

Battles to Gain Camera/Audio Access to State and Federal Courtrooms Continue

Health Care Argument Is Catalyst for Congressional Action

For years, First Amendment advocates have fought for camera and audio recorder access to judicial proceedings. State and federal courts have been slow to embrace rules allowing the use of cameras in their courtrooms, although all 50 states allow electronic access to some degree. At the federal level, a pilot program has been launched in some federal district courts. However, the Supreme Court of the United States still does not allow the use of cameras during its proceedings. But both the U.S. House of Representatives and the U.S. Senate are considering versions of the Cameras in the Courtroom Act of 2011, which would require the Supreme Court to allow television coverage of all open sessions of the court.

Even with access rules in place, the procedures sometimes make it extremely difficult for news organizations or other citizens to actually gain what is often called “extended access” to courtrooms. Nevertheless, the camera and audio access issue is becoming more important to media organizations of all types, who increasingly utilize video and audio reporting to some extent. Coupled with important issues being decided by the courts, such as the constitutionality of the federal health care law, politicians and media groups have called for more workable rules to guarantee access to all judicial proceedings.

Congress and Media Advocate for Cameras Access to Supreme Court Health Care Law Hearings

In March 2012, the Supreme Court of the United States is slated to hear oral arguments in three cases addressing the Patient Protection and Affordable Care Act (PPACA), 42 U.S.C.A. § 18001. The Act, more commonly known as the “health care reform law,” was signed by President Barack Obama on March 23, 2010, significantly changing parts of the private health insurance industry and public health insurance programs. The legislation expands insurance coverage of pre-existing medical conditions and increases national medical spending. The law passed the House of Representatives by a vote of 219-212, with 34 Democrats and all 178 Republicans serving in the House at

the time voting against the bill. It passed the Senate by a vote of 60-39 with all serving Democrats and Independents voting for it and all serving Republicans voting against it. Since it was signed into law, a majority of states, numerous organizations, and individual citizens have filed lawsuits challenging the constitutionality of PPACA. After a number of federal district courts and courts of appeals ruled on the issue, the Supreme Court agreed to hear oral arguments in three cases: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393, *Florida v. Dep't of Health & Human Servs.*, No. 11-400, and *Dep't of Health & Human Servs. v. Florida*, No. 11-398.

C-SPAN chairman and CEO Brian Lamb and Sen. Charles Grassley (R-Iowa) have asked the court to allow camera access to record the proceedings for broadcast to the public. “It is a case which will affect every American’s life, our economy, and will certainly be an issue in the upcoming presidential campaign,” Lamb wrote in a November 15, 2011 letter to Chief Justice John Roberts. Grassley called the case “momentous” and urged the court in his separate letter to let the American people have the opportunity to witness the arguments presented before the court. House Democratic Leader Nancy Pelosi (D-Calif.) said she backed Grassley’s request, according to a November 16 CBS News report. “Openness and transparency are essential to the success of our democracy, and in this historic debate, we must ensure the ability of our citizens to take part,” she said in a statement. Copies of the letters can be found at <http://www.grassley.senate.gov/judiciary/upload/Cameras-11-15-11-signed-letter-to-SCOTUS-on-live-coverage-Healthcare.pdf> and <http://www.rcfp.org/news/documents/20111118-lettertous-supremecourtonaccesstoargumentsinhealthc.pdf>.

The court has set aside 5 ½ hours for arguments, substantially longer than the half hour generally allotted for each side to present its case. “Interested citizens would be understandably challenged to adequately follow audio-only coverage of an event of this length with all the justices and various counsel participating,” Lamb wrote. Audio recordings of oral arguments are released on the Friday of the week in which they occurred.

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Because oral arguments are only heard Mondays, Tuesdays, and Wednesdays, the audio of the health care oral arguments would not be available for same-day coverage or broadcast unless an exception was made.

COVER STORY

In a November 18 letter to Chief Justice Roberts, the Reporters Committee for Freedom of the Press (RCFP), on behalf of several media corporations and press advocacy organizations, also asked the court to allow audio and video access to the health care proceedings. “[T]he Court’s current policy of releasing audio recordings of arguments at the end of the week will not adequately satisfy this strong public interest in being timely informed of important developments in a matter of such overwhelming impact on such a widespread scale,” RCFP Executive Director Lucy Dalglish wrote. She also argued the current procedure will “impede journalists’ ability to provide same-day coverage of the arguments to readers, viewers, and listeners” who rely on the media for information about critical public issues. In a November 25 editorial, *The Washington Post* called for an end to the ban on cameras in the Supreme Court and rejected the court’s arguments that televised proceedings would compromise decorum of the proceedings, encourage outbursts from audience members, and exacerbate security and privacy concerns. “These are not arguments for banning cameras; they are arguments for banning virtually all coverage of the court and the justices. No reasonable person would accept that,” the editorial said.

On Dec. 5, 2011, Grassley and Sen. Richard Durbin (D-Ill.) introduced the Cameras in the Courtroom Act of 2011, S. 1945, which would require the Supreme Court to permit television coverage in the courtroom “unless the Court decides, by a vote of the majority of justices, that doing so would constitute a violation of the due process rights of one or more of the parties before the Court.” A similar bill was approved by a bipartisan majority of the Judiciary Committee during the last congressional session. A companion bill, H.R. 3572, was introduced in the House of Representatives on December 6 by Rep. Gerry Connelly (D-Va.). The House of Representatives bill can be viewed online at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.3572;> and the Senate bill can be viewed at [http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01945.](http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01945;)

The Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts held a hearing, “Access to Court: Televising the Supreme Court,” on December 6. Sen. Amy Klobuchar (D-Minn.), who co-sponsored the bill, presided. According to a December 7 story on MinnPost.com, Klobuchar believes the court’s decisions have such a significant impact on the public that the deliberation that leads up to them should be accessible to all Americans. “Although the Supreme Court is open to all Americans in theory, the reality is that access is extremely restricted,” she said at the hearing. “The public has a right to see how the court functions and how it reaches its rulings. ... Democracy must be open.” But Congress may not have the power to force the court to allow cameras. Maureen Mahoney, a member of a Washington-based Supreme Court and appellate legal practice, told the committee the legislation could face serious constitutional challenges before taking effect, the MinnPost story said. “It would, after all, be an effort to strip the court of its historic authority to decide how to control

proceedings in its own chamber,” she said during hearing testimony, the story said. Thomas Goldstein, an attorney who runs SCOTUS Blog, said during his testimony that forcing a constitutional challenge on the matter is probably not necessary. “They are headed in this direction on their own. ... They have asked for some deference in the process of reaching this conclusion,” he said at the hearing. “The trajectory is that it is inevitable that television will be in the Supreme Court, and I would not provoke the constitutional controversy of requiring them to do it.” In an interview with MinnPost, Silha Professor of Media Ethics and Law and Silha Center Director Jane Kirtley said, “I believe that time is on the side of getting cameras in there.” But, “will

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U.S. Senator

this force the Supreme Court to put cameras there? No, it will not.” MinnPost’s full story about the hearing can be viewed at http://www.minnpost.com/devinhenry/2011/12/07/33633/klobuchar_looks_to_put_cameras_in_the_supreme_court.

If cameras are allowed, it will be a first in Supreme Court history. Some justices are leery of the idea of audio and video coverage of the court’s proceedings. According to an October 6 Associated Press (AP) story, Justices Antonin Scalia and Stephen Breyer expressed their concerns about cameras in the courtroom during a Senate Judiciary Committee hearing on October 5. Scalia said during the hearing that people would only see short clips of the proceedings, which he said would likely be taken out of context. However, Breyer said that although he is still hesitant to allow cameras, he is more open to them than he has been in the past. In an October 2 column in *The New York Times*, former appellate judge and solicitor general and current Baylor University President Kenneth Starr, wrote that Justice Anthony Kennedy’s fear that televising oral arguments would motivate justices to work in TV sound bites seems groundless. “The idea that cameras would transform the court into ‘Judge Judy’ is ludicrous,” Starr wrote.

Justice Elena Kagan has been the most supportive of allowing broadcast coverage of the Supreme Court. “[I]f cameras were in the courtroom, the American public would see an amazing and extraordinary event,” she said during the 2009 9th Circuit Judicial Conference. In a November 14 article in *The National Law Journal (NLJ)* titled “Let the cameras roll,” *NLJ* Supreme Court correspondent Tony Mauro wrote that Justice Sonia Sotomayor, who was exposed to cameras in the courtroom as a judge on the U.S. Court of Appeals for the 2nd Circuit, “appears to be a fan” of the idea. But even with some justices warming up to the idea, Adam Liptak, a columnist and Supreme Court correspondent of *The New York Times*, wrote

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that the request for broadcast coverage is “doomed,” though “it is hard to say why.” Liptak points to the Supreme Courts of Canada and the United Kingdom, which both allow cameras. “What the public sees in those countries, and what it would see here, is something not always prominent in the elected branches of our government: able public servants with a complete mastery of difficult materials grappling seriously with matters surpassing consequence. It probably inspires confidence. It certainly dispels ignorance,” he wrote. Liptak argued the reasons for the ban on cameras are rooted in paternalism or self-interest, with some justices fearing the American public will not understand the proceedings, while other justices worry that “additional public scrutiny would alter the behavior of lawyers and justices for the worst.”

At a minimum, Liptak urged the court to consider compromising by considering accommodating more than the roughly 50 public spectators that the courtroom holds by arranging for a closed-circuit transmission to an overflow room or sending similar transmissions to other courthouses. Justice Breyer discussed this idea in his dissent last year in *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010), on application for stay of the broadcast of a federal trial. The lawsuit involved an action challenging the constitutionality of Proposition 8, a California ballot initiative that amended the constitution by adding a section defining marriages as only between a man and a woman. According to the Supreme Court’s opinion, the U.S. District Court for the Northern District of California “issued an order permitting the trial to broadcast live via streaming audio and video to a number of federal courthouses around the country.” The Supreme Court held in a *per curiam* opinion that the district court’s amendment of its local rules to broadcast this trial did not comply with federal law and stayed the order. Justice Breyer disagreed with the court’s decision. “I can find no basis for the Court’s conclusion that, were the transmissions to other courtrooms to take place, the applicants would suffer irreparable harm. Certainly there is no evidence that such harm could arise in this nonjury civil case from the simple fact of transmission itself,” he wrote. (For more on the court’s decision in *Hollingsworth v. Perry*, see “Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings” in the Fall 2010 issue of the *Silha Bulletin*.)

If full camera and audio access is denied for the health care oral arguments, the RCFP and its Media Coalition have asked that the court make live simultaneous audio available or, at the very least, make the audio of the proceedings available immediately after the hearing. The court released the audio of certain high-profile oral arguments to the media shortly after they occurred in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) and *Bush v. Gore*, 531 U.S. 98 (2000), the cases that arose after the 2000 presidential elections, according to Mauro’s *NLJ* story. The court turned down requests to have those proceedings broadcast live.

Federal Cameras in the Courtroom Pilot Sees Slow Start

On Sept. 14, 2010, the Judicial Conference of the United States, the national policy-making body for U.S. federal courts, approved a pilot project to permit cameras in federal district

courtrooms and to evaluate the impact of the public release of footage from some civil proceedings. According to a press release issued the same day, the pilot will be national in scope and will last up to three years. Fourteen federal trial courts were selected to take part in the pilot, which launched on July 18, 2011. According to a June 8 Administrative Office of the U.S. Courts press release, the participating courts are: Middle District of Alabama, Northern District of California, Southern District of Florida, District of Guam, Northern District of Illinois, Southern District of Iowa, District of Kansas, District of Massachusetts, Eastern District of Missouri, District of Nebraska, Northern District of Ohio, Southern District of Ohio, Western District of Tennessee, and Western District of Washington. Participation in the pilot is left to the judge’s discretion. Under the pilot program, courts may amend their local rules if necessary to provide exceptions for judges participating in the program.

More than 100 U.S. District Court judges, who hold mixed opinions about the use of cameras in the courtroom, will be participating, the press release said. In order for a proceeding to be recorded, approval must be given by the presiding judge and the parties must also consent. Judges have the discretion to halt recording at any time and have the right to review the recording before making it available to the public. Any recordings the court decides to make available after review will be posted on www.uscourts.gov and on local participating websites.

This newest experiment is the second such test in federal courts. The first pilot project occurred in the early 1990s. The U.S. Court of Appeals for the 2nd and 9th Circuits also allow broadcast coverage. (For more on the pilot program, see “Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings” in the Fall 2010 issue of the *Silha Bulletin* and for information on legislative efforts to allow cameras in U.S. courts, see “Court Access: Federal Law would Allow Cameras in U.S. Courts” in the Fall 2007 issue of the *Silha Bulletin*.)

The three-year experiment was treated skeptically from the outset. In a June 13 First Amendment Center article, journalist Tony Mauro wrote that the main hurdle to overcome is the rule that both parties must consent to recording. C-SPAN general counsel Bruce Collins also criticized the rules. “The judges are showing no courage in this, compared to the states,” Collins told Mauro. “We ought to be able to cover court proceedings the way we cover congressional hearings. What are they afraid of?” But Thomas Burke, a partner and co-chair of the Media Law Practice at Seattle-based law firm Davis Wright Tremaine, said in an interview with Mauro that he was not surprised by the “cautious approach” reflected in the guidelines. “The federal courts are never going to go from a crawl to a flat-out run” on this issue, said Burke, who has also represented media clients in disputes over camera access to trials.

According to an October 17 Citizen Media Law Project report, the first recording of a proceeding produced under the pilot program, a preliminary injunction hearing in *Gauck v. Karamian*, Civil No. 11-2346 (W.D. Tenn. filed May 4, 2011), was posted in July. As of December, five of the 14 courts authorized to record civil proceedings have posted recordings online. Although the Citizen Media Law Project report touted postings of the first six released recordings as a sign the experiment was “on a roll,” it added, “[O]nly time will tell if this experiment

finally leads to federal courts being open to regular camera coverage, or if it will be just another short period of openness before cameras are once again left outside the courtroom doors.”

The U.S. District Court for the District of Massachusetts began its participation in the pilot study on October 17. Chief U.S. District Court Judge Mark Wolf told the AP for an October 6 story that cameras will turn court proceedings into a “media circus” like the 1995 O.J. Simpson trial. Nevertheless, Wolf told the AP he favors camera access. “It’s a way that a public holds government officials and attorneys accountable,” he said. In an October 28 opinion piece in *The Boston Globe*, Hiller B. Zobel, a retired Associate Justice of the Superior Court of Massachusetts, called the federal pilot study a “severely hobbled baby step. Because they are rigorously restricting the process, the judges are hardly opening their daily work to outside scrutiny. This is not a victory for public-access advocates, still less a First Amendment coup. Indeed, the federal courts are so limiting the cameras’ presence that the happy announcement seems more like what the witches did to Macbeth: Keeps the word of promise to the ear, and breaks it to the hope,” he wrote. The most disturbing part of the pilot, Zobel said, is the provision that allows the court to review the recordings before they are broadcast. “The federal plan ... is fundamentally flawed by the excessive control parties and judges retain, even in cases involving significant public attention,” he wrote. Zobel conceded that news media often use courtroom video in ways that annoy and distress the parties involved with cases, but argued it is not a judge’s duty to “dictate, restrict, or even improve reports of the proceedings,” and that judges should only be concerned with ensuring a fair trial. “Because courtroom cameras do not obstruct justice, the federal courts would do well to loosen their experimental guidelines, follow the state example, and leave the news business to its proper practitioners,” he wrote.

In Tony Mauro’s *NLJ* article about cameras in the courtroom, he predicted the Supreme Court will probably wait for results from the federal pilot program before making any decisions about cameras in the high court. “We wait, yet again, for the results of another three-year experiment with broadcast of a limited category of civil proceedings in the lower federal courts,” he wrote. Mauro also cited Justice Roberts’ June remarks, “I’ll be very interested to see what the results of the pilot program look like. I’m sure we’ll take that into account.” Justice Roberts then reminded the audience of the court’s deliberate nature, Mauro wrote. But, he concluded, “Even a tortoise crosses the finish line eventually.”

Court Orders Closed-Circuit TV Broadcasts of Guantanamo Proceedings

After years of Pentagon secrecy, *The Miami Herald* reported on November 6 that Pentagon prosecutors had filed a sealed motion with the Military Commissions Trial Judiciary in Guantanamo Bay, Cuba that “apparently proposes” allowing the public for the first time to watch military proceedings against an accused al Qaeda terrorist, Abd al-Rahim al-Nashiri. Nashiri is accused of leading the 2000 bombing of the U.S.S. Cole, which killed 17 Navy sailors and injured hundreds more. The filing was secret because intelligence experts from the Defense Department and other U.S. agencies had 15 business days to remove classified information.

The November 7 order, made public on November 8, said the Military Commissions Tribunal Judiciary found that “spectator access, including access by the media, family members of victims, surviving victims, and the general public is limited by the small size of the gallery” and is further limited by logistical problems and security limitations. Citing a public interest in the Commission proceedings, it ordered that the open Commission proceedings be contemporaneously transmitted to closed circuit television at two locations. The order, released late in the day, gave potential viewers little opportunity to make ar-

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— Hiller B. Zobel
Retired Associate Justice, Massachusetts

rangements to watch the November 9 arraignment hearing for Nashiri, who is accused of murder in violation of laws of war and conspiracy to commit acts of terrorism. The U.S. government is seeking the death penalty. According to the order, a broadcast for the media, the Office of the Chief Defense Counsel, Office of the Chief Prosecutor, Office of Convening Authority and general public would stream to Fort Meade, Md.; and one for surviving victims and victims’ family members would stream to Naval Station Norfolk. The order applied only to the November 9 hearing. The remote telecasts were delayed by 40 seconds to allow a courtroom censor to use a white noise machine to block sensitive information disclosed during the hearing, *The Miami Herald* report said.

The broadcast of the November 9 hearings is the first time military proceedings were transmitted in the United States. The media viewing center was established at the request of news organizations, *The Miami Herald* story said. According to a November 8 Reuters report, “the Guantanamo tribunals for suspected terrorists have been widely criticized as secretive and rigged to convict.” Brig. Gen. Mark Martins, Guantanamo’s new chief prosecutor, said the military was addressing some of those concerns by making Guantanamo documents and transcripts more readily available and through these types of broadcasts. “The Supreme Court has said that the people of an open society do not demand infallibility of their institutions, but it is difficult for them to accept what they cannot observe,” Martins told journalists at Guantanamo. “Transparency is good, democracy requires it.” Media organizations sought greater access by proposing that C-SPAN or other organizations be allowed to broadcast the proceedings. But Dave Oten, a Pentagon spokesman, told *The Miami Herald* that “broadcast beyond closed-circuit viewing is forbidden under ‘federal court rules’ that ban recording of criminal proceedings.” If the proceedings were broadcast, Oten said there is the potential someone could record them.

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According to a September 30 Reporters Committee for Freedom of the Press (RCFP) report, the Pentagon launched a new website that aims to provide the public with information about the military proceedings. The report said the most important feature of the website for journalists is “a page that allows visitors to download copies of the court filings from each military commission’s cases against suspected terrorists.” The story characterized the Nashiri case as “the first critical test for the [Obama] administration’s continued pledges to increase transparency in the controversial offshore commissions after a rocky past with reporters.”

Until now, the Pentagon restricted access to Guantanamo trials to three types of observers: journalists under military escort who had approval to travel to Guantanamo, legal observers under escort by the prison camps’ Distinguished Visitors unit, and five citizens with guests invited by the prosecution’s victims’ right advocate that are chosen by lottery, *The Miami Herald* report said. The citizens in attendance are generally victims or family members of victims.

A trial date for Nashiri has not yet been set.

Minnesota Supreme Court Advisory Committee Releases Rules Recommendations for Camera Pilot Project

By a March 11, 2011 order, the Minnesota Supreme Court established a two-year pilot project on video and audio recording in civil cases that began July 1, 2011. The order directed the pilot’s advisory committee to work with the media organizations who had petitioned for the pilot program to identify media coordinators who will facilitate interactions between the courts and the media and to report to the court on any needed rule changes. On Sept. 28, 2011, the advisory committee released its recommendations for the implementation and its proposed rule changes.

The seeds of the pilot program date back to February 2009, when the Minnesota Supreme Court adopted the General Rules of Practice Committee’s recommendation to retain the current rule governing cameras at the trial level. That rule, Minnesota General Rule of Practice 4, imposes a presumptive ban on cameras which can be overcome by an order of the trial judge and consent of all parties in the case. However, the Supreme Court instructed the committee to “design a pilot program that will include a study of the impact of televised proceedings on victims and witnesses.” (For more on the development of the pilot project see “Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings” in the Fall 2010 issue of the *Silha Bulletin* and “Minnesota High Court Approves Cameras-in-Court Pilot Program” in the Winter 2009 *Silha Bulletin*.)

The committee recommended that Minnesota General Rule of Practice 4.03 be amended to include the procedures the media must follow to gain camera access to the courtroom under the pilot program. The rule will now require the media to provide written notice of their intent to cover district court pro-

ceedings by audio or video to the judge, all attorneys involved, and any parties appearing without attorney representation as far in advance as possible, and at least 10 days before the hearing or trial begins. A judge is free to waive this requirement. The rule will also require the media to notify their media coordinator of their request. Media coordinators will be responsible for collecting basic information about the case and the camera usage, which will be used to evaluate the pilot program upon its completion.

The rule also provides guidelines for parties to object. According to the amended rule, “the party shall provide written notice of the party’s objections to the presiding judge” at least three days before the trial or hearing begins where the media has given at least 10 days’ notice. The judge will have “discretion to limit, terminate, or temporarily suspend audio or video coverage of an entire case or portions of a case at any time.” Witnesses may also object to the audio or video coverage at or before the hearing or trial. The amended rule states that no ruling of a trial judge related to audio or video coverage of proceedings will be appealable by a party until the trial has been completed.

The committee also added a section to Rule 4.03 that establishes the responsibilities of the media coordinators. Requirements include compiling basic information about the cases involved in the pilot; notifying the state Court’s Information Office of all requests for audio or video coverage; explaining to persons requesting access the local practices, procedures, and logistical details of the court they will be covering; resolving all issues related to pooling of cameras and microphones; and making available surveys to the participants of the pilot project. Minnesota media attorney Mark Anfinson, who is in charge of recruiting media coordinators, will serve as the media coordinator for the 1st, 2nd, 4th, 9th, and 10th Minnesota Judicial Districts until other permanent coordinators can be secured. Jay Furst, managing editor of the *Rochester (Minn.) Post-Bulletin*, will serve in the 3rd District; Joe Spear, editor of the *Mankato (Minn.) Free Press*, will serve in the 5th District; Steve Goodspeed, news director of broadcast stations WDIO-Duluth and WIRT-Hibbing, will serve in the 6th District; and David Unze, a *St. Cloud (Minn.) Times* reporter, will serve in the 7th District.

The committee recommended that participants be asked to complete a confidential survey about the pilot program no later than 18 months into the project. According to the recommendations, the amended rule went into immediate effect, subject to review by the Minnesota Supreme Court. The committee offered a comment period for interested parties to provide statements in support or in opposition from October 14 to November 14. The court will consider the amendments along with reviewing comments on the proposal.

– HOLLY MILLER
SILHA BULLETIN EDITOR

Occupy Wall Street Produces Legal and Ethical Issues for Journalists

On Sept. 17, 2011 Occupy Wall Street (OWS), an ongoing series of demonstrations, was born after the Canadian activist group Adbusters organized a protest in Zuccotti Park in New York City's Wall Street financial district. The protests include messages against social and economic

FREEDOM OF SPEECH

inequality, high unemployment rates, "greed," "corruption," and the influence of corporations on government. The protesters' slogan, "We are the 99%" refers to the growing economic disparity between the wealthiest one percent of the U.S. population and the rest of the citizenry. By October 9, the New York City OWS protests spread to more than 95 cities in 82 countries and more than 600 communities in the United States. OWS has raised First Amendment issues for protesters, and it has also led to the arrests of journalists covering the OWS protests as well as industry debates on the ethical issues involved in covering protests. In addition, potential trademark violations arose when local OWS groups used metropolitan newspaper flags as a basis for the designs of their own publications.

Journalists Arrested Covering OWS Protests Across the Country

Journalists have become part of the story of the OWS movement after several were arrested while reporting on protests across the country. In a November 30 Society of Professional Journalists (SPJ) editorial, SPJ President John Ensslin identified an "alarming trend" of journalists being "arrested, detained or restricted from doing their jobs at various 'Occupy' demonstrations." Arrested reporters have included those covering OWS for mainstream media outlets, freelance journalists, and student journalists. Arrests have occurred in cities including Atlanta; New York City; Oakland, Calif.; Rochester, N.Y.; Richmond, Va.; Chapel Hill, N.C.; Nashville, Tenn.; and Milwaukee.

According to a November 15 Associated Press (AP) report, at least six journalists were arrested during the

overnight police raid of OWS's New York encampment in Zuccotti Park. Those not arrested were kept at a distance during the raid, the story said. Arrested journalists included AP reporter Karen Matthews and AP photographer Seth Wenig, who were taken into custody along with about eight other protestors who they had followed through an opening in a chain-link fence into a park, the story said. Others arrested included a *New York Daily News* reporter, a freelancer for National Public Radio (NPR), a blogger for *The New York Times*' Local East Village, a *Vanity Fair* correspondent, and other freelancers. "I told them I was a reporter," NPR freelancer Julie Walker told the AP. "I had my recorder on before [the police officer] ripped it out of my hand."

Mayor Michael Bloomberg defended New York Police Department's (NYPD) policy of keeping journalists back from the scene, the AP reported. "The police department routinely keeps members of the press off to the side when they're in the middle of police action. It's to prevent the situation from getting worse and it's to protect members of the press," he told the AP. Journalists found the arrests troubling and the AP reported at least one city official has called for an investigation into the arrests. Deputy NYPD Inspector Kim Royster told the AP that the two AP journalists arrested, along with two other journalists, had unlawfully entered a private park and had cut the fence to get into the area. "The space was off limits. It was private property and there was signage that said no trespassing," Royster told the AP. Gene Policinski criticized the "arrest 'em now, sort 'em out later" approach in dealing with demonstrators in an October 31 column for the First Amendment Center following the arrest of journalists along with OWS protesters in Nashville, Tenn. "Guiding principles in dealing with these issues are that government authorities are permitted to intrude on our First Amendment rights only in very narrow, well-defined circumstances and the only to the minimum degree necessary to achieve the desirable outcome of public safety," he wrote. Making arrests in broad sweeps, Policinski added, "falls woefully short of these principles."

Following the New York City arrests, news organizations sent letters to city officials on November 21 expressing concern over the police treatment of journalists covering the OWS protests and called for meetings to address the issue. "The police actions of last week have been more hostile to the press than any other event in recent memory," a coalition of news organizations and journalist groups said in the letter to Deputy Commissioner Paul Browne, NYPD's chief spokesman. The letter described reports of credentialed media being identified, segregated, and kept away from reporting on or photographing the police action being taken against OWS protesters. Journalists were also struck by police officers or intentionally impeded from doing their jobs, the letter said. A copy of the letter signed by coalition members can be viewed at <http://www.nyclu.org/files/releases/DCPI%20Letter%20-%20Signed%2011-21-11.pdf>. Numerous organizations including the Association for Education in Journalism and Mass Communication (AEJMC), Society of Professional Journalists (SPJ), and the Committee to Protect Journalists (CPJ) also released statements expressing their concerns. "We are alarmed by New York law enforcement's treatment of journalists covering the eviction of Occupy Wall Street today," Carlos Lauria, CPJ senior coordinator for the Americas said in a statement. "Journalists must be allowed to cover news events without fear of arrest and harassment. It is particularly disturbing that government officials sought to block any coverage of the event at all."

Josh Stearns, the associate program director at Free Press, a national nonprofit public interest organization, has taken on the project of documenting journalist arrests at OWS protests around the country, earning him national attention from organizations like journalism think tank The Poynter Institute. According to Stearns' Storify website, 32 journalists have been arrested as of December 6, 10 of them occurred in New York City on November 15. Stearns describes his methods for tracking and verifying

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journalist arrests in a November 21 blog post. Providing accurate information about arrested journalists rather than posting the information online quickly is a priority for Stearns, he says. If Stearns heard about an arrest via email or Twitter from an unknown source, he would not add the name of the journalist to the list until he could verify the person was “indeed arrested, was indeed a journalist working for a news org,” he wrote. In most cases, he waited for two independent confirmations from others on Twitter, his own online research, or from the organization the journalist was working for. “I decided early on that I wasn’t going to quibble about who is a journalist, and who isn’t. My goal was to account for anyone who was clearly committing acts of journalism when they were arrested. However, I also recognize that to hold police and city officials accountable for these arrests, those being arrested had to identify as journalists publicly — either with some form of credentials or verbally,” Stearns wrote. In one case, he removed a journalist from his list after learning that the person was participating in the protests, not covering them, according to Poynter’s November 22 report on Stearns’ effort. Stearns told managing editor of Poynter.org Steve Myers by email that he has been criticized for including student journalists in his count and said “I reject the notion that student journalists are not full journalists, or somehow doesn’t deserve First Amendment protection.” Stearns’ blog can be found at <http://stearns.wordpress.com/2011/11/21/trust-and-verify-how-i-curate-my-list-of-journalist-arrests/> and his tracking website can be found at <http://storify.com/jcstearns/tracking-journalist-arrests-during-the-occupy-prot>.

According to a November 4 *Columbia Journalism Review* (*CJR*) story, disorderly conduct charges were dropped in a New York City criminal court against the first reporter arrested while covering OWS. New York City public media broadcaster, WNET’s MetroFocus reporter John Farley had been arrested September 24 while interviewing two women who had been pepper-sprayed.

According to a November 18 post on Wired.com’s Threat Level blog, Stu Loeser, a spokesman for Mayor Bloomberg, said in a statement that the best way for reporters to avoid being arrested while covering OWS is to carry a NYPD-issued press pass. But the NYPD is not issuing press passes, the blog post said. “We aren’t issuing press credentials to reporters covering Occupy Wall Street,” Detective Gina Sarubbi, NYPD’s deputy commissioner of public information, told *Wired*. Loeser later clarified that an NYPD press pass is restricted to reporters who regularly need to cross police lines when covering fire or crime related stories.

CJR and the Student Press Law Center (SPLC) have released tips for journalists who may find themselves in conflict with law enforcement as they continue to cover OWS demonstrations. Both organizations urge journalists to bring credentials with them to the protest and to keep them easily accessible. *CJR* recommends that journalists alert local authorities that their news organization plans to cover the protests, take protective gear, wear comfortable boots that they can run in, and pack a medical kit, among other suggestions. The full list of safety tips is available at http://www.cjr.org/behind_the_news/safety_tips_for_covering_occup.php. SPLC suggests that student journalists avoid the appearance of being participants in the protests, obey police orders, and if arrested or detained, show police press credentials and contact an editor or other staff representative as soon as possible. The full SPLC guide is available at <http://www.splc.org/wordpress/?p=2722>. Citizen Media Law Project has also created a citizen’s guide to reporting on OWS available at <http://www.citmedialaw.org/blog/2011/citizens-guide-reporting-occupywallstreet>.

Freelance Journalists Fired For Conduct at OWS and Related Protests

Two public radio freelance journalists made the news after being fired for their involvement with OWS and related causes. A November 14 *CJR* story reported Caitlin Curran, a freelance web producer for WNYC/PRI’s radio show “The Takeaway,” was fired from the show, which had been covering the OWS protest. Curran was let go after a picture of her holding a sign at a recent OWS protest went viral online, the story said. The firing led to a conversation

about whether or not public radio stations should be firing employees over perceived political endorsements. Upon a request from NPR, WNYC issued an official statement about the firing of Curran. “[Curran] was expected to observe the general standards of journalistic practice and more specifically WNYC’s editorial guidelines which require that editorial employees be free of any conflict that might compromise the work of the show overall. ... When Ms. Curran made the decision to participate in the protest and make herself part of the story, she violated our editorial standards.” Jay Rosen, media critic and New York University journalism professor, said in an interview with NPR’s Brooke Gladstone on November 4 for “On the Media” that he did not think the policy was helping public radio gain public trust and that public radio needs to recognize “that its people have lives.” Rosen also pointed out Curran’s freelance status. “It might be a good rule for WNYC to not try and control the lives of people that you don’t provide health insurance to. The fact that she’s not an employee, I think, is relevant, because WNYC is not investing in her career as much as it could. I would say there are limits to how much control we should have on our freelancers.” But, Richard Wald, former senior vice president at ABC News and Columbia University professor of ethics, disagreed. He told *CJR* that as long as ethics rules are clear from the outset, the news organization has a right to fire someone who violates the established standards. “The [news organization] is entitled to have their sense of what’s ethical, and you as the journalist are entitled to either accept or reject it,” said Wald. “If those rules are clear, even if the person is only part time, then they have every right to fire her.”

On October 20, the AP reported Lisa Simeone, a freelance host for “Soundprint,” a documentary show that is not produced by NPR but airs on about 35 of its affiliate stations across the country, was fired because she helped organize a Washington protest. “In my mind, it’s fine if you want to be a leader of an organized protest movement, but you can’t also be in a journalistic role,” Moira Rankin, president of “Soundprint” told the AP a day after firing Simeone. Simeone told the AP she has been serving on a steering committee of about 50 people who are

organizing an occupation protest on Pennsylvania Avenue that is known as the October 2011 Movement. It is not connected to the OWS movement, but they share similar philosophies, Simeone told the AP. "I have never brought any of my political activities into my work for 'Soundprint' 'NPR World of Opera' or the Chicago Symphony Orchestra series," she told the AP, adding that she does not cover politics or news. However, many news outlets reported the firing under some version of a headline that indicated NPR had fired Simeone over her participation in OWS protests. After receiving mail surrounding the firing of Simeone, NPR ombudsman Edward Schumacher-Matos posted a statement on October 20 on NPR's website clarifying that NPR was not responsible for Simeone's termination. "Simeone . . . is a non-NPR employee who hosts an opera program produced by a North Carolina public radio station that has nothing to do with news. The program is distributed by NPR, but Simeone has no influence or role in NPR news. The issue surrounding her, therefore, is a management and legal one. Any comments listeners want to make should be addressed to Audience Services," he wrote.

In an October 20 blog post written by Erik Wemple for *The Washington Post's* opinion blog on news media, he clarified that NPR was not responsible for firing Simeone and that her dismissal was not over involvement in Occupy DC. According to Wemple's post, Rankin questioned Simeone on her involvement as the organizer of the October 2011/ Stop the Machine protests. NPR tweeted several news organizations asking for corrections and clarifications regarding the misreported information. "By tomorrow noon, this whole mess will be gone, its legacy a bunch of errors — and, hopefully, corrections — spread across media-obsessed websites," Wemple wrote of the erroneous reports.

Coverage of OWS Sparks Debate Among Industry Professionals

Early on in the OWS movement, *CJR's* Erika Fry considered in a September 29 column whether or not the protests were getting appropriate coverage by the news media. Fry said the question began to be "kicked around" on the blogosphere after Current TV's Keith Olbermann alleged there was a "media blackout of the OWS

movement." The rumblings, Fry wrote, led the media to do some self-reflection. In a September 26 blog post, NPR Ombudsman Edward Schumacher-Matos wrote "We asked the newsroom to explain their editorial decision. Executive editor for news Dick Meyer came back: 'The recent protests on Wall Street did not involve large numbers of people, prominent people, a great disruption or an especially clear objective.'" In a September 28 post *The Atlantic's* Eric Randall argued that the media's stories about the "non-coverage" of OWS events actually amounted to news coverage of the movement. "Columnists at well-regarded news outlets who chose to respond concluded that there were plenty of great reasons not to cover Occupy Wall Street. In delineating those reasons throughout this week, they got to write at length about the protestors' quirks and shortcomings, making their defense of non-coverage of a protest read a lot like colorful coverage of a protest," he wrote. But Fry pointed to other news outlets like *Time* magazine, which ran a story titled "Occupy Wall Street Protest: 12 Days and Little Sign of Slowing Down" on September 29. Fry concluded that less than two weeks into the protests, most journalists had found the protests were not significant enough to warrant widespread coverage. "It needs to be remembered that Occupy Wall Street has a lot at stake and a serious interest in perpetuating itself," Fry wrote. "It may be that the effort — if not the underlying ideas — is just not that newsworthy."

As coverage of the OWS movement picked up, some columnists equated the protests to those during the civil rights movement in the 1960s. The *New York Daily News* published an October 9 column by veteran columnist Jimmy Breslin with the headline "Spirit of Selma reborn in N.Y.: Occupy Wall St. protests echo roots of 1965 civil rights movement." Breslin covered the civil rights marches from Selma, Ala. to Montgomery in 1965. "They all cannot see the start of a long future that will make history. The crowds today at a small park on Broadway and Liberty are perhaps the most pleasant, uplifting scene that we've had around this city for so long," he wrote. In an October 10 story, Capital, an online news publication covering New York City, pointed out that Breslin was "among the first prominent New York newspaper columnists to offer unqualified praise

for the protest." Breslin told a Capital reporter he was not sure what audience he was writing for, but that he had been disappointed by the media's coverage of OWS up to that point — specifically stories in *The New York Post*. Breslin was referring to articles like an October 10 editorial in *The New York Post* criticizing coverage of the movement by the three major TV broadcast networks and newspapers like *The New York Times*. "[M]any reporters have been romanticizing the protests as akin to the turbulent '60s — blaming the police for disorderly conduct and studiously ignoring the garbage dump Zuccotti Park has become. Par for the media course, we guess," *The Post* editorial said. Breslin told the Capital "*The Post* doesn't count. [I]t should have a men's room sign over it. ... Decrepit old Murdoch."

Columbia University's Todd Gitlin, a sociology and journalism professor who has been following the media's coverage of protests since the 1960s, told Poytner's Mallery Jean Tenore that the media's coverage of OWS is "predictable," "lazy," and includes "knee-jerk preconceptions," according to an October 11 story. Gitlin told Tenore the press has used some of the same methods they used during the anti-war protests of the 1960s by choosing to focus on outcasts and framing the movement as a crime story. Many journalists reporting on the OWS movement think "the way to report a social movement is to go take pictures of freakish looking people or ask three different people what they want and get three different answers and conclude that the thing is 'incoherent,'" Gitlin told Tenore. "I think journalists fall into traps, which are partly the result of their routines and partly the result of bad habits." Gitlin said the press has been interviewing "hippies" or people who are dressed differently at the demonstrations, rather than those people who look more mainstream. Gitlin observed that protestors have noticed the media's tendency to do this, and photographed one sign that read: "Am I dressed too nice so the media doesn't interview me?" Nevertheless, Gitlin was optimistic that as journalists deepen their understanding of the demonstrations, their coverage will become more insightful and informative. "News coverage last week wasn't what it

was the week before, and the movement isn't what it was," Gitlin said. "There's an intricate balance between movements and media, and each learns from the other."

As the movement continued to grow, so did the news coverage. An October 12 story in *The New York Times* titled "A News Story Is Growing With 'Occupy' Protests," described how the movement spread across the country with similar increases in the media coverage. "Coverage of the movement last week was, for the first time, quantitatively equivalent to early coverage of the Tea Party movement in early 2009," according to Pew Research Center data. The Pew study showed that although cable news and radio stations initially ignored the protests entirely, coverage increased in early October and often included a positive or negative reactions to them. The story characterized the spike in coverage as "significant because, among other reasons, it may lend legitimacy to the movement and spur more people to seek out protest information on Facebook and other Web sites." <http://www.people-press.org/files/legacy-pdf/10-12-11%20NII%20Final.pdf>

Poynter's Adam Hochberg wrote in an October 13 story that the complaints about the way the media cover OWS are not surprising because similar criticism surfaced around the coverage of the Tea Party movement, the Wisconsin collective bargaining protests, and Jon Stewart's "Rally to Restore Sanity." Hochberg said journalists are often cynical about covering protests, especially in metropolitan areas or college towns where they often occur regularly. "You can't send reporters out every time somebody announces they're mad as hell about something," former *Baltimore Sun* deputy managing editor Sandra Banisky, who now teaches journalism at the University of Maryland, told Hochberg. "But if indeed there's something that captures the public eye, then we have the obligation to go there." Newsroom policies regarding protest coverage may also have had something to do with early coverage of the movement. According to Hochberg's story, news organizations often have informal policies or maintain specific guidelines that outline the number of protestors that must be part of the demonstration before it receives coverage. At the *Kansas City Star*, for example, 25-person protests

warrant a brief news story, while those with 100 or more participants justify longer pieces or the use of photos, the story said. Derek Donovan, the *Star's* reader representative told Hochberg the paper wrote stories about "Occupy KC" after a rally attracted 300 people. Reuters columnist Jack Shafer said in an interview with Hochberg that he followed a similar standard when he edited the *Washington City Paper*.

Hochberg suggested that a better standard to judge newsworthiness of protests might be to analyze whether the message of the particular protests is resonating with the public. "While attendance at Occupy Wall Street's New York encampment was inconsistent during its first couple of weeks, the movement already had started to spawn rallies in other cities and pick up traction on social media. Those trends suggested the protesters' message had begun to strike a nerve," he wrote.

By mid-November, Brian Stelter of *The New York Times's* Media Decoder blog reported the Occupy Wall Street movement received more media attention the week of November 14 than it ever had before. The change in coverage, measured by the Pew Research Center's Project for Excellence in Journalism, was correlated with the November 15 police eviction of protestors from Zuccotti Park and the mass protests that followed, the post said. The week before, the OWS movement received the least amount of coverage since it began in September, accounting for only one percent of all news coverage the week of November 7. http://www.journalism.org/index_report/pej_news_coverage_index_november_1420_2011

In his report, Hochberg points out that media executives and bloggers are starting to deal with another issue beyond whether the coverage is adequate — developing long-term coverage plans if OWS continues into the winter months. "If this goes on, do you take a picture of them every day?" asked Banisky. "If it's the same 50 people camped out, do they continue to be a story?" Dean Elwood, the news director at San Diego's CBS affiliate, KFMB, said the station is already beginning to scale back coverage of the San Diego sit-in associated with OWS. "We've sort of been there, done that," he said in a phone interview with Hochberg. "It starts becoming white noise. It's the same story day after day after day."

OWS Protestors Publish Media, Stir Up Controversy Over Use of Trademarked Logos

On October 1, demonstrators participating in OWS protests in New York City distributed the first issue of "the Occupied Wall Street Journal." According to an October 4 story in *The Wall Street Journal*, the newspaper was a four-page issue with an initial print run of 50,000 and a second printing on October 3 of 20,000 copies. Co-editor Jed Brandt told the *WSJ* that using a traditional broadsheet paper brings a "super hip retro" feel to the social-media-savvy protest. "It's so old, it's new," he told the *WSJ*. Brandt shares editorial responsibilities with Michael Levitin, a former reporter for the AP and *Newsweek* magazine.

The publication's flag and font resembled that of the *WSJ*, which the newspaper pointed out in its story. "The name of this new publication ... nods to a certain national newspaper with origins not that far from the protesters' encampment in Zuccotti Park. Money was raised for the publication through fundraising website Kickstarter and received promotional help from documentary filmmaker Michael Moore and "No Logo" author Naomi Klein. As of the first issue, the effort had raised \$44,000 from 1,000 donors. The success of the NYC publication caught the attention of OWS Boston counterparts. "We are planning to put out our own issue," Dana Schneider, a representative from the protesters' media working group in Boston, told the *WSJ*. "Not the Occupied Wall Street Journal, but the Occupied Boston Globe."

According to an October 17 story in the free daily newspaper *Metro Boston*, Occupy Boston protestors launched the online-only "Occupy Boston Globe" and started collecting money to fund a print version, but not before a warning from *The Boston Globe* to stop using its iconic name and look. "We do not condone the use of our trademark-protected name and logo by any organization," said Robert Powers, *The Boston Globe's* Vice President of Public Affairs in an interview with *Metro*. No formal actions have been taken against the OWS publication.

— HOLLY MILLER
SILHA BULLETIN EDITOR

FCC Defends Regulatory Regimes in Court; U.K. Explores Cross-Ownership Regulations

Two separate cases moving through federal courts this year have left the Federal Communications Commission (FCC) trying to defend how it regulates swear words that are broadcast on television and radio and how it regulates the ownership of

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multiple media companies in the same community. But as the FCC seeks to relax some of its media ownership regulations, the United Kingdom is considering more stringent cross-ownership regulations.

Supreme Court to Hear Arguments in FCC “Fleeting Expletives” Case

On July 13, 2010, the U.S. Court of Appeals for the 2nd Circuit vacated an FCC order and policy that prohibited all “patently offensive” references to sex, sexual organs, and excretion on First Amendment grounds, saying that they were “unconstitutionally vague, creating a chilling effect.” Under the policy, the FCC issued fines to broadcasters who did not censor what had been deemed “fleeting expletives” — unexpected, single incidents of profanity used in the course of a broadcast. The Supreme Court of the United States is expected to hear the case in early 2012. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d. Cir. 2010)

“Under the FCC’s current rules, even fleeting expletives and fleeting nudity are prohibited on broadcast radio and television,” the ACLU said in a November 10 statement on its website about the case. “A violation of that rule can lead to substantial fines. The FCC’s enforcement of that rule has been inconsistent and uncertain, however, leading to arbitrary enforcement by the agency and self-censorship by broadcasters.”

The case arose after two Fox Television broadcasts of the Billboard Music Awards in 2002 and 2003. In 2002, when singer Cher was accepting an award, she said “People have been telling me I’m on the way out every year, right? So fuck ‘em.” In 2003, when entertainer Nicole Richie was presenting at the awards show, she said “Have you ever tried to

get cow shit out of a Prada purse? It’s not so fucking simple.” The FCC levied substantial fines against the broadcaster for the incidents.

According to the 2nd Circuit, the FCC set forth its indecency policy in its 2001 “Industry Guidance.” The court said that the FCC’s authority to regulate the speech was based on two determinations: (1) Whether the material “describe[s] or depict[s] sexual or excretory organs or activities”; and (2) whether the broadcast is “patently offensive as measured by contemporary community standards for the broadcast medium.” Under the policy, the court said, whether a broadcast is patently offensive depends on three factors: (1) “the explicitness or graphic nature of the description or depiction”; (2) “whether the material dwells on or repeats at length” the description or depiction; and (3) “whether the material appears to pander or is used to titillate, or whether the materials appears [sic] to have been presented for its shock value.” These rules apply only between the hours of 6 a.m. and 10 p.m. Both Billboard Music Awards show incidents happened in that time period.

A landmark 1978 Supreme Court case established the FCC’s authority to regulate indecency over the airwaves. *FCC v. Pacifica*, 438 U.S. 726 (1978), upheld the FCC’s decision that George Carlin’s famous “seven dirty words” monologue was indecent when carried on the radio during times when children could hear it. But the case left open the question of whether the FCC could regulate the occasional swear word that came across the air, rather than the more systemic indecency in Carlin’s case. (For more on “fleeting expletives” and the court’s approach the FCC’s regulatory regime, see “U.S. Supreme Court Ruling Leaves FCC’s Ban on Fleeting Expletives in Place” in the Spring 2009 issue of the *Silha Bulletin*.) For years, the FCC elected not to regulate “fleeting expletives,” as they are often called, as part of a plan to proceed cautiously to avoid any chilling effect. In 2004, however, the policy changed. During the 2003 Golden Globe Awards, U2 singer Bono said after receiving an award, “this is really, really, fucking brilliant. Really, really great.” In

response to complaints, the FCC said for the first time that a “single, nonliteral use of an expletive . . . could be actionably indecent.”

“Finding that ‘the “F-word” is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language,’ and therefore ‘inherently has a sexual connotation,’” the 2nd Circuit said, “the FCC concluded that the fleeting and isolated use of the word was irrelevant and overruled all prior decisions in which fleeting use of an expletive was held *per se* not indecent.” The Supreme Court has said that it will rule only on the question of whether this enforcement regime violates the First Amendment and the due process clause of the Fourteenth Amendment.

According to a June 27 story in *The New York Times*, after the Supreme Court announced that it would hear the case, Fox said in a statement that it was “hopeful that the Court will ultimately agree that the F.C.C.’s indecency enforcement practice trample [sic] on the First Amendment rights of broadcasters.” A spokesman for the FCC, on the other hand, told the newspaper “we are pleased the Supreme Court will review the lower court rulings that blocked the FCC’s broadcast indecency policy. We are hopeful that the court will affirm the commission’s exercise of its statutory responsibility to protect children and families from indecent broadcast programming.”

This is not the first time the case, *FCC v. Fox Television Stations, Inc.*, has come before the Supreme Court. In 2009, the Supreme Court held in a 5-4 decision that the FCC followed the correct administrative procedures when it created its ban on expletives during the specific time period. But the court did not consider the constitutionality of the procedures, and asked the 2nd Circuit to do so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) The 2nd Circuit held that the regulations were unconstitutional because they were so vague that broadcasters could not easily know what was and was not permitted, and thus free speech would be chilled. “We agree with

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the Networks that the indecency policy is impermissibly vague,” Judge Rosemary Pooler wrote for the 2nd Circuit. “For instance, while the FCC concluded that ‘bullshit’ in a ‘NYPD Blue’ episode was patently offensive, it concluded that ‘dick’ and ‘dickhead’ were not. . . . Other expletives such as ‘pissed off,’ ‘up yours,’ ‘kiss my ass,’ and ‘wiping his ass’ were also not found to be patently offensive. . . . The Commission argues that its three-factor ‘patently offensive test gives broadcasters fair notice of what it will find indecent. However, in each of these cases, the Commission’s reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. Thus, the word ‘bullshit’ is indecent because it is ‘vulgar, graphic and explicit’ while the words [sic] ‘dickhead’ was not indecent because it was ‘not sufficiently vulgar, explicit, or graphic.’ This hardly gives broadcasters notice of how the Commission will apply the factors in the future.”

Some media attorneys have speculated that the high court could end the FCC’s indecency regime entirely. Pointing to *Brown v. Entertainment Merchs. Ass’n*, 131 S.Ct. 2729 (2011), a case decided by the Supreme Court in June 2011 that struck down a California law banning the sale of violent video games to minors, John Stephens, a media attorney and partner at California-based law firm Sedgwick, asked in a September Media Law Bulletin blog post whether “given only two Supreme Court justices were willing to find in favor of a California statute designed to protect minors from violent video games, will the Court likewise find that broadcast stations are not always worthy of special treatment different from other media including cable, DVDs, CDs, MP3s and the Internet?” (For more on *Brown v. Entertainment Merchs. Ass’n*, see “U.S. Supreme Court Strikes Down Ban on Violent Video Game Sales to Minors” in the Summer 2011 issue of the *Silva Bulletin*.)

3rd Circuit Strikes Down Portion of FCC Media Ownership Rules

On July 7, 2011, the U.S. Court of Appeals for the 3rd Circuit struck down a portion of new FCC media ownership rules that regulated cross-ownership of newspapers and broadcast stations in a single media market, saying that the

agency failed to provide adequate notice before changing the rules, as required by law.

The case, *Prometheus Radio Project v. FCC*, 652 F.3d 431 (2011), arose from a 2007 revision of the FCC rules, approved despite intense criticism from public interest groups, the commission’s Democratic members, and congressmen, according to previous *Bulletin* coverage. (For more coverage of the regulations,

“Finding that ‘the “F-word” is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language,’ and therefore ‘inherently has a sexual connotation,’ the FCC concluded that the fleeting and isolated use of the word was irrelevant and overruled all prior decisions in which fleeting use of an expletive was held *per se* not indecent.”

— **Fox Television Stations, Inc. v. FCC**
U.S. Court of Appeals for the 2nd Circuit

see “FCC Changes Cross-Ownership Rules amid Intense Criticism” in the Fall 2009 issue of the *Silva Bulletin*.) Consumer groups and others challenged the FCC’s regulations in court, arguing that the agency did not give enough notice of the proposed changes to allow for adequate feedback.

“The decision is a vindication of the public’s right to have a diverse media environment,” said Andrew Jay Schwartzman, policy director of Media Access Project, a Washington-based advocacy group, in an email to Bloomberg News. “The FCC majority knew that its effort to allow more media concentration was politically and legally unworkable, so it tried to end-run the procedural protections that are designed to give the public the right to participate in agency proceedings.”

The court also struck down proposed regulations aimed at increasing media ownership by people of color and women. The court said the FCC had not sufficiently proven that its proposed changes would be adequate to the task. “The Commission has not shown that [new regulations] will enhance significantly minority and female ownership,

which as a stated goal of this rulemaking proceeding. This is troubling,” the court wrote.

The Administrative Procedure Act (“APA”) requires that federal agencies provide notice to the public before changing federal regulations. That notice has to contain “either the terms or substance of the proposed rule,” or “description of the subjects and issues involved.” After the notice is given, the agency has to give interested members of the public “an opportunity to participate in the [development of regulations] through submission of written data, views, or arguments with or without opportunity for oral presentation.” According to the 3rd Circuit, courts evaluating whether this process was adequate need to determine “whether it would fairly apprise inter-

ested persons of the ‘subjects and issues’ before the agency.” The court said that the APA is designed this way to make sure that any proposed regulations get a full public airing before they are enacted, so that any parties who may be adversely affected can have their say. The APA also requires that during the comment period, an agency must remain receptive to diverse views, the court pointed out. Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (1946)

The proposed regulation that the court sent back to the FCC was created in 2007. Rather than ban the ownership of both a television station and a newspaper in the same media market outright, the FCC had devised a complex formula to determine whether to allow cross-media ownership. In the 20 largest media markets in the country (called Designated Market Areas, or “DMAs,” regions where residents receive the same network television offerings), the FCC would presume that “it is not inconsistent with the public interest” for an entity to own either “a newspaper and a television station if the television station is not ranked among the top four stations in the [community], and at least eight

independent ‘major media voices’ remain in the [community],” or “a newspaper and a radio station,” according to the 3rd Circuit opinion. In every other, smaller market, the FCC would presume that owning a newspaper and a broadcast station would be “inconsistent with the public interest.” However, the Commission would reverse that presumption — i.e., ignore the idea that it is inconsistent with the public interest — if the combination “initiates at least seven hours a week of additional local news programming,” or the newspaper or broadcast outlet meets a specific FCC standard that shows it is struggling.

The FCC would consider four things when evaluating whether to approve a proposed combination, the court said. It would look at the extent to which cross-ownership “will serve to increase the amount of local news disseminated through the affected media outlets in the combination;” whether each affected media outlet will exercise its own, independent news judgment; the “level of concentration in the . . . DMA” and the financial condition of the broadcast station or newspaper. If either is struggling, the FCC would evaluate the owner’s commitment to invest significantly in the newsroom of the media company. The FCC has not defined “market concentration” and says that it “will not employ any single metric” to measure it.

But the problem with this regulation, the court said, was that the FCC did not give adequate notice to the public before changing it. (The FCC had also changed many other rules — from regulations on radio-television cross-ownership to whether one entity can own more than one television station — but the court found the notice process adequate in those cases.) The notice the FCC gave in this case was not specific enough to allow for meaningful public comments, and it held just six public hearings on media ownership in cities around the country. Moreover, the court noted, the date and location of the final public hearing “were announced just 10 calendar days beforehand.” The court also said that the FCC had appeared to make up its mind before the comment process was over. “Two weeks before the . . . response period closed, and before most of the responses were received, a draft of the order was circulated internally. The final vote occurred within a week of the

response deadline. This is not the agency engagement the APA contemplates.”

The court also rejected proposed changes to a regulation dealing with increasing media ownership by people of color and women. The court questioned the part of the rule that would allow small businesses to have a chance at

“The FCC majority knew that its effort to allow more media concentration was politically and legally unworkable, so it tried to end-run the procedural protections that are designed to give the public the right to participate in agency proceedings.”

— Andrew Jay Schwartzman
Policy Director of Media Access Project

buying struggling stations before they are sold to an entity that already owns stations in the same media market, rather than allowing minority- and female-owned businesses that opportunity. The court also criticized the FCC for not even having accurate data to reflect the level of media ownership among people of color and women.

“Promoting broadcast ownership by minorities and women is, in the FCC’s own words, ‘a long-standing policy goal of the Commission, and is consistent with [its mandate].’ We recognize that there are significant challenges involved in meeting this important policy goal that is shared by Congress, the Commission, and the myriad interested parties who have participated in rulemaking proceedings toward this end. However, the Commission appears yet to have gathered the information required to address these challenges.”

Michael J. Copps, a Democratic FCC Commissioner, hailed the ruling in a July 7 press release: “This decision is a huge victory for the millions of Americans who have gone on record demanding a richer and more diverse media.”

U.K. Considers Establishment of Media Ownership Rules

The broadcasting and telecommunications regulator in the United Kingdom — Ofcom — is contemplating establishing media cross-ownership rules in England,

in the wake of a failed attempt by Rupert Murdoch’s News Corporation to acquire BSkyB, the U.K.’s biggest pay-television operator.

According to an Oct. 21, 2011 article in *The Guardian*, Culture Secretary Jeremy Hunt asked the regulator to look at how media pluralism should be measured and

whether it is possible to set limits on media ownership to encourage it. The article said that the issue came to the forefront during the Murdoch bid because the takeover raised long-term plurality concerns, because it would have increased the domination of News Corporation.

In October, Ofcom called for

public comment on a number of issues that could be involved in establishing media cross-ownership rules, such as how to measure media plurality across the different media forms, whether it is practical or advisable to set absolute limits on news market share, or whether reviews of plurality concerns should only happen when mergers are proposed, the story said. According to a Sept. 11, 2011 article in *The Guardian*, the only current restriction on cross-media ownership in the U.K. prevents any newspaper owner whose holdings account for more than 20 percent of total circulation — such as News Corporation — from owning more than 20 percent of ITV, Britain’s oldest commercial television network. An Oct. 21, 2011 Dow Jones Newswires report said the analysis will be completed by June 2012, and the results will be given to a panel led by Lord Justice Brian Leveson that is conducting an inquiry into U.K. media in the aftermath of the British phone hacking scandal. (For more on the phone hacking scandal, see “Not Just a ‘Rogue Reporter’: ‘Phone Hacking’ Scandal Spreads Far and Wide” in the Summer 2011 issue of the *Silha Bulletin*.)

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

News Media Copyright Firm “Righthaven” Suffers Critical Legal Setbacks

Following its creation in January 2010, controversial copyright holding firm Righthaven LLC, launched a campaign of lawsuits challenging what it characterized as unauthorized republication of its clients’ copyrighted news stories. By the end of that year, many

COPYRIGHT

of the cases had settled, typically costing defendant website operators thousands of dollars per suit. However, court rulings throughout 2011 held that Righthaven lacked standing to bring copyright enforcement actions on behalf of its clients. These developments curbed the company’s litigious behavior and brought the viability of its business model into serious doubt. The controversy illustrates the conflict between copyright law enforcement and the First Amendment right to disseminate news and information that has surfaced in the age of online news dissemination.

Righthaven’s Business Model and Copyright Enforcement Effort

Righthaven began its partnership with Stephens Media LLC, the parent company of the *Las Vegas Review-Journal*, with the goal of targeting bloggers and other Internet users who copied and republished the newspaper’s stories online. Copyright enforcement lawsuits formed the basis of the companies’ business model, and Stephens Media agreed to fund Righthaven in exchange for a portion of whatever money the firm generated. In December 2010, Righthaven expanded the scope of its business to include graphics and began policing material taken from MediaNews Group publications, including *The Denver Post* and the *San Jose Mercury News*.

The firm operates by initiating lawsuits against alleged infringers after discovering republished news media content online, and claims to buy the content’s copyright from a news publication’s publisher. Rather than issue requests to remove covered content, it immediately sues, typically seeking \$75,000 in damages from infringers. It also demands forfeiture of the offending website’s domain name to the FBI, who

takes custody of the domain and replaces its contents with messages stating that copyright infringement is a crime. The facts among the cases vary, and the lawsuits brought by the firm challenge publication of full stories, as well as republication of story excerpts. (For further details on the relationship between the firm and its clients, see “News Media Seek Legal Tools to Protect Original Content” in the Summer 2010 issue of the *Silha Bulletin*.)

Righthaven’s copyright litigation drew critical reactions among online commenters and judges alike, with several publications, including the *ABA Journal*, labeling the firm a “copyright troll.” Attorneys for the Electronic Frontier Foundation (EFF), a digital rights advocacy group providing legal assistance to defendants in several suits, characterized the lawsuits as threats aiming to push defendants into quick settlements. U.S. District Court Judge James Mahan wrote in his opinion in *Righthaven LLC v. Jama & Ctr. for Intercultural Org.* that the firm’s litigation strategy “has a chilling effect on potential fair uses of Righthaven-owned articles, diminishes public access to facts contained therein, and does nothing to advance the Copyright Act’s purpose of promoting artistic creation.” *Righthaven LLC v. Jama & Ctr. for Intercultural Org.*, 2:10-CV-1322-JCM-LRL, 2011 WL 1541613 (D.Nev. 2011)

Nevertheless, the practice quickly caught hold in Denver and Nevada, with now-former Stephens Media CEO Sherman Frederick writing in a May 28, 2010 blog post on the *Las Vegas Review-Journal*’s website “It is our primary hope that Righthaven will stop people from stealing our stuff.”

In a phone interview with journalism think tank The Poynter Institute in August 2010, Stephens Media General Counsel Mark Hinueber said that the goal of the arrangement was to protect the company’s intellectual property rights. “We were seeing our entire work product in some stories just being right-clicked and cut and pasted into blogs, where people were selling Google ads around them and making money,” he told Poynter.

According to a May 20, 2011 story in the Bureau of National Affairs (BNA)

Computer Technology Law Report, Righthaven filed more than 275 lawsuits since March 2010 in Nevada and Colorado seeking to enforce its transferred copyrights. The blog Righthaven Lawsuits, which has tracked the suits since mid-2010, reported that Righthaven had collected an estimated \$352,500 in settlements as of July 1, 2011.

In its complaints, Righthaven generally brings claims asserting violations of exclusive rights enumerated in Section 106 of the Copyright Act, 17 U.S.C. § 106, including the exclusive rights to reproduce the work in question, distribute copies of the work, and publicly display the work. At the crux of the company’s claimed right to take legal action for infringement are its agreements with publishers, which the firm alleges transfer full control over copyrights, thus granting it Section 106’s exclusive rights. These transfers and Righthaven’s alleged copyright ownership were the subject of dispute, with onlookers speculating that the companies’ assignment of copyrights was deficient under the standard established in *Silvers v. Sony Pictures Entertainment*. For a copyright assignment to be valid under *Silvers*, pursuant to Section 501(b) of the Copyright Act, only the exclusive or beneficial owner of a specific Section 106 right has standing to sue for infringement. A company’s transfer of a general “right to sue,” the purported right that Righthaven was granted by its agreement with its clients, is insufficient support for copyright ownership under *Silvers* and fails to confer standing to sue. In June 2011, the U.S. District Court for the District of Nevada identified this flaw in Stephens Media’s agreement with Righthaven in *Righthaven LLC v. Democratic Underground LLC*, precipitating a string of legal defeats that brought the company’s future into serious jeopardy. *Silvers v. Sony Pictures Entertainment*, 402 F.3d 881 (9th Cir. 2005)

Release of Agreement Impedes Righthaven’s Progress, Facilitates Downward Slide

Defendants in Righthaven’s cases frequently challenged the firm’s standing to sue over the republication of materials, claiming it did not own the content’s

copyright at the time of the alleged infringement, as defendant website Majorwager.com argued in an October 2010 motion to dismiss claims brought against it by Righthaven. In denying the website's motion, U.S. District Judge Gloria Navarro found that Righthaven's complaint had provided sufficient evidence for an inference that all rights against past infringements were transferred through the firm's Strategic Alliance Agreement ("SAA") with Stephens Media. *Righthaven v. MajorWager.com*, 2010 U.S. Dist. LEXIS 115007 (D. Nev. Oct. 28, 2010) (For full details of *Righthaven v. MajorWager.com* and other early challenges to Righthaven lawsuits, see "Law Firm's Approach to Protecting News Media Copyrights Raises Eyebrows" in the Fall 2010 issue of the *Silha Bulletin*.)

The SAA was unsealed in April 2011 in the course of Righthaven's lawsuit against political forum Democratic Underground.com. Against the objections of Righthaven and Stephens Media, Senior Judge for the U.S. District Court for the District of Nevada Roger Hunt issued an order to make the agreement public, writing that the public interest in the two entities' business arrangement overrode any claimed confidential commercial rights. Under the agreement, Stephens Media receives a 50 percent cut of Righthaven's lawsuit proceeds, and retains ultimate control over who to sue. Clause 3.3 of the contract gives Stephens Media the ability to call off any lawsuit if the defendant is "a charitable organization, is likely without financial resources, is affiliated with Stephens Media directly or indirectly, or is a present or likely future valued business relationship of Stephens Media." Most significantly, the agreement reveals that Righthaven did not own the copyrights, stating in Section 7.2 that the firm "shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery." In addition, Stephens Media retains a right to terminate the copyright assignment and enjoy a complete reversion of ownership under Section 8. The document's release confirmed suspicions that Stephens Media's transfers to Righthaven were insufficient to grant an enforceable interest under *Silvers v. Sony Pictures Entertainment*. The SAA

can be found online at https://www.eff.org/files/filenode/righthaven_v_dem/79-1.pdf. Following the SAA's unsealing in the Democratic Underground case, BuzzFeed Inc. brought a class action counterclaim in May 2011 in response to a \$150,000 Righthaven lawsuit accusing the website of reposting an image of a TSA screening originally published in the *Denver Post*. Seeking to combine Righthaven defendants as a class to sue the firm for bringing what it deems faulty lawsuits, the class action claimed Righthaven's legal efforts were an abuse of process and unfair or deceptive trade practices. The complaint alleges that the firm's litigation tactics and its demands for domain seizure are "motivated solely to intimidate Defendants and extract settlement money." It also accuses the firm of suing in bad faith, by failing to send a preliminary take-down notice or investigating whether use of content qualifies as fair use. The class action seeks to impose an injunction against Righthaven filing additional copyright lawsuits.

After the Nevada court's release of the SAA, the U.S. District Court for the District of Colorado in *Righthaven LLC v. Rozzell* ordered stays of all of Righthaven's copyright infringement proceedings in the state on May 19, 2011. In the order, Judge John L. Kane, Jr. acknowledged the jurisdictional concerns previously voiced by the defendant in *Righthaven LLC v. Wolf*. Wolf filed a motion to dismiss suggesting that the terms of Righthaven's SSA with MediaNews Group were similar to its flawed agreement with Stephens Media. Though the agreement had yet to be released in any of Righthaven's Colorado cases, Judge Kane wrote "Should I find that I lack subject matter jurisdiction over Righthaven's claim of copyright infringement, it is likely that I will be required to dismiss all pending actions." *Righthaven LLC v. Rozzell*, No. 1:11-cv-00133-JLK (D. Colo. 2011) and *Righthaven LLC v. Wolf*, No. 1:11-cv-00830-JLK, 2011 WL 4469956 (D. Colo. 2011)

Nevada Courts Rule on Standing Defect Allegations

Two months after ordering the release of the SSA, the federal district court in Nevada dismissed Righthaven's claim against Democratic Underground for lack of standing on June 14, 2011, finding that the agreement failed to transfer the

rights that would allow Righthaven to bring suit against websites copying portions of newspaper articles. Righthaven had sued the website after one of its forum users posted the first five sentences of an article about Nevada Republican Senate candidate Sharron Angle, and the EFF soon stepped in to represent the website. After reviewing the SAA and Copyright Act Section 106, Judge Hunt wrote that "the assignment of a bare right to sue is ineffectual because it is not one of the exclusive rights." Because the agreement transferred only the bare right to sue, the court determined no transfer of substantive rights took place between the parties, concluding that "[i]n reality, Righthaven actually left the transaction with nothing more than a fabrication." *Righthaven LLC v. Democratic Underground LLC*, No. 2:10-cv-01356-RLH-GWF (D. Nev. 2011)

Hunt also criticized the firm's failure to include publisher Stephens Media in the Certificate of Interested Parties accompanying its complaints, suggesting that this constituted misrepresentation in the roughly 200 Righthaven cases filed in Nevada. Noting Stephens Media's 50 percent share of litigation proceeds, Hunt ordered Righthaven to show cause why it should not be sanctioned for trying to "manufacture standing," writing that for Righthaven to bring enforcement suits under its current copyright ownership status was "flagrantly false, to the point the claim is disingenuous if not outright deceitful." A sanction of \$5,000 was imposed on the firm in July. *Righthaven LLC v. Democratic Underground LLC*, 791 F.Supp.2d 968 (D. Nev. 2011)

Democratic Underground's holding had a domino effect on the firm's other Nevada cases, and in the following weeks many of its claims were dismissed for standing defects. On June 20, 2011, less than a week after *Democratic Underground's* resolution, the Nevada District Court dismissed Righthaven's claims in *Righthaven LLC v. Hoehn* for lack of standing. The case had been filed in January 2011, after the defendant Wayne Hoehn posted a comment to a website in which he reproduced the entirety of a *Review-Journal* article. Relying on Judge Hunt's characterization of the SAA in *Democratic Underground* as creating "only an illusory right to exploit or profit from the work," Judge Philip

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Righthaven, continued from page 15

M. Pro granted the defendant's motion to dismiss. Two months after dismissing the suit, Judge Pro ordered Righthaven to pay \$35,045 in attorneys' fees. Other district court cases reached to the same result, and Righthaven saw its complaints dismissed in *Righthaven LLC v. DiBiase* in June 2011 and *Righthaven LLC v. Mostofi* in July 2011. *Righthaven LLC v. Democratic Underground LLC* No. 2:10-cv-01356-RLH-GWF (D. Nev. 2011) and *Righthaven LLC v. Hoehn*, No. 2:11-cv-00050-PMP-RJJ (D. Nev. 2011)

Fair Use Defense Recognized for Reproduction of Entire Articles

Judge Pro also held in *Hoehn* that even if standing to bring the suit did exist, the defendant's posting of the entire article was protected by "fair use" under the Copyright Act, 17 U.S.C. § 107 et seq. To determine fair use, a court looks at four factors surrounding a defendant's use of copyrighted content, including the nature of the work, the purpose and character of the use, the proportion of the work used, and the use's effect on the potential market for the copyrighted work. Determining that the defendant's use was noncommercial because it was posted in the context of an online discussion, the court relied on 9th Circuit U.S. Court of Appeals precedent in *A&M Records Inc. v. Napster Inc.* to hold that while the appropriation of an entire work weighs against fair use, "wholesale copying does not preclude a finding of fair use." The court dismissed Righthaven's complaint for failure to show actual harm to the newspaper's market, holding that Hoehn's noncommercial use fit under a fair use exception. *Righthaven LLC v. Hoehn*, No. 2:11-cv-00050-PMP-RJJ (D. Nev. 2011) and *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001)

This decision was the second to hold that reposting an entire *Review-Journal* article was protected under fair use. Oregon-based nonprofit Center for Intercultural Organizing (CIO) prevailed on this defense in March 2011 following reproduction of an article on the deportation of illegal immigrants. Judge Mahan raised the fair use question without input from CIO attorneys, and found that the nonprofit used the fact-based story in an informative and educational way while operating in an entirely different market

from the newspaper. Mahan also noted that the copyright was removed from the original context in which it was used by the *Review-Journal*, according it less protection because Righthaven used the copyright to support a lawsuit. "The Copyright Act is important. The First Amendment is important. You'd be remiss if you didn't run it up the flagpole," Judge Mahan told an attorney representing Righthaven, according to a March 18 story in the *Las Vegas Sun*. Fair use was previously found in the October 2010 case of *Righthaven LLC v. Realty One Group Inc.*, which involved reproduction of a smaller portion of a *Review-Journal* article. (For a full discussion of the *Realty One Group* case, see "Law Firm's Approach to Protecting News Media Copyrights Raises Eyebrows" in the Fall 2010 *Silha Bulletin*.) *Righthaven LLC v. Jama & Ctr. for Intercultural Org.*, 2:10-CV-1322-JCM-LRL (D. Nev. 2011)

Unsuccessful SAA Amendments and Lack of Standing in Colorado

The unfavorable rulings plagued Righthaven throughout the summer and into the fall. The firm attempted to correct the defects in its transfer agreement and secure the exclusive rights to the stories following the unsealing of the SAA. However, courts regarded this "amended agreement" as impermissible. The same conclusion was reached by Judge Mahan in *Righthaven LLC v. Pahrum Life*, which held that such amendments could not be permitted to cure defects in facts of cases. *Righthaven LLC v. Pahrum Life*, No. 2:10-CV-1575 JCM (D. Nev. 2011)

Righthaven's losing streak reached its Colorado market in late September when Judge Kane ruled that it did not have standing to sue the blogger defendant targeted in *Righthaven LLC v. Wolf*. Characterizing Righthaven's operation as an "enforcement dragnet," Judge Kane extended to the U.S. District Court for the District of Colorado the results reached by District of Nevada courts and lead the *Denver Post* itself to speculate that the ruling would have a "domino effect" on the firm's other cases in Colorado. The court awarded the defendant costs and attorney's fees, hoping to "discourage the abuse of statutory remedies for copyright infringement." *Righthaven LLC v. Wolf*, 1:11-cv-00830-JLK, 2011 WL 4469956 (D. Colo. 2011)

Righthaven's Uncertain Future

With its business model's viability threatened by the precedent-setting rulings in the U.S. Court of Appeals for the 9th and 10th Circuits, the company's future is uncertain. The firm's efforts to expand into the eastern U.S. were met with a petition filed in South Carolina Supreme Court on June 27 accusing the firm of engaging in the unauthorized practice of law. The plaintiff group filed a complaint alleging that Righthaven's copyright litigation was "a copyright-specific form of a scheme that has been rejected, so far as Petitioners can determine, by every court that has ever examined it[.]" A copy of plaintiffs' petition for jurisdiction in *Citizens Against Litigation Abuse, Inc. v. Righthaven LLC* is available at http://bloglawblog.com/docs/CALA_v_Righthaven_Supreme_Court_Petition.pdf.

Further adding to company's problems was the news that John Paton, MediaNews Group's new chief executive, allowed the *Denver Post* publisher's contract with Righthaven to expire at the end of September 2011. Replacing outgoing Chief Executive Dean Singleton, Paton called the agreement "a dumb idea from the start" in a September 8 telephone interview with technology magazine *Wired.com*'s Threat Level blog. "The idea that you would hire someone on an — essentially — success fee to run around and sue people at will... does not reflect how news is created and disseminated in the modern world."

Righthaven appealed the orders recognizing fair use in *Center for Intercultural Organizing, Realty One Group LLC* and *Hoehn*, and successfully stayed the \$34,045.50 attorneys' fees award in *Hoehn*. In the order granting the stay, however, the U.S. District Court for the District of Nevada noted that Righthaven "does not enjoy a reasonable probability of success on the merits of its appeal." Bringing the company's financial solvency into question, Righthaven's attorney Shawn Mangano wrote in the emergency motion requesting the stay that "Righthaven faces the very real threat of being forced out of business or being forced to seek protection through bankruptcy" if made to pay the fees. The stay was granted on September 28, 2011, 10 days after one of the firm's creditors moved to seize its assets.

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Amid Skepticism, Uncertainty, Culture Clash, EU Eyes Online “Right to be Forgotten”

Throughout 2011, a controversial proposal to protect privacy online sparked debate accentuating fundamental differences in European and American attitudes. As both governments entertain legislative proposals aimed at strengthening consumer control of personal information, European Union support for a “right to be forgotten” has strengthened.

PRIVACY

The right, which purports to grant individuals the freedom to request removal of personal information released on the Internet, would curtail online expression by granting users greater control over their data. Observers on both sides of the Atlantic question the feasibility of such a right in the face of the Internet’s expanding presence in daily life, and fear that this type of legislation could create a “chilling effect” on free expression. (See also “Director’s Note” in the Summer 2011 issue of the *Silva Bulletin*.)

EU Announces Intent to Pursue “Right to Be Forgotten” Legislation

On Nov. 4, 2010, the European Commission, the European Union’s executive body, released a proposed privacy directive titled “A Comprehensive Approach on Personal Data Protection in the European Union.” Data protection provisions mandated in 1995 will be updated in response to a perceived need for transparency in personal data collection exacerbated by developments in technology and Internet use. The proposal is intended to clarify what the Commission dubbed “the right to be forgotten,” described as “the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes.” This right would give Internet users the ability to unilaterally remove personal data, allowing for complete deletion of social media profiles and photos. The Commission’s proposal can be found at http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf.

In March 2011, the EU further confirmed the right to be forgotten when Justice Commissioner Viviane Reding

referred to it as a “pillar” of individual privacy rights and a necessary component of data protection reform. Speaking to the European Parliament, Reding, though failing to provide specifics, said “I want to explicitly clarify that people shall have the right — and not only the possibility — to withdraw their consent to data processing. The burden of proof should be on data controllers ... [t]hey must prove that they need to keep the data, rather than individuals having to prove that collecting their data is not necessary.”

Reding’s call to action follows a series of warnings she issued to social media giant Facebook in February 2010, reproaching the company’s decision to make user data publicly accessible by default on its website and thus capable of being indexed by search engines. In an effort to make privacy design more integrated into online services and less of an appended afterthought, the proposed laws would make the EU the first jurisdiction to implement a right to be forgotten. Reding has since offered few concrete details on the legislation, though an Aug. 9, 2011 *New York Times* article reported it was set to be introduced in fall 2011. In the interim, she continues to insist that the right to be forgotten will become a reality. “I cannot accept that individuals have no say over their data once it has been launched into cyberspace,” she stated during a June speech before the British Bankers’ Association at its Data Protection and Privacy Conference.

Conceptual and Practical Restraints On Right to be Forgotten

Although the concept is often presented as a simple solution to a growing concern, the broad grant of power presented by a right to be forgotten presents many problems, among them the difficulty of adequately policing the abundance of information on the Internet, defining “deletion” in a meaningful way, and distinguishing deletion from censorship. Martin Abrams, a policy director at law firm Hunton & Williams’ Centre for Information Policy Leadership, framed the right as “the right not to be observed in the first place,” a proposition he charac-

terized as “absurd” in an interview with *The Atlantic* for a Feb. 3, 2011 story. The sheer volume of information generated daily on the Internet means that once content is published, it becomes difficult for any individual organization to control. The resources required for an organization to sift through deletion requests would require finding ways to distinguish between legitimate and invalid requests.

Factoring in the question of ownership of the data collected by online sites complicates the task. Google’s Global Privacy Counsel Peter Fleischer illustrated this problem in a post on his blog *Privacy...?* titled “Foggy Thinking About the Right to Oblivion,” in which he distinguished between deletion of a user’s own content, deletion of a subsequent reposting of the content, and deletion of a third-party’s unique discussion of the same content. The first scenario may be easy, but the other two situations present a conflict between privacy rights and freedom of expression. Fleischer’s blog post can be found at <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>.

Some commenters fear the erosion of the ability to hold public officials accountable for misdeeds. In an April 17, 2011 *Forbes* editorial, Adam Thierer addressed this problem, asking “Could a public figure claim ‘a right to be forgotten’ when a journalist pens an article about them beating their wife or committing corporate fraud?” Rather than “using censorship as a privacy policy,” Thierer recommended encouraging better social norms and increased accountability by online operators. “Teaching our kids smart online hygiene and ‘Netiquette’ is vital,” he wrote. “Think before you click’ should be lesson #1.”

However, there has been qualified support for the right even in the United States, particularly in situations involving information posted by or about children. A bill introduced in the United States House of Representatives in May by Rep. Edward Markey (D-Mass.), H.R. 1895, the “Do Not Track Kids Act of 2011,” proposed extending coverage of the Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506, and implementing

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an “eraser button” giving children and their parents the right to completely opt out and delete information. The legislation would require website operators to “implement mechanisms that permit users of the website, service, or application of the operator to erase or otherwise eliminate content that is publicly available through the website, service, or application and contains or displays personal information of children or minors.”

Beyond the practical difficulties of implementing this kind of right, the basic concept of the right as it has been proposed can be difficult for some to grasp. In a March 18, 2011 column for *The Guardian*, journalist Tessa Mayes argued there is no basis in European law for the right to be forgotten. “To say there should be a right to be forgotten is to say we can live outside society,” wrote Mayes. “The world is modern and complex, bound by laws, convention and culture.”

European and American Privacy Approaches

The United States and the EU take different approaches to individual privacy rights on the Internet. The two nations agree on general concepts such as designing privacy safeguards into Internet services from the start. However, questions in the United States have largely focused on whether Americans should have the right to subscribe to “do not track” lists in order to prevent marketers from recording user activity and engaging in behavioral advertising. According to a Sept. 28, 2011 story in the Bureau of National Affairs (BNA) *Electronic Commerce and Law Report*, panelists at the International Association of Privacy Professionals Academy ’11 conference argued that despite the Obama administration’s March 2011 call for a “privacy bill of rights” law and the introduction of several comprehensive privacy framework bills, the 112th Congress is unlikely to pass such legislation. This reflects the traditional approach of the United States Congress, which generally values a balance between the competing concerns of entrepreneurship with data protection. American courts are also hesitant to tighten control on voluntarily disclosed personal information, and have consistently favored the First Amendment’s right to free speech when faced with

requests to remove true but unflattering information from publications.

Under United States law, consumer information generally may be kept by companies that process it. This creates an incentive for Internet companies to base their operations in the United States. The clear disconnect between the two cultures has caused some European observers, like Professor Franz Werro of Georgetown University, to find what he characterized in a Feb. 3, 2011 interview with *The Atlantic* as an American “fetishization” of the constitutional First Amendment right of free speech.

“As a general matter, companies in the United States don’t have to recognize your right to be deleted,” said Marc Rotenberg, executive director of the Electronic Privacy Information Center, in an interview for an Aug. 20, 2011 story in *The New York Times*. “They may choose to accommodate you, but they are not required to.”

The removal practices in place at journalism think tank The Poynter Institute, which is reluctant to modify or redact its own content, illustrate this point. In Bill Mitchell’s March 3, 2011 story, “Removing Content: When to Unring the Bell,” he expressed concern with “the potential erosion of a body of work that others have read and, in some cases, referred to in their own feedback comments posted to the site.”

Mitchell cites as an example the dilemma faced by *The New York Times* and its Public Editor Clark Hoyt. As newspapers try to push their articles to the top of search engine results, long-buried information takes on a new life. As a result, Mitchell writes, *Times* editors receive an average of one removal request per day from people complaining that “they are being embarrassed, are worried about losing or not getting jobs, or may be losing customers because of the sudden prominence of old news articles that contain errors or were never followed up.” Though the newspaper takes such requests seriously, it has yet to find a satisfactory solution to the dilemma of deletion or preservation. Mitchell wrote that Poynter itself considers amending or editing a story for accuracy when faced with such requests, but that removal of the original material is “usually among the last alternatives we consider as opposed to the first.”

By contrast, French President Nicolas Sarkozy characterized the European position on the issue in a speech delivered at the French embassy in Vatican City in October 2010 following a meeting with Pope Benedict XVI. Sarkozy declared that correction of “excesses and abuses that come from the total absence of rules” on the Internet to be a “moral imperative.” This sentiment permeates the European population as well, as *The New York Times* reported in its Aug. 9, 2011 story. A European Union poll found that three-fourths of its respondents were worried about how Internet companies use their information and that 90 percent supported the “right to be forgotten.” Similarly, the Spanish Data Protection Agency reported a 75 percent increase in privacy complaints targeting Internet companies like Facebook and Google from 2009 to 2010.

The European Perspective in Action

Even before the EU announced its intent to pursue the right to be forgotten, European countries enacted legislation attempting to clarify the right, or recognized it without any specific enumeration.

After France’s Secretary of State in Charge of the Digital Economy Nathalie Kosciusko-Morizet campaigned for the right to be forgotten in 2009, the country began implementing its Code of Practice on the Right to Be Forgotten on Social Networks and Search Engines in October 2010. The code of good practice stops short of mandating a total right to be forgotten like that proposed by the EU. Nonetheless, it requires its voluntary adherents, which include social networks, content service providers and search engine operators, to safeguard individuals’ rights to control personal data and respect their choice to wholly opt out of data processing. Search engines must also disclose to individuals at the time their data is stored and indexed. Kosciusko-Morizet contends that such commitments “could be the starting point for a future international agreement.”

In January 2011, the Agencia Española de Protección de Datos (AEPD), Spain’s data protection agency, ordered Google to cease indexing information on 90 citizens who filed complaints requesting removal of their personal information. The dispute came two years

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Cops and Citizens Clash over Recordings of Law Enforcement Activity

Confrontations between police and citizens who record them doing their jobs have increased as more citizens made video and audio recordings via their cell phones.

A rash of recent clashes between police and citizens who are recording police activity in public has raised the eyebrows of civil liberties advocates who argue that there is a First Amendment right to record activity in public places, especially when it implicates important issues of public concern such as police conduct.

Advances in technology have given many people access to video and audio recording devices via their cell phones, but have led to more confrontations between police and citizens when these cell phones are used to record suspect police behavior. Police often argue that these citizens are violating state wiretapping laws, which sometimes require the consent of all people taking part in a conversation before audio can be recorded. But in August 2011, the U.S. Court of Appeals for the 1st Circuit ruled in *Glik v. Cunniffe*, a case involving the recording of Boston police officers, that recording or videotaping of government officials engaged in their duties in a public place “is a basic and well-established liberty safeguarded by the First Amendment,” as long as it does not directly interfere with law enforcement activity. *Glik v. Cunniffe*, 655 F.3d 78 (2011)

“This is a resounding victory for the First Amendment right to openly record police officers carrying out their duties in a public place,” said Sarah Wunsch, a staff attorney with the American Civil Liberties Union (ACLU) of Massachusetts, in an Aug. 29, 2011 press release. “It will be influential around the country in other cases where people have been arrested for videotaping the conduct of the police.”

1st Circuit Finds First Amendment Right to Record in Public Places

The 1st Circuit case arose from a fall 2007 incident when lawyer Simon Glik was walking past the Boston Common. He came across three Boston police officers who appeared to be hurting a man they were arresting. One bystander yelled “You are hurting him, stop.” Glik stopped about 10 feet away from the police, took out his cell phone, and started making a video recording of the arrest.

An officer approached him once the arrest was complete. “I think you have taken enough pictures,” he said, according to the 1st Circuit decision. “I am recording this,” Glik replied. “I saw you punch him.” When an officer asked Glik if his phone recorded audio, Glik said that it did. The officer then arrested him for unlawful audio recording in violation of Massachusetts’ wiretap statute, M.G.L.A. 272 § 99. Glik was taken to the South Boston police station, and when he was booked, the police took his cell phone and a computer flash drive, holding them as evidence. More than two years later, Glik sued the officers and the City of Boston in federal court with the help of the ACLU of Massachusetts, accusing the department of violating his civil rights.

The City of Boston argued that the police officers were entitled to “qualified immunity,” from Glik’s lawsuit. “Qualified immunity” is a doctrine established by the U.S. Supreme Court exempts state officials from lawsuits stemming from violations of someone’s federal constitutional rights unless the violation was against “clearly established law.”

For Glik to prevail, he needed to demonstrate that these rights were “clearly established.” The 1st Circuit held that the First Amendment right to record officers performing their duties in public was “clearly established,” and thus that the officers should not be immune from the lawsuit. “The state of the law at the time of [the incident] gave the defendants fair warning that their particular conduct was unconstitutional,” Judge Kermit Lipetz wrote for a unanimous court. “A citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is

a basic, vital, and well-established liberty safeguarded by the First Amendment.”

The court also made clear that it did not matter that Glik was not working as a credentialed journalist when he was filming the police in action. “The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press ... Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.”

“Police officers must be trained to respect the right of people to openly record their actions in public,” said David Milton, an attorney who represented Glik for the ACLU, according to the August 29 press release announcing the court’s decision. “Simon did what we hope any engaged citizen would do, which was documenting what he thought looked like an improper use of force, and his action in no way interfered with the police.”

Miami Beach Police Revise Policy After High-Profile Incident

On May 30, 2011, Florida resident Narces Benoit made headlines nationwide when he captured video of Miami Beach police officers shooting and killing Raymond Herisse, a 22-year-old who hit a police officer with his car before driving through police barricades. After the shooting, a YouTube video posted by Benoit shows police officers approaching him after they notice him making the recording and pointing their guns directly at the camera while Benoit got into his car.

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Benoit later told CNN during a June 7 interview that when one of the police officers noticed him recording, he “jumped in the truck, [and] put a pistol to my head ... My phone was smashed — he stepped on it, handcuffed me.” According to a June 8 Reporters Committee for Freedom of the Press (RCFP) story, Benoit told reporters that he stored the video on his phone’s SIM card, which he hid in his mouth and did not disclose to officers when they requested it.

In reaction to the controversy, the Miami Beach police department enacted new guidelines in August that prohibit officers from searching or seizing video footage of pictures taken by the general public or members of the media who capture images of police officers doing their job in public areas, except under certain circumstances. The new policy says that the police department “recognizes that the taking of photographs and/or videos by private citizens and media personnel is permitted within areas open to general public access and occupancy.” It also says that civilians may record police activity as long as they remain at a reasonable distance, do not interfere with the employee’s duties and responsibilities, and do not create a safety concern. The full set of guidelines can be found at <http://blogs.nppa.org/advocacy/files/2011/08/MBPD-Letter-08-06-113.pdf>.

In an August 6 letter to Police Chief Carlos Noriega, the National Press Photographers Association (NPPA) applauded the changes made by the department, but still urged caution. “The real challenge will be in the ongoing education and training of your officers,” wrote NPPA’s General Counsel Mickey Osterreicher. “It is also critical that when violations of this policy occur — they are quickly and thoroughly investigated by your department — and employee(s) found to have violated departmental policy be properly disciplined and criminally charged if necessary.”

Long Island Case Adds to the Trend

According to an Aug. 2, 2011 RCFP report, a New York police officer arrested a freelance photojournalist after he tried to film police on the side of the road arresting suspects who had allegedly led officers on a police chase.

A YouTube video shows a police officer approaching Phil Datz, of the Long

Island-based Stringer News Service, and yelling at him to “go away, go away now,” according to the RCFP story. The video can be viewed at http://www.youtube.com/watch?v=oI38MnpAIW4&feature=player_embedded. The officer eventually grabbed Datz’s press badge, asked his name, and said, “I want you to go away and not stand here and argue with me, otherwise you’re ... going to be locked up.” The story said Datz was arrested, and charged with obstruction of governmental administration. According to a July 30 *Newsday* story, the charges were dropped soon afterward. Police Commissioner Richard Dormer told the *Long Island Press* in a statement for an August 1 report that there was an internal review of the incident and all officers will undergo media relations refresher training. “The police department believes in keeping an open line of communication with the media and we will be reviewing the department’s policy concerning involvement with the news media,” the statement said.

ACLU of Illinois Challenges State Eavesdropping Statute

On Aug. 18, 2010, the ACLU of Illinois filed a lawsuit in the U.S. District Court for the Northern District of Illinois challenging the constitutionality of Illinois’s Eavesdropping Act, Ill. Comp. Stat. 5/14-2, which criminalizes the use of an “eavesdropping device” for “recording all or any part of any conversation,” unless the person does so “with the consent of all the parties to such conversation or electronic communication.” It does so “regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.” In other words, it does not matter whether the people in the conversation have a reasonable expectation of privacy. In its complaint in *ACLU of Illinois v. Alvarez*, the ACLU argued that the law was being used “to arrest and prosecute those who want to monitor police activity in order to deter or detect any police misconduct,” according to an August ACLU press release. The ACLU cited an incident in Champaign, Ill. where a group of community activists filmed and recorded police interactions with citizens in public as part of an attempt to document police practices in predominantly African-American neighborhoods. The

activists were charged with violating the Illinois law, although charges were later dropped.

“There is a lot of talk about the need for more transparency in government — we should demand that transparency from the policy,” Harvey Grossman, Legal Director for the ACLU of Illinois, said in the press release. “Organizations and individuals should not be threatened with prosecution and jail time simply for monitoring the activities of police in public, having conversations in a public place at normal volume of conversation ... Illinois’ eavesdropping law does not permit individuals or groups such as ours to gather critical information about police activities — information that we share with our members, policy makers and the general public.”

The district court dismissed the ACLU’s complaint on procedural grounds on Jan. 10, 2011, for failure to allege an actual injury. “The ACLU cites neither Supreme Court nor Seventh Circuit authority that the First Amendment includes a right to audio record,” the court wrote. “The ACLU proposes an unprecedented expansion of the First Amendment.” An appeal to U.S. Court of Appeals for the 7th Circuit was heard on Sept. 13, 2011. In briefs filed before the courts, the state of Illinois argued that the First Amendment right to receive information via audio recording requires a willing speaker, and that no speaker is willing without his consent to audio recording. The state argued that people would have the right to watch and listen to police and write down what they say, but that recording their activity steps over the line. The ACLU countered in its August 26 reply brief that “the right to record is part of the well-recognized right to gather core protected speech about government officials, particularly in public forums, to record that information in a variety of manners, and then to disseminate it and use it to petition the government.” The court has not yet ruled on this case.

The RCFP, joined by the American Society of News Editors, the National Press Photographers Association, and the Society of Professional Journalists, filed an April 22, 2011 *amicus curiae* brief urging the court to rule that the law, as applied to citizens recording police, is unconstitutional. “The U.S. Constitution protects people who gather and disseminate information about matters

of public interest,” the RCFP wrote. “Yet, the arrest and prosecution of such people under the Illinois Eavesdropping Act violate the constitutional protection and run counter to the text, history and longstanding interpretation of the First Amendment. ... The Act is a national outlier among the states, the overwhelming majority of which (along with the federal government and the District of Columbia) require the subject of a recording to have a reasonable expectation of privacy in the communication. ... As such, the Act vests in law enforcement near-limitless discretion to decide which recordings should be concealed from public view and which may be conveyed to the public.”

The ACLU of Illinois said in an August press release that it brought the case because it sometimes wants to monitor police activity in Illinois and worries that it could be subject to prosecution if it does so. “We hope the Appeals Court will act swiftly to strike down this application of the eavesdropping law,” said Adam Schwartz, senior staff counsel for the ACLU of Illinois, in the press release. “If one can be prosecuted for recording a police officer doing their public duty in a public space, truly effective monitoring of police by the citizens of Illinois will remain out of reach. It is time to constrain the bounds of this law and bring transparency to the practices of our law enforcement agencies.”

Journalism Professor Detained by Police, Video Deleted

A Loyola University journalism professor was detained by Chicago police on November 12 after videotaping them arresting a young man who had jumped a turnstile at a subway station, and the police deleted the footage he had recorded, according to a November 22 RCFP story.

Ralph Braseth had been working on a documentary about young black people who frequent an affluent area of Chicago. He had been filming the group for several months, and told the RCFP that he had recorded arrests in the past. Because of that history, he said he was surprised when the Chicago police officer “expressed his strong feelings that it was illegal to videotape police during an arrest.”

While Braseth was sitting in the police car, one of the officers questioned him about why he was filming the arrest, and asked him to hand over the recording equipment. The officers looked at the footage, Braseth told the RCFP, and deleted it. “As soon as he touched that button, I was thinking, ‘You’ve got to be kidding me,’ ” he said. He was released 20 minutes later, and no charges were filed. The police gave him back his camera, and Braseth filed a complaint with the police department the next day. The incident is still being investigated.

ACLU Publishes Guidelines for Recording Police

The ACLU has published a guide on its website entitled “Know Your Rights: Photographers.” The guide points out that when individuals are lawfully in a public place, they have a right to photograph anything that is in plain view. On private property, property owners set their own rules about what may and may not be photographed. Police officers cannot generally confiscate or demand to see photographs or video without a warrant, and police may not delete photographs or video under any circumstances. They can, however, order those who are truly interfering with their operations to stop. The ACLU’s full guide is available online at <http://www.aclu.org/free-speech/know-your-rights-photographers>.

These incidents have become ubiquitous in recent years as access to video recording technology has much easier. The Nielsen Co. estimates that half of Americans will have a smartphone by the end of this year, according to a November 3 story by *St. Louis Dispatch* investigative reporter Jeremy Kohler for the *The Crime Report*, a website that covers nationwide criminal justice issues.

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

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Righthaven refiled the request for a stay of enforcement on October 9, turning to the U.S. Court of Appeals for the 9th Circuit rather than the district court. Unable to secure a \$34,045 bond to secure the judgment, the company argued that “[d]ue to the pending appeals and the stay of certain active litigation matters, Righthaven’s operating capital is being utilized to service its monthly operating expenses.” This request was denied on October 19, and on November 1, the U.S. District Court of the District of Nevada directed the U.S. Marshal for the District of Nevada to use “reasonable force” to seize \$63,720.80, the amount of the \$34,045.50 judgment with additional attorney fees.

Righthaven largely stopped filing new lawsuits pending resolution of the *Hoehn* case and its other appeals. Though those

cases rejected Righthaven’s efforts to establish retroactive standing, neither determined if its amended agreement could confer standing prospectively. The company refiled *Righthaven v. Mostofi* on July 13, an action previously dismissed due to a standing defect. Though the complaint alleges that the amended agreement assigns sufficient rights to grant standing, David A. Tashroudian, writing for *Law Technology News*, notes that the suit still targets conduct predating the amended agreement, making it vulnerable to the same grounds for dismissal as *Democratic Underground* and *Hoehn*. Tashroudian suggests that the move shows the firm’s adherence to its established operation, writing that it makes no sense for a company with such a profitable business model “to capitulate because of a few adverse decisions —

decisions based on flaws that could be remedied by the clarification and the amended SAA.” *Righthaven v. Mostofi*, 2:11-cv-01160-LRH-CWH (*Mostofi II*) (D. Nev. 2011)

Despite many legal and business setbacks, Righthaven’s CEO Steve Gibson remains committed to the cause underlying the firm’s efforts. “Is this really a fight over hyper-technicalities over particular language aspects of this private-party contractual documentation, or is this really a fight over whether the blogosphere should be able to take people’s creative works and reproduce it?” he said in an interview with *Wired.com*’s Threat Level blog in September 2011.

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Dangers Faced by Journalists Extend to Social Media Users

When traditional media shy away from a story, social media users can also be confronted by dangers faced by mainstream journalists.

Recent high-profile incidents of violence against journalists have highlighted the dangers faced by anyone using social media to report on international events.

As more traditional news organizations might shy away from a story — either because of the potential for violence or lack of access to dangerous places — citizen journalists utilizing social media are picking up the slack. Recent events including the murder of Mexican journalists who used Twitter to report on drug cartels have made clear to online journalists that they can face some of the same threats.

PRESS FREEDOM

Earlier this year, the United Nations sent out an alert declaring journalism to be one of the world's most dangerous professions, according to the Knight Center for Journalism in the Americas. Journalists, both traditional and digital, “report on human rights violations and bad governance,” said the U.N.'s High Commissioner for Human Rights, Navi Pillay. They “give voice to the victims and the oppressed, and contribute towards raising awareness of human rights issues. ... Mapping out a UN plan of action on the safety of journalists and to put an end to impunity for perpetrators of violations against them is essential.”

Murders of Mexican Journalists Linked to Their Use of Social Media

According to a Sept. 26, 2011 Committee to Protect Journalists (CPJ) story, the killing of a Mexican journalist in Nuevo Laredo on September 24 is the first documented case of murder “in direct retaliation for journalism posted on social media.” The victim, journalist

Maria Elizabeth Macías Castro, was the news editor of daily newspaper *Primera Hora*, but she also contributed to a local social media website that discussed the local activity of drug cartels. Her body was found, decapitated, with a note nearby, reading “I'm here because of my reports, and yours,” and the message was tagged with multiple Z's, showing a link to the violent Zetas cartel, according to a September 25 story in the *Los Angeles Times*. Article 19, an international group that protects freedom of expression, said in a September 21 statement on its website that “against the backdrop of endemic violence against journalists, social networks and other online communication platforms ... are increasingly being used by citizens ... to break the silence around criminal activities that are not being reported in the press because of the pervading climate of fear and self-censorship.” The group also pointed out that the declaration of principles of freedom of expression of the Inter-American Commission on Human Rights acknowledges that issuing threats, murder, kidnapping, and intimidation violate fundamental human rights.

According to CPJ, drug-related violence now makes Mexico one of the world's most dangerous countries for the press. Macías Castro's body was found almost two weeks after the bodies of two young people were hung from a pedestrian overpass in Nuevo Laredo, according to CPJ, with a note left with the bodies that warned against writing on social media websites. Article 19 reported that the note said “This will happen to all the Internet snitches ... Be warned, we've got our eye on you,” and that it was similarly signed by the Zetas drug cartel.

“As Mexican citizens, including journalists and media, are increasingly turning to new technology in the face of rampant censorship, drug cartels are using violence to control information on the Internet,” said Carlos Lauría, CPJ's Americas senior program coordinator, in a statement released September 26 on the group's website. “This wave of unprecedented violence is endangering the constitutional rights of all Mexicans to freedom of expression and access to information.”

The Electronic Frontier Foundation (EFF), a San Francisco-based non-profit, reported in an October 3 story that throughout Mexico, traditional journalists are familiar with the constant threat of kidnappings and violence, which has chilled some coverage of drug cartel violence in traditional media outlets. But “in some parts of Mexico, websites such as Blog del Narco and Frontera al Rojo Vivo and social media sites such as Facebook and Twitter are able to provide news about drug-related violence that is not being covered in local newspapers or on television.” The EFF story said that people who post information sometimes use nicknames or pseudonyms to disguise their identity, but this is often insufficient: Macías Castro, for example, used a nickname on the website on which she posted.

A state police spokesman told the Associated Press (AP) that the body of a man was found near a Nuevo Laredo monument, “lying on his belly on top of a bloodstained message and a chopped head nearby,” according to a Nov. 10, 2011 AP story. The message read “this happened to me for not understanding that I shouldn't report things on the social networks,” the AP said. The message said the man was a moderator for a website used by city residents to denounce crime and warn each other about drug cartel gunfights and roadblocks, the AP reported.

Rumors abound in Nuevo Laredo about many details surrounding the man's murder, according to a November 11 CPJ story. But “the veracity of the reports and photos are nearly beside the point,” Lauría wrote. “In Mexico's current climate, where CPJ research shows criminal organizations control the information agenda in many cities, what matters is the success of such attempts to scare professional and increasingly, citizen journalists.” (For more on the state of journalism in Mexico, see “Journalism Suffers amid Drug Wars in Mexico” in the Fall 2010 issue of the *Silha Bulletin*.)

Mexican Citizens Arrested on Terrorism Charges for Twitter Use

Drug violence is not the only danger that social media users in Mexico face. Two Mexican citizens using Twitter were

arrested on terrorism charges after they reported rumors they believed to be true about a kidnapping at a local primary school. According to a September 21 statement from Article 19, Twitter user “gilius_22” tweeted a message claiming that five children had been kidnapped at a local school. The tweet allegedly read “I confirm that in the school ‘Jorge Arroyo’ in the Carranza neighborhood 5 kids were kidnapped, armed group, panic in the zone.” The message was re-tweeted by many in the community, and the news spread rapidly. The Governor of Veracruz eventually dismissed the rumor on Twitter. But the Article 19 statement said it was too late “to avert the rapid spread of panic and chaos across the city, with scores of parents rushing to remove their children from school and several schools temporarily closing.”

Twitter users Maria de Jesus Bravo Pagol and Gilberto Martínez Vera were accused of “disturbing the peace and spreading fear among fellow citizens ... by disseminating false information on social networks,” according to Article 19. They were charged with terrorism and sabotage offenses under the Veracruz criminal code. The crime of terrorism, Article 19 said, prohibits “using explosives, toxic substances, firearms, fire, flood, or any other means against the people, public property or services to produce alarm, fear, or terror in the population or group thereof; to disturb the public peace, or to undermine the authority of the state or to pressure it to act.” The charges were later dropped amid intense public pressure, but only after they both spent a month in prison, according to a September 22 story from “Reporters Sans Frontières” (RSF or “Reporters Without Borders”).

According to a September 8 Citizen Media Law Project blog post, the crime carries a sentence of three to 30 years, a fine of up to 750 times the minimum wage, and up to six years suspended political rights. Arthur Bright, an attorney at Harvard’s Berkman Center for Internet and Society, criticized the actions of the Mexican government in the blog. He wrote that the “potential for chilling effects is huge. Why should anyone share information about possible criminal activities in Veracruz if the state might decide to prosecute you if you’re wrong (and even could decide to do so if you’re right)?” If the state had continued with

the prosecution, Bright wrote, “I’d expect to see a significant drop in these sorts of warnings. And given the apparent lack of rapid news sources in Mexico, that’s particularly problematic.”

RSF also criticized the incident on its website. “This month in prison makes you think,” the organization wrote. “The Veracruz state prosecutor’s office wasted a lot of time on this pointless case when it still has to solve three recent murders

“As the self-proclaimed guardian of the revolution, the military council ought to facilitate the work of long-silenced voices in the media instead of shutting them down and threatening them with repressive state security proceedings.”

— Mohamed Abdel Dayem
Middle East & North Africa Program Coordinator
Committee to Protect Journalists

of journalists which have made Veracruz one of the most dangerous states for the media this year.”

Mexican News Organizations Also Under Attack

November also saw an uptick in shooting attacks on several traditional Mexican journalistic organizations. According to a November 15 CPJ story, a group of gunmen attacked Mexican daily newspaper *El Siglo de Torreón* that morning, “setting a car on fire and shooting at the building several times.” The attack came only nine days after a similar attack on the *El Buen Tono* newspaper, where gunmen vandalized equipment and set the premises on fire, CPJ reported. *El Siglo* editor Javier Garza told CPJ that the gunmen set a car on fire in front of the main door, and that before leaving, they used assault rifles to spray the newspaper with about 20 bullets. Nobody was injured. “Criminal organizations will continue targeting the Mexican media unless federal authorities take decisive and timely actions to guarantee journalists’ safety,” Lauría said in the article.

Arab Spring Brings Journalism Via Social Media to the Forefront

In Egypt and elsewhere in the Middle East, social media have been lauded as a communications conduit that has helped organize protesters and gather

support for the pro-democracy movements during the Arab Spring. Although it is unclear what role social media really played in the uprisings, Egyptian users are finding that the military regime controlling the country after the revolution has not embraced freedom for social media, even enforcing a Hosni Mubarak-era Emergency Law allowing journalists and other civilians to be tried in state security courts for critical reporting.

A September 19 “PBS Newshour” story reported that since the uprising “a plethora of new on-line initiatives have sprung up. Several citizen journalists have become full-on celebrities,” and “news agencies have started disseminating on Facebook ... But the red lines

restricting Egyptian voices are still there, only pushed back.” The story points out that the military leading the country has punished people who have criticized the army. For example, blogger Maikel Nabil Sanad was sentenced to three years in prison after being tried in military court. In early September, the military raided the Cairo office of Al Jazeera, confiscated some of its equipment, and arrested an engineer.

“For months now, the ruling Supreme Military Council of the Armed Forces has been going to great lengths to hamstring the media and snuff out critical reporting,” said Mohamed Abdel Dayem, the Middle East and North Africa Program Coordinator for the Committee to Protect Journalists in a September 13 story on the group’s website. “As the self-proclaimed guardian of the revolution, the military council ought to facilitate the work of long-silenced voices in the media instead of shutting them down and threatening them with repressive state security proceedings.”

The ultimate impact of social media remains uncertain, although increasingly diverse voices in Egyptian media have appeared since the revolution. Researchers from George Washington University did a comprehensive study of Tweets about the Egyptian and Libyan uprisings between January and March

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In *Snyder's* Wake, Protests Continue to Test Boundaries of Protected Expression, Spark Regulatory Efforts

Following the Supreme Court's March 2011 ruling protecting funeral protestors' picketing rights in *Snyder v. Phelps*, legislators continue to advocate for the regulation of this controversial form of expression. Fall 2011 saw passage of state laws to curb protest activity, but successful challenges to such laws as well. Meanwhile, parties agreed to a settlement in a noteworthy challenge to a journalist's arrest by police patrolling the 2008 Republican National Convention protest in St. Paul, Minn. The continued debate surrounding the limits of acceptable conduct at protests demonstrates that *Snyder's* narrow holding has failed to put the issue to rest.

FREEDOM OF SPEECH

Furor Over Funeral Protest Activity Fails to Abate Post-Snyder

Spurred by persistent, disruptive protests led by political and religious groups, states continue to attempt to pass laws placing limits on funeral demonstrations. These protests, frequently led by members of the Westboro (Kan.) Baptist Church, often target military funerals and aim to convey the group's belief that overseas deaths of U.S. soldiers represent God's punishment of America for its tolerance of homosexuality.

In September 2011, New York became one of 45 states imposing funeral protest limitations when Gov. Andrew Cuomo

signed into law two bills circumscribing picketer behavior at funerals. Proposed as S. 5605 and set to take effect in March 2012, Ch. 528 N.Y. Sess. Laws 2011 triples the buffer zone between protestors and any religious or memorial service from 100 to 300 feet. Violators would face a misdemeanor charge for violating the law, which was co-sponsored by Sens. Lee Zeldin (R-Shirley) and Joseph A. Griffo (R-Rome). Purporting to have balanced the constitutional right to free speech with the ability of families to freely mourn deceased soldiers, Griffo said in a press release following the bill's legislative approval on June 16 that although free speech is an American right, "it is a tremendous misuse of that freedom to use the funerals of our veterans as a vehicle for protests."

A second measure, proposed as S.3901A, gives the state and its communities discretion to establish 1,000-foot zones around funeral events on public land, to implement a mandatory permit system for funeral demonstrations within 1,000 feet of a military funeral, and to impose fines of up to \$5,000 for failure to comply. The law, Ch. 527 N.Y. Sess. Laws 2011, took effect on Nov. 22, 2011. In a press release following Gov. Cuomo's signing, the law's sponsor, Sen. Jack M. Martins (R-Mineola) said, "The Supreme Court let us down. While we have freedom of speech, it shouldn't infringe on a family's and a community's right to mourn with dignity."

Enforcement of these laws may prove problematic, because although local communities are permitted to define the permit process, they may not target a particular group or message. In a September 26 interview with WHAM-TV Channel 13 in Rochester, N.Y., Barrie Gewanter, director of the Central New York Chapter of the American Civil Liberties Union (ACLU), said that the creation of protest zones raises legal questions concerning the permissible scope of restrictions. "An analysis would be applied in court ... to see whether or not there was really a problem with a 100-foot barrier, and whether the 300-foot barrier is necessary," Gewanter said.

Funeral picketing was at the center of the Supreme Court of the United States' March 2011 decision in *Snyder v. Phelps*. The court held in *Snyder* that First Amendment protections extended to Westboro's antagonistic military funeral picketing. Finding that the church's speech addressed matters of public concern and occurred in a public place, Chief Justice John Roberts wrote for the majority that "As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate." The decision denied a damages award sought by a deceased soldier's father who alleged tort liability for infliction of emotional distress by the church. *Snyder v. Phelps*, 131 S. Ct. 1207 (March 2, 2011). (For a full discussion of the Supreme Court's opinion and reac-

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2011, and found that more than three-quarters of the people who clicked on embedded Twitter links related to the uprisings were from outside the Arab world, according to a September 16 story on Nextgov, a website that covers the management of information technology in the federal government. Although the number of people clicking on these links from inside Egypt was smaller, inter-

est stayed consistent throughout the revolution, while the clicks from outside the country surged around major news events, such as Egyptian President Hosni Mubarak's resignation, the study said.

At a September 16 panel discussion convened by Nextgov, the website reported, panelists cautioned that although social media can be a tool for harnessing international attention and organizing

protests, it "can also be a tool for oppressive regimes to root out and track down dissidents. And paid government tweeters or computer programs can flood Twitter hash tag search results and blog commentary to give a false sense of public opinion."

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

tions to its decision, see “Supreme Court Ruling Protects Funeral Picketers” in the Winter/Spring 2011 issue of the *Silha Bulletin*.)

The court did not decide the constitutionality of content neutral state laws seeking to directly regulate protests. Justice Roberts wrote that “Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach — it is ‘subject to reasonable time, place, or manner restrictions’ that are consistent with the standards announced in this Court’s precedents.” Justice Stephen Breyer concurred, underscoring this limitation and arguing that the court’s decision did “not hold or imply that the State is always powerless to provide private individuals with necessary protection” from invasions of privacy or inflictions of emotional distress.

Funeral protest ordinances like New York’s and Maryland’s in *Snyder* are routinely struck down as unconstitutionally vague and overbroad. The U.S. Court of Appeals for the 8th Circuit affirmed one such determination on Oct. 5, 2011, holding that a St. Louis, Mo. suburb’s ban on protests within 300 feet of a funeral service impermissibly curtailed First Amendment rights. The city of Manchester adopted the law into its municipal code in 2007 in response to activities of Westboro members. The restriction prohibited “picketing” and “other protest activities,” which it defined as conduct “disruptive or undertaken to disrupt or disturb a funeral or burial service. Shirley and Megan Phelps-Roper, members of the Westboro church, brought a First Amendment challenge to the law.

The U.S. District Court for the Eastern District of Missouri held that Manchester had no significant interest “in protecting funeral attendees from unwanted communication,” relying on the 8th Circuit’s comparable holding in *Phelps-Roper v. Nixon* which asserted that individuals have less constitutionally-protected privacy outside the home. The 8th Circuit affirmed this holding, but disagreed with the district court’s determination that the law was a content-based regulation that restricted speech based solely on its topic. “The ordinance does not favor some topics or viewpoints over others and it ‘appl[ies] equally to all demonstrators, regardless of viewpoint,’” the court wrote. “It is not a regulation of speech

but a regulation of the place where some speech may occur.” The court also acknowledged that the U.S. Court of Appeals for the 6th Circuit reached the opposite result in 2008 in *Phelps-Roper v. Strickland* when it held that Ohio legislators had a significant government interest in protecting funeral participants from disruption. Nevertheless, the 8th Circuit opted to adhere to *Nixon*, contributing to an inter-circuit split that may

“As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

— Chief Justice John Roberts
U.S. Supreme Court

ultimately be resolved by the Supreme Court. *Phelps-Roper v. Manchester*, NO. 10-3197 (8th Cir. 2011), *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008)

The plaintiffs in *Manchester* were represented by ACLU attorney Tony Rothert, who in an interview with the Associated Press (AP) the day after the October 5 decision said that “These broad laws that prevent standing with a sign silently on a sidewalk do not further any government interest that would justify setting aside the First Amendment.”

Comparable holdings were reached throughout fall 2011 in cases involving funeral picketing laws adopted in Nebraska and Michigan. On September 9, the U.S. District Court for the Eastern District of Michigan struck down a provision of a statute prohibiting conduct that intended to “adversely affect” a funeral setting. The suit was filed in 2009 by the ACLU of Michigan after an army veteran and his late wife were arrested in the middle of participating in a friend’s funeral procession for displaying signs and bumper stickers on their van critical of the Bush administration. In finding in favor of the challengers who brought the suit, the court wrote that the law was “unconstitutional on its face under the First and Fourteenth Amendments” by being overbroad and vague. *Lowden v. Clare County*, No. 1:09-cv-11209, 2011 WL 3958488 (E.D. Mich. 2011)

The 8th Circuit issued a *per curiam* (unsigned) opinion on October 20, vindicating the *Manchester* case’s reasoning by invalidating a comparable Nebraska funeral picketing law in *Phelps-Roper v. Troutman*. The statute at issue, the Nebraska Funeral Picketing Law (Neb. Rev. Stat. 28-1320.03), restricted picketing at a funeral from one hour before the funeral until two hours afterward, and defined “picketing” as “protest activities ... within three hundred feet of a cemetery, mortuary, church or other place of worship during a funeral.” Westboro successfully challenged the legislation, with the 8th Circuit striking down the law based on its decision in *Nixon. Phelps-Roper v. Troutman*, No. 10-

2601, 2011 WL 4975771 (8th Cir. 2011)

However, the three judges on the panel in *Troutman* each wrote concurrences urging the entire panel of 8th Circuit judges to reconsider the *Nixon* decision. In his concurring opinion, Judge Clarence Beam said that although *Nixon* was correct in holding that the First Amendment’s free speech mandate outweighs a “court-fashioned” right of privacy, the court failed to weigh against freedom of expression the countervailing interests of “free exercise [of religion]” and the “right of ... peaceabl[e] ... assembl[y]” enumerated in the First Amendment. Beam also took note of the Supreme Court’s explicit refusal to decide the constitutionality of picketing regulation in *Snyder*, writing that this omission opened the door for the circuit to reconsider the issue. “I believe that it is constitutionally sound, in the balancing test we must make in a case such as this, to employ other expressly enumerated First Amendment rights as we decide whether to erect a constitutional shield for the family and friends of this deceased against the self-centered verbal and written thrusts of appellant in the name of free speech,” he wrote.

Settlement Reached Over 2008 RNC Journalist Arrest

Journalist Amy Goodman, host of the syndicated radio and television news show “Democracy Now!”, announced on Oct. 3, 2011 that a final settlement

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was reached in a federal lawsuit brought by Goodman and her show's producers Sharif Abdel Kouddous and Nicole Salazar against the cities of Minneapolis and St. Paul as well as Secret Service personnel. Goodman filed the lawsuit in 2010 in response to incidents at the 2008 Republican National Convention (RNC) when three journalists were arrested by police patrolling the event and their press credentials were confiscated by a Secret Service agent. The terms of the settlement awarded the plaintiffs a total of \$100,000, with both cities agreeing to pay a combined \$90,000 and the federal government paying \$10,000. The settlement also requires the two cities' police departments to develop and implement a policy properly educating police officers of the First Amendment rights of the press and public concerning police operations, including correct protocol for dealing with press covering demonstrations.

More than 40 journalists were arrested and detained during the RNC in St. Paul and Minneapolis from Sept. 1, 2008 to Sept. 4, 2008, including local news and television reporters, photographers, and videographers, as well as journalists working for national news outlets. Goodman was among the event's high-profile arrests, and was taken into police custody after approaching a line of riot police to request the release of Kouddous and Salazar, who had previously been arrested. (For a full account of the arrests, the city's decision to decline prosecuting members of the media, and reaction to the event, see "Dozens of Journalists

Arrested at Republican National Convention in St. Paul" in the Fall 2008 issue of the *Silha Bulletin*.)

In the 2010 lawsuit, *Goodman v. St. Paul*, the plaintiffs alleged that law enforcement policies and conduct during the RNC led to unlawful arrests and unreasonable use of force, violating their First Amendment right to report on matters of public concern and law enforcement's public actions. The lawsuit was filed on behalf of the plaintiffs by the Center for Constitutional Rights (CCR), which framed the policies and actions of law enforcement as "part of a larger civil liberties crisis that has been intensifying at an alarming rate over the past decade." The plaintiffs claimed violation of First Amendment rights and the Fourth Amendment's protection from unreasonable search and seizure, as well as common law false arrest, assault, and negligence. Attorneys Steven Reiss from the New York-based law firm Weil, Gotshal and Manges LLP and Albert Goins of Minneapolis contributed pro bono assistance in the case.

CCR attorney Anjana Samant said in an interview for an October 3 Reporters Committee for Freedom of the Press (RCFP) story that the \$100,000 figure was driven by principle. "It was a payment for their anger and frustration and the anxiety that was caused. It's an acknowledgement that their Constitutional rights were violated," Samant said. Goodman said she will donate her portion of the settlement award to "Democracy Now!"

Attorneys for the local governments and law enforcement agencies down-

played the significance of the settlement in an October 3 Associated Press (AP) report, noting that the settlement contains no admission of liability. Jon Iverson, who represented the local governments and law enforcement agencies, said that police had policies in place before the convention to protect the rights of journalists and would be happy to repeat the training. However, the CCR will provide input in the development of new police training programs, and has set a deadline for the proposed program plans to be sent to the Center for approval by December 2011.

Speaking at an October 3 press conference announcing the settlement, Goodman, Kouddous, and their counsel characterized the settlement as a vindication of the right of journalists to gather news free from interference by authorities. Goodman called it a "major step forward" and expressed hope that police departments covering protests like Occupy Wall Street could learn from her case. "[T]his largest settlement to come out of the 2008 RNC arrests should be a warning to police departments around the country to stop arresting and intimidating journalists," she said. (For additional information, see "Occupy Wall Street Produces Legal and Ethical Issues for Journalists" on page 7 of this issue of the *Silha Bulletin*.)

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

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Changing Attitudes in Online News Media Copyright Enforcement

With the feasibility of outsourcing copyright litigation seemingly foreclosed, some industry participants remain confident that news media and journalists may continue to thrive in the digital age. John Paton has been blogging about MediaNews Group's efforts to preserve free expression, calling for an end to paywalls, and extolling the value of open-sharing of content. Rather than continuing to pursue litigation, the EFF

reports that MediaNews Group joined up with local news and information provider the Journal Register Company to form Digital First Media, an entity devoted to ensuring that journalism survives and finds new ways to harness the Internet to inform the public. Policing websites facilitating copyright infringement is unlikely to end, however, as the FBI remains committed to its Operation In Our Sites anti-piracy and counterfeiting initiative, which has seized 150 domains according to a November 28, 2011

Department of Justice press release. In addition, a powerful U.S. House of Representatives bill introduced by Rep. Lamar Smith (R-Texas), the "Stop Online Piracy Act," H.R.3261, would allow law enforcement to shut down websites having "only limited purpose or use other than" copyright infringement, potentially providing another protection avenue for news media.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Social Media Laws Aim to Curb Bullying and Abuse of Children Online

The bullying and abuse of children through social media services remain a concern among legislators. States have responded to these threats by passing laws limiting digital communication between teachers and students or banning the use of these services in

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schools. Several state legislatures have backpedaled when accused of infringing upon free expression, but others support such limitations as a means of protecting students and ensuring a productive classroom environment.

Missouri Teacher Social Media Ban Held to Chill Free Speech

On July 14, 2011, Missouri Governor Jay Nixon signed into law Senate Bill 54, intended to “more clearly define teacher-student boundaries” by banning direct contact between teachers and students on social-networking websites. The law is the first of its kind, and revises a set of state laws aimed at preventing and punishing child sexual abuse. Impetus for the law grew after an Associated Press (AP) investigation found that 87 Missouri teachers had lost their licenses between 2001 and 2005 because of sexual misconduct, some of which involved the exchange of explicit online messages with students. Before the law could be enforced in its original form, it was enjoined by a Missouri state judge.

Dubbed the “Amy Hestir Student Protection Act,” the law was named for a young woman who was sexually abused by her junior high teacher, a lifelong state employee who worked in multiple school districts and retired with a “Teacher of the Year” award. In a press release, Senator Jane Cunningham (R-Chesterfield), the bill’s sponsor, wrote that under Missouri’s current employment law, a fear of litigation makes school districts hesitant to disclose past employee behavior. “As a result, teachers who engage in sexual abuse or misconduct with students have the ability to transfer from one school district to another ... as in the case of the teacher who assaulted Ms. Hester.” The bill passed overwhelmingly, with strong support for provisions mandating, among other things, that any student-reported incidents of

sexual misconduct by teachers must be reported to a school district’s superintendent within 24 hours. Codified as Mo. Rev. Stat. section 162.069 and originally scheduled to take effect on Aug. 28, 2011 before it was enjoined on August 26, the statute also forbids teachers to “establish, maintain, or use a non-work-related Internet site which allows exclusive access with a current or former student.” In addition, it limits teacher-student communication to work-related websites publicly available to third parties, including “school administrators and the child’s legal custodian, physical custodian, or legal guardian.” The law also requires each school district in the state to develop written policies detailing expectations for online communication between students and teachers, intended to take effect in January 2012. The text of Senate Bill 54 can be found at <http://www.senate.mo.gov/11info/pdf-bill/tat/SB54.pdf>.

Shortly after the bill’s passage, the Missouri State Teachers Association (MSTA) challenged the measures as a violation of First Amendment rights. Asserting that the restrictions placed upon use of non-work-related sites were a prior restraint and violated free speech rights, the union asked the Missouri Circuit Court in Cole County to prevent the state from implementing the contested portions of the bill. The Association’s suit characterized the law as overbroad, writing that it “makes it unlawful for school teachers to communicate with their children, relatives, church youth group members” by means of “many of the ... popular and increasingly indispensable computer and cell phone based technologies in wide-spread use in society today.”

The court granted a preliminary injunction on Aug. 26, 2011. Finding a violation of First Amendment freedoms, Circuit Judge Jon Beetem called the measure’s breadth “staggering” and noted that in addition to producing a chilling effect on speech, it could effectively prohibit teachers from using non-work-related social-networking websites to contact their own family members. Enjoining the state from enforcing the law two days before it was set to take effect, the court wrote that “Given the fundamental nature of the right implicated, a ‘chilling effect’ constitutes an immediate and irreparable harm sufficient to support a preliminary injunction.” A copy of Judge

Beetem’s order granting the injunction can be found at <http://www.msta.org/files/resources/publications/injunction.pdf>.

The ruling came as a relief to teachers and school districts. “This gives everyone time to debate and discuss the issue to come to a proper resolution rather than rushing to piece together language that doesn’t resolve the concerns of educators or allow time for teacher input,” said Gail McCray, legal counsel for the MSTA, in an August 26 press release following the injunction.

Less than two weeks after the legislation was blocked, Missouri’s Senate Education Committee unanimously passed a narrower version of the law that repealed the disputed social media ban. Rather than banning social media communications outright, the new bill requires that school districts draft their own social media policies that feature “the use of electronic media and other mechanisms to prevent improper communications between staff members and students.” Some of the original uncertainty remains, however, because the change does not detail what these policies should contain. The amended legislation was subsequently passed by the Missouri House 139 to 2, sending the measure to Gov. Nixon for approval.

Nixon signed the law on October 21, effectively repealing the original statutory ban before it had the opportunity to take effect. However, he took the opportunity in an accompanying signing statement to express reservations over delegating responsibility to school districts to develop their own policies. “Senate Bill No. 1 is not perfect, but the alternative of educators having to conform to the unreasonable restrictions of ... Senate Bill No. 54 is a far worse result,” Nixon wrote. The American Civil Liberties Union (ACLU) of Eastern Missouri encouraged Nixon to veto the new bill despite its previous opposition to Senate Bill No. 54, suggesting that shifting discretion to local schools was an inadequate response. “We think the current legislation just passes the buck to the various school boards and doesn’t really solve the problem,” said John Chasnoff, program director for the ACLU of Eastern Missouri, in an interview with the AP.

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According to a September 23 post on the *St. Louis Beacon*, a non-profit online news publication, Rep. Chris Kelly (D-Columbia), who handled the amended bill, called the original ban “a lesson to us all in the effect of unintended consequences.” Rep. Jay Barnes (R-Jefferson City), one of two representatives opposed to the bill, questioned the choice to delegate policy drafting control to all of the state’s school districts. “What I’m afraid that we’re doing is taking one big unconstitutional law and we’re telling 529 different school districts to adopt the policy, he told the *Beacon*. “Some of them are going to adopt constitutional policies. But some of them probably aren’t.” Nevertheless, Rep. Kelly suggested that guidance from the Missouri School Boards Association and the ACLU would help school boards draft policies that will pass constitutional scrutiny. “That doesn’t mean everyone’s going to get it right every time,” he said. “It means that over time, the best policy will emerge.”

Although Missouri is the first state to attempt to codify a school social media embargo between students and teachers, it is not the only state contemplating legislation. Virginia’s Board of Education considered adopting a teacher social media ban in November 2010, titled “Proposed Guidelines for the Prevention of Sexual Misconduct & Abuse in Virginia Public Schools.” The guidelines would have limited teachers’ electronic communication with students to publicly-accessible platforms, and banned interaction through social-networking sites and text messages, much like Missouri’s original law. Citing increased opportunities for one-on-one online communication that did not exist before, Virginia Board of Education Communications Director Charles Pyle, in an interview for a Jan. 14, 2011 *PC Magazine* story, said “We’re trying to strike a balance that allows for appropriate uses of technology and social networking while still providing for transparency and accountability.”

However, support in the Virginia Legislature waned following months of debate, and the state’s board of education settled for passing guidelines merely calling for transparency and accessibility to parents and administrators. The move was welcomed Frank LoMonte, executive director of the Student Press Law Center (SPLC), who pointed out that a more

open-ended set of guidelines would better serve student journalism participants and advisors than a highly restrictive regime. “[S]tudent journalism in particular is not an 8 a.m. to 3 p.m. business,” LoMonte said in a March 25th SPLC blog post addressing the guidelines.

As part of similar regulatory efforts, Louisiana in 2009 passed Act No. 214, a law that requires school employees who contact students by phone, email, or other electronic means to report the communications to the school district and to use only school-provided devices. The provision has yet to face constitutional challenge.

Rhode Island Imposes Limits on Social-Networking Site Use in Schools

Rhode Island became the first state to impose a blanket ban on use of social networking sites on school grounds in June 2011 with an expressed goal of curbing “cyber-bullying.” Following approval by the state’s General Assembly, Governor Lincoln D. Chafee signed into law the “Safe School Act,” codified as R.I. Gen. Law 1956 section 16-21-33. The Act’s findings of fact state that “it is important that all participants feel free to express their thoughts and ideas in a manner that does not disrupt the educational process, or create unnecessary distractions to, or adversely impact the interpersonal relationships between the students, faculty, and staff.” To that end, the law prohibits student access to social networking sites at school, with an exception for “educational or instructive purposes” given prior approval by school administration. A copy of Rhode Island’s legislation is available at <http://www.rilin.state.ri.us/BillText11/HouseText11/H5941Aaa.pdf>.

Observers reacted to the bill with many of the same criticisms that faced the Missouri legislation, citing vagueness and overbreadth as possible barriers to compliance. Similar critiques have been leveled at past cyber-bullying legislation, as commenters caution against reflexive corrective legislation to fix a problem traditionally handled without legal recourse. (For more on this issue see “Federal Government, States Grapple with Cyber-bullying Laws” in the Fall 2009 issue of the *Silha Bulletin*.) Rather than targeting a particular type of speech, such as speech intended to coerce, intimidate, harass or cause substantial emotional distress, Rhode Island’s law simply cuts off communication

via “social networking sites” entirely. The statute provides no clear definition of what “social networking sites” are, potentially giving schools authority to ban access to any website with features of social media such as comments and user profiles. “Even if we thought traditional social networking sites were somehow more risky than other sites, which they are not; and even if we thought schools were capable of banning them from student phones, which they are not; trusting schools with a mandate and a vague grant of authority is a recipe for abuse,” said Adam Goldstein, an attorney with the Student Press Law Center, in a June 27 editorial written for the Huffington Post’s Education blog.

Nevertheless, the law’s proponents emphasize that the law identifies its aim as preventing cyber-bullying, not preventing social media access. “We have very good cyber-bullying policies, but this legislation now puts that into law, requiring a statewide policy, which we will draft and develop, which will incorporate the best elements from the current policies that are currently in place in other districts,” said Rhode Island Rep. Deborah Ruggiero (D-Jamestown), in an interview with the education technology blog eSchool News for a July 12 post.

Responding to accusations that the law’s practical effect would be to ban access to these sites in schools, Elliot Krieger, a spokesperson for the Rhode Island Department of Elementary and Secondary Education, told eSchool News that “It allows social media to be used appropriately for instructional and educational purposes.” But in a June 24 SPLC blog post, Executive Director Frank LoMonte noted that most schools already block social networking sites on their own servers and prohibit use of personal electronic devices during school.

Bans may also be circumvented through students’ knowledge of technology. A Sept. 2, 2011 *New York Times* article by Jennifer Conlin points out that students are increasingly finding ways to access social networking in school. Such bans may be overcome with proxy servers, for instance, which allow a means of side-stepping a ban on direct access to certain websites. Alternatively, students encountering filters may simply access such material at home.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Silha Lecture Highlights Free Speech in the Digital Age

British media lawyer Mark Stephens, best known for representing WikiLeaks founder Julian Assange, delivered the 26th Annual Silha Lecture.

British media lawyer Mark Stephens said a healthy debate about freedom of expression and the First Amendment eventually led notorious WikiLeaks founder Julian Assange to seek him out as his attorney. The two met while participating in a debate: Stephens was at a London club and Assange participated via Skype. Because of Stephens' First Amendment affinity, he said he and Assange found themselves agreeing on freedom of expression issues that may seem alien to other people in England, but are a daily reality to someone like Assange.

"Julian Assange had a flash of genius," Stephens said during the 26th Annual Silha Lecture on Oct. 4, 2011 at the University of Minnesota's Coffman Theater. "He identified that if you go back in time to any newspaper here in Minneapolis or anywhere in the world, they have got a brown paper envelope drop box where you can take an anonymous piece of information, drop it in the letterbox, and the newspaper can deal with it. Julian realized that no longer do journalists get a few dog-eared photocopies; what they get is data."

Stephens, the head of the International and Media department at the London-based law firm Finers Stephens Innocent, shared his stories of working with Assange, his personal experience as a victim of the British media's phone hacking scandal, and his thoughts on how data are changing journalism during the lecture, titled "Free Speech and the Digital Challenge Around the Globe." The lecture, presented as an "observed conversation" with Silha Professor of Media Ethics and Law and Silha Center Director Jane Kirtley, drew an audience of nearly 400 people.

Stephens recounted that Assange traveled to London and called Stephens a few weeks after their debate. "One Sunday, he rang me up and said, 'Mark, I've got a bit of a problem. I wonder if you'd pop round.' So, I said, 'Sure! What's the problem?'" The phone call resulted in Assange retaining Stephens as his lawyer to try to keep him from being extradited to Sweden.

Stephens "is ubiquitous in Britain as being the expert on everything pertaining to freedom of the press and freedom of expression," Kirtley said later. "This isn't a media scholar looking at [these issues] from afar ... This is a guy who has been in the trenches."

Kirtley introduced Stephens, noting that the *Law Society Gazette*, a trade magazine for English lawyers, describes him as the "patron solicitor of previously lost causes." His work focuses on international comparative media law and regulation, and he is also the chairman of the board of governors at the University of East London.

Stephens attempted to demystify the work of Assange and WikiLeaks, which describes itself as a not-for-profit media organization with the goal of bringing "important news and information to the public," according to its website. Led by Assange, the organization has made headlines in recent years for publishing classified data, some allegedly leaked by U.S. Army Pfc. Bradley Manning. The leaked information included a video shot in Afghanistan through the gun-sights of an American helicopter during a mission in which two Iraqi journalists were killed. Manning also allegedly provided WikiLeaks with hundreds of thousands of classified documents he stole while working for the U.S. government, including diplomatic cables. (For more on the U.S. government's pursuit of WikiLeaks in response to its release of classified government documents, see "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue of the *Silha Bulletin*, "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue, and "WikiLeaks' Document Dump Sparks Debate" in the Summer 2010 issue. Silha Center Director Jane Kirtley also dis-

cussed "The WikiLeaks Quandary" in the Director's Note in the Fall 2010 issue of the *Silha Bulletin*.)

Assange, Stephens said, set out to create the anonymous drop box for the modern age, thinking about what such a drop box would require. Stephens said Assange realized that "it had to be anonymous ... The whole point is that you can send data to them, and the information as to who sent that data and where it came from is stripped off, so it cannot be found and cannot be reverse engineered. It allowed people from around the world, particularly from totalitarian regimes, and also people who were in business with the corrupt, to provide information." Stephens also said that "gradually they realized they needed to be more sophisticated about how they dealt with this information, so they began, I think, dealing with it in much the same way that journalists do. They verified the information, they got comment on it, and started to look at the data and on occasion, manipulate the data to enable it to be 'crowdsourced' and accessible." Kirtley asked Stephens if the public assessment of Assange — that he does not believe there should ever be any government secrets — rings true. Stephens said he did not believe so and that Assange's views have moderated with time.

"[H]e understands that there is no real desire to get people killed," Stephens said. Rather, Assange is driven by "a belief that you should receive all shades and colors of opinion and information to be able to make up your mind on issues of moment of the day," a view that he said could be a "threatening model" for people in the traditional media. Part of the system that Assange is fighting against, Stephens said, is the over-classification of government documents and his belief that governments are keeping too many secrets from their citizens. "Everybody in this room believes that governments should have secrets," he said. "We all cede a degree of secrecy to the government to enable them to better rule us. That covenant we have with them — we allow them secrets so they can better rule in our interest — is something which is universal. Some governments abuse that, and some don't."

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AMERICA'S PHONE HACKING SCANDAL

Stephens said he believes the "Chiquita Banana scandal" scared American journalists away from the practice of hacking into telephones to get stories.

A July 28, 2011 story in *The New Yorker* describes the 1998 "Chiquita Banana scandal," which Stephens said discouraged American journalists from the practice of phone hacking more than a decade before its widespread use across the Atlantic was revealed.

The Cincinnati Enquirer published an exposé on Chiquita International, alleging that Chiquita employees and a subsidiary "were involved in a Colombian bribery scheme, that it secretly controlled dozens of supposedly independent banana companies in an attempt to avoid Central American restrictions on land ownership, and that its ships had been used to smuggle cocaine," the story said, although Chiquita later denied the allegations. According to *The New Yorker* article, when the newspaper later issued a retraction (and paid Chiquita more than \$10 million), it suggested that reporter Mike Gallagher had actually hacked into the company's phone system to get part of the story.

According to a June 29, 1998 story in *The New York Times*, *Enquirer* publisher Harry M. Whipple printed an apology stating that "the facts now indicate that an *Enquirer* employee was involved in the theft of this information in violation of law." Renowned First Amendment attorney Floyd Abrams told the *Times* that "there have been settlements in substantial amounts after someone has lost a lawsuit, but I can't think of a situation in which a publication has been obliged to pay a figure on the order of \$10 million in circumstances in which there was never litigation." Abrams told the *Times* that when the *Enquirer* admitted the information was stolen from Chiquita, it was on weak legal ground. "A great deal of aggressive newsgathering may be protected by the First Amendment, but stealing isn't," he said.

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What we have to say is that governments are increasingly using those secrets or over-classifying information to a degree which is unfortunate and unhelpful."

Stephens also spoke about the phone hacking scandal that engulfed the United Kingdom this summer, which revealed that reporters and investigators working for British-tabloid *News of the World* hacked into the voice mail accounts of politicians, celebrities and private citizens to get scoops for their stories, an illegal activity punishable under the law of England and Wales. The scandal led to the July closure of *News of the World*, a public outcry, and widespread police investigations looking into the frequency of the practice amongst the British press. (For more coverage of the phone hacking scandal, see "Not Just a 'Rogue Reporter': 'Phone Hacking' Scandal Spreads Far and Wide," in the Summer 2011 issue of the *Silha Bulletin*). Several days before the lecture, Stephens said, he found out that his phone had been hacked, probably because he has many high-profile clients. He described how intrusive this practice is by giving the example of one of his clients, a well-known singer, who had been affected. She was pregnant and on tour, and wanted to wait until she was back home to tell her parents about the pregnancy in person. British journalists published a story about the pregnancy with information gathered from hacking into her voice mail and her doctor's voice mail, Stephens said. The story "denied the ability to say to her parents face-to-face ... that she was pregnant with her first child. That's a deeply human desire and wish, and [the hacking] is grossly intrusive and highly inappropriate behavior," he said.

Stephens said that he does not think the scandal will extend to the American media, because American journalists were caught doing something similar in 1998. (For more information, see "America's Phone Hacking Scandal" in the sidebar on this page.) The fact that it is illegal in England did little to curb the practice among the British press, he said. In England and Wales, "it has always been illegal to do this, and it's been made more illegal in recent times in the sense that we've enacted specific legislation ... But I think that it had become so normal in some of the tabloid newspapers [in England]. I think you have to under-

stand that if you think about [the United States], it has got a strong, vibrant, independent press, but many of the newspapers are virtual monopolies or quasi-duopolies in geographic locations, so you get much less competition. The competition in the UK is positively fetid. You've got seven tabloid newspapers vying for pretty much the same market, and there is enormous pressure on the editors on circulation and they push that down to journalists ... They have to come up with stories every week."

Stephens also expressed concern that an investigation taking place in Britain, led by Lord Justice Brian Leveson, Court of Appeal judge and head of the Sentencing Council for England and Wales, could lead to media "reforms" that could harm the ability of British investigative journalists to do legitimate journalism. "I think it's a very poignant concern," he said. "You've got a judge who knows just about zero about the media, and he's surrounded himself with a panel of experts to assist him, but the problem is that not any one of those experts has worked in the tabloid media and [they] don't really know what goes on in a tabloid newsroom. I have real concerns that he will make recommendations which the government will feel compelled to turn into legislation, which will inhibit proper, thorough investigative journalism, and that is going to be a real issue for us going forward in the U.K." The inquiry began in September and the judge is expected to complete his report within 12 months.

Stephens also fielded questions from Kirtley about the increasing use of "super-injunctions" in England, which are injunctions that prevent the press from reporting on an issue, but then also prevent the press from reporting that an injunction exists. Stephens said social media sites such as Twitter are making the enforcement of British privacy injunctions difficult because anonymous users are revealing the information the injunctions are seeking to keep quiet. Although the information becomes public, the traditional press remains "gagged" under these injunctions. Stephens pointed to the case of British soccer star Ryan Giggs as an example of the futility of the super-injunctions. "One guy who plays for Manchester United, who is married, who had slept with a model

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Attribution Controversies Prompt Reexamination of What Constitutes Journalistic Plagiarism

Arlington, Va.-based political journalism website Politico found itself at the center of an ethics scandal in October 2011 when it was revealed that Kendra Marr, a Politico reporter for two years, plagiarized portions of at least seven news stories throughout 2011. A month later, the Poynter Institute accused its most famous blogger, Jim Romanesko, of a technical violation of its rules by failing to use quotation marks in his daily aggregation of news stories, prompting Romanesko's resignation. The incidents have prompted reevaluation of the nature of plagiarism in the electronic age.

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Politico Investigation Reveals Stories Lifted Without Attribution

On Oct. 13, 2011, Politico announced the resignation of reporter Kendra Marr through an editor's note written by its Editor-in-Chief John F. Harris and Executive Editor Jim VandeHei. The decision came a day after an email from Susan Stellan, a freelance reporter for *The New York Times*, alerted Politico's editing staff to similarities between two news stories. An initial comparison of Marr's October 10 piece "TSA, Not Flying High Fiscally, Looks for Cash" alongside Stellan's September 26 piece "Paying for Security" revealed enough similarities in phrasing and reporting to warrant a full investigation by Politico's editorial staff. Altogether, seven instances of similar plagiarism were named in the editors' note, with Marr typically rewriting portions of published news articles through rephrasing and inclusion of her own original reporting alongside that of the existing article. The investigation revealed reporting in which, according to the editor's note, "specific turns of phrases or passages ... bore close resemblance to work published elsewhere. Others involved similarities in the way stories were organized to present their findings." The articles drew from a range of sources without proper attribution, including reporting from the Washington, D.C.-based newspaper *The Hill*, the

Associated Press (AP), and the Scripps-Howard News Service, the note said. Six of the seven instances appeared between September 19 and October 10, starting immediately after Marr's September 19 transition from working as a national political reporter to the national transportation beat for Politico Pro, a paid service that produces content aimed at political and policy professionals. The editor's note can be found online at <http://www.politico.com/news/stories/1011/65940.html>.

The editor's note was careful to distinguish the conduct at issue from outright fabrication, stating that "None of these examples represented invention of quotes, scenes, or other material." Nonetheless, the editors affirmed that a violation of the publication's journalistic standards, which call for conspicuous citation to reporting or ideas first produced by others, had occurred. "Material published in our pages borrowed from the work of others, without attribution, in ways which we cannot defend, and will not tolerate," the editor's note said. In response to the incident, Politico edited the stories to give Marr's sources proper attribution, including a disclaimer that "An earlier version of this story drew extensively on reporting [the affected news source] without proper attribution. Politico regrets the omission." Nowhere in the editor's note or the edited stories did Politico refer to Marr's behavior as acts of plagiarism, opting for descriptors such as "improper borrowing" and "inadequate attribution" amid apologies to journalistic colleagues and competitors.

News media commenters were much less hesitant to append the plagiarism label to Marr's work, and the incident sparked renewed discussion of what constitutes plagiarism in the age of electronic media. Speculating that the behavior may have been symptomatic of a high-pressure work atmosphere at Politico, Erik Wemple, who blogs about the media for the *Washington Post*, wrote that Politico Pro's promise of "no boring stories telling you things you already know" effectively works against attribution. Much more uncompromising was Reuters' Jack Shafer, who opined

that such excuses are confessions that inculcate rather than exonerate the author. "By having no sources of his own and failing to point to the source he stole from, [the plagiarist] breaks the 'chain of evidence' that allows readers to contest or verify facts ... he produces worthless copy that wastes the time of his readers," Shafer wrote in an October 14 blog post responding to the incident titled "How to Think About Plagiarism." However, Shafer distinguished plagiarists from aggregators who cite of the sources they summarize and provide a service tailored to an online format. "[A]ggregators are serving 'a huge, previously ignored readership out there [which] wants its new hot, quick, and tight,'" an audience coveted by established media outlets who find themselves "playing aggregation catch-up," Shafer wrote, suggesting that Marr's writing might have been acceptable with proper attribution.

Responding directly to Shafer's indictment, Felix Salmon, a blogging editor for Reuters, suggested in an October 18 post to the *Columbia Journalism Review's* (CJR) business press blog The Audit that Marr's conduct was not necessarily the type of plagiarism seen in the era of print news, but a permutation unique to the continuous news era that he dubs "link-phobia." "These days, there's a lot of pressure, at places like [*The New York Times's* financial and business news blog] Dealbook and Politico, to match stories quickly — so quickly that it's significantly easier to just copy-and-paste your rival's material than it is to craft your own story when you're not much of an expert in the first place," Salmon wrote. Such behavior, Salmon suggests, stems from a lingering reluctance to embrace linking and aggregation in newsrooms.

Writing for *Chicago Magazine's* staff blog The 312, Whet Moser wrote in an October 14 post that blogging was the "obvious solution" if Marr wanted to use portions of Susan Stellan's reporting. Although the "traditional model of news articles" substantially limits the use of others' reporting in one's own work, Moser posited that referring to the original article with full attribution and advanc-

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ing its reporting with original research was a writing format that presents “a simple, ethical solution[.]” However, although Moser recommended building upon others’ previous work as “the basis of most other forms of nonfiction, particularly academic work . . .,” he acknowledged that it may not be appropriate for news consumers, who remain unfamiliar with the original source material.

The incident follows several other high-profile instances of plagiarism in 2011, including *The Washington Post’s* three-month suspension of Pulitzer Prize-winning reporter Sari Horwitz for copying substantial portions of stories from *The Arizona Republic* “in whole or in part” without attribution. Rather than attempt to rewrite the reporting as Marr had, Horwitz copied and pasted material from the *Republic* directly without attribution on two separate occasions in March during her coverage of the investigation of accused Arizona gunman Jared Lee Loughner. London’s *The Independent* also became a victim of plagiarism in September, after a reader discovered that a quote in a story written by George Orwell Prize-winning journalist Johann Hari was directly copied and pasted from a book. After he initially denied it, additional incidents were uncovered and Hari took a four month unpaid leave.

Steve Myers of the journalism think tank The Poynter Institute responded to these incidents in an October 14 column, asserting that outright fabrication of facts and theft of material should not be the baseline plagiarism standard. Instead, he suggested that such behavior represents a worst-case scenario on a

continuum of wrongs. “Plagiarism runs so contrary to what journalists value, it makes sense for colleagues to try to understand why someone would do it,” he wrote. “We should pause, however, before saying that someone didn’t plagiarize maliciously. . . . Just because someone doesn’t aim to malign doesn’t make his actions benign.” Like others who commented on the incident, he proposed attribution as a solution to some types of plagiarism.

Amid Accusations of Improper Attribution, Jim Romenesko Resigns From Poynter

On Nov. 10, 2011, Jim Romenesko resigned from The Poynter Institute following accusations of improper quote attribution, bringing an abrupt end to his 12-year tenure running the think tank’s media aggregation blog. Romenesko’s daily blog on Poynter.org operated as a daily aggregation of articles relating to news media and journalism issues, with Romenesko providing a short summary of a story’s salient details and a link to the source material.

His resignation followed accusations in an article written by Poynter Online’s Director Julie Moos, who claimed Romenesko’s posts too often included an author’s verbatim language without the use of quotation marks. Moos was tipped off to the perceived infractions, which she characterized as a constituting a “pattern of incomplete attribution,” by Erika Fry, an assistant editor at *CJR* who was preparing a story about the topic. Preempting Fry’s story exposing the supposed defects, Moos published her criticisms on November 10 and pre-

cipitated a firestorm of reactions. Moos wrote that Romenesko’s practices gave the impression that the writing consisted of his thoughts and ideas. Moos saw this as a serious infringement of Poynter’s stringent sourcing guidelines, which mandate use of quotation marks when using verbatim language. Stating her intent to further investigate other Poynter writers and raising the question of whether aggregation pieces should be subject to the same attribution standards as normal news reports, Moos announced that in the future, Romenesko’s posts would be edited prior to their publication, rather than retroactively as they had been. Moos’s article, “Questions Over Romenesko’s Attributions Spur Changes in Writing, Editing” can be found at <http://www.poynter.org/latest-news/mediawire/152802/questions-over-romeneskos-attributions-spur-changes-in-writing-editing/>.

Romenesko resigned the day after Moos published her criticisms, and the blog, simply titled Romenesko upon its purchase by Poynter in 1999, was reintroduced on Poynter’s website as The MediaWire on November 13 to be run by a cadre of Poynter reporters. The Romenesko blog was a primary source of traffic to the Poynter site, and often used as a way for journalists to ensure exposure of their work to a broader audience. Romenesko was only weeks from retiring from aggregation blogging to pursue reporting. In an email to *The New York Times* on the day of his resignation, Romenesko said that he had hoped to finish out his final weeks without incident, writing that “[t]his really did throw me for a loop.”

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and a television presenter, and he’d also slept with his sister-in-law . . . and he got an injunction to prevent his wife knowing about it,” Stephens said. “But . . . Ryan Giggs’ name is posted all over Twitter feeds. Because the injunction is obtained in London it doesn’t have any impact on Twitter, so they carry on publishing way.”

Finally, Kirtley asked Stephens whether new media and the information age mean that “privacy is dead.” “I think the whole concept of privacy has really changed,” he said. “Everything is now discoverable or available online or in some other way. I think that is some-

thing that we have to understand — that there is a greater degree of exposure, a greater degree of scrutiny.” The French have developed a concept, he said, called the “right to be forgotten,” which is now being enacted to apply across all of the countries of the European Union. “The idea is: You may have done something which was noteworthy and got you national publicity, but after a period of time, the collective memory forgets, and as a result, you should be entitled to have that collective memory forget permanently. It’s quite interesting — an attempt to put the toothpaste back in the tube.” But he said he does not think it will

work. “As soon as you’ve got archives, information is out there, and that will be the problem of the future.” (For more on the development of the “right to be forgotten”, see “Amid Skepticism, Uncertainty, Culture Clash, EU Eyes Online ‘Right to be Forgotten,’” on page 17 of this issue of the *Silha Bulletin*.)

The lecture is available on the Silha Center website at silha.umn.edu. Silha Center activities, including the annual lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

— EMILY JOHNS

SILHA RESEARCH ASSISTANT

Other journalism publications evidently felt the same way, with many comments swiftly and harshly criticizing Poynter's rigid adherence to its attribution standards. Contending that Romenesko "doesn't deserve to be treated this way," Rem Rieder wrote for *American Journalism Review* on November 14 that Poynter was effectively "hanging its groundbreaking media blogger/aggregator out to dry." Rieder conceded that Romenesko should have been more scrupulous about his use of quotation marks, but wrote that "there's no real sin here" because of Romenesko's conscientious citation and linking practices. Felix Salmon, a blogging editor for *Reuters*, exalted Romenesko as "a KING of the blogosphere," in a post on a personal blog on November 11, writing that "[i]f your guidelines go against what Jim is doing, then there might well be something wrong with your guidelines." David Carr of *The New York Times*' Media Decoder blog on November 11 described Moos' reaction as "an answer in search of a problem," suggesting the decision was an unnecessary response to a minor concern.

In his inaugural blog post to jimromenesko.com on November 18, titled "How I Ended Up Leaving Poynter," Romenesko framed his departure as a gradual decision hastened by *CJR*'s impending attribution story and Moos' preemptive response. As he described it, in April 2011, Poynter had rebranded Romenesko's blog as "Romenesko+," which featured a modified format of increasingly lengthy aggregation posts from other Poynter contributors and aimed to bringing more traffic back to Poynter's site. After announcing his intention to leave Poynter and begin running a personal blog, Romenesko signed a one-year contract that would allow him to cross-post items to Poynter and his own site. Romenesko said he originally speculated that Moos' story responding to *CJR*'s investigation might have been intended to scare Poynter's advertisers away from his new venture. However, he acknowledged that Moos had held other staffers to similar attribution standards in years past. "I believe my initial suspicion about Julie's actions — that she was trying to keep Poynter's advertisers off my site — was wrong. ... Julie, I think, is the chief of Poynter's Attribution Police." He concluded by writing that four days

after *CJR* published their planned story about his blog's attribution practices, he declined an invitation from *CJR* to return to aggregating for an upcoming website about business journalism education.

CJR, however, continued to assert the need for attribution, with Justin Peters writing on *CJR*'s Behind the News media blog on November 11 that "[i]t's rare that you see so many people rising to declare

"Material published in our pages borrowed from the work of others, without attribution, in ways which we cannot defend, and will not tolerate."

— Editor-in-Chief John F. Harris and Executive Editor Jim VandeHei Politico

their support for sloppy attribution practices. Arguing that no casual browser of Poynter's website would know that Romenesko's language was not his own, Peters drew attention to the irony of "critic[izing] a journalism ethics institute for caring too much." Meanwhile, Erika Fry, who had initially brought the attribution issue to Moos' attention, wrote in a November 11 post on the Behind the News Blog titled "The Romenesko Saga" that the blog began indulging in "over-aggregation" as its posts got longer following its rebranding as Romenesko+ in April. "[M]y interpretation matches that of Moos, who described over-aggregation as when an aggregated post contains too much ... substantive work of the original source, such that it removes any incentive for the reader to visit the original story," Fry wrote. Fry drew particular attention to the verbatim reproduction of an entire 700-word *CJR* story in an October Romenesko blog post, writing that in such instances the term over-attribution no longer even applies. Fry's post can be found at http://www.cjr.org/behind_the_news/the_romenesko_saga.php.

The lasting impact on attribution practices in online media remains to be seen, but the incident has drawn attention to the possibility of differing standards depending on the format of a piece of journalism, and underline Steve Myers' assertions in response to the Kendra Marr incident that conceptions of what constitutes plagiarism can span a wide

spectrum. Fry noted in her response to Poynter's decision that the industry-wide conversation over standards and best practices in aggregation was one that needed to happen. "Poynter — an institute that regularly weighs in on these matters — needs to honestly consider its own practices while advocating for the rest of the community," she wrote.

Cavalier Daily Faces Controversy Over Plagiarism

The University of Virginia's *Cavalier Daily* found itself at the center of an ethics scandal in fall 2011 after alerting its readers to the presence of plagiarism in a pending news article, and the subsequent discovery of at least

three past instances of plagiarism by the same writer. In an editorial titled "Taking Action," published on September 12, the paper's managing board wrote that the offending behavior consisted of frequent copying of content from sources ranging from Wikipedia to major news outlets without proper attribution. In response, the *Cavalier* followed its established protocol of permanently removing the writer from the staff and taking down the infringing content from its website. The *Cavalier* also reported the incident to the school's Honor Committee, a student-run group that ensures compliance with the University of Virginia Honor System's blanket prohibition on lying, cheating, and stealing. In contrast to commercial newspapers' practice of identifying plagiarists and preserving their articles, the *Cavalier* concealed the name of the alleged plagiarist after reporting to the Honor Committee, which keeps secret offenders' identities. The *Cavalier* editorial disclosing the plagiarism can be found at <http://www.cavalierdaily.com/2011/09/12/taking-action/>.

On September 14, the chair of the Honor Committee filed charges against the paper's editorial board with the University Judiciary Committee (UCJ), a separate student-run Committee that hears cases involving violations of the University of Virginia's Standards of Student Conduct, an enumerated list of prohibitions ranging from physi-

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cal assault to disorderly conduct. The complaint alleged that disclosure of the investigation in the *Cavalier's* September 12 editorial breached the pending case's confidentiality in violation of Standard 11 of the University's Standards of Conduct, which prohibit "intentional, reckless, or negligent conduct which obstructs the operations of the Honor or Judiciary Committee, or conduct that violates their rules of confidentiality." The newspaper wrote in a September 22 editorial, "A Higher Standard," that it was "bound by its responsibility to readers" to fully disclose the incident and the pending case against its editorial board, even though doing so put it at the risk of further alleged university honor code violations. The Honor Committee chair dropped charges against four members of the editorial board, leaving the *Cavalier's* Editor-in-Chief Jason Ally as the sole defendant. No comment on the change was provided, but in the September 27 *Cavalier* editorial "McKenzie Drops Four UJC Charges," the newspaper's Managing Editor Andrew Seidman suggested the decision was made to preserve the Honor Committee's reputation.

Commenters reacting to the situation questioned whether the case fell within the UCJ's jurisdiction, drawing attention to a clause in its constitution stating that the committee "shall not have jurisdiction over the exercise of journalistic and editorial functions by student groups."

In a follow-up story on September 22 announcing the alleged honor code violations, "Cavalier Daily Faces UJC Charges," the paper's staff quoted Rebecca Glenberg, the legal director for the American Civil Liberties Union of Virginia, as doubting the validity of the UJC's jurisdiction. Noting that proceed-

"Plagiarism runs so contrary to what journalists value, it makes sense for colleagues to try to understand why someone would do it. We should pause, however, before saying that someone didn't plagiarize maliciously. ... Just because someone doesn't aim to malign doesn't make his actions benign."

— Steve Myers
The Poynter Institute

ings against the paper should not be brought "if the judicial council's bylaws deprive it of jurisdiction to act against student newspapers," she said that the possibility of disciplining the paper's staff for writing about issues of importance to the university community presented "great constitutional concerns." Attorney Advocate Adam Goldstein of the Student Press Law Center (SPLC) expressed sentiments to *The Washington*

Post on October 19, distilling the conflict to a case of a "student editor [who] got called before a judiciary committee for exercising his First Amendment rights."

On October 18 the UJC cleared Ally of violating the university's Standards of Conduct and also affirmed that its constitution deprived it of jurisdiction over student journalism. The newspaper's managing board published an October 18 editorial titled "Playing by the Rules" prior to Ally's trial in which it expressed a goal of remaining "accountable to the readers for the accuracy and authenticity of the content that appears in its pages." Speaking to *The Washington Post* after the proceedings, Ally said he intended to take action further clarifying the paper's independence from the university's judicial system, in hopes of avoiding similar conflicts in the future.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Silha Fellowships and Research Assistantships

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Satire Gone Too Far?: *The Onion* Causes a Stir

Tweets from satirical newspaper The Onion about Congress taking schoolchildren hostage caused a stir when they went viral

American satirical newspaper *The Onion* sparked a mini-crisis in Washington on Sept. 29, 2011 when it posted on its Twitter page that members of Congress had taken visiting schoolchildren hostage, promoting a similar story on its website and in its print edition. “BREAKING: Witnesses reporting screams and gunfire heard inside Capitol building,” the first tweet said. Another said a “group of armed congressmen” was holding 12 children hostage, and another said a “police helicopter [was] just ordered to pull back after Rep. Trent Franks (R-Ariz.) tried to take it down with a shotgun.”

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But not everybody got the joke. Tweets about violence in the capitol building spread quickly before some people realized they were false. Some members of the media and others on Twitter expressed outrage at what they characterized as an irresponsible decision by *The Onion* to publish these types of statements. The U.S. Capitol Police, a federal police force in charge of protecting Congress, investigated the reporting, according to a press release it sent out the same day the tweets were posted. “It has come to our attention that recent twitter feeds are reporting false information concerning current conditions at the U.S. Capitol,” the release said. “Conditions at the U.S. Capitol are currently normal.” *The Onion*, however, did not back down from its decision to publish the tweets. “This is satire. That’s how it works,” an Onion representative told *The Washington Post* for a September 29 blog post titled “The Onion’s tweets about Capitol gunfire prompt panic, mockery.” Other tweets from *The Onion* about Congress being taken hostage further fed into the newspaper’s satire. “Police

helicopter just ordered to pull back after Rep. Trent Franks tried to take it down with a shotgun,” one tweet said. Another tweet reported that “Arlington gun shop confirms Rep. [Eric Cantor] bought 6 semi-automatic handguns, 3 rifles & 600 clips of ammo last month.” Another said that “two chaperons are also being held, one of whom is said to be pregnant.”

The tweets were promoting a story on *The Onion*’s website, “Congress Takes Group of Schoolchildren Hostage.” “WASHINGTON – Brandishing shotguns and semiautomatic pistols, members of the 112th U.S. Congress took a class of visiting schoolchildren hostage today, barricading themselves inside the Capitol rotunda and demanding \$12 trillion dollars in cash,” the story said. “House Speaker John Boehner (R-OH), who has emerged as a spokesman for the bipartisan group, informed FBI negotiators this morning that the ransom was to be placed in stainless-steel suitcases and left on the Capitol steps by 4 p.m. sharp. If their demands are not met in full, the 11-term representative announced, ‘all the kids will die.’” The website also featured a fake photograph of Boehner holding a gun to the head of a small girl, and a fake news video. “I know Speaker Boehner personally,” President Obama said in the story, “and I know that he and his colleagues will not hesitate for a second to kill these poor children if they don’t get their way.” (The story is available at <http://www.theonion.com/articles/congress-takes-group-of-schoolchildren-hostage,26207/>.)

The reaction was swift. *Time Magazine*’s Megan Friedman questioned in a September 29 blog post whether *The Onion* went “too far with its #Congress-Hostage satire.” Many Twitter users also expressed distaste for the satirical tweets. One Twitter user, “ChrisWitschy,” called the Congress Hostage hoax “completely inappropriate.” For a short time after *The Onion*’s tweets, some wondered whether the site’s Twitter feed had been hacked. “Did idiot hackers hack [*The Onion*] thinking it was a real news org?” wondered user “Adrianchen.”

For many, the incident recalled the famous 1938 Orson Welles radio drama “War of the Worlds,” when a series of fake news bulletins broadcast via radio convinced some Americans that Earth

was under attack from Martians. Freelance journalist and activist Josh Wolf tweeted that the fake hostage crisis “reminds me of how Orson Welles’ War of the Worlds sparked confusion [and] controversy.”

An Oct. 29, 2011 BBC online report, “The Halloween Myth of the War of the Worlds Panic,” (available at <http://www.bbc.co.uk/news/magazine-15470903>), reflected on the headlines across the United States printed in response to the terror that Welles’ show had supposedly created. *The New York Times* headline read “Radio Listeners in Panic, Taking War Drama as Fact,” the BBC said. *The Chicago Herald and Examiner* told how “Radio Fake Scares Nation.” *The San Francisco Chronicle* reported that “US Terrorized by Radio’s ‘Men From Mars.’”

However, the BBC article also quoted Hadley Cantril, a Princeton University psychologist who researched the notorious broadcast, who said that the size of the panic that was actually created has been exaggerated in modern history. He said that although about six million people listened to the original broadcast, perhaps 1.2 million listeners were “frightened” or “disturbed” by what they heard.

Some Twitter users suggested that the reaction to *The Onion*’s tweets was similarly overstated. Twitter user “scott_tobias,” mocked the reaction to the tweets. “Thinking the real satire [behind *The Onion*’s tweets] is the response to it,” he wrote. “Post 9/11, we’ve become a nation of feral cats.”

Another post about the incident on *The Guardian*’s News Blog written by Matt Wells suggested that *The Onion* ran into problems in this situation when it failed to realize using Twitter strips away context. “With its latest stunt, maybe the Onion took the conventions of social media too literally.” “Even by the Onion’s standards, this was pushing at the boundaries. Only yesterday, a man was arrested for plotting to fly remote-controlled aircraft stuffed with plastic explosives at the U.S. Capitol and the Pentagon ... Making realistic-sounding jokes about potential terrorist situations is always going to be problematic in the United States.”

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after the archives of Spain's weekly official government gazette, a publication containing information ranging from bankruptcy auctions to criminal pardons, were published online in order to foster transparency. This caused centuries of information once confined to physical documents to become easily accessible through Google's search engine, forcing individuals to confront potentially damaging or inaccurate information from their past.

According to a Jan. 20, 2011 BBC News story, the AEPD asserted in its orders that Google violated Spain's right to be forgotten by denying individuals control of their information. Google filed suit challenging the orders in the Spanish National Court in January 2011, but was rebuffed by a Spanish judge. Arguing that its role as a search engine makes it a fundamental part of the information society, Google sought to overturn five adjudications already made in the case by arguing that Spain's actions violate freedom of expression. Confronted with possible liability for providing access to materials generated by its others, Google

once again argued that its actions classify it as a distributor of the information, rather than a publisher. "Spanish and European law rightly hold the publisher of material responsible for its content," said Google's Director of External Relations Peter Barron in a statement prior to its January challenge to the orders in the Spanish National Court. "Requiring intermediaries like search engines to censor material published by others would have a profound chilling effect on free expression without protecting people's privacy."

American policymakers urge careful deliberation. "In the United States we have a very strong tradition of free speech freedom of expression. We would strongly caution against any interpretation of the right to be forgotten that infringes upon that," said Justin Brookman, director of the Center for Democracy and Technology's Privacy Project to the Associated Press in April 2011.

A final decision on the case could take months or years depending on the appeal process, but Spain remains resolute and intent on meeting the expectations of its citizens. "This is just the beginning,

this right to be forgotten, but it's going to be much more important in the future," said Artemi Rallo, director of the AEPD. "Google is just 15 years old, the Internet is barely a generation old and they are beginning to detect problems that affect privacy. More and more people are going to see things on the Internet that they don't want to be there."

In response, Peter Fleischer argued that targeting search engines is the wrong tactic. "These cases are not about deleting or 'forgetting' content, but just about making it harder to find content," he wrote on his blog. Fleischer argued that holding search engines responsible for infringing content instead of the content's creators further complicates the dichotomy between privacy and freedom of expression. "There are better ways to protect privacy online, by remembering that it should be the publisher of content who is responsible for it." The full entry can be found at <http://peterfleischer.blogspot.com/2011/09/right-to-be-forgotten-seen-from-spain.html>.

— MIKEL J. SPORER
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