolutely necessary, but she would make one small change. "Justice Brennan, toward the end of his life, regretted that he used the term 'actual malice' because it doesn't really make sense," Jones said. "So if we could change that without getting rid of the case, it would be ideal." Gilson was emphatic in his support for the decision. "Absolutely not," Gilson said. "All governments lie. Not all the time, but too often, and it's the job of journalists to root out the truth."

The day's capstone event was Sack's speech, "Thirteen Ways of Looking at *New York Times v. Sullivan*." Sack described *Sullivan* as an important and difficult case decided in a "short, yet sprawling, opinion by Justice [William J.] Brennan." The case itself was remarkable because it started with a clean slate, Sack said. Prior to the *Sullivan* case, civil judgments in defamation cases were solely within the realm of state law without any First Amendment protections. "From there, in a single bound, with one opinion, the Court jumped to a new and complex set of constitutionally-based limitations on defamation suits by public officials," explained Sack. The path that the Supreme Court took to reach the *Sullivan* decision was just as complex, he said.

Sack discussed the important role that the history of English common law played in understanding the *Sullivan* decision. The system contained effective tools to suppress free expression. *Sullivan* arose from the Supreme Court's difficulty in guaranteeing First Amendment protections for speakers within the restrictive aspects of the English system, such as press licensing and seditious libel laws. "It was *New York Times v. Sullivan* that began to outline the limitations on the use of [libel and slander] actions to quash unpopular speech about public figures, public men and women, and, to some extent, public affairs," Sack said.

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>
> **— Judge Robert D. Sack,**
> **Senior Judge,**
> **United States Court of Appeals for the Second Circuit**

Sack agreed with the earlier panels that the *Sullivan* case needs to be understood in the context of history. Sack said that many of the landmark Supreme Court cases have arisen out of civil turmoil. The Sullivan case is not any different. "Plainly, *Sullivan* cannot be divorced from the fight for civil rights or *The New York Times*," said Sack. The case simply would not have existed without the increasing tension of race relations in southern states during the 1960s, he said.

Sack noted that in addition to *Sullivan*'s main holding, requiring proof of actual malice, several other intriguing legal questions arose from the case. For example, should *The Times* have been required to appear in the Alabama state court when the newspaper did very little business in the state? If the Supreme Court had ruled that the Alabama state court did not have jurisdiction over the *Times*, the *Sullivan* case could have been quickly resolved, because only the Alabama ministers would have been defendants in the Montgomery official's lawsuit in the state courts, and few, if any, constitutional issues would have been raised. Sack suggested that dropping the *Times* from the case would have meant that the "weightiest [constitutional] issues" at stake in the case would have had to wait for another day.

The core issue at the heart of the *Sullivan* decision was how the Supreme Court could provide speakers with protection from judges and juries who wanted to punish speech, Sack said. "The First Amendment is about protecting unpopular speech. You don't need a constitutional provision to preserve your right to say things at the terrible risk of wide public approval and applause." Sack suggested that Justice William Brennan, author of the *Sullivan* opinion, drew heavily from Justice Oliver Wendell Holmes' and Justice Louis Brandeis' arguments in earlier opinions for free expression to protect "the thought that we hate." Justice Brennan's ruling provided speakers with protection from hostile judges and juries by allowing appellate courts to independently examine whether the plaintiff had proven actual malice in the trial court, he said.

Sack concluded that he believes the standards for the protection of speech and press Justice Brennan created in *Sullivan* work well, though he acknowledged that the decision did create substantial hurdles for plaintiffs. He noted that the Court probably limited the *Sullivan* decision to public officials because its central concern was focused on discussion of public issues. "Perhaps most strikingly in what may be the most famous sentence in the case, Justice Brennan referred to debate on public issues, which he said should be uninhibited, robust, and wide open," Sack said.

Throughout the day, participants reflected on the impact Gillmor had made on their lives. Both Tanick and Jones said that Gillmor had encouraged them to enter law school. Allen said, "[Gillmor] continues to shape my research, my teaching and my life in many ways." Blanks Hindman remembered Gillmor "especially for his ability to encourage students to make sound legal and philosophical arguments, his kindness and, most importantly, his devotion to his wife, Sophie."

The symposium honoring Gillmor's legacy was funded primarily by the School of Journalism and Mass Communication. The Silha Center, the event's co-sponsor, was established by a generous endowment from the late Otto Silha and his wife, Helen.

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2014 Silha Lecture

David A. Schulz

October 6, 2014
7:00 pm Cowles Auditorium
University of Minnesota West Bank, Twin Cities Campus

See No Evil: Why We Need A New Approach to Government Transparency

Featuring
David A. Schulz
Partner, Levine Sullivan Koch & Schulz, LLP
Co-Director of the Media Freedom & Information Access Clinic at Yale Law School
Counsel to The Associated Press, *New York Times*, *Guardian*, and other investigative news organizations

On the 25th anniversary of *Department of Justice v. Reporters Committee*, one of the nation's leading advocates for press access and the public's right to know will explore the judicial and bureaucratic debilitation of the Freedom of Information Act since 9/11, and the critical need to broaden and enforce the First Amendment right of access to government proceedings and records. The discussion will consider the untapped potential of the constitutional access right and the role of the press in illuminating issues ranging from "secret law" articulated by the Foreign Intelligence Surveillance Court, to the government's plans to prevent Guantanamo detainees from testifying publicly at their own trials, to a State's ability to keep secret the formulas used for lethal injection executions.