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This Issue's Highlights

SCHOOL OF JOURNALISM & MASS COMMUNICATION
COLLEGE OF LIBERAL ARTS
UNIVERSITY OF MINNESOTA

D.C. Circuit Rules That Reporters Have No Constitutional Right of Access to Military Operations

The U.S. Court of Appeals for the D.C. Circuit ruled on Feb. 3, 2004, that reporters do not have a constitutional right to be embedded with U.S. troops during combat. That case was brought before the court by *Hustler* publisher Larry Flynt.

Flynt has been a player on the stage of First Amendment rights of access for the media for a number of years. He had first brought a lawsuit seeking access to military operations during the invasion of Granada in 1983. In that case, *Flynt v. Weinberger,* 246 U.S. App. D. C. 40 (D.C. Cir. 1985), federal judges ruled in a *per curiam* opinion that different war circumstances require different restrictions on media access. Furthermore, these conflicts are so short in duration that media organizations must move quickly to initiate a lawsuit, or else the question before the court becomes moot.

Flynt's most recent case, *Flynt v. Rumsfeld*, 2004 U.S. App. Lexis 1561 (D.C. Cir. 2004), began when *Hustler* magazine publisher Flynt asked the military to allow reporters from his magazine to follow troops fighting the war against terrorism in Afghanistan during the fall of 2001. Flynt had written a letter to Victoria Clarke in her capacity as Assistant Secretary of Defense for Public Affairs, requesting that *Hustler* correspondents "be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom."

When Clarke did not respond after two weeks, Flynt wrote to her again. Three days later, Clarke sent Flynt a fax stating that there were only a small number of troops then located in Afghanistan and "the highly dangerous and unique nature of their work makes it very difficult to embed media" with the ground troops currently stationed there. But Clarke wrote that "scores of reporters and photographers have covered [air] strikes, witnessed humanitarian drops and interviewed dozens of [soldiers]." Clarke provided Flynt with information necessary to contact the Public Affairs Officer (PAO) for the Fifth Fleet so that Flynt could arrange similar access for correspondents from *Hustler*.

Rather than contacting the Fifth Fleet's PAO, Flynt filed suit, then wrote to Clarke saying that his request did not take into consideration the kind of access that would have been available through those channels. "Rather," Flynt wrote, "I specifically requested reporter access to actual battlefield combat activities." In further correspondence between Flynt and Clarke, Flynt was provided with an "extensive" list of contact persons and informed that Department of Defense (DoD) decisions regarding media access were controlled by DoD Directive 5122.5. One portion of Directive 5122.5, Enclosure 3, negotiated between the media and the Pentagon after the Persian Gulf War in 1992, states that "open and independent reporting shall be the principal means of coverage of U.S. military operations," and allows for media pools, but states that pools are not to be the "standard means of covering U.S. military operations." Enclosure 3 further states that "field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible" but does include the caveat that special operations may limit access in some cases."

In Flynt's initial complaint, filed Nov. 16, 2001 in federal District Court in the District of Columbia, he challenged Directive 5122.5 and Enclosure 3 in part on the grounds that enforcement of the policies violated the media's historical and constitutional rights of access to the battlefield, and that enforcement of the policies constituted a content-based form of prior restraint. The District Court denied Flynt's motion for a preliminary injunction in *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174 (D.D.C. 2002), stating that the rapidly changing situation with the war in Afghanistan "would have to await the development of a fuller record."

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Flynt v. Rumsfeld, *continued from page 1*

On Jan. 17, 2002, Flynt filed an amended complaint with the D.C. District Court, saying in part that the First Amendment guaranteed a reporter's access to the battlefield and that Directive 5122.5 does not recognize that right. But in May 2002, David Buchbinder, a reporter for *Hustler*, arrived in Afghanistan. Buchbinder subsequently filed several stories for the magazine, including one written after he was allowed to accompany troops on a mission searching for al-Qaida operatives.

The D.C. District Court rejected Flynt's additional complaints in *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003), stating that there was no record that the DoD ever made a final decision regarding Flynt's request, and that Flynt could not prove that he had suffered "concrete injury" as a result of a lack of final decision. Flynt appealed to the D.C. Circuit Appeals court.

There is nothing in the Constitution, American history, or case law that requires the military to provide the media with access to combat.

– Judge David Sentelle

Writing for a unanimous three-judge panel, Judge David Sentelle affirmed the District Court's ruling, saying that "The Government has no rule – at least as far as Flynt has made known to us – that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DoD rule." But Sentelle concluded that there is no First Amendment right requiring the military to provide the media with access to combat. "There is nothing," Sentelle wrote, "we have found in the Constitution, American history, or our case law to support this claim."

Flynt, however, argued that the right is supported by the U.S. Supreme Court's decisions in *New York Times v. United States*, 403 U.S. 713 (1971) and *Mills v. Alabama*, 384 U.S. 214 (1966), both of which centered on the importance of access to government in order to cultivate an informed public. But Sentelle disagreed, stating, "These cases say nothing about media access to U.S. combat units engaged in battle."

Flynt also cited *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), saying that the right of the press to court proceedings also applied to access to battlefields. Again Sentelle disagreed, stating, "[T]he history of press access to military units is not remotely as extensive as public access to criminal trials. . .. No comparable history exists to support a right of media access to U.S. military units in combat. . .. Beginning with the American Revolution, war reporting was primarily in the form of private letters from soldiers and official reports that were sent home and published in newspapers. Indeed, the rise of the professional war correspondent did not begin until at least the time of the Civil War. In addition it is not entirely clear that in any of our early wars the media was actively embedded into units, which is the right appellants seek."

In a story posted by the Reporters Committee for Freedom of the Press, Eugene Fidell, president of the National Institute of Military Justice is quoted as saying, "I think Flynt's lawsuit was unrealistic. [Sentelle] made it clear that the case would have been different if Hustler had been treated differently from other news outlets. It's a signal to the Pentagon, if one was needed, that it cannot play favorites." Fidell further commented that the "media will likely always be at the mercy of the Pentagon." That story is available online at www.rcfp.org/news/2004/0205flyntv.html.

The Flynt case was not the first time Sentelle handed down a ruling hostile to the concept of the First Amendment rights of access. He wrote for a unanimous three-judge panel in *Center for National Security Studies v. Department of Justice,* 331 F.3d 918 (D.C. Cir. 2003), that exemptions to the federal Freedom of Information Act (FOIA) which allow the government to withhold the names of detainees taken into custody following the September 11, 2001 terrorist attacks do not violate the Constitution. (See "*Center for National Security Studies v. Department of Justice*" in the Summer 2003 issue of the Silha *Bulletin*.)

No other news organization joined Flynt in his lawsuit. At the time the *Bulletin* went to press, it was not known whether Flynt would appeal the decision to the U.S. Supreme Court.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Representative Rangel Introduces Resolution for Press Access

On March 11, 2004, saying that "a cloak of secrecy" surrounds the homecoming of soldiers' remains, Rep. Charles Rangel, D-N.Y., introduced a resolution calling "for the removal of all restrictions from the public, the press, and military families in mourning" that would prohibit them from access to military installations such as Dover Air Force Base in Delaware, where war dead are returned stateside. The only restriction in Rangel's resolution was the "assurance that family requests for privacy will be respected."

The press traditionally covered the return of bodies at Dover until, shortly before Desert Storm, the Department of Defense arranged for the war dead to be returned to facilities closer to their families. The press challenged the policy on First Amendment grounds, but the D.C. Circuit ruled in *JB Pictures v. Department of Defense*, 86 F.3d 236 (D.C. Cir., 1996) that because military installations were not typically open to the public, such restrictions do not impede the press' acquisition of "basic facts."

Rangel's resolution acknowledges that there is a "cloak of secrecy" surrounding the "return of fallen heroes" that "denies them the deserved recognition and should be removed."

While participating in a demonstration near Washington D.C. on March 14, 2004 honoring war dead, Rangel told the Associated Press that war dead "should not be coming home in the middle of the night when people can't thank them for serving their country."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

FCC Updates

FCC Crackdown on Indecency Leads to Historic Fines

Janet Jackson's and Justin Timberlake's controversial Super Bowl halftime performance may not have prompted the current Congressional and Federal Communications Commission crackdown on broadcast indecency. But, broadcasters and media observers say, the stunt certainly added fuel to efforts to toughen broadcasting decency standards.

The pair's performance, which culminated in Timberlake's tearing off a portion of Jackson's leather bustier, "couldn't have come at a worse time in the indecency debate," Tom Taylor, editor of the trade newsletter *Inside Radio*, said in the Feb. 3, 2004, edition of the New York *Daily News*. "It will spark more outrage from Congress and the FCC will have to react."

House subcommittee hearings on broadcast indecency began in January 2004, before the Super Bowl aired, with FCC Chairman Michael Powell voicing his support for a House bill that would increase the maximum fine for incidents of broadcast indecency from $27,500 per offense to $275,000 per offense. The hearings – and the attention they received – picked up steam after the Super Bowl. According to a Feb. 13, 2004 article by television critic Kay McFadden of *The Seattle Times*, Republican lawmakers pushed for the hearings, citing dramatic increases in the number of indecency complaints in recent years. In 2001, the FCC received 346 indecency complaints. In 2003, by contrast, the commission received 250,000 such complaints. Much of the increase, McFadden suggested, can be traced to the Parents Television Council, a media-watchdog group that claims 860,000 members. The organization's website, http://www.parentstv.org, includes a link entitled "File an FCC Complaint."

The House hearings were followed by a Feb. 11, 2004 hearing before the Senate Commerce, Science and Transportation Committee. Sen. John McCain, R-Ariz., chaired the hearings.

"To be clear," McCain said in his opening remarks, "the Committee had scheduled this hearing before the Super Bowl aired due to members' concerns about increasingly violent and indecent programming."

"By now, there isn't a person in this room who is unfamiliar with CBS and the NFL's 'fumble' during the Super Bowl halftime show last week, which was viewed by an estimated 140 million Americans, including millions of young children. And then, in an instant, this issue became the subject of national debate. And rightfully so."

McCain noted that the fines for violations of indecency regulations had not changed since 1989. "[N]ow is the time," he said, "so companies don't continue to accept these fines as 'the cost of doing business.'"

McCain's full statement, as well as statements of witnesses and a webcast of the hearing, is available online at: http://commerce.senate.gov/hearings/witnesslist.cfm?id=1042.

The Super Bowl halftime debacle is hardly the only high-profile decency issue faced by media companies in recent months. Perhaps more significant than the halftime flash, some suggest, is the record-setting fine recently levied by the FCC against subsidiaries of radio giant Clear Channel Communications. On Jan. 27, 2004, the commission proposed the maximum $27,500 fine for each of 26 separate airings of "Bubba the Love Sponge," a Tampa, Fla., based radio show. The broadcasts included discussions of oral sex, masturbation and sexual organs, the FCC said. The $755,000 total fine, which included a $40,000 fine for poor record keeping, is the largest ever proposed by the FCC, according to the commission.

That fine, more than any Congressional hearing, strengthened FCC enforcement or public backlash, poses a threat to free expression by broadcasters, said Sean Ross, vice president of music and programming at Edison Media Research, in the Feb. 3, 2004, New York *Daily News*. "It's hard to imagine that [after this fine was announced] most general managers didn't sit down with their morning shows," Ross said. "Whatever the FCC does, my guess is the chilling effect has already taken place."

> "Whatever the FCC does, my guess is the chilling effect has already taken place."
>
> – Sean Ross, Edison Media Research

The ripple effect of the fine and the increased attention to broadcast indecency may have contributed to Clear Channel's February 25, 2004 decision to remove Howard Stern's radio show from the company's stations. The company's president and CEO, John Hogan, vowed not to bring Stern back to Clear Channel stations until "we are assured that his show will conform to acceptable standards of responsible broadcasting."

Stern's removal arose from his Tuesday, Feb. 24, 2004 broadcast, during which he spoke with Rick Saloman, who was involved with Paris Hilton's now-notorious sex video, according to CNN.com. A listener who called in during the interview used a racial slur, and Stern hung up.

"It was vulgar, offensive and insulting, not just to women and African-Americans but to anyone with a sense of common decency," Hogan said in a statement released the next day.

The interview and phone call that caused Stern's suspension from Clear Channel occurred on the same day that the company announced a zero-tolerance policy regarding indecent content, CNN.com reported. Under the policy, any DJ who violated FCC indecency rules was subject to immediate dismissal. Clear Channel fired the DJ known as "Bubba the Love Sponge" that day.

Some media observers voiced disgust over both Clear Channel's actions and the Congressional hearings, chalking up the moves to election-year politics.

"Clear Channel's move was intriguing largely for its timing," wrote Dan Gillmor, technology columnist for the *San Jose Mercury News*. "Stern had only days earlier come out on his show strongly against the re-election of President Bush. Senior executives of Clear Channel, which is based in Texas, have close ties to the Bush administration and the president."

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FCC Updates

Prometheus Radio Project v. FCC

A three-judge panel of the U.S. Court of Appeals for the Third Circuit heard oral arguments in February 2004 in *Prometheus Radio Project v. FCC,* No. 03-3388, a challenge to the Federal Communications Commission's rules allowing increased consolidation of media ownership. The rule change, adopted last year but stayed by a Sept. 3, 2003 order of the Third Circuit, includes a provision allowing newspaper companies to purchase television stations in the same media market, a practice that has been prohibited since the 1970s. Critics of the rule change argue that allowing large media conglomerates to control larger slices of the market will squeeze out local news.

During the Feb. 11, 2004, arguments, the Media Access Project, a coalition of groups opposing the rule change, said that the FCC exceeded its authority when it eliminated the prohibition. Lawyers for the group told the court that the FCC erroneously interpreted the 1996 Telecommunications Act, 47 U.S.C. § 161, as creating a presumption in favor of media deregulation, according to the *Chicago Tribune.* The Act requires the FCC to review its rules periodically and "repeal or modify any regulation it determines to be no longer in the public interest."

Media corporations argued that the public interest is best served by free competition, while opponents of the new rules said diversity and "localism" best served the public.

The nine-hour argument came down to competing definitions of "public interest," according to the *Tribune*. Media corporations argued that the public interest is best served by free competition, while opponents of the new rules said diversity and "localism" best served the public according to the *Tribune*.

During the argument, media lawyers seized on the day's headlines concerning the proposed $54 billion purchase of the Walt Disney Company by cable giant Comcast to demonstrate what the newspaper industry views as an inherent unfairness of the previous FCC rules, according to a Feb. 12, 2004, report in *The New York Times*.

The *Times* quoted attorney Carter G. Phillips of Sidley Austin Brown & Wood, which represents both the Tribune Company and Media General.

"What we're saying is cable operators can buy any broadcaster, and yet a newspaper in a community cannot," Phillips told the court. "I submit that is an immaterial and unfair distinction."

Richard E. Wiley, who served as chairman of the FCC when it first adopted cross-ownership restrictions in the 1970s, argued for the new rule on behalf of the Newspaper Association of America and three media companies, according to the *Times.*

Wiley told the court that the number of competing media voices in the marketplace today has rendered cross-ownership restrictions unnecessary, according to the *Times*. "To call these changes radically deregulatory," he was quoted as saying, "is unduly alarmist."

The Third Circuit did not consider another part of the new FCC rule, which allows television networks to grow larger than was previously permitted. That aspect of the rule was modified by Congress in January 2004.

—Doug Peters
Silha Fellow

Senate's Compromise Lowers National TV Ownership Cap by 6 Percent

Under the apparent threat of a presidential veto, the United States Senate agreed in January to allow television networks to grow bigger — but neither as big as a 2003 Federal Communications Commission rule would have allowed nor as big as networks would have liked.

Both the House and Senate originally intended to reverse the FCC's new ownership rule and return to the old standard, which barred television networks from owning stations that reached more than 35 percent of the national audience, according to the (London, England) *Financial Times.*

The FCC last June issued a new rule that raised the ownership cap to 45 percent. The Senate compromise, adopted Jan. 22, 2004, allows television networks to own stations reaching 39 percent of the national audience. Opponents of the new FCC rules, including the National Association of Broadcasters and other groups representing non-network-owned affiliate stations, complained that greater media consolidation would eliminate media diversity and silence local voices.

"We're pleased the national television ownership cap issue appears to be resolved by the passage of this legislation," NAB President Edward O. Fritts said in a statement reported in the *Washington Post*. "We salute all broadcasters who worked with Congress to reach this compromise that recognizes the enduring value of free, local television stations."

The compromise, part of an $820 billion spending bill, passed 65-28, and was the result of closed-door meetings between Congressional Republicans and White House officials, according to the *Washington Post*.

The compromise pays the greatest dividends to Viacom, Inc., which owns CBS and News Corp., which owns Fox. Both companies currently own stations reaching more than 35 percent of the national audience, according to the *Post*. CBS reaches 39 percent and Fox, 38 percent. That means neither company will have to shed stations in order to comply with the ownership cap.

While the rest of the new FCC rules are stayed pending a decision by the U.S. Court of Appeals for the Third Circuit, the compromise legislation meant that consideration of the television ownership rules is no longer part of the case.

—Doug Peters
Silha Fellow

Access to Documents

Library of Congress Opens Former Justice Blackmun's Papers

The Library of Congress on March 4, 2004, opened the voluminous personal papers of former Supreme Court Justice Harry Blackmun, a move court-watchers say could yield unprecedented insight into a quarter-century of Supreme Court decisions.

Blackmun, known for his extensive note taking, donated the 1,576 boxes of papers to the Library of Congress in 1997, on the condition that the papers be made public five years after his death.

The notes concerning two landmark abortion-rights cases should draw the most initial attention, according to a *Legal Times* report by Tony Mauro. At least 15 folders relate to the 1973 *Roe v. Wade,* 410 U.S. 113 (1973) decision, which Blackmun authored. Blackmun's notes also are expected to shed additional light on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a decision that upheld *Roe v. Wade*, Mauro wrote.

Like any good legal drama, this one has a few subplots: First, while scholars and journalists waited for the Blackmun files to be released, two journalists wangled advance access. Both Linda Greenhouse, who covers the Supreme Court for *The New York Times*, and Nina Totenberg, who covers the Court for National Public Radio, have been combing through the files since Jan. 1, 2004.

Other media outlets, including the *Washington Post*, were dismayed at the favored treatment Greenhouse and Totenberg received, Mauro wrote.

"We were frankly very disappointed about the decision not to give us equal access with the *Times*," Mauro quoted *Post* national editor Mike Abramowitz as saying. "Justice Blackmun is a public figure of enormous public significance, and the papers were supposed to be in the public domain."

The 500,000-document collection also promises to contain some material that will make current justices squirm, Mauro wrote. Blackmun's voluminous note-taking, coupled with the fact that he served alongside most of the current justices, raises the prospect that his papers will contain information unflattering to some sitting justices.

Some say Blackmun may have kept some records for precisely that purpose.

"When he talked about these papers, he sometimes had an impish grin," Mauro quoted one anonymous historian as saying, "as if he knew that they would cause dyspepsia for some of his fellow justices."

—Doug Peters
Silha Fellow

The papers could yield unprecedented insight into a quarter-century of Supreme Court decisions.

Bill Prohibiting Access to Identities of Peace Officers Tabled

A Delaware bill that would prohibit public access to names of police, parole and probation officers under the state's Freedom of Information Act was tabled by the state Senate in late January, less than a week after the state House passed it unanimously, according to a Jan. 29, 2004 report in the *(Wilmington, Del.) News Journal*.

Delaware House Bill No. 319 was introduced at the request of Delaware Attorney General M. Jane Brady in response to a Dec. 30, 2003 decision by the state supreme court to allow release of such information in the state's criminal justice records.

The state supreme court decision was part of a long legal struggle by the *News Journal* for access to computerized crime records, the Reporters Committee for Freedom of the Press (RCFP) reported. The *News Journal*, in a Jan. 22, 2004 editorial, said it needed access to the records in order to examine how well the state's criminal justice system worked. The newspaper's editorial board called the bill "possibly unconstitutional . . . a clear swipe at defendants' right to know the identities of their accusers."

"Police work is dangerous. But like the other participants in criminal justice, officers must be accountable to the public and trustworthy. Ms. Brady's attempt to evade the state Supreme Court with this ridiculous legislation is deplorable," the editorial stated.

The state Senate tabled the bill on Jan. 28, and no further action had been taken as the *Bulletin* went to press.

—Doug Peters
Silha Fellow

Comments, *continued from page 21*

such discrimination. A statement submitted by the Most Reverend Harry J. Flynn, Archbishop of the Archdiocese of St. Paul and Minneapolis, read, "[R]acism is alive and well today in our nation and in our own state and, I believe, that the fact it remains in our midst, is one of America's and Minnesota's most serious and unresolved evils."

Other speakers argued that it is common practice for employers and landlords to search court records for information regarding applicants before hiring them or allowing them to rent property. Many landlords and employers cannot or will not make the distinction between a person charged with a crime and later found to be innocent and one later found to be guilty. Either way, they contended, the person arrested faces discrimination.

In her oral presentation at the hearing, Kirtley commented that the best way to deal with this problem would be to enforce laws against discrimination rather than to close off access to public records.

The advisory committee must make final recommendations to the Supreme Court by April 2, 2004. Additional information is on the Minnesota Supreme Court's Web page at http://www.courts.state.mn.us/cio/public_notices.htm.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Access to Documents

Judge Orders Release of Papers Relating to Sheriff's Arrest

The Michigan Court of Appeals has ordered the Kent County (Mich.) Sheriff's Department to release files and reports concerning a sergeant who was arrested in a prostitution sting nearly two years ago.

The appeals court issued its ruling in *Herald Company, Inc. v. Kent County Sheriff's Department*, 2004 WL 136534, Mich.App. (unpublished), on Jan. 27, 2004, after receiving the case on remand from the Supreme Court of Michigan.

Sgt. Robert Vanderlaan, who was elected in 1999 to a four-year term as city commissioner in Kentwood, Mich., was among 16 men arrested by the Grand Rapids Police Department during a May 2, 2002 prostitution sting, according to the state appeals court's decision. Fourteen of the men received citations and spent the night in jail. However, Vanderlaan and Michigan State Trooper Kelly Hillary, who also was arrested in the sting, were released.

"The released documents shed light on the official acts and workings of the government." – Judge Jane E. Markey

After news of the arrests leaked out, local media outlets, including the *Grand Rapids Press*, sued for access to Vanderlaan and Hillary's personnel files under Michigan's Freedom of Information Act. Three months later, in August 2002, a state circuit court judge granted the media request. That decision was overturned by the state court of appeals, which in turn was vacated by Michigan's supreme court on May 30, 2003. *Herald Co., Inc. v. Kent County Sheriff's Dep't.*, 662 N.W.2d 749 (Mich. 2003) (Table).

On reconsideration of the case, the state appeals court focused on the public interest in release of the documents.

"The released documents shed light on the official acts and workings of the government," wrote Judge Jane E. Markey of the state court of appeals. "[T]he documents contained some information from which the public could make a determination with respect to whether the [Vanderlaan] was given preferential treatment."

Vanderlaan is no longer with the sheriff's department and did not run for reelection as city commissioner last fall, according to the Reporters Committee for Freedom of the Press.

—Doug Peters
Silha Fellow

Seattle Schools Attempt to Block Access to Complaints Records

As the *Seattle Times* tried to gather information for an investigation of sexual-misconduct charges against teachers and coaches, a major suburban Seattle school district joined forces with its teachers union to block access to public records, the newspaper reported in December 2003.

The newspaper sought disciplinary records for use in its series on sexual misconduct by coaches of girls' amateur sports teams and was surprised the Bellevue School District's resistance to its requests, Executive Editor Michael Fancher wrote in a Dec. 14, 2003 article explaining the paper's investigation.

According to Fancher, the paper requested records of sexual misconduct complaints from 10 of Washington state's largest school districts. Some of the districts released the information promptly, in accordance with a 14-year-old state Supreme Court precedent stating that records of sexual misconduct by teachers are public records. The Bellevue school district resisted.

"Some districts, notably Bellevue, conspired with the Washington Education Association (WEA), the state teachers union, to thwart access," Fancher wrote. In his report, Fancher quoted Maureen O'Hagan, one of two reporters who worked on the series.

"We were very surpised when the teachers union mounted a legal campaign to prevent us from getting those records," Fancher quoted O'Hagan as saying. "We were hit with a restraining order by a Pierce County teacher first, and once we got over the initial shock of that, there were dozens more."

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FCC Indecency, *continued from page 3*

"The company suddenly discovered that programming it had been airing for years was unacceptable in this new era of neo-Victorianism," Gillmor continued. "The word 'hypocrisy' doesn't do justice for such people."

On March 11, 2004, the House voted 391 to 22 to increase penalties for those who violate federal decency standards. The increase would raise fines to from $27,500 to $500,000 for broadcaster license holders and from $11,000 to $500,000 for individual performers.

On March 18, the FCC proposed maximum fines for the Howard Stern broadcast and for the two Florida radio stations owned by Clear Channel.

Even before the Clear Channel fine, Stern's removal, or the Super Bowl, FCC Chairman Michael Powell had proposed barring the use of the so-called "F-word" on television or radio, regardless of the context in which the word is used, according to a Jan. 13, 2004, Reuters report. The FCC previously defined indecent speech as speech that depicts or describes sexual organs or activities. But on March 18, the FCC accepted Powell's proposal and overruled the staff, declaring that when Bono, frontman for the rock group U2 accepted his Golden Globe Award in 2003, and said "This is really, really f——— brilliant," the statement was both indecent and profane, even though Bono's use of the word did not describe a sexual act. That order marks the first time the FCC defined a four-letter word as profane; normally the FCC has equated profanity with language challenging the divinity of God.

However, the FCC did not fine NBC, the network that carried the Golden Globe Award ceremony. As a result of Bono's speech as well as the Jackson/Timberlake halftime incident, NBC aired this year's Golden Globe Award broadcast on a 10-second delay. ABC also aired the Academy Awards with a similar delay.

—Doug Peters
Silha Fellow

Reporters Privilege

Business Week Reporter May Be Called to Testify

Judge Michael Obus of the New York Supreme Court, a trial court in Manhattan, has ruled that a *BusinessWeek* article may be admitted into evidence in the trial of two former Tyco executives accused of misuse of company funds, but has yet to announce whether the author of the article will have to testify in the case. According to the Associated Press, William Symonds, a reporter for *BusinessWeek*, interviewed one of the defendants, L. Dennis Kozlowski, and, in an article he wrote in May 2001, quoted Kozlowski as saying, "Hopefully, we can become the next General Electric."

New York's shield law (New York Civil Rights Law § 79-h) recognizes an absolute privilege against compelling journalists to testify about confidential information and also recognizes a qualified privilege regarding non-confidential information. Non-confidential information might be privileged, for example, if a judge determined that the party seeking the information had not exhausted all means of obtaining it.

Symonds would likely be called to confirm the accuracy of his article and could also be asked to furnish the notes he took during the course of writing his articles. Such information and materials would be likely to fall under the category of non-confidential information as they were produced by Symonds during the general course of his interview with Kozlowski rather than coming from a confidential source. The Associated Press reported that a *BusinessWeek* attorney, Susan Buckley, stated that the shield law protected Symonds and that he should not be required to testify, ". . . particularly if his questioning is likely to go beyond the scope of simply attesting to Kozlowski's quotes being accurate."

Judge Obus has not indicated when he would issue a ruling on the matter.

—Ingrid Nuttall
Silha Research Assistant

New York's shield law protects Symonds and he should not be required to testify.
– Susan Buckley, Attorney

Cincinnati City Beat Reporter Testifies Before City Council

On Feb. 3, 2004, *Cincinnati CityBeat* reporter Leslie Blade complied with a subpoena from Cincinnati's City Council and testified regarding a story published Dec. 10. The City Council called Blade as part of its investigation into whether Cincinnati Police Department officers billed the Cincinnati Metropolitan Housing Authority for off-duty hours that coincided with their on-duty schedule, possibly resulting in a misuse of their overtime hours. According to the Associated Press, city council subpoenas in Ohio are rare, last used in 2001.

According to the *Cincinnati Enquirer*'s online edition, Blade's testimony before the Council was largely confined to questions about the contents of her story, causing some members of the Council to question why it was necessary to subpoena Blade in the first place. The *Enquirer* quoted Law Committee Chairman David Pepper as saying, "We have, as a city, a pretty poor record when it comes to the First Amendment . . ..You could probably write a book filled with cases of '*City of Cincinnati v. Someone*' with all the First Amendment cases we've screwed up."

Pepper did not indicate any specific incidents of Cincinnati's poor First Amendment record with regard to the press. However, in *Karlan v. City of Cincinnati,* 416 U.S. 924 (1974), the Supreme Court addressed whether or not a violation of the Cincinnati Municipal Code 901-d4 was unconstitutionally overbroad with regard to freedom of speech. The language of the Code dictated that, "No person shall willfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof…" and the petitioner was convicted of violating the code when he used offensive language to a police officer. The Supreme Court overturned this case, *City of Cincinnati v. Karlan,* 39 Ohio St. 2d 107 (1974), and ruled that, "The ordinance thus remains unconstitutionally overbroad since it prohibits words which are merely 'rude' and has not been limited to words which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"

—Ingrid Nuttall
Silha Research Assistant

Seattle Schools, *continued from page 6*

The district's teachers' union made arrangements for teachers to review their files and remove records according to the terms of their contract, according to the *Seattle Times*.

District administrators, meanwhile, encouraged the statewide teachers union to file suit against the school district on behalf of the teachers whose records were being sought, according to the *Times* report. "I'd be delighted," wrote assistant superintendent Sharon Howard to the Washington Education Association's general counsel, "if we could share as little as possible" with the *Times*. After her comments were made public, Howard defended her position, saying the newspaper's document request intruded on teachers' privacy.

The Seattle School District took another approach. After the statewide teachers union argued that the precedent requiring disclosure applied only to sexual misconduct cases that resulted in letters of discipline or harsher action, the Seattle district allegedly tried to alter the wording of some disciplinary records to change "letters of discipline" to "letters of direction," which would ostensibly protect them from disclosure.

The newspaper's efforts to gather the records resulted in an April 2003 unpublished ruling by King County Superior Court Judge Douglass North in *Doe v. Bellevue School District*, No. 405, No. 73989 - 1, granting access to records in 21 cases but denying access in 15 others because no formal discipline resulted from the allegations. The newspaper has appealed. The newspaper still was involved in legal action against some districts at the county level in December 2003.

—Doug Peters
Silha Fellow

Endangered Journalists Around the World

Canada

Royal Canadian Mounted Police searched the home and the newsroom office of Canadian reporter Juliet O'Neill on Jan. 21, 2004, after she wrote a story about Syrian-born Canadian citizen Maher Arar, who was suspected to have links to al-Qaida.

According to The Reporters Committee for the Freedom of the Press, the police were hoping to find the source of an information leak behind a story O'Neill wrote for the *Ottawa Citizen* in November 2003. Citing an unnamed "security source" and an intelligence document leaked by Canadian security officials, O'Neill reported that Arar confessed to Syrian authorities that he had attended an al-Qaida training camp in 1993.

O'Neill may face criminal charges, the Associated Press reported, because Canadian police believe that O'Neill's information came from a document protected by the Canadian Security of Information Act, R.S.C, ch. O-5, § 1 (2001); ch. 41, § 25 (1985).

Passed after the September 11 attacks on the United States, the law prohibits the "distribution or unauthorized possession of sensitive government materials" and carries a maximum sentence of 14 years in prison.

"If they decide to charge Julie O'Neill, this will be a full frontal assault on freedom of the press," *Citizen* lawyer Richard Dearden told Reuters.

Arar was deported to Syria by the United States in 2002, after he was arrested in New York while changing planes. According to the Associated Press, he has claimed that he was tortured by Syrian officials and made a false confession about his links to al-Qaida. He was never charged with any crime and was allowed to return to Canada last fall after 10 months in Syria. According to Reuters, U.S. authorities claimed that Canadian security officials provided information regarding Arar's alleged al-Qaida connections, but Canadian security agencies have denied involvement.

Arar launched a lawsuit against the United States on Jan. 22, 2004, according to Canada's CBC News, claiming that U.S. officials deported him despite knowledge that Syria practices state-sponsored terrorism. He is also seeking damages for economic losses and mental and physical anguish.

Ivory Coast: Update

Policeman Theodore Sery Dago was convicted on Jan. 22, 2004, of killing French radio reporter Jean Helene in October 2003.

Helene, a reporter for Radio France Internationale, was shot in the head while he was waiting outside police headquarters in Abidjan for an opportunity to interview jailed opposition figures. (See "Endangered Journalists Around the World" in the Fall 2003 issue of the Silha *Bulletin*.)

According to the Associated Press, Dago shouted, "I'm innocent, I'm innocent," after the judge read the verdict and ordered him to serve a 17-year sentence in a military prison.

Dago's lawyers told the Associated Press they planned to appeal the ruling.

Pakistan

A Pakistani freelance reporter detained by police for assisting two French journalists was charged with sedition and conspiracy in January 2004 and could face a sentence of life in jail.

Reuters reported that Khawar Mehdi Rizvi was arrested on Dec. 17, 2003, after helping Marc Epstein and Jean-Paul Guilloteau, reporters for the French weekly *l'Express,* travel to the southwestern city of Quetta that borders Afghanistan. The French reporters' visas, however, allowed them to visit only the cities of Karachi, Islamabad, and Lahore, according to the *International Herald Tribune.* Because the two had violated their visas, Pakistani authorities sentenced them to six-month prison sentences. According to Agence France-Presse and the Associated Press, it was not until Epstein and Guilloteau began a hunger strike in protest of their arrest that a Pakistani judge waived their sentences.

In addition to assisting Epstein's and Guilloteau's travels, Rizvi also took part in a documentary on the Taliban filmed by French reporters, which Pakistani authorities claimed was an "attempt to tarnish Pakistan's image," according to Reuters. The *International Herald Tribune* claimed that Pakistan has been criticized for not doing enough to keep Taliban loyalists from retreating to the country.

For weeks, authorities denied that they were holding Rizvi, prompting concern from media and human rights groups, according to Reuters. When Rizvi finally appeared in court on January 24 for a hearing on the sedition and conspiracy charges, authorities ordered him to remain in custody while an investigation into his activities continues.

Philippines

Rowell Endrinal, a radio broadcaster and newspaper publisher, was shot and killed by unknown gunmen in that country's central city of Legaspi on Feb. 11, 2004, as he was leaving his home for work.

Agence France-Presse reported that Endrinal was the host of a political commentary program at local radio station DZRC and the publisher of the regional newspaper *Bicol Metro News*. According to Reporters Without Borders, Endrinal was well-known for speaking out against corrupt politicians. However, Agence France-Presse reported that police had not yet found evidence that the murder was politically motivated.

Mina Endrinal, Endrinal's widow, said that the journalist had received death threats in the days preceding his murder.

—Elizabeth Jones
Silha Research Assistant

Ethics

Jeb Bush Bans Newspaper from Press Conference

When Florida Gov. Jeb Bush excluded the 500,000-circulation *Palm Beach Post* from his annual year-end press conference in December, his office said the move was prompted by "unprofessional behavior" on the part of one of the newspaper's reporters.

Although she did not offer specifics, Bush's communications director, Jill Bratina, said the ban had nothing to do with the newspaper's coverage, according the Reporters Committee for Freedom of the Press. Instead, Bratina said, the ban stemmed from "the manner in which their reporter has addressed members of my staff as well as employees of the governor's office." Bratina said the ban was necessary to ensure that the governor's annual press conference had an "air of professionalism."

According to a Dec. 18, 2003, Associated Press report, Bush's office barred the newspaper because its state capitol bureau chief, S.V. Date, had sworn at Bratina during a phone call regarding a public-records request. Bill Rose, the newspaper's deputy managing editor, said the governor's action "punishes the readers and the public."

The *Tallahassee Democrat* questioned the official explanation for the ban in its Dec. 19, 2003 edition.

"The governor's office maintains that [the] *Post* reporters were banned because the [capitol] bureau chief of the newspaper, S.V. Date was rude to administration staff," the *Democrat's* unsigned editorial stated. "Date and his newspaper – apparently coincidentally – also have been uncovering big problems in contracts within the Department of Education."

Bush's year-end press conference is a Q&A session with reporters who cover the Florida statehouse. Although some journalists acknowledge that the press conference generally has little news value, they worry about the message Bush's ban sends.

"Regardless of the reason, [the ban] gives the appearance that Gov. Bush will retaliate against any news organization that questions his administration," Alisa LaPolt, president of the Florida Capital Press Corps, wrote in an e-mail to Bratina, according to the Reporters Committee. The Reporters Committee article is available online at http://www.rcfp.org/news/2003/1216report.html.

Addressing the question of potential public outcry against Bush for the ban, retired *Denver Post* capitol bureau chief Fred Brown wrote in the Dec. 21, 2003 edition that, "[I]n a squabble between the politicians and the press, the public isn't going to be very sympathetic with either side."

"The press is not one of the public's favorites," Brown wrote. "Neither are politicians. It's too bad. Both institutions actually believe they are performing a public service. But they've spent so much time attacking each other's motives, they've convinced the public that neither is deserving of confidence."

—Doug Peters
Silha Fellow

> Gov. Jeb Bush's action punishes the readers and the public.
> – Bill Rose, Deputy Managing Editor, *Palm Beach Post*

Allegations of Unethical Practices Lead to *USA TODAY* Reporter's Resignation

On March 18, 2004, *USA TODAY* released the initial findings of a team of journalists who were investigating 720 stories filed by Jack Kelley from 1993 through 2003. Kelley, characterized as a "star foreign correspondent" by *The New York Times*, had been nominated by *USA TODAY* editors for a Pulitzer Prize five times during his 21 years with the paper.

An anonymous complaint to *USA TODAY* in May 2003 led to the very first investigation into Kelley's reporting, completed by a team of employees with the paper. Kelley then resigned "under pressure" on Jan. 6, 2004. In an article published by *USA TODAY* on Jan. 13, 2004, the editors wrote that a seven-month investigation had not resolved the question of Kelley's alleged unethical reporting practices.

Afterwards, it was learned that a 1998 article Kelley had written while in Pakistan appeared to have passages identical to an article in the *Washington Post*. At that point, *USA TODAY* reopened its investigation, this time calling in veteran journalists Bill Hilliard, former editor of *The Oregonian;* Bill Kovach, chairman of the Committee of Concerned Journalists; and John Seigenthaler, *USA TODAY's* founding editorial director, to head the panel. Members of the team spent seven weeks re-examining Kelley's stories, and although "hundreds" of them were characterized in *USA TODAY's* March 18 report as "relatively routine news reports," 150 of them stood out as problematic. To verify the stories, the investigative panel interviewed people, examined Kelley's expense and telephone call records, traveled to Cuba, Israel and Jordan, and ran stories through plagiarism-detection software. They also examined the laptop issued to Kelley by the newspaper. According to *USA TODAY,* a number of phone and expense records were incomplete, and most of the documents had been deleted from the laptop prior to Kelley's departure in January 2004. One e-mail that remained contained a script Kelley had prepared for a man in Jerusalem, requesting that he pose as an Israeli intelligence agent named "David," in order to validate a 2001 story about the friction between Palestinians and Jewish settlers. "I need you to be David one more time," Kelley allegedly wrote in the message dated July 18. "This will be it. I promise. No more." "David" was one of three people Kelley reportedly enlisted to validate his stories.

Jack Kelley, *continued on page 12*

Ethics

Virginia-Pilot Fails to Disclose Details of Reporter's Death

On Feb. 1, 2004, the *Virginian-Pilot* reported that the newspaper's military reporter Dennis O'Brien had passed away the day before, but the report did not specify the cause of death. It was later revealed by *Editor & Publisher* that the reporter, who spent much of last year as an embedded journalist in Iraq, had committed suicide at midday in a public park in Norfolk, Va. A newspaper colleague, whom O'Brien had reportedly arranged to meet at the park, discovered his body there.

Although newspapers routinely do not report on suicide deaths in an effort to protect families, avoid sensationalism, and minimize risk of copycat suicides, the *Virginian-Pilot*'s decision to withold the cause of the death of one of their well-known reporters in a public area raised important ethical questions. The newspaper withheld information about O'Brien's death, claiming that they were doing so at his family's request. Due to his status as a public figure, however, should the details surrounding his death have been reported?

Withholding information opens the paper to charges that it showed favoritism to its own.
– Gary Hill, SPJ Ethics Committee Chair

Editor & Publisher probed these issues in an article posted on their website, available online at: http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=2083124.

"Many newspapers have a policy against revealing 'ordinary' suicides," Fred Brown, co-chair of the SPJ Ethics Committee, was quoted as saying in the *Editor & Publisher* report. "[But] I would not call this an ordinary suicide."

Due to O'Brien's public status, Gary Hill, the SPJ Ethics Committee chair, told *Editor & Publisher* that withholding information "opens the paper to charges it showed favoritism to its own."

According to Robert Steele, Scholar for Journalism Values at the Poynter Institute, the lesson that other newspapers might take from the *Virginian-Pilot* matter is that the lack of detail in a death notice will prompt the public to wonder if the paper may be "hiding something." And even if the paper is attempting to protect a family or minimize copycat behavior, the public may argue journalists don't show the same amount of deference to other sensitive news issues.

The ethical issue surrounding the publication of suicide deaths is not new. "Coverage of suicide has been a weak spot in the underbelly of journalism for a long time," Steele told *Editor & Publisher*. "I believe we have terribly undercovered or miscovered the incidence of suicide in our society."

In an article posted on Poynter's website in December 2003, Cindi E. Deutschman-Ruiz, a Pennsylvania radio producer and director, wrote, "Gauging from the news, it would be easy to conclude that suicide is rare, rather than a widespread and ongoing public health problem. As journalists, we're fond of criticizing ourselves for over-covering homicide. Why do we fail to address our under-coverage of suicide?" That article is available online at: http://www.poynter.org/content/content_view.asp?id=54176.

"I don't suggest we report every suicide," Steele told *Editor & Publisher,* "but I would say we should disclose them unless there are extraordinary circumstances – reveal more rather than less, and sooner rather than later."

Additional information about the ethical issues surrounding coverage of suicides is available in "Guidelines Issued for Coverage of Suicides" in the Fall 2001 issue of the Silha *Bulletin*.

—Elizabeth Jones
Silha Research Assistant

Judge Orders Attorneys to Stop Giving Interviews in Kidnapping Case

The judge presiding over the case against the man charged with kidnapping University of North Dakota student Dru Sjodin ordered attorneys to stop granting media interviews regarding the case in January 2004.

Sjodin, 22, disappeared from a Grand Forks, shopping mall in November. Alfonso Rodriguez Jr. was arrested in December and through his attorney has denied kidnapping Sjodin or knowing her whereabouts.

In his Jan. 2, 2004 order, District Judge Lawrence Jahnke of North Dakota's Northeast Central Judicial District expressed dismay over attorneys' failure to comply with two informal requests to stop giving interviews, even after they said they would, according to Jan. 7, 2004, article by Stephen J. Lee in the *Grand Forks* (N.D.) *Herald*.

"In fact, within the past week, two more media interviews were granted, one locally and one nationally, within hours of yet another personal assurance from counsel that there would be no more," the judge wrote.

Jahnke recommended that the lawyers, David Dusek, who represents Rodriguez, and prosecutor Peter Welte, "focus on preparing their respective cases rather than preparing for another media interview."

Prior to the order, Dusek had given numerous interviews to both the local and national media, saying such an approach was necessary, because "the press [had] already convicted Mr. Rodriguez without any evidence," according to the *Grand Forks Herald*.

—Doug Peters
Silha Fellow

Ethics

FALSIFIED RESUME - Michael Freeman, *The Indianapolis Star*

Three days before starting a new job as a sports columnist at *The Indianapolis Star,* Michael Freeman, a sports reporter who had spent 11 years at *The New York Times,* resigned in January 2004 after he was found to have lied on his resume about being a college graduate.

According to the *New York Post,* Freeman's job application claimed he had graduated from the University of Delaware. When a tipster called the paper and stated that the information was false, *Star* editors investigated and found that Freeman had attended the University for four years but had never graduated.

In a statement published in the *Star,* Freeman said, "This was a terrible and unforgivable manipulation of the facts . . .. It was the only time I have told such falsehoods, and no other deceptions have ever appeared in any of my newspaper stories or two books at any time in my 16 years of practicing journalism."

Star Editor Dennis Ryerson told the *New York Post,* "We recognize credibility issues have confronted our industry and we want to be a leader in addressing those issues."

Tom Jolly, sports editor for the *Times,* told *Editor & Publisher* that Freeman never misrepresented himself there. According to Freeman's statement, the resume he submitted to the *Star* was the first that had ever included false information. Neither the *Times* nor the *Star* have a college degree requirement.

OFFENSIVE LANGUAGE - *USA Weekend*

A racial epithet was inadvertently embedded into the background text of an illustration in a January 2004 issue of *USA Weekend,* prompting hundreds of newspapers to withdraw the magazine from distribution.

According to *Editor & Publisher,* the word "nigger" was found in the illustration while the magazine issue was being printed for publication Jan. 16-18. Printing was stopped, but the offending word was removed from the illustration in only about 43 percent of the copies. Due to the production schedule, 327 newspapers received issues in which the language had not been removed. The magazine is carried in 598 newspapers.

According to the Associated Press, the background of the illustration used text that had been randomly selected from a freelance story previously published in a November 2003 issue of *The New York Times* magazine. The text had been taken from a part of the story in which the use of the epithet was discussed.

In an article posted on the Poynter Institute's website, the artist, freelance illustrator Santiago Cohen, said he was unaware that the inflammatory word appeared in the text. "I remembered the story . . . as a warm story of an African American person who had some experiences living in Egypt . . . I forgot that [the author] used the offensive language."

That article is available online at: http://www.poynter.org/content/content_view.asp?id=59345.

Marcia Bullard, *USA Weekend* president and CEO, was quoted in *Editor & Publisher* as saying, "We are extremely chagrined this found its way into print and believe it is important to let our newspapers and readers know in advance that we are aware of the problem and are apologetic."

A letter was sent to the publisher of each of the affected newspapers, Bullard said in a statement. It included an apology and an explanation of how the error occurred. Many newspapers chose not to carry the publication, which has a circulation of 23.7 million.

DISSEMINATION OF PRIVATE INFORMATION - CBS

A woman assaulted by convicted rapist Andrew Luster filed a $30 million lawsuit in the Los Angeles Superior Court against CBS Broadcasting Inc. on Jan. 20, 2004, claiming that the network allegedly illegally obtained and televised on "48 Hours" an edited video that shows the plaintiff being assaulted while under the influence of a date rape drug. The video does not show the woman's face. The suit alleges negligence and invasion of privacy, according to the Associated Press.

According to *The Los Angeles Times,* Luster's mother, Elizabeth Luster, allegedly obtained the video and provided it to CBS, despite knowing about a court order barring access to the tapes to anyone except the lawyers involved in the case. The edited video, which showed private scenes depicting the plaintiff known as "Lynn Doe," was shown on prime time television on Feb. 19, 2003.

Elizabeth Luster apparently found a box of about 40 videotapes while cleaning out her son's house in January 2003. She allowed a CBS crew to view the tapes and make copies but was unaware of their contents, defense attorney Kiana Sloan-Hillier told *The Los Angeles Times.* "Liz had no idea what these were," Sloan-Hillier was quoted as saying. "She was horrified when I told her."

It was unclear how Andrew Luster obtained the tapes that were sealed by court order in July 2001. "My understanding of the protective order was that Andrew was not supposed to [have his tapes returned]," Sloan-Hillier reportedly said. She speculated that Luster may have taken a bag containing the materials from an anteroom at the courthouse.

Andrew Luster is the great-grandson of cosmetics entrepreneur Max Factor. He was convicted in 2003 of raping three women in 1996, 1997 and 2000 and is currently serving a 124-year sentence in Monterey County, Calif.

"This [video] was shown during sweeps week, and it's the ultimate example of how networks focus on reality TV without regard to the impact it has on innocent people," Barry Novack, the plaintiff's attorney, told the Associated Press.

—Elizabeth Jones
Silha Research Assistant

Tenth Circuit Rules National "Do-Not-Call" Registry Constitutional

The national do-not-call registry is a valid regulation of commercial speech that does not violate the First Amendment.

– Judge David M. Ebel

The Tenth Circuit ruled on Feb. 17, 2004, that the national do-not-call registry is a valid regulation of commercial speech that does not violate the First Amendment. The case, *Mainstream Marketing Services, Inc., v. Federal Trade Commission*, et al., 2004 U.S. App. LEXIS 2564, 10th Cir. 2004, consolidated four cases, including one originating in Oklahoma, and another in Colorado. (See "'Do-Not-Call' List Faces Questions of Constitutionality" in the Fall 2004 issue of the Silha *Bulletin*.)

Writing for a unanimous three-judge panel, Circuit Judge David M. Ebel identified four key aspects of the do-not-call registry that "convinced" the court it was consistent with the First Amendment. The registry limited only "core commercial speech;" it targeted speech that invaded the privacy of the home; it provided an "opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of the consumers;" and it furthered the government's interest in "combating the danger of abusive telemarketing and preventing the invasion of consumer privacy," citing findings by Congress that consumers lose an estimated $40 billion each year due to telemarketing fraud.

Ebel further wrote that "The challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising."

Ebel distinguished commercial from charitable or political calls, stating that charitable and political calls "sell a cause, [their purpose is] not merely to receive a donation" so that non-commercial callers "have stronger incentives not to alienate the people they call or engage in abusive and deceptive practices." He continued, quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), "Because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech."

Ebel wrote that the registry is specifically directed at "unwilling recipients," and wrote, "The Supreme Court has repeatedly held that speech restrictions based on private choice are less restrictive than laws that prohibit speech directly," and "the Supreme Court has often reasoned that an opt-in regulation would have been a less restrictive alternative." Although other alternatives exist, such as banning calls from companies that may be especially problematic, Ebel characterized such measures as "extremely burdensome" and difficult to enforce, concluding that the law was therefore "narrowly tailored."

Ebel also addressed telemarketers' claims that the fees they are forced to pay to access the do-not-call registry are unconstitutional. "It is well-established that the First Amendment protects against the imposition of charges, such as a license taxes [sic], for the enjoyment of free speech rights. Nevertheless, the government is permitted to exact a fee in order to defray the cost of legitimate regulations, even though such a fee incidentally burdens speech."

Finally, Ebel concluded that the Federal Trade Commission (FTC) had the authority to enact the do-not-call registry, saying that Congress, under Pub. L. 103-297, 108 Stat. 1545 at § 3, authorized the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices or other abusive acts or practices" or "calls which the reasonable consumer would consider coercive or abusive of [a] consumer's right to privacy."

The Denver Post reported on March 4, 2004, that Mainstream Marketing Services, Inc., located in Boulder, and TMG Marketing, located in Denver, as well as the American Teleservices Association, plan to appeal the ruling to the U.S. Supreme Court. However, the Direct Marketing Association will reportedly drop its legal fight in the issue.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Jack Kelley, *continued from page 9*

USA TODAY stated that the "most egregious" of Kelley's ethical lapses occurred in 2000, when he used a snapshot of a Cuban hotel worker in a story, claiming the woman died in her efforts to escape Cuba by boat. The newspaper further reported that one of its reporters located the woman, who had neither fled nor died, in March 2004. She said that if Cuban authorities had learned that she was the woman in the picture, she "could have lost her job and her chance to emigrate."

Hilliard, Kovach and Seigenthaler characterized Kelley's conduct as "a sad and shameful betrayal of public trust" in a statement included in *USA TODAY's* March 18 story. Editor Karen Jurgensen was also quoted as saying that the newspaper will "withdraw all prize entries it made on Kelley's behalf" and that online archives of Kelley's stories will be flagged. *USA TODAY* publisher Craig Moon told the Associated Press, "As an institution, we failed our readers by not recognizing Jack Kelley's problems. For that I apologize."

But according to the Associated Press, Kelley denies any wrongdoing and told *USA TODAY* editors, "I feel like I'm being set up."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Music Copyright

Musicians Form Alliance to Sell Work Online

Some music artists are answering the call of online users who want to download music off the Internet. The alliance, "Magnificent Union of Digitally Downloading Artists" or MUDDA, is seeking to redefine the relationship between the artists, record label and consumer. MUDDA would allow musicians to sell their music online without being confined to selling their music only through record labels, according to *USA TODAY*.

Co-founder Peter Gabriel has already started a similar initiative in Europe, called On Demand Distribution or OD2. According to *Reuters*, this digital downloading service might be a profitable alternative to free file-sharing services. However, Gabriel's statement on MUDDA's homepage frames the creation of online downloading services as being ultimately in the best interests of the artists rather than the record labels. According to Gabriel, "The relationship of artist to the business has most often been one of contract and servitude. We believe the way forward must be a partnership in which the artist can take a much bigger role in how their creations are sold, but also have the chance to stand at the front of the queue when payments are made instead of the traditional position of being paid long after everyone else."

MUDDA would allow musicians to sell their music online without being confined to selling their music only through record labels.

It is not yet clear what the impact of services such as MUDDA and OD2 as consumer alternatives to peer-to-peer (P2P) file-sharing will be in the long term, nor is it clear what the lasting effects of RIAA's lawsuits on downloading music will be. Although RIAA has indicated it supports legal online services that allow users to pay a fee to download music, it seems unlikely that it would support artists moving outside the confines of record label distribution and marketing directly to the public. (See "RIAA Tries to Enforce Fees for Music Downloads" in the Fall 2003 issue of the Silha *Bulletin.*)

The NPD Group, a sales and marketing research group, reported an increase in P2P use between October and November 2003. According to a Jan. 16, 2004 press release, there was a 14 percent increase in P2P use between those months, despite the filing in September of several hundred lawsuits by RIAA against online users suspected of illegally downloading copyrighted songs. The press release quoted NPD vice-president Russ Crupnick as saying, "It's important to keep in mind that file-sharing is occurring less frequently than before the RIAA began its legal efforts to stem the tide of P2P file-sharing. We're just seeing the first increase in these numbers. NPD will continue to monitor whether it's a temporary seasonal blip, or a trend that suggests that the industry should be more aggressive in capping the use of illegal methods to acquire digital music."

The Pew Internet & American Life Project issued a report in January 2004 noting that the number of individuals using file-sharing services from March 2003 to November-December 2003 had dropped from 35 million to 18 million users. Those who still download files are doing so less frequently according to the study. This could be attributed to RIAA's continued statements that they seek only to pursue "egregious offenders" and would likely not pursue those who were only downloading occasionally. The report specifically states, "The RIAA lawsuits against online music file sharers appear to have had a devastating impact on the number of those engaging in Internet peer-to-peer music sharing." The report is available online at http://www.pewinternet.org/reports/pdfs/PIP_File_Swapping_Memo_0104.pdf.

—Ingrid Nuttall
Silha Research Assistant

DC Circuit Rules: RIAA Cannot Subpoena ISPs

The Recording Industry Association of America (RIAA) is no longer able to use its favored tactic of issuing subpoenas to Internet service providers (ISPs) in order to obtain the identity of suspected copyright infringers. In December 2003, the Court of Appeals for the DC Circuit ruled in favor of Verizon Internet Services when it concluded that RIAA's use of the unique subpoena provision in the Digital Millennium Copyright Act (DMCA) to obtain the identities of suspected copyright infringers was a misuse of the statute. This ruling, *Recording Industry Association of America v. Verizon Internet Services, Inc,* 351 F.3d 1229 (D.C. Cir. 2003), reverses a January 2003 order by the federal District Court in the District of Columbia which directed Verizon to comply with two RIAA subpoenas. The Court of Appeals remanded the case to the District Court and ordered it to vacate its previous order and grant Verizon's motion to quash.

Section 512(h) of the DMCA allows copyright holders or their representatives to obtain a subpoena from a clerk of a federal district court in order to compel an ISP to disclose the information. However, DC Circuit Chief Judge Douglas Ginsburg's opinion upheld Verizon's contention that, "512(h) does not authorize the issuance of a subpoena to an ISP acting solely as a conduit for communications the content of which is determined by others . . . " CNETNews.com reported that the ruling does not address the lawsuits pending as a result of RIAA subpoenas, nor does it prohibit the RIAA from continuing to sue suspected infringers. (See "RIAA Subpoenas Those who Allegedly Download Music" in the Summer 2003 issue of the Silha *Bulletin.*) Rather, the court's ruling specifically addresses the use of the DMCA's subpoena provision for obtaining consumer's identifying information.

RIAA, *continued on page 18*

Access to Courts

In an effort to support the public's right to know, journalists often struggle to gain access to court information and proceedings to which public access has been restricted. For their part, judges are often forced to balance the rights of the defendant to a fair trial with the First Amendment rights of the press.

KOBE BRYANT

The courtroom was closed during basketball star Kobe Bryant's pretrial hearings in February 2004, after Chief District Court Judge Terry Ruckriegle granted Bryant's attorneys' request to keep secret certain statements that Bryant made to investigators the day after he allegedly raped a 19-year-old woman.

Ruckriegle ruled there was "substantial probability" that the statements contained information that could influence potential jurors, jeopardizing Bryant's right to a fair trial.

"Public disclosure of the statements prior to a ruling as to the relevance and admissibility of such statements would be prejudicial," Ruckriegle wrote in the ruling. "It is also undisputed that this case is the subject of extensive public and media scrutiny, and that any statements attributed to the defendant will be subject to broad dissemination and comment."

Attorneys for a group of media organizations argued that the pretrial hearings should have remained open. *The Los Angeles Times* quoted media attorney Thomas Kelley as saying, "Criminal proceedings in which a court determines the admissibility of evidence that is important to either the prosecution's or defense's theory of the case are trial-like adjudications that invoke the strongest presumption in favor of public access."

The *Denver Post* reported that defense attorneys Pamela Mackey and Hal Haddon allege the statements were obtained illegally. They say officers gave Bryant the impression that he was in custody, never informed him of his Miranda rights to remain silent and to be represented by an attorney, and recorded the interview without notifying him that it was being taped.

MICHAEL JACKSON

Cameras were banned from pop singer Michael Jackson's arraignment on child molestation charges on Jan. 16, 2004.

The Los Angeles Times reported that Judge Rodney S. Melville of Santa Barbara Superior Court ruled that "the privacy rights of all participants," "preserving the security and dignity of the court," and the "importance of maintaining public trust and confidence in the judicial system" formed the bases for his decision.

Ken Paulson, executive director of the Freedom Forum's First Amendment Center at Vanderbilt University, was quoted in a report by the Reporters Committee for Freedom of the Press as saying, "There is always the fear that lawyers will play to the cameras, but the attorneys in this case already have. . .. It is ridiculous to suggest that keeping cameras out of this courtroom would restore dignity and solemnity to this trial."

In February, judges also banned cameras from the murder trials of Scott Peterson and actor Robert Blake. According to *The* (San Jose) *Mercury News,* the judges in both cases "cited the chilling effect cameras could have on witnesses who might alter their testimony if they knew their face were to be on the nightly news." The article noted that many judges have been hesitant to allow cameras in the courtroom ever since the O.J. Simpson trial "created a public spectacle" when it was televised in 1995.

MARTHA STEWART

The U.S. Circuit Court of Appeals (2nd Cir.) ruled on Feb. 18, 2004, that U.S. District Court Judge Miriam Goldman Cedarbaum was wrong to ban journalists from observing jury selection in the Martha Stewart trial in Manhattan. "The mere fact that the suit has been the subject of intense media coverage is not . . . sufficient to justify closure," the appeals court wrote.

A coalition of news organizations appealed Cedarbaum's decision in January 2004.

According to *Newsday,* Assistant U.S. Attorney Deborah Landis "argued the Stewart case had attracted such massive media coverage that prospective jurors would be less than forthright in expressing their opinions were reporters allowed in the room," putting Stewart's right to a fair trial at risk.

Reporters were instead given transcripts of the proceedings with the juror names deleted.

The Associated Press reported that Attorney David Schultz, who represented the news organizations, claimed that suggestions that Stewart was being prosecuted unfairly made it especially crucial that the news media report the details of the trial to the public. He argued that jury selection should not be closed due merely to "high public interest."

"That's a reason the normal procedures should be followed, not abandoned," he said.

According to The Reporters Committee for Freedom of the Press (RCFP), the media have been barred from jury selection in rare instances involving organized crime, terrorism or drug-related cases – but "only when there is a provable risk of physical harm to a publicly identified juror."

Access to Courts, *continued on page 15*

Secrecy is Compounded as Supreme Court Refuses to Hear an Appeal in *M.K.B. v. Warden*

The U.S. Supreme Court has refused to hear an appeal in the case of *M.K.B. v. Warden*, docket 03-6747, 2004 U.S. LEXIS 1553, which challenged government secrecy in a case involving a waiter who served two of the Sept. 11 hijackers. The high court also refused to allow a coalition of news and public interest organizations to intervene in the case, and allowed Solicitor General Theodore Olson to file a completely sealed brief on behalf of the government. Not only was the Solicitor General's brief sealed, so were 63 of the 65 docket entries, according to a story posted on the Web site for the Reporters Committee for Freedom of the Press (RFCP), available online at www.rcfp.org/news/2004/0223mkbvwa.html.

The Supreme Court's refusal to hear the case was issued without comment or analysis.

The case involves Mohamed Kamel Bellahouel, who, while working as a waiter in South Florida, reportedly served meals to two of the September 11 hijackers, Mohamed Atta and Marwan al Shehhi. Although Bellahouel himself was not charged with a crime related to terrorism, the case was supposed to remain secret, allegedly in the interest of national security. But Bellahouel's identity became known as the result of a docketing error in the Eleventh Circuit. Bellahouel has denied any involvement with terrorism, and has since been released on $10,000 bond. An Algerian who is married to an American citizen, Bellahouel faces deportation because his student visa expired. In a Feb. 23, 2004 story by Associated Press writer Anne Gearan, Bellahouel's lawyers describe their client as "one of countless Middle Eastern men" secretly detained following the 9/11 attacks. (See "*M.K.B. v. Warden*" in the Fall 2003 issue of the Silha *Bulletin*.)

Floyd Abrams, who was co-counsel to *The New York Times* in *New York Times Co. v. United States,* 408 U.S. 713 (1971), commonly known as the "Pentagon Papers" case, is quoted in RCFP's story as saying, "I cannot think of any other [Supreme Court] case in which there was a complete absence of publicly articulated reasons for the government's position." In the Pentagon Papers case, by contrast, there were two briefs filed on behalf of the government – one sealed and one that was made available to the public. Under those conditions, Abrams said, the public was able to "pass judgment on the *bona fides* of the government's position." But with the Bellahouel case, Abrams said, "the public cannot tell what it is the government has to say, even at a broad level of abstraction."

One of the media coalition attorneys in the case, Thomas Goldstein, was quoted in the *Palm Beach Daily Business Review* as saying, "We may never really know what was going on . . .. Our hope was that, even if the justices decided the case needed to be essentially secret, they would make the lower courts give some kind of an explanation, or at least a signal that the need for secrecy had been given serious consideration. Without that, it's hard to see how the public can have confidence in the process."

"The public cannot tell what the government has to say, even at a broad level of abstraction."
– Floyd Abrams, Attorney

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Access to Courts, *continued from page 14*

Schulz was quoted in the *Newsday* article as saying, "You can count on one hand the number of cases where [jury selection] was closed in the history of this country."

It is too late for the decision to affect the Stewart trial, but according to the RCFP, it "may well set a precedent for future high-publicity cases."

SLOBODAN MILOSEVIC

At the request of the U. S. State Department, cameras were banned from broadcasting Gen. Wesley Clark's December 2003 testimony at the war crimes trial of former Yugoslav leader Slobodan Milosevic in the International Criminal Tribunal for Yugoslavia in The Hague, Netherlands. In addition, the courtroom was closed, and transcripts of the testimony were not released for 48 hours in order for State Department lawyers to delete any information that might harm national interests, according to The Reporters Committee for Freedom of the Press (RCFP).

State Department spokesman Lou Fintor told the *Chicago Tribune* that the 48-hour delay "[was] not to discourage or hinder reporting, but to allow for the maximum provision of information by Gen. Clark to the tribunal while at the same time protecting against the inadvertent disclosure of sensitive information."

Many political and military officials had previously testified publicly against Milosevic and other former leaders. According to the RCFP, the International War Crimes Tribunal usually reserves secret testimony for "intelligence matters and to protect the identity of [individuals] who fear for their safety."

—Elizabeth Jones
Silha Research Assistant

Student Press Updates

ILLINOIS

On Jan. 8, 2004, the U.S. Court of Appeals for the Seventh Circuit re-heard oral arguments in *Hosty v. Carter*, a case involving the censorship of a student newspaper at Governors State University in Illinois. According to the Student Press Law Center (SPLC), *The Innovator* has not been published since Fall 2000, when Dean of Student Affairs Patricia Carter directed the publishing company used by the paper to refrain from printing without first obtaining official approval from the university. The paper had previously published several articles that were critical of the administration.

No further issues were published, because newspaper editors refused to comply with Carter's order to obtain administrative consent. In their original 2001 lawsuit in which the staff claimed that their First Amendment rights had been violated, they also alleged that officials withheld payment to editors and staff, tampered with their mail, locked them out of the newspaper office, and denied them equipment and supplies. The SPLC reported, "Although school officials said the editors can publish at any time and have simply chosen not to, the students say their ability to produce a newspaper has been effectively crippled."

Students say their ability to produce *The Innovator* has been effectively crippled.

—Student Press Law Center

Challenging the First Amendment protection afforded college newspapers, the case sets student *Innovator* editors against school administrators and the Illinois Attorney General's office, which is representing the university. According to the SPLC, the Illinois attorney general claims that the U.S. Supreme Court *Hazelwood School District v. Kuhlmeier* decision, 484 U. S. 260 (1988), which limits First Amendment protections for high school students, "should also guide judges when determining the amount of legal protection for expression on the country's public college and university campuses."

"[The student editors] failed to show that their First Amendment rights are any greater than the limited rights accorded to the students in *Hazelwood*," Attorney General James Ryan argued in his brief to the court of appeals.

A three-judge panel of the court initially handed down a decision (*Hosty v. Carter*, 325 F.3d 945 [7th Cir. 2003]) on April 10, 2003, that offered strong support for college press freedom. The court ruled that the high-school censorship standard determined by Hazelwood was not the appropriate standard for censorship of college student media.

However, the Illinois Attorney General then filed a petition on Carter's behalf for a rehearing *en banc* before the federal appeals court. On June 25, 2003, a majority of the 11 active judges of the court granted that petition and vacated the April decision.

A new decision is expected within three months. The *Hosty v. Carter* ruling will be binding in Illinois, Wisconsin and Indiana, but it is likely to influence university newspapers nationwide.

"It's important that people realize that the outcome of this case could affect any school-supported expression at public colleges," said Mark Goodman, SPLC executive director, in an article posted on the SPLC website. "The implications are mind-boggling." Additional information about the case is available online at: http://www.splc.org/legalresearch.asp?id=49.

NEW YORK

Long Island University student newspaper adviser Mike Bush was fired and editor Justin Grant was suspended after an article in the Jan. 21, 2004, edition of the *Seawanhaka* published the Student Government Association president's grades to suggest they might be a possible cause for his sudden resignation.

According to *Newsday*, the article, written by Grant, quoted SGA president Abdel Alileala, as citing "personal problems I have to take care of" for his decision to resign. The story went on to describe the "speculation that Alileala's academic struggles last year are the reason for his decision to reign." The student leader's grades followed the statement, but Alileala was not asked to comment.

Newsday reported that Bernadette Walker, dean of students, asserted that the publication of a student's grades is a violation of federal law. According to the Student Press Law Center (SPLC), however, the federal law only applies to university employees or those acting on their behalf, not student newspapers.

Walker blamed Bush for providing the grades to Grant. According to the SPLC, Bush maintained that he was not the source of the information, although he did recommend that they be published.

Grant apologized to the SGA president in a subsequent issue of the paper, but he defended his decision to publish the grades.

"My decision to include the grades was based on the rationale that when an elected official resigns from office, the constituents have a right to know why," Grant wrote. "This wasn't a personal attack on [the SGA president]. This was based on some elementary journalistic principles we are taught in journalism classes here at LIU."

According to the SPLC, private schools, such as LIU, are not required to provide journalists with the same First Amendment protections as those attending public schools. But LIU's Student Code of Conduct states, "[The university] is committed to preserving the exercise of any right guaranteed to the individual by the constitution."

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Student Press, *continued from page 16*

In 1979, a Maryland appeals court ruled that college athletes could be considered public figures and that the University of Maryland's student newspaper *The Diamondback* did not invade their privacy when it published the grades of members of the university's basketball team in *Bilney v. Evening Star*, 406 A.2d 652 (Md. Ct. Spec. App. 1979).

Bush told the SPLC that administrators changed the locks of its offices to keep editors out. "At this point, the newspaper is not being published," Bush told the SPLC. He could not predict when the weekly newspaper will resume publication.

TEXAS

***University Daily*, Texas Tech University**

A lawsuit brought against Texas Tech University by a medical student who was expelled after writing an eyewitness account of an autopsy in the student newspaper was settled in late January 2004, according to the Student Press Law Center (SPLC).

Sandeep Rao, a student at Texas Tech University Health Science Center in Lubbock, sued the university in the 99th District Court of Lubbock County District Court in May 2002 (No. 2002-517,844), claiming that his First Amendment rights had been violated. Rao was expelled in April 2002 for allegedly violating a confidentiality agreement he signed before observing an autopsy as part of a class assignment. According to the Associated Press, the agreement with the Health Science Center prohibited Rao from releasing the deceased's name, cause of death, or any other identifying details.

Rao, a former opinions editor at the *University Daily*, told the Associated Press he wrote about the autopsy in the Jan. 24, 2002, issue in order to share a medical student's perspective of the procedure. According to an article posted on WorldNetDaily, Rao's column, entitled "Autopsy Proves Eye-Opening," did not disclose the deceased's name. He did identify the doctor who performed the autopsy, who filed the initial complaint.

Under Texas Law, however, records of autopsies performed by medical examiners are open to the public, SPLC noted.

"In this country, in this state, even students have a right to free speech," Rao's attorney Andrew Golub told the Associated Press. "The university and school officials . . . are constitutionally prohibited from using their state power to retaliate against and intimidate people like Mr. Rao."

Both the district court and the state's Seventh Court of Appeals ruled in Rao's favor and ordered the school to reinstate him in *Texas Tech University Health Sciences Center v. Rao*, 105 S.W.3d 763 (Tex. Ct. App (2001)). In August 2002, the university filed a petition for review with the Texas Supreme Court. But a motion to dismiss the case was filed by Texas Tech on Jan. 28, 2004, suggesting that the two parties had reached a settlement before the court had heard the university's appeal.

Golub told the SPLC, "Although Texas Tech disagreed with the merits of Mr. Rao's case, it acknowledges that both the trial and appellate courts ruled against it, and authorized a temporary injunction in Mr. Rao's favor."

Golub went on to say that Texas Tech and Rao "worked together to resolve their differences, thereby enabling Mr. Rao to continue his medical education uninterrupted and unimpeded."

> "In this country, even students have a right to free speech."
>
> —Attorney Andrew Golub

***The Baylor Lariat*, Baylor University**

The president of Baylor University condemned an editorial supporting gay marriage that appeared in the student newspaper on Feb. 27, 2004.

Claiming that the administration would now exert tighter control over the Baptist university's newspaper *The Baylor Lariat*, President Robert B. Sloan Jr. called the editorial "out of touch with traditional Christian teachings" in a statement published in the Lariat on March 2.

The editorial supported San Francisco's recent lawsuit against the state of California that seeks the ability to continue issuing marriage licenses to same-sex couples.

"Like many heterosexual couples, many gay couples share deep bonds of love, some so strong they've persevered [through] years of discrimination for their choice to co-habitate with and date one another," the article stated. "Just as it isn't fair to discriminate against someone for their skin color, heritage or religious beliefs, it isn't fair to discriminate against someone for their sexual orientation."

"The kids certainly have a right to free speech. But Baylor has certain rules," Doug Ferdon, chairman of the Baylor journalism school, told *The Los Angeles Times*. "They shouldn't advocate things that would be against the basic tenets of Baylor and Baptists. In a private school, there is something that the school really stands for — in this case, kind of a conservative, Christian theology."

School spokesman Larry Brumley was quoted in *The Los Angeles Times* as saying, "The difference here is that the *Lariat* took an editorial stance . . . attacking a basic Christian tenet upon which the university was founded. These are always judgment calls. And they crossed the line in this case."

Editor & Publisher reported that *Lariat* Editor Lacy Elwood mantained the editorial took a legal rather than a moral stance on the issue.

Student Press, *continued on page 18*

Student Press, *continued from page 17*

VIRGINIA

Ending a two-month long dispute over editorial control of Hampton University's student newspaper, the university's acting president adopted new policies to ensure the paper's free-press rights on Dec. 19, 2003.

According to the Student Press Law Center (SPLC), the decision was an "about-face" for President JoAnn Haysbert, who confiscated thousands of copies of the Oct. 22, 2003, Homecoming edition of *The Script* after editors denied Haysbert's request to publish her letter to the editor on the front page. Haysbert's letter, which addressed steps taken by the university in response to health-code violations at a school cafeteria, was printed on page 3.

In November 2003, the American Society of Newspaper Editors rescinded a $55,000 grant to the private Virginia university because of the incident. "We're an organization that is devoted to the interests of newspapers and is devoted to the First Amendment and everything it stands for in our society," said ASNE President Peter Bhatia, as quoted on CNN.com. "And the actions that Dr. Haysbert took fly in the face of that."

After Haysbert ordered the confiscation of the newspapers, editors agreed to print the letter on the front page in exchange for the formation of a task force that would make recommendations regarding the future management of the newspaper.

According to SPLC, Haysbert accepted the policies recommended by the task force, a group made up predominately of faculty and students with a journalism background. The policies include:

• Student journalists at *The Script* should "have the right to a free press in order to practice their craft in the unfettered fashion envisioned by the framers of the First Amendment of the Constitution;"

• No administrator, faculty member, student or university-affiliated organization will confiscate and/or halt the distribution of the newspaper;

• The newspaper's advisers must have adequate knowledge of journalism;

• An advisory board made up of faculty and students should be established and empowered to resolve issues between the editors and advisers.

—Elizabeth Jones
Silha Research Assistant

RIAA, *continued from page13*

RIAA issued 532 new lawsuits in January against unnamed individuals. The "John Doe" lawsuits include specific Internet Protocol (IP) addresses of the suspected individuals. Previously, RIAA would indicate the IP address in its subpoena to an ISP and the service provider would use that address, a unique number for every online user, to obtain the identifying information. Verizon had previously suggested this tactic as an alternative to subpoenaing ISPs. In the January 2003 ruling, the District Court determined that ". . . there is absolutely nothing in the DMCA or its history to indicate that Congress contemplated copyright owners utilizing John Doe actions in federal court to obtain the identity of apparent infringers, rather than employing the subsection (h) process specifically designed by Congress to address that need." (*Recording Industry Association of America v. Verizon Internet Services,* 240 F. Supp. 2d 24 (D.D.C 2003)) That court also found that because the threshold of proof for executing a John Doe action is so low, it might offer less protection for the consumers than the subpoena process which required the requester to provide evidence, usually a list of songs that appeared to be unlawfully obtained by a particular user, of his or her "good faith belief" that the downloading was not legal.

—Ingrid Nuttall
Silha Research Assistant

US Internet Updates

Ninth Circuit Opens Door for Search Engine Ad Lawsuits

The U.S. Court of Appeals for the Ninth Circuit ruled on Jan. 14, 2004 that Playboy Enterprises could sue over use of its trademarks for targeted advertising sales by Internet search engines.

The courts, ruling in *Playboy Enterprises, Inc. v. Netscape Communications Corporation*, 354 F.3d 1020 (9th Cir. 2004), quickly prompted the parties to settle their five-year legal fight, according to a Jan. 23, 2004 report by CNET News.com. The dispute arose from Netscape's practice of selling banner advertisements that would appear on users' computers depending on what keywords the user entered into Netscape's search engine. Advertisers for adult content were eager to purchase rights to have banner ads appear when users typed in keywords including "playboy" and "playmate," both trademarks of Playboy Enterprises.

Netscape had successfully argued for summary judgment before the U.S. District Court for the Central District of California. The Ninth Circuit reversed that decision and allowed the case to move forward.

Google Faces Keyword-Advertising Lawsuit

Less than two weeks after the Ninth Circuit's decision, American Blind and Wallpaper Factory filed a federal lawsuit against the search engine Google in the Southern District of New York. The company alleged that Google had used its trademark to sell keyword advertisements to competitors. That lawsuit followed Google's own lawsuit, filed last November in the U.S. District Court for the Central District of California. In that suit, the Internet search company asked the court to rule on the legality of keyword advertising practices, according to a Jan. 28, 2004 report by CNET News.com. Google filed that suit in anticipation of the lawsuit filed by American Blind and Wallpaper Factory.

Federal Courts in California are bound by Ninth Circuit opinions, but federal courts in New York, where American Blind and Wallpaper Factory filed its lawsuit, are not.

Google Complains about Alleged Trademark Infringement

The Internet search giant Google finds little humor in "Booble.com," an adult-content search engine described by its owner as a "parody of the world's largest and best known search engine."

Reuters reported on Jan. 30, 2004 that Google had contacted Booble and asked that the adult site stop using the name and transfer rights to the domain name to Google. Google's e-mail was posted on the Booble Web site. Booble's owner, who identified himself only as "Bob," said his company would defend itself "as long as it makes financial sense," according to the Reuters report.

Abortion Foes Prevented from Cybersquatting

Federal judges issued restraining orders and injunctions against anti-abortion activists in two separate incidents of alleged cybersquatting. The rulings, both in January, were issued by district court judges in Minnesota and West Virginia, and stemmed from complaints filed by a law firms and newspapers.

In the first case, *Faegre & Benson v. Purdy,* 2004 U.S. Dist. Lexis 896 (2004), the Minneapolis law firm of Faegre & Benson, LLP, sued South St. Paul resident William S. Purdy Sr., to prevent Purdy from operating websites with domain names such as "faegre-benson.com" and "startribune-faegre.org" according to the *St. Paul Pioneer Press*. The law firm represents the *Star Tribune*.

According to the Jan. 7, 2004 story, computer users who used that address were redirected to a website purporting to show pictures of aborted fetuses. Purdy allegedly targeted Faegre & Benson because the law firm had represented companies that previously sued Purdy for cybersquatting. Purdy had previously been ordered to stop using domain names that included trademarks of the Washington Post, McDonald's and Coca-Cola, according to the *Pioneer Press* report. (See "Developments in Internet Law: Cybersquatting" in the Summer 2002 issue of the Silha *Bulletin.*)

U.S. District Judge Michael Davis issued the temporary restraining order and preliminary injunction on Jan. 5, 2004.

In the second case, *MediaNews v. Barry,* No. 2:03-cv-2459, U.S. District Judge Joseph R. Goodwin granted a preliminary injunction against John Barry, a New York resident, who used the domain name "charlestondailymail.com" to redirect computer users to anti-abortion websites, according to a Jan. 26, 2004, Associated Press report. MediaNews Group, Inc., the Denver-based parent company of the Charleston (W.Va) Daily Mail, sued, alleging that the domain name violated the newspaper's trademark. According to the Associated Press, Barry had previously been sued for a similar act of cybersquatting. In October 2003, the AP reported, The (Nashville) *Tennessean* successfully stopped Barry from using the domain name "thetennessean.com."

US Internet Updates, *continued on page 20*

FCC Indecency, *continued from page 14*

"Clear Channel's move was intriguing largely for its timing," wrote Dan Gillmor, technology columnist for the *San Jose Mercury News*. "Stern had only days earlier come out on his show strongly against the re-election of President Bush. Senior executives of Clear Channel, which is based in Texas, have close ties to the Bush administration and the president."

"The company suddenly discovered that programming it had been airing for years was unacceptable in this new era of neo-Victorianism," Gillmor continued. "The word 'hypocrisy' doesn't do justice for such people."

Before the Clear Channel fine, Stern's removal, or the Super Bowl, FCC Chairman Michael Powell proposed barring the use of the so-called "F-word" on television or radio, regardless of the context in which the word is used, according to a Jan. 13, 2004, Reuters report. Powell's proposal, if adopted, would reverse an October 2003 FCC decision not to sanction NBC for an incident during the Golden Globe Awards when Bono, frontman for the rock group U2, used the word in his acceptance speech. The FCC's decision not to impose a fine turned on the commission's determination that Bono used the word to emphasize an exclamation and not as a reference to sexual or excretory functions, according to Reuters. The FCC currently defines indecent speech as speech that depicts or describes sexual organs or activities. For a broadcast to be considered indecent by the FCC standards, speech currently must be "patently offensive" by contemporary broadcasting standards.

"The company suddenly discovered that programming it had been airing for years was unacceptable in this new era of new-Victorianism."
– Dan Gillmor, *San Jose Mercury News*

—Doug Peters
Silha Fellow

US Internet Updates, *continued from page 19*

Celebrities succeed in actions to control use of names in web addresses

In January 2004, the World Intellectual Property Organization (WIPO), one of the specialized agencies of the United Nations that administers international treaties dealing with intellectual property protection, ordered a Canadian company to relinquish two domain names incorporating the names of celebrities, the Associated Press reported.

The panel's decision means that Network Operations Center, also known as Alberta Hot Rods, must transfer the domain name www.carmenelectra.com to the former star of the television series "Baywatch" and the domain name "jrrtolkien.com" to the estate of the "Lord of the Rings" author, according to the AP report.

WIPO previously granted similar relief to other celebrities, including actor Pierce Brosnan, the AP reported.

Microsoft accuses Canadian teen of trademark infringement

Mike Rowe, a teenage web designer and high school student from Victoria, British Columbia, thought his Internet domain name, "www.MikeRoweSoft.com," was catchy and funny. Microsoft saw the situation differently, however.

In November 2003, Microsoft lawyers contacted Rowe and demanded that he stop using the domain name, claiming that it infringed on the corporation's trademark, according to a Jan. 19, 2004, report by CNN.com. The company offered $10 as compensation, and Rowe countered with a request for $10,000.

In late January, the two sides agreed to a compromise, in which Rowe would relinquish the domain name and Microsoft would pay the cost of switching to a new site and provide training and certification on Microsoft products as well as a trip to the company's Redmond, Wash., headquarters, according to Reuters.

Struan Robertson, editor of Out-Law.com, a web site that covers information technology law, told CNET News.com that Microsoft faced a difficult situation under trademark law. Rowe had a strong claim to the domain name, because it was based on his own legal name and because Rowe did not claim to be affiliated with Microsoft. However, Robertson said that Microsoft is obligated under trademark law to defend its trademark whenever a potential infringement comes to light. Failure to do so, he said, exposes the trademark holder to future widespread infringement. The report is available at http://news.com.com/2100-1014-5143614.html.

Microsoft now acknowledges that it may have gone overboard, according to the CNET News.com report. "We appreciate that Mike Rowe is a young entrepreneur who came up with a creative domain name," the report quotes a Microsoft representative as saying. "We take our trademark seriously, but maybe a little too seriously in this case."

—Doug Peters
Silha Fellow

Silha Center Files Comments on Records Access

On Feb. 12, 2004, the Minnesota Supreme Court Advisory Committee convened a public hearing for comments on that committee's Rules of Public Access to Records of the Judicial Branch (Access Rules). If adopted, the Access Rules would allow electronic access to the state's court records.

Established by a Jan. 23, 2003 order from the Minnesota Supreme Court, the advisory committee was instructed to consider a report entitled "Public Access to Court Records: Guidelines for Policy Development by State Courts," which was originally prepared by the Conference of Chief Justices and Conference of Sate Court Administrators (The CCJ/COSCA Guidelines). After reviewing those documents, the Committee was to make recommendations concerning remote electronic access to court documents; which documents should be made available; what privacy protections should be considered; and what fees, if any, should be charged for such access.

The Silha Center has been active in the debate over remote access to court records. In 2001, the Silha Center filed comments regarding electronic access with the Judicial Conference of the United States, prepared by Silha Center director Prof. Jane Kirtley, with the assistance of graduate student Erik Ugland. In 2002, the Silha Center filed comments with the National Center for State Courts, prepared by Kirtley with the assistance of research assistant Kirsten Murphy.

Both documents are available on the Silha Center's Web page at www.silha.umn.edu.

In February 2004, Kirtley again filed comments with the Minnesota Supreme Court, prepared by Kirtley with the assistance of Silha Fellow Doug Peters. Kirtley was invited to present the Silha Center's comments to the Committee at the February 12 hearing in St. Paul.

The Center's comments advocate electronic access to court records on the grounds that such records are public documents and should be readily accessible to the public. Making court records available in electronic form is the next logical step in a society where so much information is available electronically, and particularly where there is a trend towards handling all court filings electronically. The comments are available online at http://www.silha.umn.edu/silhacentercomments.pdf.

The Silha Center's comments were based on the presumption that court records are public documents and therefore should be accessible to the public. This access is guaranteed by both common law and the First Amendment, supported by such cases as *Minneapolis Star & Tribune v. Schumacher*, 392 N.W. 2d 197 (Minn. 1986). *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). The government, furthermore, cannot pick and choose who can and who cannot have access to court records, and therefore must provide equal access to them. In addition, modern technology is promoting a trend towards electronic courtrooms, where no paper records are generated. Although paper records are generally accessible to anyone willing to take the time to go to a courthouse to retrieve them, the growing trend to handling court matters electronically makes posting them to the World Wide Web a much simpler matter. "Here is the fundamental question," Kirtley was quoted in a Feb. 12, 2004 article in the St. Paul Pioneer Press, "Do we believe in public access or not?" She said that Minnesota's slow approach to making records available electronically "makes it harder to get the access we should."

The comments further addressed privacy concerns by stating that the law could be modified so that policies would be consistent for both paper and electronic records. Information such as social security numbers or information regarding minors would be redacted across the board, not just from electronic records.

The comments also noted that:

- Information that is public in one format should not become confidential when it is converted to another format.
- Redacting court records is feasible using current technology
- Remote access to court documents would reduce administrative burdens on court administrators, not increase them.

Once an effective redaction process is adopted, persons seeking court records would not have to burden court personnel with in-person requests for access and copies.

The hearing afforded an opportunity for groups on both sides of the issue to be heard. Besides Kirtley, who represented the Silha Center, other speakers advocating access included the Reporters Committee for Freedom of the Press, represented by Executive Director Lucy Dalglish; the Minneapolis *Star Tribune*, represented by reporter Chris Ison and John Borger, attorney with the law firm of Faegre and Benson; and Gary Hill, director of Investigations & Special Segments KSTP-TV and Chair of the Freedom of Information Committee of the Minnesota Pro Chapter of the Society of Professional Journalists.

Ison and Hill both stated that electronic access was more convenient for reporters who often face problems parking and navigating a complicated bureaucratic system when trying to retrieve paper records from a courthouse. Immediate electronic access would enable reporters to check for the most recent and up-to-date information, allowing them to tell their readers, for example, that the charges against someone were dropped, and would aid in accuracy in reporting. When a person with a common name is apprehended, a quick check for a birth date or an address on a court record would enable a newspaper to correctly report that person's identity, they explained. Remote access to electronic court records also allows comprehensive studies of the data, so that trends – such as racial profiling or victims of crime – can be more easily spotted.

Many of those speaking against electronic access represented religious communities, and argued that remote access to criminal records would lead to discrimination against members of minority groups, particularly young men of color.

Citing studies that claimed Minnesota's prisons hold a disproportionate number of African American prisoners to whites, some speakers claimed that allowing electronic access to court records would perpetuate

Comments, *continued on page 5*

"The fundamental question is: do we believe in public access or not?"
– Jane Kirtley, Director, Silha Center