

Te'o, Armstrong, Pistorius, and Collins Stories Raise Ethical Questions in Sports Journalism

In early 2013, the world learned that Notre Dame linebacker Manti Te'o's dead girlfriend had never existed, Lance Armstrong had used performance enhancing drugs (PEDs) during each of his seven Tour de France victories, and South African Olympic and Paralympic sprinter Oscar Pistorius — a hero for many with disabilities — was charged with murdering his girlfriend. These stories emerged after news media had continuously included Te'o's girlfriend as a part of stories about the football star without verifying her existence, few in the news media had challenged Armstrong's clean record, and many sports journalists focused on the issues surrounding Pistorius's carbon fiber prosthetic legs and not on Pistorius's history of high risk and violent behavior. The stories have called into question the investigative reporting ability of sports journalists, and have left sports journalists and media analysts asking what went wrong and how such major blunders can be prevented in the future. Meanwhile, the April 29, 2013 story that NBA center Jason Collins is gay has presented sports journalists with a different set of ethical issues, such as how they should cover gay athletes at a time when lesbian, gay, bisexual and transgender (LGBT) issues are at the forefront of national media attention.

Manti Te'o's Fake Girlfriend Story Challenges Sports Journalists' Ability to Perform Thorough Fact-Checking

Te'o was an All-American senior linebacker for the University of Notre Dame football team, who finished runner-up in voting for college football's highest honor, the Heisman Trophy, in 2012 and led the Fighting Irish to an undefeated regular season and a spot in the Bowl Championship Series (BCS) National Championship Game. A defining moment in Te'o's and Notre Dame's season came on Sept. 12, 2012, when Te'o learned that his grandmother, Annette Santiago, and his girlfriend, Lennay Kekua, had died within hours of each other. Santiago died after a long illness, according to multiple media reports, and Kekua purportedly died from complications of leukemia, only months after she had survived a horrific car accident.

On Jan. 16, 2013 Timothy Burke and Jack Dickey, reporters for Deadspin, a sports blog owned by Gawker Media and a self-described "maverick in sports media," broke the story that Te'o's reported girlfriend, Kekua, was not real. The story listed the discrepancies and holes in the mainstream sports media's coverage of Te'o's relationship with Kekua that prompted them to look into the story, linking to each of the faulty stories they examined. For example, the story pointed to an Associated Press (AP) article

that reported Kekua's funeral would be held in "Carson City, CA," which does not exist.

The Deadspin reporters conducted several simple searches of public records, including Social Security Administration records and news clip searches. The reporting team also contacted the Stanford University Office of the University Registrar to determine the office had no record of Kekua attending the school. The reporters also used a reverse image search, a tool available through Google, to determine that the photo on Kekua's Twitter profile belonged to a woman named Diane O'Meara. Burke and Dickey reported in the same Jan. 16, 2013 article that the person who allegedly carried out the hoax was Ronaiah Tuiaosopo. According to the story, O'Meara (originally given an alias, but her identity was later revealed) had provided her photo to Tuiaosopo, a former high school classmate, after he requested it to use it in a "get-well" slideshow for a cousin who had been in a car accident. Deadspin's full story is available online at <http://Deadspin.com/5976517/manti-teos-dead-girlfriend-the-most-heartbreaking-and-inspirational-story-of-the-college-football-season-is-a-hoax>.

Following Deadspin's story, numerous journalists criticized major news media outlets for not breaking the story sooner. Patrick Hruby of *The Atlantic* wrote in a Jan. 17, 2013 commentary that the "Te'o debacle ... is a journalistic failure of the highest order, on a systemic scale." Timothy Burke, the Deadspin reporter who broke the Te'o hoax story, told the Poynter Institute's Mallory Jean Tenore in an email interview published on the journalism think tank's website Jan. 17, 2013 that he felt "shocked" and "saddened" that no other journalists had looked into the story. In an interview with Louisville, Ky. *Courier-Journal* columnist Adam Himmelsbach for a Jan. 17, 2013 column, Director of the Silha Center and Silha Professor of Media Ethics and Law Jane Kirtley said, "For me, the narrow issue that comes out of this matter is that there's no evidence that a lot of journalists made any effort to verify things that could have been verified independently fairly easily."

Amid the criticism, journalists also sought answers for how the story could have been missed. Some cited respect for the purported girlfriend's privacy. Roger Yu's Jan. 18, 2013 *USA Today* column said that ESPN reporter Gene Wojciechowski acknowledged that he had failed to find an obituary for Kekua or an article about her car accident, yet chose to do nothing about it. Wojciechowski told Yu he asked Te'o for contact information for Kekua's family, "but was told that the family would prefer not to be

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contacted.” Deadspin’s Burke told the Poynter Institute’s Tenere that attempting to talk to friends and family members close to Te’o was the most challenging part of reporting on the story, as “[a] lot of people were reluctant to talk, citing Samoan family traditions about not going against the family,” the January 17 report said.

To address questions related to reporting on matters of death, the Association of Health Care Journalists in 2011 released its “Guidance on the release of information concerning deaths, epidemics or emerging diseases,” a collection of nonbinding recom-

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mendations that “are meant to help public health officials balance the need to keep the public informed with requirements to maintain individuals’ privacy.” The document suggested that journalists “[i]n all cases — whether the [deceased] person has been publicly identified or not — demonstrate sympathy for the family’s distress and respect their wishes concerning coverage of private events, such as funerals or wakes.” (The guidelines are available online at <http://healthjournalism.org/secondarypage-details.php?id=965>.) Some journalists may have followed what they naturally perceived as a similar spirit of sensitivity in covering Kekua’s alleged death. For example, *Detroit Free Press* columnist Mitch Albom wrote on Jan. 20, 2013 that, “Yes, it’s strange that reporters might now require proof of existence for a dead loved one.”

Some journalists alleged that conflict of interest could have played a role, specifically in sports cable station ESPN not reporting the story sooner. *The New York Times* reported on Jan. 22, 2013 that ESPN received a tip before Deadspin did (the actual date was not specified) that Te’o’s girlfriend was a hoax, and that the network had compiled enough information to run the story, but decided to hold the publication until after its reporters could interview Te’o. ESPN Director of News Vince Doria told the *Times* that ESPN “wanted to be very careful.” The article quoted three unnamed ESPN executives as expressing regret for not publishing the story sooner. Meanwhile, Jason McIntyre reported on *USA Today’s* sports blog “The Big Lead” on Jan. 17, 2013 that, according to an unnamed source at ESPN, the network might have known about the hoax as early as Jan. 6, 2013, the day before the BCS National Championship Game. According to the post, ESPN asserted that the allegation was false and that it did not learn about the story until Jan. 10, 2013. McIntyre surmised that ESPN might have sat on the story to not disrupt their airing of the BCS title game.

In the wake of the Te’o story, sports journalists sought to control their own narrative. *Sports Illustrated* reporter Pete Thamel said in a Jan. 17, 2013 interview on ESPN Radio’s “The Dan Patrick Show” that even though he noticed some “small red flags” about the Kekua story, he was “able to write around it.” Allan Joseph, the editor-in-chief of Notre Dame’s student newspaper *The Observer*, said in a Jan. 21, 2013 statement that, “[A]fter reading through every word of our coverage mentioning Kekua, I feel safe standing by all of it.... As a student newspaper, we always felt the story should be about Te’o and the support he received from fellow students, and thus Kekua was only a minor detail. That mindset helped us cover the story that mattered to our readers, and helped us maintain accuracy too.” Allan continued, “We will be more vigilant in checking verifiable facts, and will be more comfortable sacrificing compelling but unverifiable details in order to maintain our accuracy. We won’t stop covering the great stories that take place every day, from the triumphant to the heartbreaking. But we won’t stop striving for the truth, either.”

Himmelsbach wrote in his Jan. 17, 2013 column, “There are plenty of journalists standing on their soapboxes now, saying they would have sniffed out this stunning hoax and still had time to grab a sandwich afterward. But I don’t believe them. I think most

would have been fooled just like everyone else.” Mitch Albom saw the news media’s reaction to the hoax as a bigger concern. In his Jan. 20, 2013 *Detroit Free Press* column, Albom chastised journalists like *Sports Illustrated* columnist Stewart Mandel, who demanded that Te’o apologize for not revealing the hoax as soon as he found out about it. “I imagine he was embarrassed,” Albom wrote. “He had become almost legendary in a single season. Asking a 21-year-old to immediately and voluntarily undo that is unrealistic, even if it would have been more ethical.”

“There are plenty of journalists standing on their soapboxes now, saying they would have sniffed out this stunning hoax about Te’o and still had time to grab a sandwich afterward. But I don’t believe them. I think most would have been fooled just like everyone else.”

— Adam Himmelsbach
Columnist,
Louisville, Ky. *Courier-Journal*

Albom himself has been subject to criticism for his own ethical lapses. In April 2005, Albom erroneously wrote in a *Free Press* column that two former players on the Michigan State University basketball team attended an NCAA Final Four game that year between MSU and North Carolina. The error prompted the *Free Press* to conduct an internal review of Albom’s columns and the editors who oversaw them, which revealed that Albom “at times ha[d] used quotes from ... other publications without indicating that he did not gather the material himself, in violation of *Free Press* rules on crediting sources.” (For more information, see “Albom, *Free Press* Editors Disciplined for Erroneous Column Filed Prior to ‘Final-Four’ Game” in the Spring 2005 edition of the *Silha Bulletin*.)

Lance Armstrong’s Confession to Using Performance Enhancing Drugs Reveals Failings in Investigative Sports Reporting

Lance Armstrong’s athletic achievements led him to become one of the most prominent sports heroes in the United States at the turn of the millennium. After surviving testicular cancer, Armstrong, a professional cyclist, won seven consecutive titles in the Tour de France, endurance cycling’s premier race, from 1999 to 2005, when he announced his retirement from competitive cycling. After focusing on other endurance sports such as marathon running and triathlons, Armstrong returned to the Tour de France, finishing third in 2009 and 23rd the following year, his last Tour race. Outside of racing, in 1997, Armstrong founded The Lance Armstrong Foundation, which officially changed its name to The Livestrong Foundation in 2009. According to the foundation’s website, Livestrong’s mission is to support people affected by cancer and raise money for various cancer-related causes.

Although other top riders tested positive for using performance-enhancing drugs (PEDs) during Armstrong’s career, Armstrong consistently and vehemently maintained that he was clean, despite allegations of using PEDs (colloquially known as “doping”) throughout his career. For example, *The Sunday Times* of London published a story on June 13, 2004 that accused Armstrong of doping and cited the book *LA Confidential: The Secrets of Lance Armstrong* by *Sunday Times* sports reporter David Walsh. An

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Aug. 23, 2005 story in the French newspaper *L'Equipe*, owned by Amaury Sports, the same company that owns and operates the Tour de France, accused Armstrong of having used the banned substance EPO (erythropoietin, a drug that increases the ability of red blood cells to carry oxygen) during his Tour victory in 1999. Armstrong called the *L'Equipe* article "nothing short of tabloid journalism" in a response posted to his website, according to an Aug. 24, 2005 ESPN.com story.

On Aug. 24, 2012, the United States Anti-Doping Agency (USADA) issued a press release that said it had "sufficient" and "overwhelming" evidence that Armstrong used PEDs during each of his Tour titles, and that it would subsequently strip him of those titles. According to a *Cycling News* story the same day, Armstrong chose not to contest the charges in a full evidentiary hearing, stating that his reason for not doing so was the "toll" the investigation had taken on his family and his work. The International Cycling Union (UCI), the world governing body for the sport, announced in a press release on Oct. 22, 2012 that it also would formally strip Armstrong of his titles. On Jan. 17, 2013, the Oprah Winfrey Network (OWN) aired an interview, in which Armstrong admitted to Oprah that he used EPO, blood transfusions, testosterone and human growth hormone (HGH) when competing. In the interview, Armstrong equated doping with having "air in our tires" or "water in our bottles," and said he did not believe it was "humanly possible" to win the Tour de France without doping. Video segments of the interview can be viewed online at http://www.oprah.com/own_tv/onc/lance-armstrong-one.html. An unofficial transcript of the interview can be viewed online at <http://www.bbc.co.uk/sport/0/cycling/21065539>.

ESPN columnist Bill Simmons argued in a Feb. 1, 2013 column for ESPN's blog "Grantland" that Armstrong's story illustrates how the issue of reporting on athletes and PEDs is complicated. Simmons wrote that as a journalist he believes that "[t]he whole 'innocent until proven guilty' mind-set will always be our default," and that it is "unfair to speculate [about PED use] without any real proof." However, he argued that sports journalists have "been burned too many times by the words 'absolutely incredible'" in relation to sports feats that turned out to be PED-aided to not be suspicious, and thus sports journalists need to start covering the issue more critically.

The 2004 *Sunday Times* article that alleged Armstrong was not clean led the cyclist to sue the British newspaper for libel. On July 29, 2005, the Supreme Court of Judicature Court of Appeal (Civil Appeals Division) in London upheld a ruling made in December 2004 by Justice Eady of the Queen's Bench Division that the article "was capable of imputing either 'guilt' ... or, at the least, that there were reasonable grounds to suspect [Armstrong] of having taken [PEDs]." Without evidence to prove the allegation was true, *The Sunday Times* was found guilty of violating Britain's 1952 Defamation Law. The court's full decision is available online at <http://www.5rb.com/case/Armstrong-v-Times-Newspapers-Ltd-Others-%28CA%29>.

The Sunday Times paid Armstrong an out-of-court settlement of £300,000 (\$546,000 in 2005), according to *The Guardian*. Gill Phillips, one of *The Sunday Times*' lawyers who dealt with the Armstrong litigation, was interviewed for a Jan. 22, 2013 *Guardian* story. "The way British libel laws are, the burden of proof lay with the paper," Phillips said. "This makes it very difficult for investigative journalism ..., particularly when the evidence points to guilt, but doesn't actually prove it." According to a Jan. 18, 2013 article in *The Guardian*, *The Sunday Times* is now attempting to reclaim its settlement money from Armstrong, as well as recoup its own legal fees and interest, a sum of close to £1 million (\$1.51 million in early 2013). In an interview with the *Press Gazette* for

an Oct. 12, 2012 story, Andy Sutcliffe, former editor of the British magazine *Cycling Weekly*, expressed regret over not investigating the possibility of Armstrong's doping, even though he and his staff were aware that doping was widespread in the sport. "[T]he idea of the rest of us doing our jobs, knowing this [rampant doping] was going on, the idea of some small cycling journalist thinking they'll go up against Lance Armstrong when News International [who owned the *Sunday Times*] had lost became very unlikely," Sutcliffe said. Some reporters admitted to and apologized for believing in Armstrong. ESPN columnist Rick Reilly, a staunch defender of Armstrong's innocence throughout his career, wrote a column on Jan. 17, 2013 in which he admitted his own guilt in believing Armstrong. "I guess I should thank [Armstrong] for finally admitting his whole magnificent castle was built on sand and syringes and suckers like me," he wrote, "You're sorry, Lance? No, I'm the one who's sorry."

Oscar Pistorius' Alleged Murder of his Girlfriend Challenges His Portrayal as a Hero

South African sprinter Oscar Pistorius made history at the 2012 London Olympics by becoming the first double-amputee to compete in track-and-field at the Olympic Games. Pistorius advanced to the semi-finals of the 400-meter dash, and he ran on the South African 4x400-meter relay team that finished eighth. Pistorius also won two gold medals and a silver medal in the 2012 Paralympic Games. Pistorius was born without fibula bones in both legs, leading doctors to amputate his legs below the knee. During his track career, Pistorius has run on J-shaped carbon-fiber prosthetics. Critics have claimed that Pistorius' prosthetics give him an unfair advantage against able-bodied runners due to their light weight and their ability to generate greater force against the ground than lower leg muscles, according to an article published in the April 2010 *Journal of Applied Physiology*. Meanwhile, Pistorius' supporters saw him as a hero for people with disabilities.

On Feb. 14, 2013, Pistorius was arrested and charged with the murder of his girlfriend, model Reeva Steenkamp. According to the AP, police arrived at Pistorius' Pretoria home to find that Steenkamp had sustained three gunshot wounds. Police recovered a 9mm pistol belonging to Pistorius. Prosecutors officially charged Pistorius with pre-meditated murder on February 19, alleging that Pistorius shot Steenkamp through a closed door when she hid in the bathroom after an argument, according to the AP. Pistorius denied the charge, saying he thought an intruder was hiding in the bathroom after he noticed a window was open, and that he only realized that it was Steenkamp after he fired the shots. On February 23, Pistorius was released on bail, and on March 28 the terms of the bail were relaxed to allow Pistorius to travel outside South Africa. Pistorius is scheduled to appear in court next on June 4, 2013, when the prosecution will serve him with indictments, according to the AP. The Chief prosecutor said the trial could begin by the end of the year.

Pistorius' involvement in Steenkamp's death has brought some of Pistorius' less-than-heroic qualities to light, such as AP reports that police previously had responded to several "domestic disturbances" at Pistorius' residence, or another AP report that Pistorius once crashed his speed boat and police found bottles of alcohol in the wreckage. The sudden revelation of Pistorius' dark side led journalists to question why they overlooked the athlete's flaws and covered him in a predominantly positive manner. ESPN columnist Jeff MacGregor wrote on Feb. 19, 2013 that Pistorius' murder charge was "another warning to those of us in the worldwide sports hero business." South African sports journalist Graeme Joffe told CNN for a March 7, 2013 story that the "PR machine" behind Pistorius "made him untouchable" to critical

media coverage. CNN pointed to several incidents where news media, authorities and Pistorius' manager appeared to "protect" Pistorius, including Pistorius' allegedly drunken speedboat crash and Pistorius accidentally firing a handgun at an outdoor café.

Some media critics blame Pistorius' disability for enamoring journalists. William J. Peace, a blogger with a PhD in anthropology from Columbia University who has been paralyzed since he was 18 years old, wrote on his blog "Bad Cripple" on Feb. 15, 2013 that the image the media created of Pistorius amounted to "inspiration porn." In the post, Peace criticized the media for perpetuating in Pistorius what he called the "super cripp [slang for "cripple"] myth," the story of a person with a disability who overcomes the disability and is defined by his or her subsequent status as "a role model for all." People with disabilities, Peace wrote, are "not mythic beings but rather complex people that ha[ve] strengths and weaknesses," and building up heroic athletes like Pistorius "set[s] up people with a disability to fail."

Sports Journalism Seeks Answers

The downfall of these three athletes, whose prominence was long held up by blindly positive media coverage, have led sports journalists and media analysts to question what went wrong and seek answers on how to bolster the credibility of sports journalism. Raymond Boyle, a researcher at the Centre for Cultural Policy Research at the University of Glasgow, Scotland, wrote in a 2012 article for the journal *Communication & Sport* that "the issue of trust (or the lack of it) between sports stars and journalists has a long and infamous history." That history, Boyle said, has seen journalists cede more and more power to athletes and the public relations machines behind them, resulting in less and less access for journalists to inside information. One media consultant argued that the central role of the Internet in journalism today might be exacerbating the access problem.

In a Sept. 15, 2011 commentary for the Poynter Institute, Jason Fry, a former columnist for the Indiana University National Sports Journalism Center, observed that the Internet has put sports journalists and the public relations offices for sports organizations in direct competition with each other. Fry argued that sports teams — which are simultaneously newsmakers and entertainment businesses — and sports journalists have traditionally kept what he calls a "tacit bargain," in which sports journalism outlets "got access and readers, while teams got publicity and customers." Now, Fry said, the Internet has created an environment where "teams are publishers, and athletes can speak directly to fans, [and] the cost-benefit analysis of opening locker rooms to journalists changes." The effect of such an environment, Fry said, is that sports fans will be "largely content with in-house stories, indie blogging, highlights on demand and athlete tweets, and will dismiss talk of journalism as a civic mission as special pleading."

Some media analysts have attributed the lack of independent verification in these stories, particularly the Te'o story, to a broader problem within sports journalism of carelessly re-attributing facts. Eric Deggans, a columnist for Indiana University's National Sports Journalism Center, wrote on Jan. 18, 2013 that "features on well-known athletes often include details cribbed from other, trusted media outlets — with full attribution of course, but little verification. So if CBS, ESPN and *Sports Illustrated* miss debunking a huge lie in an athlete's background, it increases the possibility that lie will get repeated more often."

ESPN's MacGregor wrote in his Feb. 19, 2013 column, "Sports runs on profitable illusions of heroism and goodness and wisdom, too. We just add statistics." To combat these illusions, Deggans offered the following advice for sports journalists in his Jan. 18, 2013 column: "In the middle of rushing toward the story everyone wants to believe and journalists all hope to tell, we've all got to

stand back from the pressures for speed and conformity to ask: Is this real?"

NBA's Jason Collins Announces that He Is Gay, Sparks Media Debate

On April 29, 2013, NBA center Jason Collins, who played for both the Boston Celtics and the Washington Wizards during the 2012-13 season, announced in a *Sports Illustrated* cover story that he is gay. Although Collins was not signed with an NBA team at the end of the season, he has yet to officially retire from the league, thus making him the first active player to come out as gay

"When teams are publishers, and athletes can speak directly to fans, the cost-benefit analysis of opening locker rooms to journalists changes. Like all middlemen in the digital world, they're endangered."

— Jason Fry
Former Columnist,
Indiana University's National Sports Journalism Center

in one of the four so-called major North American sport leagues: the National Basketball Association (NBA), the National Football League (NFL), Major League Baseball (MLB), and the National Hockey League (NHL). Collins, 34, follows a handful of athletes from these leagues who came out after retiring, including John Amaechi (NBA), Esera Tuaolo and David Kopay (NFL), and Billy Bean and Glenn Burke (MLB). Soccer player Robbie Rogers, who has played for the U.S. national team and for Leeds United in the English Premier League, came out in February 2013. "I'm glad I'm coming out in 2013 rather than 2003. The climate has shifted; public opinion has shifted," Collins said in the *Sports Illustrated* story. Collins cited President Obama's and NFL players Chris Kluwe's and Brendon Ayanbadejo's support of same-sex marriage as "impressing" him. According to a March 2013 *Washington Post*-ABC News poll, 58 percent of Americans support legalizing same-sex marriage and 36 percent do not support it. Those numbers are almost the reverse of a *Washington Post*-ABC News poll conducted in September 2003, which showed that 37 percent of Americans supported legalizing same-sex marriage and 55 percent did not support it.

Collins' announcement sparked debate on how the news media should cover LGBT athletes in particular, adding another element to the ongoing discussion on how the media should cover LGBT issues in general at a time when, as Collins said, "public opinion has shifted" toward greater support of LGBT causes. Should journalists play the role of advocates for LGBT issues, or should they take a neutral approach in covering such issues? Questions also remain about what "advocacy" or "balance" means in the context of covering LGBT issues. The National Lesbian and Gay Journalists Association (NLGJA), which describes itself as an organization of journalists that works to "foster fair and accurate coverage of LGBT issues," offers its perspective on how journalists should cover "both sides" in LGBT stories. "To provide balanced coverage, reporters must talk to opponents as well as proponents," the organization states on its website. However, the organization highlights that the line between balance and advocacy is a thin one. "Who you go to, however, makes a world of difference in your audiences' understanding of the issue," it states on its website,

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adding, “Sometimes it’s helpful to step back and ask yourself what you would do if you were writing the story about a different minority group.”

Some journalists voiced their support for Collins. ESPN columnist Rick Reilly called Collins “the Jackie Robinson of gay athletes” and “an agent of change” in an April 30, 2013 column. ESPN reporter Kevin Arnovitz wrote in an April 29, 2013 column for ESPN’s TrueHoop blog, “We shouldn’t wait for everyone to be ready before we create the environment for a guy like Collins to thrive — we should *get* ready.” Former CNN host Larry King tweeted on April 29, 2013, “Congrats Mr. @jasoncollins34 on your courage to come out, you have helped paved [*sic*] the way for others - #homophobia is dead in sports - I hope!” Eric Deggans wrote in an April 30, 2013 column for the National Sports Journalism Center at Indiana University, “Collins may have done sports journalists a major favor by making it plain that anti-gay speech is no longer a perspective to receive equal consideration in the marketplace of ideas.” Deggans added that Collins’ story might help journalists “get right with how it treats gay players.”

Critical commentary of Collins’ announcement was met with backlash. ESPN reporter Chris Broussard said in an interview on the ESPN show “Outside the Lines” on April 29 that homosexuality was an “open rebellion” against God and that “there’s a lot Christians in the NBA and just because they disagree with that lifestyle, they don’t want to be called bigoted and intolerant and things like that.” Tony Manfred, a reporter for *Business Insider*, criticized ESPN for the Broussard interview in an April 30, 2013 column, saying, “ESPN knew exactly what they were getting themselves into, and it’s their fault more than Broussard’s for creating a situation that they’ve now apologized for.”

Following outcry on social media regarding Broussard’s remarks, ESPN said in a statement on April 30, “We regret that a respectful discussion of personal viewpoints became a distraction from today’s news. ESPN is fully committed to diversity and welcomes Jason Collins’ announcement.” On May 1, 2013, Howard Kurtz, former Washington bureau chief for *The Daily Beast*, wrote a post on his blog “Spin Cycle” criticizing Collins for not telling the full story about being engaged to former Stanford basketball player Carolyn Moos, whom Collins dated for eight years. Collins said in the *Sports Illustrated* article, “When I was younger I dated women. I even got engaged,” but he did not give any more details, including that he broke off his engagement to Moos one month before the wedding in 2009. Collins told Moos he was gay a few days before the *Sports Illustrated* article ran, and Moos expressed her support for Collins, according to Rick Reilly’s April 30 column. Kurtz also criticized the media for not digging deeper into that story. “Collins was hailed by the media and other public figures for having the courage to tell his story,” Kurtz wrote. “I’m sure it wasn’t easy becoming the first male athlete in a major sports league to come out as gay. But I have to assess a foul for the incomplete nature of the disclosure.” Kurtz and *The Daily Beast* “parted ways” on May 2, according to a tweet from editor-in-chief Tina Brown, who did not say whether Kurtz’s leaving was related to his blog post.

Another issue facing journalists is how momentous they should consider Collins’ announcement. Drew Magary, a correspondent for *GQ* magazine and a staff writer for Deadspin, wrote in a column for *GQ* that coverage of LGBT issues in the news media often seems overwhelming. However, Magary argued, “[P]erhaps

it has to be [overwhelming] in order to overcome the idea that there’s still some sort of bizarre ethical loophole that allows you to condemn homosexuality but do it out of love and compassion. That kind of thinking has been institutionalized across wide swaths of the country, so perhaps it takes a healthy dose of persistence [by the news media] to break that groupthink.” Magary argued that “the new meathead talking point when dealing with news about gay athletes” is not to react to a story like Collins’ announcement with homophobia, but rather with “bloated indifference,” which Magary described as arguing that the story is not a big deal because a person feels “injured by having to hear about gays all the time.” Magary distinguished that type of indifference with indifference that arises out of gay athletes

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— Eric Deggans
Columnist,

Indiana University’s National Sports Journalism Center

becoming normal. “There will come a time when a sports star comes out of the closet and no one will care,” Magary wrote. “Not the media. Not the Internet. Not teammates. Nobody. But that will be a different kind of indifference.”

The coverage of Jason Collins’ coming out has added a new wrinkle to the issue of men’s sports receiving more coverage than women’s sports. Former Baylor University basketball player Brittney Griner, the number-one overall pick in the 2013 WNBA draft, came out to the public, after having already told family and friends she was gay, in an interview with *Sports Illustrated* on April 17, 2013. During the interview, moderator Maggie Gray asked Griner, along with Elena Della Donne and Skylar Diggins (the second and third picks in the 2013 WNBA draft, respectively), whether there was a difference between men’s and women’s sports in terms of tolerance of teammates’ sexuality. “In our sport, we’re fine with it,” Della Donne said. *Sports Illustrated* columnist Jon Wertheim called the difference in the news media reacting to male and female athletes coming out a “double standard” in an April 30, 2013 column. “Brittney Griner comes out and we scarcely shrug,” Wertheim wrote. “Jason Collins comes out and ka-boom!”

Collins had not signed with an NBA team at the time the *Bulletin* went to press. Eric Deggans wrote in his April 30 column that if Collins does play in the NBA again, the challenge for journalists covering Collins, and future athletes who come out, will be “balancing the player as a symbol with the player as a person,” and “recogniz[ing] his groundbreaking status while also giving him the scrutiny as player any professional athlete demands.” (For additional information about the ethics surrounding sports reporting, see “Silha Spring Ethics Forum Discusses Issues Facing Sports Journalists” on page 31 of this issue of the *Silha Bulletin*.)

— BRETT JOHNSON
SILHA RESEARCH ASSISTANT

Justice Department Secretly Subpoenas Associated Press Phone Records

BREAKING NEWS

On May 10, 2013, the Department of Justice (DOJ) notified the Associated Press (AP) that telephone records listing incoming and outgoing numbers of individual AP reporters, the general AP office numbers in New York, Washington, D.C., and Hartford, Conn., and the main number for AP reporters in the House of Representatives press gallery, had been obtained from the AP's telephone providers. "In all," the AP reported, "the government seized the records for more than 20 separate telephone lines assigned to AP and its journalists in April and May 2012. The exact number of journalists who used the phone lines during that period is unknown, but more than 100 journalists work in the offices where phone records were targeted, on a wide array of stories about government and other matters."

The AP reported that the government did not explain the reason for the subpoena, but the wire service speculated that the government may be seeking the sources for a May 7, 2012 AP story written by reporters Matt Apuzzo and Adam Goldman, with contributions from reporters Kimberly Dozier, Eileen Sullivan and Alan Fram, working with editor Ted Bridis. Their April and May 2012 phone records were among the records subpoenaed by the government. The story was about CIA efforts in Yemen to stop an al-Qaida plot to bomb an airliner bound for the United States. According to a May 16, 2013 story in the *Los Angeles Times*, the CIA's operation included a double agent who allegedly offered to be a suicide bomber, but once he received the bomb, turned it over to the FBI. The agency had hoped the double agent would have been able to gain access to other members of al-Qaida, such as Ibrahim al-Ashiri, noted for his ability to build bombs. The double agent had provided additional information that had been instrumental in another operation: a U.S. drone strike that killed senior al-Qaida leader Fahd Mohammed Ahmed al-Quso in May 2012, according to National Public Radio (NPR). But the May 2012 AP story made any further activity by the double agent impossible, according to a May 17, 2013 story in *The Seattle Times*.

On May 14, 2013, AP President and CEO Gary Pruitt issued a statement saying that the May 2012 story had been held "until the

government assured us that the national security concerns had passed." The AP decided to publish the story after the White House released a statement in May 2012 that there was no further threat of an airliner attack by al-Qaida at that time, Pruitt said. The story contained "important information and the public deserved to know it," Pruitt added.

The AP did not receive advance notice of the DOJ's subpoena. According to the U.S. Attorney General's guidelines, 28 C.F.R. §50.10, the government must notify news organizations before subpoenas for phone records are issued, giving the news organization the opportunity to contest the subpoena and to protect itself from any surveillance that might impair its newsgathering functions. (For additional information about the Guidelines, see "Silha Bulletin Guide to Journalists' Privilege" in the Spring 2008 issue of the *Silha Bulletin*.) However, the DOJ relied on an exemption to the guidelines, informing the AP in its May 10, 2013 notification to the news agency that "prior notification can be waived if such notice ... might 'pose a substantial threat to the integrity of the investigation.'" *The New York Times* reported that as of May 15, the AP was still trying to determine whether any phone companies had tried to contact the news agency before complying with the subpoenas. A spokesperson for Verizon Wireless, Debra Lewis, was quoted in *The New York Times*, saying the company "complies with legal processes for requests for information by law enforcement," but did not elaborate further.

In a May 13, 2013 letter to Attorney General Eric Holder, Pruitt claimed the "sheer volume" of the Justice Department's request was overbroad. Pruitt wrote that the information the government sought was "far beyond anything that could be justified by any specific investigation," and "there can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations, and disclose information about AP's activities and operations that the government has no conceivable right to know." Pruitt added, "We regard this action by the Department of Justice as a serious

interference with AP's constitutional rights to gather and report the news." Pruitt further "demanded the return of the phone records and destruction of all copies."

The decision to subpoena the AP's records was made by Deputy Attorney General James Cole at the request of U.S. attorney for the District of Columbia, Ronald Machen, who is conducting the criminal investigation into who may have leaked information about the double agent to the AP. According to a May 15, 2013 article in *The Wall Street Journal*, Attorney General Eric Holder had recused himself from the investigation because he was interviewed by the FBI in connection with the probe, and had "frequent contact with the media," according to a May 14, 2013 story in *USA Today*. Because Holder had recused himself, it was Cole who requested the AP's phone records. Nevertheless, Holder defended the DOJ's action while answering questions at a press conference on May 14, contending the information in the AP article was "if not the most serious, in the top two or three most serious leaks that I've ever seen. It puts the American people at risk, and that is not hyperbole. ... Trying to determine who was responsible for [the leak] I think required very aggressive action." The Justice Department later released a letter written by Cole stating that the records had been obtained only after other avenues had been exhausted, including, according to *The New York Times*, over 550 interviews and a review of "tens of thousands" of documents. Cole also stated that the subpoenas had not sought the content of the phone calls, adding that the AP records "will not be provided for use in any other investigations." Cole's letter is available online at <http://www.scribd.com/doc/141466506/Justice-Department-letter-to-the-Associated-Press>.

Pruitt replied that Holder's and Cole's response did not address why notifying the AP in advance would have compromised the investigation, and what, exactly, the government is investigating. Pruitt's letters from May 13 and 14 are available online at <http://blog.ap.org/2013/05/13/ap-responds-to-intrusive-doj-seizure-of-journalists-phone-records/>.

First Amendment advocates have criticized the DOJ's seizure of the AP's phone records. Floyd Abrams, one of the attorneys who represented *The New York*

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Times in the Pentagon Papers case (*New York Times v. United States*, 403 U.S. 713 (1971)), told *The Daily Beast*, that the seizure was “an egregious overreaction. Why couldn’t [the DOJ] put this issue before a judge? What they have done is foreclose any meaningful response by the AP. This isn’t just seeking a record of one journalist for one day. This is breaking and entering into the heart of the journalistic process of the Associated Press.”

On May 19, 2013, the *Washington Post* reported that David Schulz, a partner with the law firm of Levine, Sullivan, Koch & Schulz, who represents the AP, said he is working with the news agency to “review our ability” to take countermeasures, even though the records were obtained by the government over two months ago. “[The] government acted as judge, jury, and executioner,” Schulz said. “We’re either going to have to go to court or we’re going to have to have the Justice Department acknowledge problems or have Congress step in [to ensure the passage of a federal shield law.] We’re not going to go away.” However, Schulz acknowledged that the chances of success are “not all good,” citing the federal appeals court decision in *New York Times v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). In that case, the U.S. Court of Appeals for the Second Circuit decided that the government could subpoena reporters’ phone records concerning stories about Islamic charities that were written in the wake of the Sept. 11, 2001 attacks. (For more about the *Gonzales* case, see “Reporter’s Privilege News: Supreme Court Rejects *New York Times*’ Motion to Block Access to Reporters’ Phone Records in Leak Investigation” in the Winter 2007 issue of the *Silha Bulletin*.)

The DOJ’s apparent failure to comply with the Attorney General’s guidelines also prompted outrage from many news organizations. More than 50 media groups, including ABC, Inc., American Society of News Editors, Cable News Network, Inc., The New York Times Company, NPR, Inc., POLITICO LLC, Reporters without Borders, and the Society of Professional Journalists, joined a letter to Holder and Cole prepared by the Reporters Committee for Freedom of the Press (RCFP), stating that the DOJ “appears to have ignored or brushed aside almost every aspect of the guidelines.” Specifically, the news organizations argued, the DOJ had an obligation to inform and negotiate with the AP before beginning the investigation. Instead, it issued a subpoena that was overbroad and that should have been limited to relevant records within a short time period, rather than “an initial

investigative step taken as part of a prosecutor’s desire to gather up even the most remote material when beginning an investigation.” The DOJ should have first sought the information from alternative sources, the letter continued, and should have obtained the approval of the Attorney General in advance, which would have minimized the possibility that “abusive practices would undermine the sensitive relationship between journalists and their sources, and between the press and the government.” The letter is available online at <http://apps.washingtonpost.com/g/page/politics/media-coalition-letter-of-protest-to-attorney-general-eric-holder/148/>.

When asked at a press conference on May 15, 2013 about the possibility of enacting a federal shield law that might have blocked the subpoena, President Barack Obama cited national security concerns, but acknowledged that there is a “flip side.” “[W]e also live in a democracy where a free press, free expression, and the open flow of information helps hold me accountable, helps hold our government accountable, and helps our democracy function.” He added that, “[T]he whole goal of this media shield law ... was finding a way to strike that balance appropriately. ... I think now is the time for us to go ahead and revisit that legislation. I think that’s a worthy conversation to have, and I think that’s important.” *Bloomberg Businessweek* reported that Sen. Charles Schumer (D-NY) has been asked by presidential staff to reintroduce the 2009 shield legislation he co-sponsored. (For additional information about attempts to pass a federal shield law, see “Journalist Subpoenas and Shield Laws: Shield Law Bills Introduced Again in U.S. House and Senate” in the Winter 2009 issue of the *Silha Bulletin*, “Reporter Shield Law Update: Utah High Court Creates Privilege; Hawaii Considers Bill; Federal Effort Slow” in the Winter 2008 issue, and “Reporters Privilege News: Federal Shield Law Introduced in 109th Congress” in the Winter 2005 issue.)

If a federal shield law like those proposed previously had been in place when the DOJ subpoenaed the AP’s phone records, a judge, not a DOJ official, would have decided whether the advance notification to the news agency would have posed a substantial threat to the investigation. “The difference is that instead of DOJ unilaterally making that determination, the department would have to convince a judge that this was the case,” Jane E. Kirtley, Silha Center Director and Silha Professor for Media Ethics and Law told the *Washington Post* in a May 15, 2013 interview.

But even if the proposed bill had been enacted, it would have contained exemptions for disclosures threatening national security. Trevor Timm, co-founder and the executive director of the Freedom of the Press Foundation, wrote in a May 16, 2013 posting on the organization’s website that a similar bill will not help in situations like the AP’s because “virtually the only time the government subpoenas reporters, it involves leak investigations into stories by national security reporters. So it’s hard to see how this bill will significantly help improve press freedom.”

Whether or not a federal shield law is enacted, this latest incident with the AP’s phone records is yet another example of the Obama administration’s record of pursuing and prosecuting those who leak information to the press. A June 20, 2012 *New York Times* story stated that Obama has “twice as many such cases than all previous presidential administrations combined.” These actions have raised comparisons between the Obama administration and that of Nixon. Kirtley told the *Pittsburgh Tribune-Review* in a May 14, 2013 article, “I’m aghast to see how relentlessly this administration and the Justice Department have been pursuing leaks.” (For additional information on the Obama administration’s pursuit of leakers, see “U.S. Supreme Court Rejects Challenge to Federal Surveillance Law” on page 14 of this issue of the *Silha Bulletin*, and “Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror” on page 17.) The Silha Center has published numerous stories about phone record subpoenas in the context of leak investigations. See “Federal Court Rulings Differ on *Branzburg* Interpretation, Reporter’s Privilege” in the Summer 2012 issue of the *Silha Bulletin*; “Judges Rebuke Government on Leak Prosecution” in the Summer 2011 issue; “Subpoenas and Reporters Privilege News: Reporters Fight Federal Subpoenas: Locy Faces Fines, Risen Subpoenaed over Sources for CIA Book” in the Winter 2008 issue; “Government Interference with the Media: Reporters Monitored at Home and Abroad” in the Spring 2006 issue; “Reporters Privilege News: Reporters’ Telephone Records Protected from Compelled Disclosure” in the Winter 2005 issue; “Reporters Privilege *In re: Special Counsel Investigation*” in the Summer 2004 issue; and “Journalists’ Records Subpoenaed in Separate Cases” in the Fall 2001 issue.

This was a developing story as the Bulletin went to press. We will continue to monitor further events as they unfold.

ELAINE HARGROVE
SILHA CENTER STAFF

U. S. Supreme Court Upholds First Sale Doctrine for Works Made Abroad in Major Copyright Decision

The U.S. Supreme Court released its 6-3 decision in *Kirtsaeng v. John Wiley & Sons*, 132 S. Ct. 1905, 2012 WL 1252751, on March 19, 2013. The court held that the first sale doctrine applies to copies of a copyrighted work lawfully made

COPYRIGHT

abroad, and means that the petitioner, a Thai national, may resell for profit in the United States, copies of books he purchased abroad. The decision has been lauded as a victory for those who lend, sell, or distribute goods made by others, like libraries and online marketplaces. For publishers and other copyright holders, the case limits their ability to determine prices based on geographic location. The full decision is available online at http://www.supremecourt.gov/opinions/12pdf/11-697_d1o2.pdf.

Supap Kirtsaeng was a native of Thailand who came to the United States for college. His family and friends sent him books that were manufactured abroad, and Kirtsaeng sold them online in the United States at significant profit. The publisher, John Wiley & Sons, sued Kirtsaeng for copyright infringement. Kirtsaeng defended his actions using the first sale doctrine. The first sale doctrine, codified at 17 U.S.C. § 109, creates an exception to copyright holders' rights and allows the lawful purchaser of a copyrighted work to sell that work after he or she has purchased it. (For more on the background of the case, see "Copyright Cases Around the Country Address Illegal Downloading, the Sale of Foreign-Made Works in the U.S., and the Aggregation of Online Listings" in the Fall 2012 edition of the *Silha Bulletin*.)

Wiley argued that language from 17 U.S.C. § 109(a), "lawfully made under this title," is limited to goods made in the United States under the Copyright Act, not overseas. The publisher asserted that "lawfully made under this title" means "made in territories in which the Copyright Act is law," which would include only the United States.

Writing the majority opinion for the court, Justice Stephen Breyer rejected this argument, stating it "bristles with linguistic difficulties." The majority concluded that § 109(a) does not mention geography and reading a geographic limitation into goods it protects would be too much of a stretch of the language. The Court agreed with

Kirtsaeng that "lawfully made under this title" means simply "in accordance with" or "in compliance with" the Copyright Act, which can include works made abroad.

The court also noted that a geographic interpretation of the doctrine would do little to "promote the Progress of Science and useful Arts" as the Constitution dictates in Article I, Section 8, Clause 8. In the opinion, the Court acknowledged

"The decision vindicates the foundational principle of the first sale doctrine – if you bought it, you own it. All who believe in that principle, and the certainty it provides to libraries and many other parts of our culture and economy, should join us in applauding the Court for correcting the legal ambiguity that led to this case in the first place."

— Library Copyright Alliance

the arguments of the American Library Association, which pointed out that hundreds of millions of books in American libraries are published abroad. If Wiley's position prevailed, the libraries would have had to get permission from every publisher before lending books produced abroad. Art museums would also have had to get permission from copyright owners before displaying works. The court concluded that "the practical problems" raised by Kirtsaeng and his *amici* "are too serious, too extensive and too likely to come about for us to dismiss them as insignificant — particularly in light of the ever growing importance of foreign trade to America."

In her dissent, Justice Ruth Bader Ginsburg criticized the majority opinion as adopting an interpretation of the Copyright Act that is "at odds with Congress' aim to protect copyright owners against the unauthorized importation of low-priced, foreign made copies of their copyrighted works." She critiqued the potential problems the majority opinion identified for libraries and others who use foreign-made works, calling the "parade of horrors . . . largely imaginary."

Reactions to the court's decision have been mixed. Publishers of content expressed concerns that if buyers of goods can sell less expensive, foreign-made works, their ability to sell goods

at different prices around the world will suffer. "We are disappointed that the U.S. Supreme Court has decided in favor of Supap Kirtsaeng and overturned the Second Circuit's ruling," Stephen M. Smith, Wiley President and CEO said. "It is a loss for the U.S. economy, and students and authors in the U.S. and around the world." Other publishers across the country lamented the decision. Tom Allen, President and CEO

of the Association of American Publishers said the decision has "significant ramifications for Americans who produce the books, music, movies and other content consumed avidly around the world." He added, "AAP expects that Congress will likely consider whether the impact of the

Court's divided ruling on the ability of US producers to effectively compete in global markets requires legislative clarification."

Other industries celebrated the decision. "[The decision] vindicates the foundational principle of the first sale doctrine — if you bought it, you own it," the Library Copyright Alliance said in an official statement. "All who believe in that principle, and the certainty it provides to libraries and many other parts of our culture and economy, should join us in applauding the Court for correcting the legal ambiguity that led to this case in the first place."

Some commentators have agreed with the court that a finding for Wiley could have been disastrous for some industries. Writing in a blog post for *Publishers Weekly* on March 20, 2013, James Grimmelmann, a law professor at New York Law School, said, "If copies made abroad aren't subject to first sale, there goes the lending right for imported books; art galleries couldn't safely display foreign paintings; and don't even think about trying to sell your imported car, which contains copyrighted software." Websites that operate markets, such as eBay and Amazon, will also benefit from the decision, according to Todd McCormick, special counsel for Sedgwick L.L.P. in New York City. The decision "protects the right to buy and sell authentic

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goods regardless of where they were created.”

A March 28, 2013 story in *The New York Times* highlighted the possible impact of the decision on new technology in a world of digital products. The article noted that a growth in markets for used digital goods might encourage creators to make digital products that diminish in quality as they age, which would hurt consumers who buy them. A possible positive consequence might be that “resales of digital products could expand access to the digital economy for lower-income Americans.”

A March 20, 2013 editorial from *The Los Angeles Times* said that the decision will make it “all but impossible for [the entertainment, software, and other copyright-holding industries] to set higher or lower prices in countries depending on the local economy.” But, the editorial argued, “[c]ourts shouldn’t assume that copyright law was designed to protect copyright holders’ slowly evolving business models.”

Decisions Highlight Intellectual Property Conflicts Between Older and Newer Technology, Freedom of Information

Several major decisions in copyright cases have highlighted important intellectual property issues that bridge the gap between older and newer technology. Textbooks sold through online marketplaces, broadcast television programs distributed by an Internet subscription service, and music downloaded illegally using online peer-to-peer sharing networks have all been the subject of copyright decisions by U.S. courts in recent months. In addition, the Connecticut Supreme Court held that federal intellectual property rights preempt state open records law in a unique decision that could limit open access to government records and strengthen copyrights for companies that contract with government agencies.

Decision in Favor of Website That Plays Broadcast Television Shows Online without Copyright Licenses Could Change Television’s Business Model

The U.S. Court of Appeals for the Second Circuit denied a preliminary injunction against Aereo, Inc., an Internet service that allows subscribers to watch broadcast television online in the New York metropolitan area, in an April 1, 2013 decision. *WNET Thirteen v. Aereo, Inc.*, 12-2786-CV, 12-2807-CV (2d Cir. 2013). Meanwhile, Aereokiller, a similar service

that was operating on the West Coast, was enjoined in December 2012 by a federal district court judge sitting in Los Angeles, Calif. in *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, CV 12-6821 (C.D. Cal. 2012). The district court’s decision directly contradicts the decision by the Second Circuit in *Aereo*. Commentators say if the Aereokiller precedent decision is upheld by the Ninth Circuit, it could threaten Aereo’s existence. Furthermore, if the current litigation results in a split between the Second and Ninth Circuits, the clash could reach the Supreme Court.

Aereo’s technology captures over-the-air television signals using one antenna per subscriber and makes a copy of the program a subscriber seeks, storing the recorded programs in a server. The subscriber can watch the programs a few seconds after they air and can save the program for later. Aereo has not paid for copyright licenses for the programs. According to an April 1, 2013 story in *The New York Times*, Aereo plans to expand to 22 new cities in the next year, including Chicago, Atlanta, Denver, Boston, and Dallas, but it will avoid the west coast to avoid the precedent set by the Aereokiller decision. On April 23, 2013, Aereo announced specific plans to launch its service in Boston on May 15, 2013.

Television broadcasters and networks sued Aereo for copyright infringement and made a motion for an injunction, arguing the owners of the copyright in the programs alone had the “public performance” right. This right, found in the Copyright Act, 17 U.S.C. § 101, gives copyright owners the exclusive right to make public performances of their work or to authorize public performances by others. The district court denied the preliminary injunction based on its reading of the word “public” in the statute. The court concluded that subscribers each had one copy, and the technology involved a subscriber transmitting a copy to him or herself. The court held that this transmission by a subscriber to him or herself did not constitute a “public performance.” In reaching its decision, the district court relied on *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). In that case, the Second Circuit concluded that a digital video recorder’s (DVR) ability to allow users to record and save programs was not a public performance and so did not violate the copyright holder’s rights.

The Second Circuit agreed with the district court. It held that because the copy Aereo provides to subscribers is unique to that subscriber and cannot be

transmitted to anyone else, the single subscriber is the only audience and does not meet the definition of “the public.” Applying the reasoning of the *Cartoon Network* decision and rejecting arguments from the plaintiffs to distinguish Aereo’s position from *Cartoon Network*, the court declined to overrule its decision in *Cartoon Network*. The full decision is available online at <http://caselaw.findlaw.com/us-2nd-circuit/1626605.html>.

Many have commented that the Second Circuit’s decision could have far-reaching effects. Wiley Rein LLP attorneys Bruce G. Joseph, Andrew G. McBride, Karyn K. Ablin, and Jennifer L. Elgin wrote that this decision coupled with *Cartoon Network* “provide[] comfort to technology companies seeking to comply with copyright law while devising innovative means of delivering video content and allowing consumers to time-shift, space-shift and device-shift content to which they have lawful access,” in an April 2, 2013 post.

The plaintiffs, including Fox, PBS, ABC, and NBC, released a statement following the decision. “Today’s decision is a loss for the entire creative community,” they said. “The court has ruled that it is O.K. to steal copyrighted material and retransmit it without compensation. While we are disappointed with this decision, we have and are considering our options to protect our programming.” Some broadcast networks have responded forcefully. In a National Association of Broadcasters speech on April 8, 2013, Chase Carey, president and chief operating officer of News Corp., which owns Fox, told the audience that Fox would pursue all of its legal options, which include going to trial on the issue of copyright infringement. Beyond legal remedies, he said, “If we can’t have our rights properly protected through legal and political avenues, we will pursue business solutions.” He suggested that Fox could make its broadcast programming available by subscription only. “It’s not a path we’d love to pursue,” Carey said. “But we’re not going to sit idly by and let people steal our content.”

Univision chairman Haim Saban adopted Carey’s concerns in a statement on April 8, 2013. “To serve our community, we need to protect our product and revenue streams and therefore we too are considering all of our options — including converting to pay TV.” The *Times* contended that the ruling could force broadcasters to work more quickly to stream programming to mobile devices and tablets. It could also spark a flurry of lobbying to have Congress change the Copyright Act. The FCC has called for public comments about whether it should

change regulations to include Internet-based video services like Aereo in the category of content distributors that must obtain permission and pay for a license to retransmit programming.

Aereo has asserted that it created its technology to comply with copyright law as it stands. “Frankly, the conclusions were reached on the merits of the technology,” Chet Kanojia, Aereo CEO, said in a phone call for an April 9, 2013 post by journalism think tank Poynter. “We set out to comply with the law, and so far, the courts have sided with us.” Kanojia observed that consumers now want to view content wherever they are, using the Internet, mobile devices, tablets, and other new technology. Kanojia said, “The macro trend is, people want access to content, and access to television wherever they are.”

In light of its plans to expand its business, Aereo filed a complaint on May 6, 2013 in U.S. District Court for the Southern District of New York in Manhattan seeking a declaratory judgment that its activities do not infringe on broadcasters’ copyrights. This action, if successful, would serve as a nationwide injunction preventing further litigation arguing that Aereo’s technology infringes broadcasters’ copyrights. Aereo argues in its complaint that CBS and other broadcasters’ threats to file litigation in other jurisdictions constitute an impermissible “do-over” of already litigated issues and these suits would waste judicial resources. In a statement, a CBS spokesperson said, “These public relations and legal maneuvers do not change the fundamentally illegal nature of Aereo’s supposed business.” *Aereo, Inc. v. CBS Broadcasting Inc.*, et al, 13-CV-3013 (S.D.N.Y. 2013). The full complaint is available online at <http://www.scribd.com/doc/139740223/Aereo-Complaint-for-Declaratory-Judgment-FINAL-FILED>.

In California, Judge Wu agreed with the broadcasters’ reasoning in his decision to enjoin Aereokiller in *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*. Judge Wu concluded that, unlike the Second Circuit’s finding, the technology that Aereokiller used resulted in a public, not private, performance and infringed on the broadcasters’ copyrights. The full decision is available online at <http://www.wileyrein.com/resources/documents/12%2012%2027%20Aereokiller%20District%20Court%20Decision%20on%20PI.pdf>. Aereokiller has appealed the decision to the U.S. Court of Appeals for the Ninth Circuit and the parties are currently in the process of submitting briefs in the case. It remains to be seen whether the Ninth Circuit will affirm the district court’s decision, which

means a conflict would exist between how the Second and Ninth Circuits view this technology’s liability for copyright infringement. The attorneys at Wiley Rein LLP wrote that “the decision is likely to spawn additional litigation and could reach the Supreme Court.”

Connecticut Supreme Court Holds that Federal Copyright Law Trumps Federal Freedom of Information Act

In a decision seen as a major victory for copyright holders who license their intellectual property to government agencies, but as a blow to open records law advocates, the Connecticut Supreme Court unanimously held on Jan. 29, 2013, that the federal Copyright Act, 17 U.S.C. § 101, preempts the Connecticut Freedom of Information Act, Conn. Gen. Stat. § 1-200.

The case, *Pictometry International Corporation v. Freedom of Information Commission*, 59 A.3d 172 (Conn. 2013), dealt with computerized aerial photographic images of Connecticut and the software and metadata that Pictometry, an aerial imaging company, created. The metadata includes the time the photograph was taken, the angle at which it was taken, and the camera’s position. Pictometry had agreed with the Connecticut Department of Information Technology that it would license the images, metadata, and software to the state’s Department of Environmental Protection (DEP). Stephen Whitaker, a Connecticut resident, requested the images, data, and software under the state’s Freedom of Information Act. The Department of Environmental Protection denied his request to receive the images for only a “minimal fee,” which is what the FOIA dictates public records normally cost. The DEP told Whitaker he would have to pay the \$25 per image licensing fee that the state and Pictometry had agreed to so he could receive copies of all 400,000 images he requested, for a total of approximately \$9 million.

Whitaker appealed to the Connecticut Freedom of Information Commission (FOIC), the state’s body that hears complaints from parties who have been denied access to records or meetings of public agencies. The FOIC denied part of Whitaker’s request, concluding that the software and metadata he requested were Pictometry’s trade secrets under Section 1-210(B)(5)(A) of the FOIA and could not be disclosed. However, the FOIC required disclosure of the images for a minimal fee, less than \$25 per image, because it concluded the Connecticut FOIA did not include an exemption for the copying of works made pursuant to the Copyright Act. It stated that the Copyright Act did

not qualify as a “federal law” under the Connecticut FOIA to prevent copying of Pictometry’s images. It concluded that Pictometry could vindicate its copyright in the images by obtaining the licensing fees not from Whitaker, but from the DEP. Pictometry and Whitaker appealed the FOIC’s decision to the Connecticut Superior Court for the Judicial District of New Britain, which agreed with the FOIC and dismissed the appeals. Pictometry then appealed to the Connecticut Supreme Court.

The Connecticut Supreme Court interpreted the federal law exemption of the Connecticut FOIA, Conn. Gen. Stat. §1-210(a), in its opinion. The statute reads: “Except as otherwise provided by any federal law ... all records maintained or kept on file by any public agency ... shall be public records....” Although the lower courts determined that the Copyright Act did not qualify as a “federal law” under the Connecticut FOIA to prevent copying of Pictometry’s images, the Supreme Court held that copying the images would result in a conflict between the Connecticut FOIA and the federal Copyright Law. When state law conflicts with a valid federal law, the federal law is supreme, according to the Supremacy Clause, Article VI, Clause 2 of the United States Constitution, and United States Supreme Court jurisprudence.

Chief Justice Chase T. Rogers wrote, “[A]lthough the federal law exemption does not entirely exempt copyrighted public records from the act, it exempts them from copying provisions of the act that are inconsistent with federal copyright law.” The court also held that neither it nor the FOIC had jurisdiction to apply federal law to decide whether the use of the images would be “fair use” under the Copyright Act because federal courts hear copyright cases exclusively. Fair use, 17 U.S.C. § 107, is a doctrine that allows for the limited use of a copyrighted work without having to obtain permission from the holder of the copyright. The court also concluded that if the state agency does have to disclose records that are subject to a licensing agreement with a third party, the agency can pass the licensing fees on to the individual making the FOIA request.

Chris Barrow, Pictometry’s president and CEO, said in an official statement, “This decision encourages companies that hold intellectual property to continue to do business with state agencies, as they know the value of their assets will be preserved.” However, the ruling does serve as an impediment to individuals’ ability to obtain records from government agencies in Connecticut.

New York District Court Protects the Associated Press' Copyrighted Content from Aggregation

A recent federal district court decision out of New York held that use of the Associated Press' content by aggregating it was not fair use under the Copyright Act. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 12-CV-1087 (2013). The opinion is available online at <https://docs.google.com/file/d/0B3JqcQ-Lxt1MLUN2djdMkRfNXM/edit>.

Meltwater is a website based in Norway. It uses a computer program to "scrape," or gather, news stories from around the Internet, including stories written by the Associated Press (AP). It used this news to create daily news roundups and included 4.5 to 61 percent of the AP's full story in its piece. Customers paid Meltwater to provide these roundups, and the AP received no compensation.

In arguments before the U.S. District Court for the Southern District of New York in Manhattan, the AP alleged that the use of its articles was not a "fair use" under the Copyright Act. Fair use is often asserted to allow for academic uses, criticism, and news reporting, among other purposes. Four factors from the Copyright Act, 17 U.S.C. § 107 govern whether a use is fair: 1) the purpose and character of the use, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion of the copyrighted work used in relation to the work as a whole, and 4) the effect of the use on the potential market for or value of the copyrighted work.

Meltwater argued that it was acting as a news engine, driving its customers from its snippets of news to the AP's actual story online. Judge Denise Cote disagreed, concluding that "[i]nstead of driving subscribers to third-party websites, Meltwater News acts as a substitute for news sites operated or licensed by AP." Discovery in the case showed that only .08 percent of Meltwater's consumers continued on to view the actual story posted online by the AP, while search engine Google's users clicked on actual news organizations' stories after searching for the news in 56 percent of cases. On these facts, the court concluded that "Meltwater News is an expensive subscription service that markets itself as a news clipping service, not as a publicly available tool to improve access to content across the Internet." Framing the business as a search engine was a key distinction because search engines have legal protection from paying licensing fees if

they merely point users to a location where information can be found.

Further, the court concluded the use was not "fair" because many of Meltwater's articles used the lede, or beginning, of the AP's stories. The court concluded that the lede takes "serious journalistic skill to craft" and thus, using it amounts to using the "heart of the work" and weighs against fair use.

The Electronic Frontier Foundation (EFF), which filed an *amicus* brief on behalf of Meltwater, disagreed with the court's analysis of whether Meltwater used the "heart of" the AP's work. It argued in

"Meltwater News is an expensive subscription service that markets itself as a news clipping service, not as a publicly available tool to improve access to content across the Internet."

— Judge Denise Cote
U.S. District Court
for the Southern District of New York

a March 21, 2013 post that the heart of news articles is not the lede, but rather the factual information sought by the public. Facts are not to be the subject of copyright under 17 U.S.C. § 103.

"We're disappointed by the court's decision and we strongly disagree with it," Jorn Lyseggen, CEO of Meltwater, said. "We're considering all of our options, but we look forward to having this decision reviewed by the Court of Appeals, which we are confident will see the case a different way."

AP President and CEO Gary Pruitt released a statement calling the decision "a victory for the public and for democracy." He said, "For years all of us have been hearing that if it is free on the Internet, it is free for the taking. This is an important ruling for AP and others in the news business who work so hard to provide high-quality original news reports on which the public relies."

Anthony Dreyer, a copyright attorney at Skadden, Arps, Slate, Meagher & Flom L.L.P. in New York City, who was not involved in the case, told Reuters for a March 26, 2013 story that while traditional search engines are likely immune from the ruling, other types of clipping services and blogs could be affected. "[The decision] would mean either taking out a license from the content provider or putting in significant creative input of their own in which they're significantly transforming the

article" in order to legally use content from other sources, Dreyer said.

U.S. Supreme Court Denies Certiorari in Thomas-Rasset Downloading Case, \$222,000 Damage Award Stands

Without comment, the justices of the U.S. Supreme Court decided on March 18, 2013 not to hear the appeal of Jammie Thomas-Rasset. *Thomas-Rasset v. Capitol Records*, No. 12-715, 2013 WL 1091785 (2013). Thomas-Rasset was found liable for illegal downloading of music after she used a peer-to-peer file sharing service to download songs. She refused to settle her

case with the record company, and the case has bounced between courts since 2006. (For more background on the case, see "Copyright Cases Around the Country Address Illegal Downloading, the Sale of Foreign-Made Works in the U.S., and the Aggregation of

Online Listings" in the Fall 2012 edition of the *Silha Bulletin*, "Updates: Punishments for Music Copyright Infringers" in the Fall 2010 edition of the *Silha Bulletin*, and "Juries Assess Large Damages against Music File Sharers in Minnesota and Massachusetts" in the Summer 2009 issue of the *Silha Bulletin*.)

Thomas-Rasset's lawyers argued the court should review the case because the damages award of \$222,000 was not proportionate to her offense. In front of the Supreme Court, her lawyer would have argued that the Constitution limits the statutory damages that the record company can receive for illegal downloading of music.

In an email to *Huffington Post*, Thomas-Rasset's attorney, Kiwi Camara, of the law firm Camara & Sibley in Houston, Texas, indicated that Thomas-Rasset may still have some legal options because another case involving illegal downloading is still pending in the U.S. Court of Appeals for the First Circuit. There, Joel Tenenbaum, another defendant being sued by record companies, is challenging a \$625,000 award against him as being "grossly disproportionate." Either way, Thomas-Rasset has indicated she cannot afford to pay the large judgment against her, according to a March 18, 2013 story in *Huffington Post*.

— CASSIE BATCHELDER
SILHA RESEARCH ASSISTANT

U.S. Supreme Court Unanimously Upholds Virginia Law Prohibiting Out-of-State Open Records Request

On April 29, 2013 the Supreme Court of the United States released its opinion in *McBurney v. Young*, No. 12-17, holding that Virginia may limit open records requests to its own citizens. Virginia's Freedom of Information

FOIA

Act does not extend access rights to non-citizens. The decision comes as a disappointment to advocates of open government and media organizations, 53 of whom filed *amicus curiae* briefs in the case, who hoped the Supreme Court would strike down the provision as unconstitutional.

Mark J. McBurney, a resident of Rhode Island, and Roger W. Hurlbert, a California resident, sued Virginia after it would not grant them access to public documents. The Virginia Freedom of Information Act restricts records requests to Virginia citizens and news outlets that broadcast or circulate in the commonwealth. (VA Code Ann. §2.2-3700.) The petitioners filed suit under 42 U.S.C. § 1983, which allows citizens to sue for government violations of their constitutional rights. They argued that the law violates the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Section 2, Clause 1, because it denies them the right to participate in the political process in Virginia. Hurlbert, who owns Sage Information Services, a company that collects public real estate assessments for private clients, also argued that the Virginia provision violates the dormant Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3, by preventing nonresidents from engaging in business related to public records in the state.

The U.S. District Court for the Eastern District of Virginia, where McBurney and Hurlbert originally filed suit, granted summary judgment for the defendant. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439 (E.D. Va. 2011). The U.S. Court of Appeals for the Fourth Circuit agreed with the district court in February 2012 and held that the law did not violate the Privileges and Immunities Clause or the dormant Commerce Clause. *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012). (For more background of the case, see "U.S. Supreme Court to Hear Challenge to Citizens-Only Limitations on Virginia Open Records Requests" in the Fall 2012 issue of the *Silha Bulletin*.)

Writing for the high court in its 9-0 decision, Justice Samuel Alito said that the Virginia FOIA does not violate the Privileges

and Immunities Clause because there is no constitutional right of access to all of the records which FOIA laws generally cover. He noted that many FOIA laws are relatively new and "[t]here is no contention that the nation's unity foundered in their absence, or that it is suffering now" because of the citizens-only provisions that some states, including Virginia, Alabama, Arkansas, Missouri, New Hampshire, New Jersey, and Tennessee, have enacted. Alito said that only laws with a "protectionist purpose of burdening out-of-state citizens" who want

"Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden."

— Samuel Alito, Jr.
Associate Justice,
U.S. Supreme Court

to engage in a "common calling" violate this clause. The court concluded that the Virginia FOIA was not meant to provide a competitive economic advantage to Virginia citizens, but rather to ensure that the commonwealth provided access to information for its own citizens. Further, the opinion noted that McBurney and Hurlbert were eventually able to obtain the documents they wanted in other ways. "Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden," Alito wrote.

Addressing the dormant Commerce Clause claim, Alito acknowledged that the Supreme Court's jurisprudence on the clause aims to prevent "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." He concluded that the Virginia FOIA does not regulate or burden interstate commerce, but "merely provides a service to local citizens that would not otherwise be available at all." If there is a market for public records in Virginia, as Hurlbert and other data miners argued, it is a market that Virginia itself created, Alito wrote, and states may regulate markets that they themselves create. The full opinion is available online at http://www.supremecourt.gov/opinions/12pdf/12-17_d1o2.pdf.

Virginia Attorney General Ken Cuccinelli expressed satisfaction with the ruling in an April 29, 2013 statement. "FOIA is an important tool to ensure open government," he said. "But responding to FOIA requests is a financial burden on Virginia taxpayers, because while state employees are looking through documents to respond to requests, they can't do the normal work for the citizens of the commonwealth they are paid to do."

Writing for *The Atlantic*, legal scholar Garrett Epps explained on April 29, 2013

that the Virginia FOIA "does seem like discrimination at its core" and the decision may have a negative impact on the openness of political processes across state lines. "Political decisions in one state can affect people in many others," Epps wrote.

The ruling will "make reporter's [*sic*] lives harder," according to an April 30, 2013 post from the Sunlight Foundation, a nonprofit organization that advocates for open government. The Sunlight Foundation disagreed with the Court's decision that access to government records is not a fundamental right, writing that "[t]he public's right to know was at the forefront of the founder's minds." The post added, "In short, the Supreme Court has made efforts by citizens and corporations to access public information much more difficult. From now on, non-citizens will have to go through in-state intermediaries to make Freedom of Information requests, adding significant cost and expense."

Deepak Gupta, who argued the case on behalf of the petitioners before the Supreme Court, told the Reporters Committee for Freedom of the Press (RCFP) for an April 29, 2013 post that he was surprised by the unanimous decision, based on how close he perceived the case to be during oral arguments in front of the court. He said his clients will now go to the Virginia Legislature and ask them to repeal the citizens-only provision of the FOIA, and he is confident they will succeed. Gupta added, "These laws are hard to justify and most states have abandoned citizens-only policies because they are out of step with the modern information economy."

— CASSIE BATCHELDER
SILHA RESEARCH ASSISTANT

U.S. Supreme Court Rejects Challenge to Federal Surveillance Law

Two other pending federal cases continue efforts to condemn similar government surveillance activities by asserting unconstitutionality

On Feb. 26, 2013, the Supreme Court of the United States rejected a challenge to a federal law that gives the United States government broad power to eavesdrop on international phone calls and emails. The court held that the group of U.S.-based journalists, lawyers, and human rights groups that brought the action lacked standing because they could not show that they had suffered any actual injury or harm.

Writing for the 5-4 majority, Justice Samuel Alito Jr. said that the plaintiffs' fear that they were likely to be the subject of future government surveillance was too speculative to establish standing. "We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," he wrote. *Clapper v. Amnesty International USA et al.*, 133 S.Ct. 1138 (2013).

The case arose after a group of 13 attorneys, journalists, and labor, media, legal, and human rights organizations sued Director of National Intelligence James Clapper, challenging the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008 (FAA), 50 U.S.C. § 1881(a), a provision of the Foreign Intelligence Surveillance Act of 1978 (FISA) which authorizes warrantless wiretapping. The section that the plaintiffs challenged amended FISA to eliminate requirements that intelligence officials identify the specific individual they intend to target for surveillance or present probable cause supporting the belief that the target is a "foreign power or an agent of a foreign power" who may be monitored.

The group challenging the law, which included Amnesty International USA, Human Rights Watch, and *The Nation* magazine, argued in its complaint that the FAA gives the executive branch "virtually unregulated authority" to monitor American citizens in violation of the Fourth Amendment, the First Amendment, Article III of the U.S. Constitution, and the separation of powers principle. The plaintiffs specifically objected to warrantless surveillance of American

citizens who engage in no criminal activity but frequently participate in international communications as a result of their work, such as journalists conducting interviews or human rights workers engaging with individuals located internationally.

The issue before the Supreme Court was not whether the law is constitutional, but rather whether the group had legal standing to sue. In August 2009, the U.S. District Court of the Southern District of New York ruled in favor of the government, but in March 2011, the U.S. Court of Appeals for the Second Circuit reversed, holding that the lawsuit could move forward. Judge Gerard Lynch, writing for a unanimous three-judge panel, wrote that standing may be based on the reasonable fear of future injury and determined that the challenging groups' concern in this case was reasonable. Lynch wrote, "The plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct." *Amnesty International USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

On Sept. 21, 2011 the Second Circuit declined to rehear the case. The government appealed to the Supreme Court and it agreed to review the case in May 2012. The court heard oral arguments on Oct. 29, 2012. The oral arguments are available online at http://www.oyez.org/cases/2010-2019/2012/2012_11_1025. (For more on the beginning stages of the case and the related vote to extend the FAA through June 2017, see "First Amendment Challenges to Government Surveillance and Detention Programs Will Proceed," in the Summer 2012 issue of the *Silha Bulletin*.)

Before the Supreme Court, the journalists, lawyers, and human rights organizations argued that because their work often requires them to engage in sensitive communications with people located outside of the United States, it was reasonable to expect that the government would listen to those conversations. As a result, the plaintiffs claimed that they have stopped engaging in certain communications, which has had a negative impact upon their work. The group also argued that they have undertaken costly measures, such as traveling to meet with people to have conversations in person, to avoid the potential for government surveillance.

In its opinion in *Clapper*, the Supreme Court reversed the Second Circuit finding, and instead, held that the plaintiffs lacked

Article III standing because they could not demonstrate that the future injury they purportedly feared was "certainly impending" and because they could not "manufacture standing by incurring the costs in anticipation of non-imminent harm." Justice Alito wrote that only the government knows whether the plaintiffs' communications have actually been intercepted. It is, however, the burden of those bringing the challenge to show they have standing "by pointing to specific facts, not the government's burden to disprove standing by revealing details of its surveillance priorities," he wrote.

Justice Stephen Breyer dissented, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Breyer argued that the plaintiffs did, in fact, have standing, writing that "this Court has often found the occurrence of similar future events sufficiently certain to support standing." Several considerations, Breyer wrote, along with "commonsense inferences" convinced him that there was a "very high likelihood" that the government would use the authority granted under the FAA to intercept some of the communications of the plaintiffs. First, Breyer agreed that the plaintiffs engage in the types of communications the FAA authorizes the government to intercept. Second, he said the plaintiffs have a strong motive to engage in, and that the government has a strong motive to listen to, these types of conversations. "A lawyer representing a client normally seeks to learn the circumstances surrounding the crime (or civil wrong) of which the client is accused. ... Journalists and human rights workers have strong similar motives to conduct conversations of this kind," he wrote. At the same time, Breyer noted, the government also has a strong motive to conduct surveillance to learn as much as it can about suspected terrorists, their contacts and activities, and friends and family.

Third, Breyer wrote that the government's past behavior shows that it sought, and will "continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications." Further, Breyer noted the government's capacity to conduct this type of surveillance through technology and its ability to obtain information from private carriers such as AT&T and Verizon. For these reasons, Breyer concluded that in assuming that the government is doing

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its job, it is likely that the government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. “[A]s the Court concedes, the word ‘certainly’ in the phrase ‘certainly impending’ does not refer to absolute certainty. As case law demonstrates, what the Constitution requires is something more akin to ‘reasonably proximity’ or ‘high probability.’ The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands,” Breyer wrote.

Jameel Jaffer, a human rights and civil liberties attorney who is deputy legal director of the American Civil Liberties Union (ACLU), argued the case before the court. In a Feb. 26, 2013 statement, he called the decision “disturbing.” “The FISA Amendments Act is a sweeping surveillance statute with far-reaching implications for Americans’ privacy. This ruling insulates the statute from meaningful judicial review and leaves Americans’ privacy rights to the mercy of the political branches,” Jaffer said. “Justice Alito’s opinion for the court seems to be based on the theory that the FISA Court may one day, in some as-yet unimagined case, subject the law to constitutional review, but that day may never come.” The court Jaffer referred to, the United States Foreign Intelligence Surveillance Court (FISC) is a U.S. federal court that is authorized by federal law to oversee requests for surveillance warrants against suspected foreign agents. It has received much criticism, as it is rare for the court to deny FISA warrant requests. The Supreme Court’s full opinion is available online at http://www.supremecourt.gov/opinions/12pdf/11-1025_ihdj.pdf.

In a Feb. 26, 2013 story, Adam Liptak wrote for *The New York Times* that the ideological vote likely means that the Supreme Court will “never rule on the constitutionality” of the FAA. More broadly, Liptak observed that the ruling illustrated how difficult it is to challenge a wide variety of antiterrorism measures, including activities such as targeted killing using drones, “in light of the combination of government secrecy and judicial doctrines limiting access to the courts.” Stephen I. Vladeck, a law professor at American University, echoed these sentiments in an interview for the *Times* article. “Absent a radical sea change from the courts, or more likely intervention from Congress, the coffin is slamming shut on the ability of private citizens and civil liberties groups to challenge government counterterrorism policies, with the possible exception of Guantánamo,” he said.

According to Nina Totenberg’s discussion of the case on NPR’s “All Things

Considered,” also on February 26, the majority opinion’s broad language limiting the right to bring an action in court has some constitutional law experts worried about judicial access being similarly foreclosed in cases that do not involve issues of national security, for example, in cases involving property rights or the environment. As Justice Breyer posited

“The FISA Amendments Act is a sweeping surveillance statute with far-reaching implications for Americans’ privacy. This ruling insulates the statute from meaningful judicial review and leaves Americans’ privacy rights to the mercy of the political branches.”

— Jameel Jaffer
Deputy Legal Director,
American Civil Liberties Union

in his dissent, homeowners worried that the construction of a dam would flood their property would be basing their case on the probability of harm. Harvard Law Professor Richard Fallon told NPR that although he saw the *Clapper* decision as “very significant,” for the FISA statute, it is “probably not terribly significant for other standing cases.”

Todd Hinnen, who served in high-level anti-terrorism positions in both the Bush and Obama administrations, told NPR he saw the FISA decision as “limited to the facts of this case and potentially other cases involving national security authorities.” The court, he told NPR, “essentially held that where plaintiffs are forced by the secret nature of the government activity to speculate as to whether they’ve been directly harmed by that activity, they did not have standing. It’s a holding that, by its terms, is limited to the kinds of national security activities the court was addressing in this specific case.” But, Elizabeth Wydra of the Constitution Accountability Center called the decision a “Catch-22.” She told NPR that when plaintiffs are attempting to challenge a secret program, it is hard to gather information about its dealing, and “yet the court is seeming to require plaintiffs to get that absolute certainty before they can challenge the constitutionality of surveillance.”

In a Feb. 26, 2013 commentary for *The Guardian*, Glenn Greenwald said that the U.S. Government has constructed a “ubiquitous Surveillance State” and “repeatedly demonstrated that it intends to eavesdrop on the communications of exactly the people” who brought the lawsuit

in this case. “What’s the point of having a Fourth Amendment that bars unreasonable searches and seizures without probable cause warrants if the US government simply shrouds its unconstitutional eavesdropping with so much secrecy that it prevents anyone from challenging the legality of what it is doing?” he asked.

Supreme Court’s Holding in Clapper Does Not Affect Challenge to NSA’s Warrantless Wiretapping Program

Although the Supreme Court’s holding in *Clapper* caused many commentators to say it will be nearly impossible to challenge surveillance

programs, at least one case remains unaffected by the recent decision. The case, *Jewel v. National Security Agency* (NSA), was originally filed in 2008, by Carolyn Jewel and other residential telephone customers (collectively “Jewel”) who alleged that the federal government, with the help of major telecommunications companies, engaged in widespread warrantless eavesdropping in the United States, following the Sept. 11, 2001 terrorist attacks. Jewel filed a class action on behalf of “ordinary Americans who are current or former subscribers to AT&T’s telephone and/or Internet services” against federal government agencies and government officers in their official and personal capacities, including President George W. Bush and President Barack Obama. No telecommunications companies were listed as defendants. Jewel alleged that the government has continually illegally acquired the communications of plaintiffs by using surveillance devices attached to AT&T’s network. Jewel claimed these actions violated the First and Fourth Amendments, the doctrine of separation of powers, and a variety of statutes such as the FISA, the Electronic Communications Privacy Act (ECPA), the Stored Communications Act (SCA), and the Administrative Procedure Act (APA). The Electronic Frontier Foundation (EFF) is serving as counsel for the plaintiffs. So far, the case has bounced back and forth between the U.S. District Court for the District of Northern California and the U.S. Court of Appeals for the Ninth Circuit.

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Jewel v. NSA, No. C06-1791 VKW, 2010 WL 235075 (N.D. Cal. 2010); *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011).

On Dec. 29, 2011 the Ninth Circuit reversed the district court's dismissal of Jewel's complaint on the ground that she lacked standing. Judge M. Margaret McKeowen wrote for the three-judge panel, "In light of detailed allegations and claims of harm linking Jewel to the intercepted telephone, internet and electronic communications, we conclude that Jewel's claims are not abstract, generalized grievances and instead meet the constitutional standing requirement of concrete injury." The court also dismissed arguments that the case was inappropriate for judicial review because the issue is a political question. Further, the court dismissed the government's arguments that a heightened standing requirement is appropriate in cases involving government officials in the national security context. The court also compared the facts of the case to the Second Circuit's decision in *Clapper*. "Jewel has much stronger allegations of concrete and particularized injury than did the plaintiffs in [*Clapper*]," the court wrote. "Whereas they anticipated or projected future government conduct, Jewel's complaint alleges past incidents of actual government interception of her electronic communications." The court reasoned if the plaintiffs in *Clapper* had standing, these plaintiffs certainly should, although the Second Circuit's decision was later overturned by the Supreme Court. "We leave for the district court to consider the first instance the government's alternative arguments that Jewel's claims are foreclosed by the state secrets privilege," McKeowen wrote. The Ninth Circuit's opinion can be read in full online at <https://www.eff.org/node/68083>.

On Dec. 14, 2012 the EFF appeared again in federal district court to continue its challenge to the National Security Agency's (NSA) domestic spying program. The district court must now consider whether to adopt or reject the government's invocation of the "state secrets privilege," a legal tool that results in the exclusion of evidence from a legal proceeding based solely on affidavits submitted by the government asserting that the court proceedings might result in the disclosure of sensitive information that could endanger national security. The Supreme Court recognized this privilege in the 1953 case *United States v. Reynolds*, 345 U.S. 1. The court held that the privilege can be invoked when "there is reasonable danger" that disclosure [of evidence] will 'expose military matters which, in the interest of national security,

should not be divulged.'" (For additional information on the *Reynolds* case, see *Reynolds v. U.S.* in the Summer 2003 issue of the *Silha Bulletin*.)

According to an EFF post on Dec. 6, 2012, it argued that the NSA's program is not a secret, and it catalogued a large amount of information that has become public since revealed by *The New York Times* in 2005 through investigative reports. Declarations under oath by an AT&T whistleblower and three NSA whistleblowers, sworn testimony before Congress, investigations by government Inspectors General, and stories by major media organizations based on highly placed sources, along with public admissions by government officials all served as evidence that the program is not, in fact, a secret. As the *Bulletin* went to press, the district court had not yet issued its opinion in the case. After the *Clapper* decision, the EFF said the case "makes the *Jewel* case one of the last remaining hopes for a court ruling on the legality of the warrantless surveillance of Americans, now conducted for over a decade." The full complaint can be found online at <https://www.eff.org/files/filenode/jewel/jewel.complaint.pdf>. A video of the Dec. 14, 2012 hearing can be viewed online at http://www.uscourts.gov/Multimedia/Cameras/NorthernDistrictofCalifornia.aspx?video_uuid=tgd2h877&categoryId=48197.

California Federal District Court Holds National Security Letter Statute Unconstitutional

On March 15, 2013, the U.S. District Court for the Northern District of California held that two sections of a federal law that allows the FBI to issue "National Security Letters" (NSLs) to secretly demand subscriber records from Internet Service Providers (ISPs), telecommunications carriers, and other electronic service providers when investigating international terrorism or conducting secret intelligence activities are unconstitutional. *In re National Security Letter*, No. C 11-02173 SI (N.D. Cal. 2013).

The case arose when an unnamed telecommunications provider challenged several provisions that are part of the Electronic Communications Privacy Act (ECPA). Sections 2709 (a) and (b) of Title 18 of the United States Code provide that a wire or electronic communication service provider must comply with requests for specified categories of subscriber information if the FBI certifies that the records sought by law enforcement are "relevant to an authorized investigation to protection against international terrorism or clandestine intelligence activities," provided that an investigation of a United

States citizen are not conducted "solely on the basis of activities protected by the First Amendment."

Section 2709 (c)(1) provides that if the FBI certifies that "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person," the recipient of the NSL cannot disclose to anyone, beyond an attorney to obtain legal advice, that the FBI has sought or obtained access to this information. Section 2709 (c)(2) provides that the FBI must inform the recipient of the NSL of this nondisclosure requirement. For example, if a phone or Internet provider receives a request for information about a customer, under these provisions, the company cannot notify the customer it has been asked to disclose the information.

The other section relevant to the proceeding was 3511, which provides for judicial review of NSLs and nondisclosure orders issued under Section 2709 and other NSL statutes. A district court may set aside or modify an NSL only "if compliance would be unreasonable, oppressive, or otherwise unlawful." The judicial review provisions limit the court's discretion to modify or set aside NSLs and allow the court to close the hearings to prevent the disclosure of sensitive or classified government information.

The district court found that the nondisclosure provision and the judicial review provisions are unconstitutional on the grounds that they violate the First Amendment and separation of powers principles. Judge Susan Illston wrote that NSLs suffer from "significant constitutional defects" that violate the First Amendment because of the way they can be utilized to effectively put gag orders on companies that receive them. The order deemed the nondisclosure provision a content-based restriction that violated procedural safeguards mandated by the Supreme Court in its decision in *Freedman v. Maryland*, 380 U.S. 51 (1965). *Freedman* requires that "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the *status quo* must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." Illston further said that the nondisclosure provision is not narrowly tailored because it applies to both the content of the NSLs and the receipt of the letter itself, making the provision overbroad.

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Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror

In January 2013, former CIA agent John Kiriakou was sentenced in the U.S. District Court for the Eastern District of Virginia to 30 months in prison for violating the Intelligence Identities Protection Act by revealing the name of a fellow CIA agent to a journalist.

LEAKS

In February 2013, Pfc. Bradley Manning pleaded guilty in military court at Fort Meade, Md., to 10 of 22 charges relating to leaking military files to WikiLeaks, for which he could face up to 20 years in prison. Military prosecutors charged Manning with “aiding to the enemy” under Article 104 of the Uniform Code of Military Justice, which carries a sentence of life imprisonment. Both cases have been viewed as emblematic of a government crackdown on leakers during the Obama administration.

Kiriakou Sentenced as a Leaker, Hailed as a Whistleblower

John Kiriakou, a CIA agent from 1990 to 2004, was arrested on Jan. 23, 2012 and charged with violating the Espionage Act (18 U.S.C. § 793(d)) and the Intelligence Identities Protection Act (“IIPA,” 50 U.S.C. § 421(b)) for revealing the names of two CIA agents to two journalists, according to the criminal complaint. According to the affidavit in support of the criminal complaint against Kiriakou, sworn by FBI Special Agent Joseph Capitano, the FBI and the Department of Justice discovered Kiriakou’s leaks during an investigation in

2009 and 2010 into how “certain high value detainees” held at Guantánamo came into possession of photographs of CIA and FBI personnel. The CIA personnel included two covert agents who worked with the CIA’s Rendition, Detention, and Interrogation (RDI) Program. These photographs were included in classified defense filings, leading investigators to believe that the photographs had “been either deliberately or inadvertently disclosed, without authorization,” according to the affidavit. “Further investigations,” according to the affidavit, led investigators to learn that Kiriakou had disclosed the names of two covert CIA agents via email to two separate journalists. The journalists, who passed the names on to defense counsel, were later revealed to be Matthew Cole and Scott Shane. The second agent (“Officer B”) worked with Kiriakou in March 2002 on an operation to capture and question suspected terrorist Abu Zubaydah, an operation that the affidavit declared was classified. The affidavit is available at <http://s3.documentcloud.org/documents/286257/john-kiriakou-criminal-complaint-and-affidavit.pdf>.

Shane wrote an article for *The New York Times* on June 22, 2008 that revealed the name of the second officer, Deuce Martinez. An editors’ note published the same day by the *Times* stated that the editors believed publishing Martinez’s name “was necessary for the credibility and completeness of the article,” even though the CIA and Martinez’s lawyer asked the *Times* to refrain from going forward with the publication. The *Times* article described how

terror suspect Khalid Shaikh Mohammed was waterboarded multiple times during his interrogations, though the article stated that Martinez never waterboarded Mohammed. The article quoted Kiriakou regarding the operation to capture and interrogate Abu Zubaydah, which included waterboarding Zubaydah. Kiriakou told the *Times* that at the time he believed waterboarding was necessary, but he later came to regard the practice as torture. On Dec. 10, 2007, Kiriakou became the first CIA agent to call waterboarding torture in an interview with ABC News.

The *Times* article did not say that it got Martinez’s name from Kiriakou. Investigators learned of Kiriakou’s disclosure during an investigation of his emails, according to the affidavit. During an interview with FBI agents on Jan. 19, 2012, Kiriakou denied disclosing the names, according to the affidavit. (For more on the case, see “Leaks: New Policies Emerge; Congress Gets Involved” in the Summer 2012 edition of the *Silha Bulletin*, and “The Obama Administration Takes on Government Leakers; Transparency May Be a Casualty” in the Spring 2012 edition of the *Silha Bulletin*.)

On Aug. 8, 2012, Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia denied Kiriakou’s motion to dismiss the case, rejecting Kiriakou’s argument that the Espionage Act and the IIPA were vague and overbroad, according to court documents. On Jan. 18, 2013, prosecutors filed a motion for a recommended sentence of 30 months in prison after Kiriakou entered

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The court order mandates that the FBI stop issuing NSLs and cease enforcing gag order provisions in all cases. Illston acknowledged that the government has “a strong argument that allowing the government to prohibit recipients of NSLs from disclosing the specific information sought in NSLs to either the targets or the public is generally necessary to serve national security in ongoing investigations.” But, she wrote, “the government has not shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of the NSL.” The ruling has been stayed for 90 days to give the government an opportunity to appeal to decision to the U.S. Court of Appeals for the Ninth Circuit. The Justice Department had no immediate comment, according

to a March 15, 2013 NBC News report. An appeal had not yet been filed, as the *Bulletin* went to press. The district court’s full order is available online at <https://www.eff.org/document/nsl-ruling-march-14-2013>.

NSLs have been controversial, with government officials advocating for their use and asserting that they are vital to fighting terrorism. In contrast, civil liberties advocates have said they are an extreme infringement on Americans’ rights. In 2011, the Electronic Information Privacy Center reported that the FBI made 16,511 NSL requests pertaining to 7,201 Americans.

“We are very pleased that the court recognized the fatal constitutional shortcomings of the NSL statute,” Matt Zimmerman, a senior staff attorney for EFF told NBC News its March 15 report. “Our client looks forward to the day when it can publicly discuss its experience.”

This decision followed the Second Circuit’s determination in a similar case decided in 2008, *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). In that case, the court found that the nondisclosure provision amounted to a prior restraint on speech about government conduct. The district court decision differs, in that it does not preserve the provisions as the Second Circuit did. According to March 21, 2013 post on law firm Davis Wright Tremaine’s “Privacy and Security Law Blog,” the decision “will surely be appealed in the Ninth Circuit and perhaps then to the Supreme Court.”

— HOLLY MILLER
SILHA BULLETIN EDITOR

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into a plea agreement in October 2012, pleading guilty to one count of violating the IIPA, according to the motion. Judge Brinkema honored the recommended sentence, though she said it was “way too light,” according to a Jan. 25, 2013 *Washington Post* story. Brinkema added, “This is not a case of a whistleblower. This is a case of a man who betrayed a solemn trust.” A pre-sentencing memo from Kiriakou’s lawyers said that Kiriakou was the first person in 27 years to be convicted of violating the IIPA.

Kiriakou’s attorney, Robert Trout, of the D.C.-based law firm Trout Cacheris PLLC, said that Kiriakou leaked the information to put a “spotlight” on the CIA’s interrogation techniques, according to the Jan. 25 *Post* article. In the pre-sentencing memo, Kiriakou’s lawyers compared Kiriakou’s leak to I. Louis “Scooter” Libby’s leaking Valerie Plame’s name as a CIA operative. In March 2007, Libby was convicted of perjury and obstructing an FBI investigation into the leak of Plame’s name to columnist Robert Novak. Libby was sentenced to 30 months in prison, but President George W. Bush commuted Libby’s prison term in July 2007, effectively reducing his sentence. The defense memo called the Plame leak a “petty political payback” that was “anything but noble,” but argued that Kiriakou had no desire to harm the United States or any individual operative. Kiriakou told the *Washington Post* that his conviction was “a badge of honor,” and that the “CIA never forgave [him] for exposing the torture program and saying it was U.S. government policy.” Kiriakou told the BBC for a Feb. 28, 2013 report that he felt “at peace” with his decision to disclose the information, saying that he was “very proud” to have taken a stand in “a case about civil liberties and human rights.” (For more information on the Valerie Plame leak case, see “Libby Trial over Leaked Information Ends in Conviction” in the Winter 2007 issue of the *Silha Bulletin*.)

Advocacy groups championing human rights and open government have hailed Kiriakou as a “hero” for his actions. In October 2012, the Shafeek Nader Trust for the Community Interest named Kiriakou one of its recipients of the 2012 Joe A. Callaway Award for Civic Courage. The award, established in 1990, recognizes “individuals who act on their integrity despite personal risk, [and] take a public stance to advance truth and justice,” according to the Government Accountability Project website. Before Kiriakou was scheduled to report to prison, activist Naomi Pitcairn threw a “\$20,000

farewell bash” in his honor in late February 2013 according to the *Washington Post*. Kiriakou will also be featured in the forthcoming documentary *Silenced: The Government’s War on Whistleblowers*, directed by Academy Award nominee James Spione. Public Editor for *The New York Times*, Margaret Sullivan, wrote

“I wanted the American people to know that not everyone in Iraq and Afghanistan are targets that need to be neutralized, but rather people who were struggling to live in the pressure cooker environment of what we call asymmetric warfare.”

— Bradley Manning
Private First Class,
U.S. Army

an op-ed on March 9, 2013 in which she argued that a “world without leaks” would be a world without public knowledge of Abu Ghraib, warrantless wiretapping under the Bush administration, or the expanding drone program under the Obama administration.

Manning Denied Intentionally Providing Information to Al-Qaeda; Wanted to Start Debate on U.S. Policy

On Feb. 28, 2013, the third day of a hearing in military court at Fort Meade, Md., Manning pleaded guilty to 10 of the 22 charges against him, according to multiple media reports. In his plea, Manning admitted to leaking more than 700,000 documents to WikiLeaks, including military incident reports, assessments of detainees at Guantánamo Bay, a video of an airstrike in Iraq depicting an Apache helicopter pilot killing civilians, and some 250,000 cables from American diplomats. On Nov. 7, 2012, Manning’s attorney, David Coombs of the Law Office of David E. Coombs, revealed on his blog that Manning would follow a strategy of “pleading by exceptions and substitutions,” whereby he would “accept responsibility for offenses that are encapsulated within, or are a subset of, the charged offenses.” Coombs also said in the post that Manning opted to be tried by a judge alone rather than by a jury.

Military prosecutors will still try to convict Manning on the remaining 12 charges, including the most serious charge, aiding the enemy. Article 104 of the Uniform Code of Military Justice (UCMJ) states: “Any person who ... aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or without proper authority,

knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.” The March 1, 2011 charge sheet against Manning,

which freelance journalist Alexa O’Brien posted on her website http://www.alexao'Brien.com/second-sight/wikileaks/bradley_manning/charges/charges_us_v_pfc_manning_violations_of_uniformed_military_code_ucmj.html, did not state a specific enemy that Manning aided

with information. On Feb. 26, 2013, the London *Daily Telegraph* reported that military prosecutors intended to call an unnamed Navy Seal, purportedly involved in the operation that killed Osama bin Laden, as well as eight “chain-of-custody” witnesses to testify that bin Laden had utilized documents Manning had given to WikiLeaks. Coombs said that whether or not bin Laden was in possession of the leaked files was immaterial to Manning’s intent when he leaked them, according to the *Telegraph* article. In April, Judge Col. Denise Lind ruled that the witness would testify in a closed session at a secure and alternate location. He would testify under the pseudonym “John Doe” and would wear “light disguise” during his testimony. (For more on the case, see “Open Government Advocates Criticize Obama’s Prosecution of Leakers” in the Winter/Spring 2011 issue of the *Silha Bulletin*.)

On Feb. 28, 2013, Manning read from a 35-page prepared statement, in which he discussed his history of becoming an intelligence analyst for the Army, how he found and copied files, and how he eventually leaked those files to WikiLeaks. In reference to the leaked diplomatic cables, Manning said, “I believe[d] that the public release of these cables would not damage the United States, however, I did believe that the cables might be embarrassing.” Regarding the leak of the aerial attack video, Manning said that he “wanted the American public to know that not everyone in Iraq and Afghanistan are targets that needed to be neutralized, but rather people who were struggling to live in the pressure cooker environment of what we call asymmetric warfare.” Overall, Manning said he hoped the leaks

would “spark a domestic debate on the role of the military and our foreign policy in general as well as it related to Iraq and Afghanistan.” An unofficial transcript of the statement is available at http://www.alexabrien.com/secondsight/wikileaks/bradley_manning/pfc_bradley_e_manning_providence_hearing_statement.html#update.

Alexa O’Brien compiled a transcript for nearly all of the three-day hearing through her notes, because Judge Lind ordered that no recording devices would be allowed into the courtroom. However, a recording of Manning reading from his statement was made and leaked to the Freedom of the Press Foundation, an organization sponsored by the Foundation for National Progress (which publishes *Mother Jones*) that funds “public-interest journalism.” The source of the recording is unknown. On March 14, 2013, Russian alternative news website RT News published an editorial in which it argued that the quality of the audio “suggests that the tape could have been leaked by the government itself rather than some rogue journalist.”

Geoffrey R. Stone, the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School, criticized the military prosecutors’ strategy in a March 13, 2013 column in the *Huffington Post*. Stone cited the military’s use of a 1863 case involving a Union army soldier, Henry Vanderwater, who published names of Union soldiers in a local newspaper to let Confederate soldiers know how many Union troops were stationed in a particular town. Stone argued that Vanderwater showed a clear intent to aid the enemy with his actions, but Manning did not. Stone further characterized the prosecutors’ argument that the Espionage Act does not require the intent to aid the enemy as “unprecedented and senseless.” (Stone was the 2006 Silha lecturer. For more information about his lecture, see “Geoffrey Stone Predicts First Amendment will Protect Journalists from Prosecution at 21st Annual Silha Lecture” in the Fall 2006 issue of the *Silha Bulletin*).

On April 26, 2012, Ben Wizmer, Director of the Speech, Privacy and Technology Project for the ACLU, wrote a blog post criticizing Manning’s prosecutors for applying Article 104 of the UCMJ too broadly. Wizmer likened Manning’s actions to the public comments that Specialist Thomas Wilson, an airplane mechanic with the Tennessee Army National Guard, made to Secretary of Defense Donald Rumsfeld at a town hall meeting in December 2004. Wilson told Rumsfeld that he did not think the unit’s vehicles had sufficient armor. Wizmer argued that “the government’s decision to prosecute Manning for ‘Aiding

the Enemy’ threatens to make public comments like Wilson’s grounds for criminal prosecution,” because technically Wilson was also indirectly providing the enemy with valuable information.

On March 1, 2013, Yochai Benkler, a Harvard Law School professor and co-Director of the Berkman Center for Internet and Society at Harvard who will be called as a witness in Manning’s trial, wrote an editorial for *The New Republic* in which he argued that the prosecutors were pushing “a novel and aggressive interpretation of the law.” Such an interpretation, Benkler argued, “would arm the government with a much bigger stick to prosecute vaguely-defined national security leaks, a big stick that could threaten not just members of the military, but civilians too.”

Manning’s full trial is scheduled to begin June 3, 2013, according to multiple media reports. In September 2012, Coombs filed a 117-page motion to dismiss the charges against Manning, arguing that his client has not received a speedy trial, thus violating his Sixth Amendment rights. Manning was arrested on May 27, 2010, meaning that by the time the initial hearings for his trial began on Feb. 26, 2013, Manning would have spent 1,005 days in pretrial confinement, according to the motion. From July 2010 to April 2011, Manning was held in solitary confinement for 23 hours per day while confined at the Marine Corps brig in Quantico, Va., according to multiple media reports. Manning was moved to the Fort Leavenworth (Kan.) Joint Regional Correctional Facility (a medium-security facility) in late April 2011, according to the AP.

On Feb. 28, 2013, Judge Lind denied Coombs’ motion to dismiss the charges on Sixth Amendment grounds, according to an unofficial transcript of the trial. Nevertheless, Manning’s pretrial treatment has been criticized as unduly harsh. The *Los Angeles Times* published an editorial in March 2011 calling Manning’s confinement at the Marine Corps brig “degrading,” and arguing that while “[p]unishment may be in Manning’s future ... [his] treatment should reflect the fact that he remains innocent until proven guilty.”

On May 8, 2013, acting assistant secretary of state for African affairs and former U.S. ambassador to Ethiopia Donald Yamamoto testified in what the AP called a “dry run” of Manning’s trial, which Judge Lind ordered to help her decide how much of the trial should be closed to the public due to the national security concerns raised by evidence in the trial. Alexa O’Brien confirmed in a tweet on May 7, 2013 that Yamamoto would testify. The evidence includes documents

Manning gave to WikiLeaks and official communications about those documents. Coombs requested the dry run to “test all reasonable alternatives to closing large portions of Manning’s trial,” which include closing only parts of the trial, redacting documents, using written summaries of classified information, or using code words for classified information, according to the AP. Prosecutor Maj. Ashden Fein called the dry run “unprecedented,” arguing that testing alternatives to closing the trial with one witness’s testimony would not necessarily apply to all of the prosecution’s witnesses. Jesselyn Radack, the national security and human rights director at the Government Accountability Project (GAP), told the AP that the “dry run” sounded “like a dress rehearsal for a secret trial.” “The more they do behind closed doors and the more they do through secret codes or anything else that shields the public from information, like not providing transcripts, those things are all antithetical to the democratic idea of having a free and open trial,” she told the AP.

Obama Policies, Recent Legislation Tighten Government Secrecy

Kiriakou’s sentencing and Manning’s plea hearing come amid criticism of harsh Obama administration policies toward leakers and recent legislation on government secrecy. On Dec. 6, 2012, the *Secrecy News* blog reported that the Public Interest Declassification Board (PIDB) published a report recommending that the White House take the lead in overhauling the security classification system. The report urged that “[t]he classification system must be modernized as a dynamic, easily understood and mission-enabling system and one that deters over-classification and encourages accessibility.” The report is available online at <http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.html>. Steven Aftergood of *Secrecy News* criticized the Obama administration’s current policy of not declassifying leaked classified documents in a Dec. 19, 2012 post. Executive Order 13526 § 1.1 states that “[c]lassified information shall not be declassified automatically as a result of any *unauthorized* disclosure of identical or similar information,” yet it does not state whether and how a leaked document might become declassified, according to Aftergood’s post. Legislative Attorney Jennifer K. Elsea wrote a Jan. 10, 2013 Congressional Research Service (CRS) report titled “The Protection of Classified Information: The Legal Framework,” in which she said, “there is little to stop

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agency heads and other high-ranking officials from releasing classified information to persons without a security clearance when it is seen as suiting government needs.” The report is available in full online at <http://www.fas.org/sgp/crs/secretary/RS21900.pdf>.

Elsea’s contention was vindicated in early February 2013, when the Department of Justice released a White Paper discussing the legal justifications for targeting American citizens in drone strikes overseas after the White Paper had been leaked to NBC News a week earlier, according to a Feb. 11, 2013 blog post on *Secrecy News*. On Feb. 7, 2013, White House Press Secretary Jay Carney called the release “extraordinary” and stemming from “interest [that] reached higher levels than in the past,” according to the blog post. *Secrecy News* reported in a separate Feb. 11, 2013 blog post that the Justice Department denied *The New York Times’* Freedom of Information Act (FOIA) request for the White Paper on Jan. 23, 2013, a week prior to the leak.

In early March, the Obama administration allowed lawmakers access to secret Justice Department memos outlining legal justifications for lethal targeting of U.S. citizens accused of collaborating with al-Qaeda in the run-up to a vote by the Senate Intelligence Committee on whether to send John Brennan, Obama’s choice for CIA director, to a confirmation vote by the full Senate, according to a March 5, 2013 *Washington Post* story. The White House has still refused to allow lawmakers access to secret memos regarding the lethal targeting of non-American terror suspects overseas, according to the *Post*.

Congress passed legislation recently that paradoxically furthers government secrecy yet seeks to protect leakers. H.R. 5949. On Dec. 28, 2012, Congress renewed the FISA Amendments Act for another five years after the Senate rejected amendments that sought to provide more public information about how government surveillance affects the privacy of American communications, according to a Dec. 28 story on the NPR news blog “Two-Way.” However, the Senate passed the Intelligence Authorization Act for fiscal year 2013 on Dec. 28, 2012 after certain measures to combat leakers — a provision that only agency leaders could present background briefings to the press, and another allowing agency

heads unilaterally to revoke the pension of an employee convicted of violating a non-disclosure agreement — were taken out of the bill, according to *Secrecy News*. However, section 504 of the bill stipulates that government officials must “notify Congress whenever classified intelligence is disclosed to the press in an authorized manner, other than through FOIA or other routine processes,” according to *Secrecy News*. The legislation is available online

“I can tell you that people who normally would meet with me, sort of in a more relaxed atmosphere, are on pins and needles.”

— Jonathan Landay
National Security Reporter
McClatchy

at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr5949enr/pdf/BILLS-112hr5949enr.pdf>.

The harsh treatment of leakers by the Obama administration has drawn criticism among the news media and advocates for open government. In an interview with *Slate*, for a March 12, 2013 article, Kiriakou said, “If this were a Republican administration, people would be in the streets, right? ... But people cut Obama a break to the point of irrationality.” In a Feb. 27, 2012 column, David Carr of *The New York Times* accused the administration of using the Espionage Act as an “*ad hoc* Official Secrets Act.” In his March 1, 2013 *New Republic* editorial, Yochai Benkler criticized the administration for punishing whistleblowers with a “World War I” law that “was used to jail Eugene V. Debs and other political activists.”

In June 2012, both the House and Senate Judiciary Committees questioned Attorney General Eric Holder about the leak of classified information about drone strikes and cyber attacks against Iran’s nuclear program. Both committees called for the Obama administration to punish leakers in the interest of national security. On June 8, 2012 Holder appointed Ronald Machen, U.S. Attorney for the District of Columbia, and Rod Rosenstein, U.S. Attorney for Maryland, to oversee FBI investigations into leaks from within the administration. “The unauthorized disclosure of classified information can compromise the security of this country and all Americans, and it will not be tolerated,” Holder told the House

Committee. House and Senate Republicans criticized Holder for not appointing special prosecutors from outside the government to investigate the leaks. Ronald Reagan’s solicitor general Charles Fried, who now teaches constitutional law at Harvard University, said in a June 18, 2012 letter to the editor in *The New York Times* that the House and Senate’s investigation of leakers was important to preserving the rule of law in the United States. “That these acts

of civil disobedience find their ultimate outlet in press reports, which may be protected by the First Amendment, does not give the criminal act of the initial disclosure that protection,” he wrote.

However, free press advocates have argued that the crackdown on leaks inhibits the ability of journalists to report on vital matters of public concern. Jonathan Landay, a national security reporter for McClatchy, told the *Huffington Post* in an interview for an April 16, 2013 article that Obama administration crackdowns on leaks had led to a “chilling effect” in his and his colleagues ability to report on national security stories. “I can tell you that people who normally would meet with me, sort of in a more relaxed atmosphere, are on pins and needles,” Landay said. Jesselyn Radack of the GAP, one of Kiriakou’s attorneys, called the crackdown on leakers a “backdoor way of going after journalists” in an interview for the Winter 2013 edition of *The News Media and The Law* report, published by the Reporters Committee for Freedom of the Press. In a March 19, 2013 interview with *Columbia Journalism Review*, James Goodale, chief counsel to *The New York Times* in 1971 when the paper published “The Pentagon Papers,” called the Obama administration’s approach to press freedom and classified information “[a]ntediluvian, conservative, backward. Worse than Nixon.” (Goodale will be the 2013 Silha lecturer. For more information about Goodale’s lecture on October 16, please refer to the ad on the last page of this issue of the *Silha Bulletin*.)

— BRETT JOHNSON
SILHA RESEARCH ASSISTANT

Media Organizations' Use of Public Data Draws Privacy Concerns from Courts, Legislatures

Technology and privacy concerns have collided in recent incidents involving media organizations' decisions to publish public data about individuals. Although the information at issue in these cases was publicly

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accessible, some legislators and commentators have raised privacy concerns about mass dissemination of the information. Additionally, some questioned the value of journalism that discloses personal information and whether the information is newsworthy by itself, or if it should be placed in context. In recent months, a New York newspaper's decision to publish an online map that showed the addresses of gun permit owners sparked legislative action making gun permit data private. In Florida, lawmakers took aim at websites that post mug shots with new legislation, as arrestees sought to protect their rights with novel claims in Ohio. And in some cases, such as with license plate data in Minnesota, reporting has enlightened the public about the government's practices with data in a way that many argued was beneficial. Minnesota legislators are seeking to change the way law enforcement in the state handles license plate data after newspapers used the data to tell a story.

National Debate About Gun Policy Includes Concerns About the Privacy of Gun Permit Owners' Personal Information

The mass shooting at Sandy Hook Elementary School in Newtown, Conn. on Dec. 14, 2012 sparked a national debate surrounding gun rights and control. The media extensively covered current policies and proposed changes in gun laws, as well as the Obama administration's call for stricter gun control policies in the wake of the shooting. The *Journal News*, based in White Plains, N.Y., published a controversial map utilizing data about the addresses of holders of gun permits in two New York counties. The New York State Legislature responded to the coverage by passing a law that allows gun owners to keep such information private. The coverage by the *Journal News* highlights the conflict that sometimes arises between the First Amendment and privacy concerns. Additionally, commentators

disagreed as to whether it is ethical for newspapers to publish large "data dumps" with individuals' information.

The *Journal News*, which covers Westchester, Rockland, and Putnam counties outside New York City, published its article and online map on Dec. 22, 2012. The print edition included only the information about those who have permits for pistols, included their names and addresses. The map, created using Google Maps, originally included digital pins that identified the addresses of pistol permit owners. The article accompanying the map stated that New York law allowed anyone to "find out the names and addresses of handgun owners in any county with a simple Freedom of Information Law request." The newspaper reported that prior to publication, it consulted with Robert Freeman, the executive director of New York's Committee on Open Government, who reportedly told the *Journal News* that government records are presumed public unless they are specifically made private by statute.

Although Westchester and Rockland county officials released the records to the newspaper, Putnam County Clerk Dennis Sant refused to do so, according to a Jan. 1, 2013 Reuters article. In a statement to reporters, Sant said the *Journal News* was "clearly wrong" by publishing the identities and addresses of permit holders. "I could not live with myself if one Putnam pistol permit holder was put in harm's way, for the sole purpose of selling newspapers," he said.

The *Journal News* defended its decision citing public interest in the information. "We believe the law is clear that this is public information and the residents of Putnam County are entitled to see it," Janet Hasson, president and publisher of The Journal News Media Group, said in a statement. Hasson said the newspaper was not surprised by the controversy surrounding the online map but that it "felt sharing information about gun permits in our area was important in the aftermath of the Newtown shootings."

However, on Jan. 18, 2013, the *Journal News* made some changes to the map that included removing the individuals' names and addresses, as well as eliminating the "zoom" function and satellite view, which allowed those who viewed the map to see photos of the identified addresses. The map now only displays the locations of holders of pistol permits with digital pins.

The map in its edited form is now available at http://www.lohud.com/apps/pbcs.dll/article?AID=2012312230056&nclick_check=1.

Following the shooting at Sandy Hook, the New York legislature quickly responded to calls for new gun laws. On Jan. 15, 2013, New York Gov. Andrew Cuomo signed the first new gun control law in the United States since the elementary school shooting. The law, the NY Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, S2230-2013, included several gun control measures including an assault weapon ban and background checks for purchasers of ammunition. The law further revised New York's previously open records on gun permit data to restrict access. For the law's first 120 days, no information on gun licenses would be available. After that period, the law's opt-out provision would take effect. Individuals who already hold licenses may fill out a form with their county clerk to make their personal information secret. Gun licenses will need to be certified again every five years. If any information on the form is inaccurate, local officials have the discretion to deny the licensee's request. The law also created a new statewide gun permit database and prohibits disclosure of individuals' names contained in that database. Furthermore, individuals are able to exempt disclosure of their names and addresses from county databases that maintain the information. Thus, if an individual lives in a county that keeps a database of gun permit data, the individual can ask that his name and address not be disclosed. The legislature justified the new law under a provision of the state Freedom of Information Law, Public Officers Law, Art. 6, § 87 *et seq.*, which states: "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: ... (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article ... or (f) if disclosed could endanger the life or safety of any person."

The new law has been criticized by some First Amendment advocates. "In all this debate over the Second Amendment, [lawmakers] may be compromising the First," wrote Sara Dunham, assistant editor, in a Jan. 16, 2013 story for *Columbia Journalism Review* (CJR).

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Matt Waite, professor at the College of Journalism and Mass Communications at the University of Nebraska, is also concerned about the impact of the law on journalistic endeavors and the watchdog function of the press. He told *The New York Times* for a Jan. 15, 2013 article that removing gun permit holders' data from public purview removes an important layer of scrutiny over the government. "We no longer know if people who are qualified or mentally ill or felons are getting firearms licenses," he said. "We have no way of independently verifying whether the government is doing their job." Mike Cavender, executive director of the Radio Television Digital News Association expressed concern about the precedent the legislation will set. "Our fear is that the more exemptions a given legislative body makes to open records, the greater the chance that the next time, which may have nothing to do with guns, it'll be that much easier for legislators to say, 'Well, just close those records too,'" he told the Reporters Committee for Freedom of the Press for its Winter 2013 edition of *The News Media and The Law*. "Where does it stop?"

Other lawmakers across the country have had similar reactions to the disclosure of gun permit holders' personal information. Although state laws related to gun permit records differ, the Sunlight Foundation, a nonprofit organization that works to increase government transparency and accountability, reports that the majority of states — 40, plus the District of Columbia — do not treat this type of record as public. After the publication by the *Journal News*, more states may follow suit. Eleven state legislatures are working on bills in the spring of 2013 that would make gun permit records private or, if gun permit records are already private to some degree, would restrict access even further. Arkansas, California, Iowa, Maine, Maryland, Michigan, Mississippi, Montana, North Carolina, Tennessee, Virginia and West Virginia have all considered bills that would restrict, or further restrict, access to gun permits.

Posting of Mug Shots Online Attracts Legislative Action, Lawsuits

Websites that post mug shots of arrestees have been emerging online for the last several years. In Florida, for example, the mug shots are accessible through the state's expansive public records laws. But some First Amendment advocates view the websites as exploiting individuals for profit and serving dubious

purposes, according to a Feb. 21, 2013 post by the Digital Media Law Project (DMLP) at the Berkman Center for Internet & Society at Harvard University. Florida state legislator Carl Zimmermann introduced a law to limit the use of mug shots by websites on Feb. 11, 2013. The law is titled "Websites Containing Information Concerning Persons Charged with Crimes," House Bill 677. Its companion is Senate Bill 1060. It would require website operators to remove the names and personal information, including photographs, of individuals charged with crimes within 15 days of receiving

"Our fear is that the more exemptions a given legislative body makes to open records, the greater the chance that the next time, which may have nothing to do with guns, it'll be that much easier for legislators to say, 'Well, just close those records, too.'"

— Mike Cavender
Executive Director,
Radio Television Digital News Association

written notice that the individual has been "acquitted or the charges are dropped or otherwise resolved without a conviction." If the website fails to take the information down within the 15-day period, it will be fined. After 45 days, failure to comply will result in a "presumption of defamation of character" under the proposed law. The bill is available online at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=49897>.

First Amendment advocates have criticized the bill for running afoul of the federal Constitution, repugnant as they might believe mug shot websites to be.

The DMLP post discussed the First Amendment issues the bill raises. For example, the law would punish publication of truthful, lawfully obtained information, which is unconstitutional under *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In that case, the Supreme Court prohibited a rape victim from civilly suing a newspaper using a state criminal statute that made publication of a rape victim's name illegal after the newspaper obtained her name lawfully and published it. Also, the bill's "presumption of defamation" runs counter to the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that plaintiffs alleging defamation must bear the burden of proof. Finally, the law would

chill crime reporting by many media organizations. Any time a story covers an arrest, charge, and trial that resulted in an acquittal, the organization would have to, in effect, "unpublish" the content. The DMLP pointed out that this means news organizations would have to remove all content about trials resulting in acquittals, which would significantly alter the historical record about public events.

Some individuals whose mug shots have been featured on websites are taking action themselves. Phil Kaplan, an Ohio resident, was featured on several mug shot websites after he was arrested, although

the charges against him were later dropped. When he contacted the websites, asking them to remove his mug shot, Kaplan told *Wired* magazine for a Dec. 12, 2012 story that the websites demanded hundreds of dollars in payment for deletion of the photograph. Kaplan and a woman also included on the

websites, Debra Lashaway, have filed a novel lawsuit against the websites instead of paying to remove the pictures. Using Ohio's right of publicity statute, Ohio Revised Code §2741.01, they allege that the mug shot websites are using their personas for commercial gain. The complaint also alleges that the defendants have been unjustly enriched by keeping money that rightfully belongs to the plaintiffs and that "such sums represents [*sic*] the proceeds of the illegal and unconsented exploitation of the persona of Plaintiffs."

Attorney Scott Ciolek filed the lawsuit against Bustedmugshots.com, Justmugshots.com, Mugshotsonline.com, Findmugshots.com and Mugremove.com on Dec. 3, 2012 in Lucas County Common Pleas Court. The complaint alleges plaintiffs are members of a class of more than 259,000 Ohio residents who have been featured on the websites, and Ciolek told *Huffington Post* that he intends to certify the suit as a class action for a Jan. 14, 2013 article. Right of publicity statutes are more traditionally a tool for celebrities whose personas have value to prevent the unauthorized, uncompensated use of their persona for commercial benefit by a third party. But Kaplan and Lashaway's attorney, Ciolek, told *Wired* for the Dec. 12, 2012 story that the issue was not the publication of photos, but rather the payment demanded to

remove them. He said that the websites do have a First Amendment right to publish the mug shots, but that they forfeit their constitutional protection by demanding payment for removal of the plaintiffs' mug shots because the plaintiffs still have a property right in their own personas. The complaint is available online at <http://www.scribd.com/doc/118236403/Class-action-complaint-against-publishers-of-mugshot-photographs>.

Some commentators think the suit has the potential to vindicate the violation of plaintiffs' rights. Peter Scheer, director of the First Amendment Coalition, told *Wired* that the right of publicity claim in this context is novel and could prove fruitful for the plaintiffs. "[T]he results may differ in each state," Scheer said. "But I do think it is not a ridiculous stretch to say charging somebody to remove one's mugshot from an internet site infringes that individuals' right of publicity." Hanni Fakhoury, an attorney with the Electronic Frontier Foundation, told *Wired* that the websites can be distinguished from more traditional media. "I'm sure the websites would maintain they are serving a public interest by broadcasting the mugshots," he said. "The fact they're willing to remove them for a fee undermines this 'public service' argument."

The First Amendment Coalition, a nonprofit organization that advances free speech and open government, argued that the Florida mug shot law could harm "legitimate journalism" in favor of protecting privacy by changing the historical record and making journalists more timid in their coverage of crime in a Feb. 26, 2013 post. Jane Kirtley, Silha Center director and Silha Professor of Media Ethics and Law, argued that the openness of mug shots and other records related to the criminal justice system protects those affected by the system for an April 6, 2013 story in the *Twin Cities Daily Planet*. "People forget that transparency in the criminal justice system is for the protection of the arrested," she said. "Secrecy imperils those in custody." Director of the Minnesota ACLU Chuck Samuelson told the *Twin Cities Daily Planet* that he agrees with the importance of openness. "Arrests must be public," he said. "If they are public, there must be a record of it and the government has to bring you into open court."

However, Samuelson agrees with some others who argue that the mug shot websites undermine the spirit of public records laws. "If a paper wanted to send a reporter to pick up a few copies, pay a fee and the print them, they have to do a lot of work. But, here, all you need is

an 18-year old with a computer. Public information is vital, but broadcasting it this way is not," he said. Matt Waite, who created one of the first mug shot websites for the *Tampa Bay Times*, told Poynter for a Sept. 12, 2012 blog post that he is concerned about the impact of such sites on public records laws. "As a journalist I am deeply disturbed by them because they are using public records against people," Waite said, explaining that many sites demand payment for removal of personal information based on current law. "And really it's a matter of time before legislatures figure out that their constituents are being held up by these sites." Federal circuits are split as to whether mug shots are considered public records for purposes of Freedom of Information Act requests. The Tenth and Eleventh Circuits have held that mug shots can be exempt from disclosure, but the Sixth Circuit treats them as public. (For more on whether mug shots are public records for FOIA purposes, see "Federal Appeals Courts Hold Mug Shots Can Be Withheld Under FOIA Exemption" in the Spring 2012 edition of the *Silha Bulletin*.)

Reporting on Policies about Recordkeeping of Minnesota License Plates Results in Legislative Action

Beginning in the summer of 2012, journalists in Minnesota began to raise questions about the collection and storage of data about license plates in the state. One reporter for the Minneapolis *Star Tribune*, Eric Roper, tracked the trend of law enforcement officers using automated license plate readers, which are small cameras mounted on squad cars and other locations, to scan license plates and aid in investigations, beginning with a story on Aug. 10, 2012. Roper requested information about his own license plate, which the city of Minneapolis's officers had scanned seven times over the course of a year.

In Minnesota, some of the information associated with the license plate readers was public prior to the 2013 legislative session, including the license plate number and the time, date, and location where the reader captured the plate's image. However, the state did not have a law dictating how long law enforcement could retain the data, and policies varied widely. According to Roper's research, the Minnesota State Patrol had a policy of deleting data after 48 hours, whereas St. Paul police erased it after two weeks, and Minneapolis had a policy of keeping the information for a year.

Officers use the information to aid in investigations, and Lt. Eric Roeske of the Minnesota State Patrol released a

statement saying that the license plate scanners are a "valuable technology that saves time for the trooper while allowing them to be more productive and less distracted while observing license plates."

Within a week of his original story, Roper reported that police began to receive more requests for the data. Roper published a map displaying the data he requested about scans of Minneapolis Mayor R.T. Rybak's city-owned vehicle's plates, which is available online at <http://www.startribune.com/newsgraphics/166561106.html>. Several months later, on Dec. 13, 2012, Rybak requested that city officials reclassify the data as secret while they awaited legislative action, according to his personal blog. "In some cases, the license plate data the police have retained have proven helpful in investigating and solving crimes," Rybak said in an official statement. "But there are important, legitimate concerns around the length of time it is stored and how it is or can be used or accessed that we need to address." The Minnesota Department of Administration ruled that the plate numbers, photos of the plates, and the times, dates, and locations of the scans would become private on March 18, 2013.

Those alarmed by the lack of a cohesive policy began to call for reclassification of license plate reader data as Roper's reporting opened their eyes to the lack of a cohesive state policy. Bob Sykora, chief information officer for the Minnesota Board of Public Defense, which provides legal counsel to indigent individuals accused of crimes, told the *Star Tribune* on Aug. 17, 2012, "Now that we see someone's patterns in a graphic on a map in a newspaper, you realize that person really does have a right to be secure from people who might be trying to stalk them or follow them or interfere with them."

Minnesota state Sen. Scott Dibble (D-Minneapolis) and Rep. Mary Liz Holberg (R-Lakeville) introduced legislation addressing license plate reader data in 2013. Their first bill, S.F. 210 and H.F. 488, would classify license plate reader data as non-public and require destruction after 24 hours unless the data identify a stolen vehicle, a vehicle owner in warrant status, or if the data are being used in an active investigation. They also introduced a bill, S.F. 385 and H.F. 474, on Feb. 11, 2013, that would classify license plate reader data "confidential" or "protected nonpublic" data if a vehicle, its owner, or an occupant is the subject of an open criminal investigation. All other data would need to be destroyed if they did not

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meet those criteria. The bill also sets forth a policy for law enforcement agencies that collect the data, requiring them to maintain a log of the locations of their readers, the times when the readers collect data, and the aggregate number of license plates recorded. S.F. 385 passed through the Senate Committee on the Judiciary and was recommended to pass. H.F. 474 passed through the House Civil Law Committee and was also recommended to pass.

In the midst of the concerns about the privacy of license plate reader data, some of the Minnesota agencies that maintain the license plate reader data came under fire when widespread breaches of driver's license data came to light. In Minnesota, the Driver and Vehicle Services (DVS) database contains photos, addresses, and driving records. On the federal level, the Driver's Privacy Protection Act, 18 U.S.C. 2721, classifies most driver's license information as private. Current Minnesota law, Minnesota Statutes 2012, 171.12, subd. 7a, further limits the use of driver's license photographs, and they may generally only be used to assist in the investigation and prosecution of crimes. In a prominent example of breach on a mass scale, Anne Marie Rasmusson, a former police officer with several Minnesota agencies, learned that officers in a range of agencies accessed her driver's license data hundreds of times without a work purpose between 2007 and 2011. Her settlements with agencies across the state for the breaches have resulted in more than \$1 million in settlements. In another example of a data breach in Minnesota, former Department of Natural Resources officer John A. Hunt allegedly made 11,747 searches for driver's license data while off-duty, nearly exclusively of women. Hunt has been named a defendant in several lawsuits filed by alleged victims of the data breaches in U.S. District Court based on Hunt's potential violations of the Driver's Privacy Protection Act. The cases include *Kost et al v. Hunt et al*, 2013-CV-583, *Davis-Downing et al v. State of Minnesota Department of Natural Resources et al*, 2013-CV-389, *Kiminski et al v. Hunt et al*, 2013-CV-358, and *Sapp et al v. Hunt et al*, 2013-CV-286. Prosecutors also charged him in state court in Ramsey County, Minn. with six misdemeanors or gross misdemeanors, including misconduct of a public employee, unauthorized computer access, unlawful use of data, and using encryption to conceal a crime. The Duluth City Attorney's Office is handling the case for the St. Paul City Attorney's Office because too many local officials' data were

breached, according to a Feb. 7, 2013 story in the *Star Tribune*.

Several legislators were targets of the data breaches and expressed outrage at the breaches. The Office of the Legislative Auditor found that more than half of Minnesota law enforcement personnel who can access the DVS database may have made inappropriate searches. "We have a real problem. And we have to face it. And we have to address it," Legislative Auditor Jim Nobles said while releasing the report on Feb. 21, 2013. "Because this is really eroding people's confidence [in the] willingness and ability of state government and local government to protect private data." The audit is available online at <http://www.auditor.leg.state.mn.us/ped/pedrep/ledatabase.pdf>. A bill has been introduced in both the Senate and the House that would make penalties for public employee misuse of private data more stringent. The bills, S.F. 211 and H.F. 183, also require local governments to disclose more information about data breach incidents. Both bills have passed out of committee and have been recommended to pass.

The claims of data breaches listed above are not exclusive — several law firms in Minnesota have begun looking for plaintiffs for class action claims related to potential data breaches. The League of Minnesota Cities, which is representing only city agencies in the breaches, has received 110 claims against 82 jurisdictions, according to an April 10, 2013 editorial in the St. Paul *Pioneer Press*.

Addressing the harm in the data breaches, Jane Kirtley told the *Pioneer Press* that the issue revolves around "public servants who are supposed to be protecting public safety flouting the rules." She said, "[T]he notion that they need to be told explicitly that they shouldn't be doing something like this seems a little disingenuous." She added that the necessity of training about restrictions on database use under federal and state law is clear. "This doesn't seem to me to be something that would require much beyond common sense," Kirtley said.

Decisions to Publish Personal Data Draw Both Ire and Praise

Decisions to publish personal data have raised questions about journalistic ethics in some cases. The gun permit data published by the *Journal News* drew particular attention. "Just because information is public does not make it newsworthy," Poynter Institute's Al Tompkins said in a Jan. 2, 2013 post on

journalism think tank Poynter's website. "People own guns for a wide range of law-abiding reasons. If you are not breaking the law, there is no compelling reason to publish the data," Tompkins said. Tompkins argued the *Journal News'* coverage lacked context and thus was not sufficiently newsworthy to justify the alleged invasion of privacy rights. David Carr of *The New York Times*, who covers the media, agreed that the piece lacked context. "The accompanying article was about whether gun permits should be public, but the newspaper seemed to have all but decided that debate by publishing the map," Carr wrote in a Jan. 14, 2013 commentary. He also took issue with the timing of the publication being so close to the Newtown shooting, which he said "served to cast suspicion and guilt in tendentious ways. By dropping the records into the maelstrom of a mass shooting, was The Journal News merely putting data-driven link bait out there?" Mark Horvit, the executive director of Investigative Reporters and Editors (IRE), echoed the call for context in stories including large amounts of data in an interview with the *Times* for a Jan. 15, 2013 story. "Any time that a news organization does something with data that causes controversy, it creates the risk that lawmakers will seize the opportunity to make information that should be public, private," he said. "This is a cycle that gets repeated."

Not everyone denounces the decision to publish personal data. "[T]he idea that a tepid story somehow negates a superb data dump escapes me," Jack Shafer said in a Jan. 2, 2013 Reuters opinion piece. "Sometimes the data dump *is* the news, as any reader of birth announcements, death notices, stock tables, batting-average tables, real estate transactions, and legal notices will attest!" He also argued that, in the case of the *Journal News*, there was a strong public interest in the data. "Surely it was considered vital news to many in Westchester and Rockland that their neighbors were packing portable heat," Shafer wrote. Geneva Overholser, professor and director of the USC Annenberg School for Communication and Journalism, agreed that data may have journalistic value even without context in a Feb. 25, 2013 post in *Online Journalism Review*. "Analysis can surely be valuable, but providing 'granular' data without context is not necessarily irresponsible," Overholser wrote. "This raw data from public records is surely something that most people would find interesting."

— CASSIE BATCHELDER
SILHA RESEARCH ASSISTANT

Recent Cases Put Online Defamation in the Spotlight

Several recent decisions from state and federal courts have once again brought online libel litigation to center stage, as courts continue to address classic defamation questions such as whether defamatory statements of opinion are actionable, whether outrageous attacks on a private individual are protected as satire, and whether a distinction should be made between media and non-media defendants in the context of online speech.

ONLINE DEFAMATION

Minnesota Supreme Court Rules Online Review of Doctor Did Not Constitute Defamation in *McKee v. Laurion*

The Minnesota Supreme Court held in *McKee v. Laurion*, 825 N.W.2d 725 (Minn. 2013) that statements Dennis Laurion posted on an online doctor review website about his father's neurologist, Dr. David McKee, were not defamatory statements of fact. Laurion was displeased with McKee's conduct during McKee's examination of Laurion's father following a stroke. Laurion posted comments about McKee and the examination on two "rate-your-doctor" websites (Insiderpages.com and Vitals.com); in one comment Laurion said a nurse told him that McKee was "a real tool." McKee responded with a lawsuit for defamation and interference with business.

The St. Louis County District Court dismissed the lawsuit in April 2011. McKee appealed the dismissal to the Minnesota Court of Appeals. The court of appeals reversed the dismissal, finding that six of Laurion's statements raised an issue of fact as to whether they constituted defamatory statements of fact. (For more on the background of the case, see "Minnesota Courts Address Defamation Claims Stemming from Blog Posts and Online Review" in the Fall 2012 edition of the *Silha Bulletin*.)

Writing for the Minnesota Supreme Court, Justice Alan Page said that to prove defamation in Minnesota, the plaintiff must establish that the defendant communicated the statement to someone other than the plaintiff, that the statement is false, that the statement harms the reputation of the plaintiff within the community, and that the statement's listener understands it to refer to a specific person. The court concluded that Laurion's statements presented no issue for a jury to decide on the "falsity" element as the substance of the statements was generally true. Page said the

statements had only minor inaccuracies, did not convey defamatory meaning, or did not suggest anything negative about McKee's work.

McKee had argued that Laurion's statement that McKee was a "real tool" was not a protected opinion. Opinion statements receive First Amendment protection provided they are not predicated on a provably false statement of fact. Citing the U.S. Supreme Court case *Milkovich v.*

"Consumers should be able to freely discuss their experiences without fear that somebody is going to come knocking on the door with a lawsuit."

— John Swapceinski
Co-founder,
RateMDs.com

Lorain Journal, 497 U.S. 1 (1990), Justice Page wrote, "Referring to someone as 'a real tool' falls into the category of pure opinion because the term 'real tool' cannot be reasonably interpreted as stating a fact and it cannot be proven true or false." The court dismissed McKee's claim for defamation, reversing the Minnesota Court of Appeals and upholding the district court's ruling. The court's full opinion is available online at <http://caselaw.findlaw.com/mn-supreme-court/1622173.html>.

Eric Goldman, a professor at Santa Clara University School of Law and director of the school's High Tech Law Institute, has been tracking suits across the country in which doctors sue patients for defamation based on online reviews. "[D]octors usually lose or voluntarily drop these lawsuits," Goldman wrote on his technology and marketing blog. He noted that increasingly, these types of lawsuits end with doctors paying the defendants' attorney's fees if the state has a strong anti-SLAPP law. Anti-SLAPP (strategic lawsuit against public participation) laws are aimed at protecting defendants from meritless claims brought by plaintiffs to chill their speech. In some cases, anti-SLAPP laws provide that the plaintiff in these meritless cases pay the defendant's attorney's fees. Minnesota has had an anti-SLAPP statute since 1994, but the statute was not invoked in this case.

Laurion's attorney, John D. Kelly, of Hanft Fride Law Firm in Duluth, Minn., told the Minneapolis *Star Tribune* for a Jan. 30, 2013 story that his client's online statements were the same as things "said

around the water cooler or perhaps posted in a letter to the editor." McKee's attorney, Marshall H. Tanick of Hellmuth & Johnson, PLLC in Edina, Minn., said in the same *Star Tribune* article that the decision gave individuals "a license to make derogatory and disparaging statements about doctors, professionals and really anyone for that matter on the Internet without much recourse." John Swapceinski, co-founder of RateMDs.com, told the Reporters

Committee for Freedom of the Press (RCFP) for a story in its Fall 2012 issue of *The News Media and The Law*, "Consumers should be able to freely discuss their experiences without fear that somebody is going to come knocking on the

door with a lawsuit." Jack Komperda, the author of the RCFP story, noted that RateMDs.com has "a self-described 'Wall of Shame' that identifies doctors who ask prospective patients before accepting them as patients to sign what the organization dubs 'gag contracts,' or agreements promising not to write any opinion pieces on Internet review sites."

Lawsuit Filed in Virginia over Online Review Comments Leads to Debate on Injunctions

Christopher Dietz, a licensed contractor based in Washington, D.C., filed a lawsuit in the Fairfax, Va. County Circuit Court on Oct. 31, 2012 against Jane Perez for defamation following comments Perez made about Dietz on consumer review sites Yelp and Angie's List. Yelp is a free service open to anybody who registers for an account. On Angie's List, reviewers and businesses pay membership fees to write and receive reviews, respectively. The comments posted in January, February and August 2012 surrounded work that Dietz performed on Perez's Falls Church, Va. home. According to the complaint, Perez alleged in her posts that Dietz caused damage to her home, that he invoiced her for work not performed, that he was not a licensed contractor, and that he did not have accreditation from the Better Business Bureau. Perez also alleged in her posts that Dietz trespassed on her property and stole some of her jewelry. Dietz was never charged with stealing the jewelry, according to a Dec. 5, 2012

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Defamation, continued from page 25 post on the *Washington Post's* blog "The Crime Scene." Along with denying Perez's claims, the complaint claimed that Perez attempted to have comments favorable to Dietz from third parties removed from Yelp and Angie's List. Dietz sought \$500,000 in damages from work he allegedly lost as a result of the posts, as well as \$250,000 in punitive damages, according to the complaint. Dietz also sought an injunction against Perez to bar her from publishing further posts on review sites. The Fairfax County Court granted the injunction, but the Supreme Court of Virginia issued a summary reversal of the injunction on Dec. 28, 2012, holding that Dietz had failed to specify the duration of the injunction. *Perez v. Dietz Development, LLC*, S.E.2d, 2012 WL 6761997 (Va. 2012). The Virginia high court's decision means Perez can still post comments about Dietz and his business. Dietz's complaint, which includes copies of Perez's posts in its appendix, is available online at <http://www.dmlp.org/sites/citmedialaw.org/files/2012-10-31-Complaint.pdf>. Perez filed a response on Nov. 19, 2012, in which she claimed all the statements she made online were true. Perez's answer is available online at <http://www.dmlp.org/sites/citmedialaw.org/files/2012-11-19-Answer.pdf>. *Dietz Development, LLC v. Perez*, Case No. 2012-16249 (Fairfax Co., Va. Cir. Ct. 2012) is awaiting trial, and no date had been set as the *Bulletin* went to press.

Paul Alan Levy, an attorney for the Washington, D.C.-based Public Citizen Litigation Group, said in a Jan. 2, 2013 press release that the Virginia Supreme Court's decision "confirms the importance of not shutting down public discussion on the Internet just because someone doesn't like what's being talked about. Review sites like Yelp are vehicles for the free flow of ideas by helping consumers make informed decisions on how to spend their hard-earned dollars." Yelp Public Relations Manager Kristen Whisenand said in a Jan. 2, 2013 statement for the *Wall Street Journal* blog "All Things D" that "businesses that choose to sue their customers to silence them rather than address their comments, rarely prevail and often bring additional unwanted attention to the original criticism."

Iowa Supreme Court Redefines "Media Defendants" in Bierman v. Weier

Following his divorce from Beth Weier, Scott Weier wrote a book in which he alleged that Beth Weier's father, Gail Bierman, molested her at a young age, consequently leading Beth to suffer from

a mental illness. Scott Weier published the book through Author Solutions, Inc. (ASI), which offers self-publishing services to authors and markets itself as "the world's leading 'indie' publishing company." Scott Weier contracted with ASI to print 250 copies of his book for \$3,183.81. Beth Weier and Bierman then sued Scott Weier and ASI in Polk County (Iowa) District Court for libel, false light invasion of privacy, and intentional infliction of emotional distress.

Both parties moved for summary judgment in district court. In September 2010, the court held that Scott Weier's statements were libelous *per se* and that neither Weier nor ASI were media

"Without a clear definition of who qualifies as a 'media defendant,' bloggers could likely be held to be non-media defendants under Iowa law."

— Eric P. Robinson
Adjunct Professor,
CUNY Graduate School of Journalism

defendants, meaning the case should proceed on a strict liability theory. Under the common law strict liability standard, the plaintiff does not need to prove fault, only that the defamatory statements were (1) published and (2) of and concerning the plaintiff. The U.S. Supreme Court case *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) held that applying this standard to media defendants would "lead to intolerable self-censorship." In the case *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), a plurality of the U.S. Supreme Court decided it did not have to decide whether a distinction should be made between media and non-media defendants when the plaintiff was a private individual. Libel *per se* applies to the publication of a false statement about someone that accuses the individual of crimes or immoral acts. The claims are considered harmful on their face and the plaintiff does not have to prove actual damages. Explaining this decision, the district court wrote, "ASI is not the *New York Times*, or any other media entity. Rather it is a business which contracts to publish documents for private authors. And while its authors may, in some instances have first amendment rights, the rights retained by ASI have nothing to do with the First Amendment. ... Accordingly, the elements of falsity, malice, and damages can be presumed as to ASI and the only element the Plaintiffs would have to prove is publication."

ASI appealed to the Iowa Supreme Court, arguing that it was a media defendant and thus the presumption of libel *per se* was inappropriate. Further, ASI argued that the court should eliminate the distinction between media and non-media defendants. A divided court instead crafted a new definition of media defendants: those, like ASI, that publish content, but do not report the news like a traditional outlet. Justice Edward Mansfield wrote that if a party "receive[s] written materials prepared by a number of different third parties" and "make[s] finished products from the materials that are designed to be more suitable and accessible for the

public to read," then the party should be considered a media defendant for purposes of libel *per se*. The court disagreed with ASI and Weier's argument that the Internet is "a great equalizer" that "has rendered libel *per se* obsolete." Rather,

the court held that the Internet had "evened the playing field" in terms of potential for harm, and even that "compared to a generation ago, nonmedia [*sic*] defendants may have a greater capacity for harm without corresponding reasons to be accurate in what they are saying." Thus, the court concluded that "libel *per se* plays a useful role in helping to keep our social interactions from becoming ever more coarse and personally destructive."

The court chose not to eliminate libel *per se* entirely, particularly in light of policy considerations about the difficulty of proving damages in some cases that libel *per se* covers. In a concurring opinion, Justice David Wiggins criticized the majority for "bypass[ing] an important opportunity to articulate a test" to identify media defendants in future cases. Wiggins said that such a test is needed because "technological developments in communications and the proliferation of new electronic media will make it difficult, if not impossible, to distinguish between media and nonmedia [*sic*] defendants." Wiggins did not elaborate on what a test should be. Justice Daryl Hecht, joined by Justice Brent Appel, concurred in part and dissented in part, arguing that no distinction should have been made between media and non-media defendants. *Bierman v. Weier*, No. 10-1503, 2013 WL 203611 (Iowa 2013). The full opinion of the Iowa Supreme Court is available online at http://www.iowacourts.gov/Supreme_

Court/Recent_Opinions/20130118/10-1503.pdf. A petition for rehearing was denied on Feb. 22, 2013. Because Scott Weier is not considered a media defendant, Bierman and Beth Weier can continue to pursue a defamation action against Scott Weier, although a complaint has not yet been filed. However, the decision bars Bierman and Beth Weier from pursuing a claim against ASI.

In a Feb. 26, 2013 post on the Digital Media Law Project blog, Eric P. Robinson, who teaches media law and ethics at the CUNY Graduate School of Journalism and Baruch College in New York, wrote, “Without a clear definition of who qualifies as a ‘media defendant,’ [bloggers] could likely be held to be non-media defendants under Iowa law. Although Scott Weier wrote his comments in a book that he paid to get published, his writings are not all that different from what many others write in blogs and other online media.” ASI’s attorney, Mike Giudicessi, based in the Des Moines office of law firm Faegre Baker Daniels, told the AP that with the court’s ruling “[w]e were able to radically expand who is considered media. It’s just not news organizations anymore, which is great.”

FishbowlDC’s “Wendy Wednesday” Series Addresses the Line between Defamation and “Satire”

A pending case in Washington, D.C. could attempt to answer whether outlandish untrue statements published online about an alleged private individual are actionable as defamatory, or protected as satirical commentary that no reasonable person would believe to be true. Wendy Gordon, a public relations professional working in Washington, D.C., filed a lawsuit in the District of Columbia Superior Court on Jan. 17, 2013 against the gossip website FishbowlDC, editor Betsy Rothstein, writer Peter Ogburn, and FishbowlDC’s parent companies Mediabistro.com Inc. and WebMediaBrands Inc., claiming libel, false light invasion of privacy, and intentional infliction of emotional distress.

According to the complaint, FishbowlDC began running weekly articles in a series called “Wendy Wednesday” in which the website posted photos of Gordon that were allegedly downloaded without Gordon’s consent from her Facebook page and wrote commentary about Gordon in relation to the photo. The complaint alleged that the articles depict Gordon as an “insatiable narcissist,” a “shameless self-promoter” and a “cougar” who has sexually transmitted diseases and drinks heavily. For example, an Aug. 15, 2012 post called Gordon an “all-around showboater” who “feels the need to bring us into her warped world and share her terrifying pictures.”

An Aug. 22, 2012 post featured a photo of Gordon taken at a charity event with the accompanying text: “Wendy is DTF [“Down to Fuck”] and on the prowl. So, give yourself an extra blast of AXE body spray, maybe think about double bagging it and say hello to Cougar Wendy!” The complaint alleged that FishbowlDC started the series for “unclear” motives and “without provocation.” *Gordon v. Mediabistro.com Inc.*, Civil No. 13-0000388 (D.C. Sup. Ct. 2013). The complaint is available online at <http://legaltimes.typepad.com/blt/2013/01/dc-media-news-website-sued-for-libel.html>.

“What’s ironic is that Fishbowl is arguing that Fishbowl readers would never believe the statements in Fishbowl are factual. It’s inherently disparaging its own product.”

— Clay Calvert, Director,
Marion B. Brechner First Amendment Project
University of Florida

Gordon sent FishbowlDC a letter demanding retraction of the articles on Oct. 5, 2012. FishbowlDC removed the articles but refused to issue a retraction or an apology, according to the complaint. The complaint also alleged that Gordon suffered more than \$1 million in damages because of lost business, as well as injury to her mental well-being. Gordon demanded punitive damages of “no less than \$1 million” in the complaint. FishbowlDC is also accused of publishing the articles with knowledge of their falsity and reckless disregard for their falsity, invoking the actual malice standard from the U.S. Supreme Court’s 1964 decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The complaint also claimed that Gordon is not a public figure, meaning that she would not have to prove the more stringent actual malice standard under District of Columbia law. An initial scheduling conference was held April 25, 2013. A response filed on behalf of FishbowlDC on March 6, 2013 claimed that the posts represent “satire, opinion, hyperbole and other expressions of speech squarely protected by the First Amendment” and that the authors did not intend for the articles to be taken as fact. The response also claimed that Gordon was a public figure, and that the articles were substantially true. FishbowlDC’s response is available online at <http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/03/12/were-fishbowl-dcs-wendy-wednesday-posts-just-a-joke/>.

Whether Gordon is likely to succeed in her libel suit is debatable. In an interview for a Jan. 23, 2013 post for the *Washingtonian* blog “Capital Comment,” Michael Rothberg, a media law attorney at Washington, D.C.-based firm Dow Lohnes said, “If a reasonable person wouldn’t take [the postings] seriously, then there wouldn’t be a valid claim. Even if it’s a terrible joke, it still wouldn’t be actionable. The amount of tastelessness really doesn’t matter.” In an interview with *Washington Post* blogger Erik Wemple for a March 12, 2013 post, Clay Calvert, the director of the

Marion B. Brechner First Amendment Project at the University of Florida, said, “What’s ironic is that Fishbowl is arguing that Fishbowl readers would never believe the statements in Fishbowl are factual. It’s inherently disparaging its own product.”

Although many of the posts have been removed, a Nov. 17, 2011 post is still available on FishbowlDC’s website. The post includes a reply Gordon made on her Facebook page to some of FishbowlDC’s initial posts. Gordon’s Facebook post said, “[A]pparently you don’t know me at all and are hell bent on presenting a false representation. Thanks for giving me a day, though. Love the alliteration, and thanks for the salute to my Photoshop skills. That’s called ‘creativity,’ a vital attribute in this business ... not to be confused with ‘fact’ when presented as such ... or maybe this is just your way of asking me to write for you!” Gordon’s attorney, David S. Wachen of the Potomac, Md. firm Shulman, Rogers, Gandal, Pordy & Ecker, said in an interview for a Jan. 18, 2013 *Politico* blog post that the comments were “obviously written sarcastically, with tongue in cheek,” and that Gordon wrote them “before the offensive 2012 posts that are the focus of the case had occurred.” A trial date had not been set as the *Bulletin* went to press.

D.C. Circuit to Rule on Application of D.C. Anti-SLAPP Statute in Online Defamation Case

The U.S. Court of Appeals for the D.C. Circuit heard oral arguments on March 15, 2013 to consider whether the District of Columbia’s Anti-SLAPP statute is applicable in federal court when the defamation lawsuit was brought before the statute went into ef-

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fect. On Feb. 11, 2011, former USDA Georgia Director of Rural Development Shirley Sherrod filed suit for defamation, false light invasion of privacy and intentional infliction of emotional distress in U.S. District Court for the District of Columbia against the conservative blogger Andrew Breitbart and Breitbart's producer, Larry O'Connor. Sherrod's complaint alleged that Breitbart, who died in March 2012, defamed her by posting a "heavily edited" video clip of a speech she gave to the Georgia NAACP in March 2010 on his blog BigGovernment in July 2010 that portrayed her as a "racist" who "racially discriminated in carrying out her federal job." The clip showed Sherrod discussing how she helped a white farmer save his farm from foreclosure in 1986, saying that she "was trying to decide just how much help [she] was going to give him," and that she "took him to one of his own" (i.e. a white lawyer) to help him. Sherrod's complaint identified that immediately before the statements she made about the white farmer, Sherrod said, "the struggle is really about poor people," and that immediately after the statements she said that the people she worked with "could be black or they could be white," and that working with the white farmer "made [her] realize that [she] needed to work to help poor people." Thus, according to the complaint, Sherrod accused Breitbart of defaming her by taking her words "out of context" to portray her as racist in her job when in fact she was describing the experience that showed her that race did not matter to her job. The complaint stated that the extensive media coverage of the blog post led the Obama administration to demand Sherrod's resignation. The complaint also stated that after it was revealed that Breitbart had edited the video, many in the media, including Fox News' Bill O'Reilly, apologized for reporting that she was a racist, yet Breitbart stood by his comments. The complaint alleged that Breitbart's actions amounted to actual malice.

Breitbart and O'Connor filed a motion to dismiss the suit in April 2011, citing the D.C. Anti-SLAPP statute that went into effect on March 31, 2011. The district court denied the motion, holding that the D.C. statute did not apply to a federal case, and that even if it did apply the statute could not be applied retroactively against Sherrod, who filed her complaint nearly two months before the statute went into effect, according to the district court's February 2012 statement of reasoning. Following Breitbart's death in March 2012, his status in the case has been unclear, as his family has not notified the court of an estate that could be sued, according to a

March 17 *Washington Post* article. *Sherrod v. Breitbart*, No. 11-7088 (D.C. Cir. 2013).

The issue before the D.C. Circuit is whether the district court erred in dismissing the application of the D.C. Anti-SLAPP statute. According to O'Connor's reply brief, O'Connor's lawyers argued that the "D.C. Council expressed a clear intent that the [Anti-SLAPP] Act applie[d] to pending cases." An *amicus* brief filed by numerous media organizations on behalf of the defendants (including NBC Universal, NPR, and the Reporters Committee for Freedom of the Press) argued that the "First, Fifth, and Ninth Circuits and numerous district courts across the country agree that anti-SLAPP statutes apply in federal diversity actions." The media organizations stated in the brief that they do not address the merits of Sherrod's lawsuit. Rather, the media *amici* stated that the "Act's heightened protection should, and indeed must, be applied in diversity actions as the substantive law of D.C." The appellate briefs and *amicus* briefs are available online at: <http://dcslapplaw.com/2013/02/08/sherrod-v-breitbart-appeal-ready-for-oral-argument/>.

Michigan Appeals Court Rules that State Rules of Discovery Provide Sufficient Protection for Anonymous Blogger Facing Defamation Suit

On April 4, 2013, the Michigan Court of Appeals held that Michigan rules of discovery afforded an anonymous blogger sufficient protection from having his identity revealed upon being sued for defamation by Thomas M. Cooley Law School (Cooley). The court of appeals overturned the ruling of the Ingham County trial court, which ruled that the blogger (John Doe 1) had no recourse to protect his anonymity. The trial court reached that conclusion after applying standards designed to protect the anonymity of online speakers established in courts of appeal in New Jersey and Delaware. The Michigan Court of Appeals held that Doe 1 did have means to protect his anonymity under Michigan rules of discovery, and it admonished the trial court for "abus[ing] its discretion" in applying the out-of-state standards. However, the dissenting appellate judge argued that the majority's decision did not go far enough to prevent defamation plaintiffs from frivolously suing simply to learn the name of an anonymous defendant.

According to the court of appeals decision, the case involved a blogger with the alias "Rockstar05," who created the blog "THOMAS M. COOLEY LAW SCHOOL SCAM" through the California-based ISP Weebly in early 2011. In his initial Feb.

14, 2011 post, Doe 1 said he was a former student of the Lansing, Mich.-based school, called the school "a diploma mill," and criticized several of the school's business practices, including the school's ranking system, which listed itself as the number-two law school in the nation behind Harvard in 2010. Doe 1 called the ranking system "little more than a marketing tool" in the post. Twice in the post Doe 1 referred to Cooley officials as "criminals."

On July 14, 2011, the law school filed a complaint, alleging that Doe 1's comments, particularly the use of the word "criminals," were defamatory. On July 25, 2011, Cooley petitioned for a subpoena in San Francisco County Superior Court of California to compel Weebly to release the identity of Rockstar05. The California court issued the subpoena on Aug. 3, 2011, and on August 5, Doe 1 filed a motion to quash the subpoena in the Ingham County trial court. Weebly initially informed Doe 1 that it would not disclose his identity until the trial court had ruled on the motion to quash, but a Weebly employee released Doe 1's identity to Cooley on August 17, according to the Michigan Court of Appeals decision. On August 29, Cooley amended its complaint to refer to Doe 1 by his legal name. In September 2011, during arguments on Doe 1's motion to quash, Doe 1 argued that even though Cooley now knew his legal name, he still sought the motion to quash as a protective order to prevent Cooley from using his name in court. The trial court granted Doe 1's protective order, which, the court said, put Doe 1 and Cooley "back in the positions they occupied before Weebly disclosed Doe 1's information." The court then heard arguments on Doe 1's motion to quash the original subpoena that Cooley issued to Weebly.

On Oct. 24, 2011, the trial court ruled that Cooley could use the information on Doe 1 that it received from Weebly because Cooley had passed a four-part test first established by a New Jersey appellate court in 2001 as a hurdle for defamation plaintiffs seeking to unmask anonymous defendants (*Dendrite Int'l, Inc. v. Doe No. 3*, 775 A2d 756 (N.J. Super. Ct. App. Div. 2001)). The test, modified by the Delaware Supreme Court in 2005 (*Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. Sup. Ct. 2005)), required that plaintiffs: (1) notify the speaker of the complaint; (2) identify the alleged defamatory statements; and (3) prove they could survive a motion for summary judgment. The final part of the analysis required the court to weigh the speaker's First Amendment rights against the strength of the plaintiff's prima facie case, only allowing the plaintiff to proceed

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FTC, State Attorneys General Set Their Sights on Consumer Privacy in the Mobile Industry

Regulators, including the Federal Trade Commission and the state attorneys general for California and Maryland, have targeted the mobile phone industry's privacy practices in recent months. In particular, applications ("apps")

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that smartphone users can download for a variety of purposes have raised concerns about whether users are informed of the type of information they collect and when they collect it. (A smartphone is a mobile phone with built-in apps and Internet access that also typically provides text messaging, Internet browsing, still and video cameras, and MP3 player, among other features.) Collection of information from children is another area of focus. In February 2013, the FTC settled an enforcement action against a social networking app and released a report with privacy recommendations for the mobile

industry. Meanwhile, California Attorney General Kamala D. Harris sued Delta Air Lines for its privacy practices related to its app and also released a report on mobile privacy.

FTC Targets Mobile Industry for Privacy Violations and Makes Industry-Wide Recommendations

The FTC reported it was demonstrating its focus on the mobile industry in a February 2013 settlement with HTC America in its first attempt to take action against a manufacturer of mobile devices. HTC, the maker of smartphones based on the Windows Mobile, Windows Phone, and Android operating systems, created software that allegedly had security vulnerabilities. HTC's software could have allowed third party applications to install software to access the user's personal information entered into or stored on the phone, send text messages from the device without the user's consent, and record the user's phone calls using the device's

microphone. The FTC also charged that HTC did not have proper security training for employees and did not properly monitor its software. As part of the settlement, HTC agreed to release software patches and establish a comprehensive security program, which a third party will audit for the next 20 years. "[HTC] didn't design its products with security in mind," Lesley Fair, a senior lawyer in the FTC's Bureau of Consumer Protection, wrote in a Feb. 22, 2013 "Business Center Blog" post.

Earlier in February, the FTC reached a settlement in an enforcement action against social networking app Path, according to a Feb. 1, 2013 press release. Path allows users to create a journal of memories with photos, videos, posts, and share it with their friends and family. The FTC brought the action against Path because the app connected to users' mobile phones' address books without users' consent or knowledge. Additionally, the FTC charged that Path collected

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Defamation, continued from page 28 with subpoenaing an ISP for the speaker's identity if it deemed the plaintiff's case strong enough. The Michigan trial court applied the four-part test because it argued that state law did not offer Doe 1 sufficient protections. Although it ruled in favor of Cooley, the trial court stayed its ruling pending Doe 1's appeal.

The two-judge majority of the Michigan Court of Appeals held that the four-part test was not necessary because Michigan's rules of discovery would protect Doe 1. Presiding Judge William C. Whitbeck wrote that the state's discovery rules required plaintiffs to make a prima facie case to survive defendants' motion for summary disposition (Michigan's term for summary judgment). Judge Whitbeck argued that this requirement "overlap[ped] with" the *Dendrite/Cahill* test. Judge Whitbeck also wrote that Michigan Court Rule (MCR) 2.302(C) allowed defendants to file for a protective order to force that "discovery not be had" or that it "be had only on specific terms and conditions." Such an order is meant to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," according to the court's opinion. Judge Whitbeck declined to accept Doe 1's argument that the Michigan courts should adopt its own version of the *Dendrite/Cahill* test to prevent what

Doe 1 called "the extreme case," citing judicial restraint. In such a case, a would-be defamation plaintiff would seek the identity of an anonymous alleged defamer by immediately pursuing discovery upon serving a complaint, essentially "out[ing]" him or her before he or she has knowledge of the suit. Judge Whitbeck remanded the case to the trial court to determine whether Doe 1 should be given a protective order.

Judge Jane Beckering concurred in part and dissented in part with the decision. Judge Beckering agreed with overturning the trial court's decision, but she disagreed in the court's ruling that it should not craft its own version of the *Dendrite/Cahill* test. "[T]here is no guarantee that an anonymous defendant will learn of the plaintiff's lawsuit and its attempt to discover his or her identity in time to request a protective order," she wrote. She also argued that Michigan's summary disposition standard was not strong enough to prevent frivolous defamation suits whose primary goal is to determine the identity of the alleged defamer "as a means to retaliate against or chill legitimate uses of speech." She argued that the protective order available under MCR 2.302(C) would offer another layer of protection to anonymous speakers if the plaintiff met all the requirements of a *Dendrite/Cahill* test. *Thomas M. Cooley Law School v. John Doe 1*, No. 11-000781 (Mich. Ct. of App. 2013).

Doe 1's attorney, Paul Alan Levy, of Public Citizen Litigation Group, told the Reporters Committee for Freedom of the Press for an April 11, 2013 press release that his client had not decided whether he would seek further review of the Michigan Court of Appeal's decision. Levy said the decision was "good news for his client," but that "the ruling did not go far enough in dictating how trial judges should issue protective orders for anonymous bloggers." Levy filed *amicus* briefs on behalf of Public Citizen Litigation Group for both of the *Dendrite* and *Cahill* cases. (For more information on the *Cahill* case, see "Defamation News: John Doe No. 1 v. Patrick Cahill and Julia Cahill" in the Fall 2005 issue of the *Silha Bulletin*. For more information on defamation suits against anonymous online speakers, see "Subpoenas Seek to Identify Anonymous Web Site Commenters and Viewers" in the Winter 2009 issue of the *Silha Bulletin*, and "Defamation Lawsuits Pose Threat to Journalists as Online Communication Complicates First Amendment Analysis" in the Spring 2012 issue of the *Silha Bulletin*.)

— Cassie Batchelder contributed to this story.

— BRETT JOHNSON
SILHA RESEARCH ASSISTANT

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information from children under the age of 13 without their parents' permission in violation of the Children's Online Privacy Protection Act of 1998 (COPPA). COPPA requires parental consent to collect information about children younger than 13, dictates what websites must include in their privacy policies, and outlines websites' responsibilities for protecting children online. (15 U.S.C. §§ 6501-6506. The full statute is available online at <http://www.ftc.gov/ogc/coppa1.htm>.)

According to its records, which collect users' birth dates, Path collected personal information from approximately 3,000 children. Under the consent order, Path is required to implement a privacy program and undergo privacy audits every other year for the next 20 years. This agreement is similar to those that the FTC reached in agreements with Google and Facebook for privacy violations in the last several years. As part of the settlement, Path must also pay an \$800,000 fine to the FTC. (For more on the FTC's privacy settlement with Facebook, see "Legislators Seek Increased Consumer Privacy Protections; FCC and FTC Investigations of Online Companies Continue" in the Winter/Spring 2012 issue of the *Silha Bulletin*.) Path CEO Dave Morin apologized to its users, explaining that the design of the app was "wrong," according to a Feb. 1, 2013 story in the *Washington Post*. "This settlement with Path shows that no matter what new technologies emerge, the agency will continue to safeguard the privacy of Americans," said FTC Chairman Jon Leibowitz. The settlement is unique, however, because it disciplines Path not for a violation of a written privacy agreement, but because of a design failure of the user interface. The FTC has premised previous privacy-related charges against companies on violations of written agreements with users. For example, in 2011, Google settled a charge with the FTC related to the roll-out of its social networking service, Buzz, because Buzz automatically used consumers' information in a way the privacy policy promised it would not. Jules Polonetsky, director and co-chair of the Future of Privacy Forum, pointed out to the *Post* that "[the FTC] focused on the omission of the proper timing of the communication to the user as a deception."

On the same day that the FTC announced its settlement with Path, it released a staff report on mobile privacy, "Mobile Privacy Disclosures: Building Trust Through Transparency." The report is not binding and offers recommendations to platforms that offer apps (such as

Google, Apple, Microsoft, Amazon, and Blackberry), app developers, advertising networks and other third parties that might collect information from apps, and app trade associations. The FTC's notable recommendations include implementing a do-not-track feature similar that used for Internet browsers. Do-not-track technology allows users to choose to prevent third parties, like advertisers, from tracking users' activities as they navigate through apps on their devices. Additionally, "just-in-time" disclosures would inform consumers of information collection just before it will be collected. The FTC also recommended the industry create both a privacy "dashboard" where consumers could view the privacy collection settings by apps and icons that would appear on the device to indicate what type of information was being collected at a given moment. The full report is available online at <http://www.ftc.gov/os/2013/02/130201mobileprivareport.pdf>.

Although the report is not binding, the industry may view it as important policy to which it should conform. "This [report] says if you're outside the recommended behavior, you're at a higher risk of enforcement action," Mary Ellen Callahan, a partner at Jenner & Block and former chief privacy officer for the Department of Homeland Security, told *The New York Times* for a Feb. 1, 2013 story. Leibowitz said that the FTC is dedicated to privacy in general, and a focus on mobile privacy "is necessary because so much commerce is moving to mobile, and many of the rules and practices in the mobile space are sort of like the Wild West." Erica Sadun, an author of books about the development of mobile apps, said she is concerned about the impact of the FTC's policies on small developers for a Feb. 26, 2013 *Bloomberg* story. "One-man shops may be driven under or may simply start avoiding anything that involves any user identification whatsoever," Sadun said. "An onerous requirement would be a tipping point that could potentially sink the independent developer, and a hazy one would open them up to potential lawsuits." Anita Ramasastry, law professor at the University of Washington School of Law, sees the FTC's focus on mobile privacy as a welcome development. "As consumers — including children — migrate to mobile apps and ubiquitous use of their devices, the issues of who is collecting what and when, and how what is collected is being used, have together become a confusing and tangled web," Ramasastry wrote for Justia's "Verdict" blog on Feb. 26, 2013. Ramasastry added that although the FTC report targets large companies like Google,

Apple, and Blackberry, it also impacts small businesses that create apps. "The FTC report and its recent enforcement action [against Path] put these smaller companies on notice that their own privacy practices are under scrutiny as well," she said. Companies seem to be acknowledging that sound privacy practices serve both the companies' and consumers' interests, according to a March 3, 2013 article in *The New York Times*. Joel R. Reidenberg, professor at Fordham Law School and director of the Center on Law and Information Policy, told the *Times* that more companies are trying to develop services to protect consumer privacy. "Platforms recognize they have to deal with privacy," Reidenberg said. "They're looking at how they can be competitive."

California Attorney General Focuses Efforts on Mobile App Privacy

California Attorney General Kamala D. Harris made consumer privacy a key component of her work as attorney general and took action in the mobile app privacy sphere in late 2012. Harris filed suit against Delta Air Lines for violation of the California Online Privacy Protection Act (OPPA) and unfair competition law because Delta did not "conspicuously post a privacy policy in its Fly Delta app" and did not conform its information collection practices to its website privacy policy, nor did the website privacy policy mention the app. *California v. Delta Air Lines Inc.*, Cal. Super. Ct., No. CGC-12-526741, complaint filed Dec. 6, 2012. The complaint is available online at [http://op.bna.com/pl.nsf/id/kjon-92rkaa/\\$File/Delta%20Complaint.pdf](http://op.bna.com/pl.nsf/id/kjon-92rkaa/$File/Delta%20Complaint.pdf).

Harris has focused on mobile app privacy throughout her tenure. In February 2012, Amazon, Apple, Google, Hewlett-Packard, Microsoft, and Research In Motion (whose platforms make up the majority of the market for mobile apps, according to a release from Harris' office) agreed to ensure apps available on their platforms would post privacy policies. Of the February agreement, Harris said, "By ensuring that mobile apps have privacy policies, we create more transparency and give mobile users more informed control over who accesses their personal information and how it is used." In October 2012, Harris notified mobile application developers and companies that were not in compliance with OPPIA that they had 30 days to post privacy policies or face suit. Delta was allegedly notified and failed to bring its privacy practices into compliance within the time frame, according to the complaint. The suit against Delta is the

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Silha Spring Ethics Forum Discusses Issues Facing Sports Journalists

At the 2013 Silha Spring Ethics Forum, five local sports journalists discussed key ethical issues they face within their profession, including the ever-blurring line between beat and opinion reporting and sports reporters' use of social media. Before an audience of 50, they also

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shared their thoughts on recent stories that have put sports journalism ethics in the national spotlight, including the Manti Te'o girlfriend hoax, Lance Armstrong's doping, and the high school football players from Steubenville, Ohio who were convicted of rape in March 2013.

The event, "Tebow, Te'o and Tiger, Oh, My!: Keeping Your Distance as an Ethical Sports Journalist," featured

Charlie Armitz, sports editor of the *Minnesota Daily*; Chris Long, weekend sports anchor for KSTP TV and anchor for ESPN Radio 1500 Twin Cities; Dawn Mitchell, anchor and sports reporter for KMSP TV; Mike Rand, assistant sports editor for the Minneapolis *Star Tribune*; and David Brauer, a reporter for *MinnPost* who covers local media. Silha Professor of Media Ethics and Law and director of the Silha Center Jane Kirtley moderated the forum.

Kirtley asked the journalists what the difference is between a sports reporter, a sports columnist, and a sports commentator. Brauer said the distinctions were not unlike those seen in non-sports journalism, where beat reporters write stories based on facts and "free-swinging columnists get people talking." However, those distinctions are

becoming blurred, he said, much like the blurring between facts and commentary in non-sports journalism. Long said that for him the distinction depended on the medium. He said that his job as a TV anchor is to deliver facts, but that on sports talk radio, his job is "opinion, opinion, opinion."

Armitz said that the job of columnists is to entertain, but blogs and Twitter allow *Minnesota Daily* sports reporters to give more insight into their stories through commentary. Brauer said that sports journalists could build their credibility on Twitter by telling jokes and giving witty commentary. Such actions help the journalist form a relationship with his or her readers, who will be more likely to trust the journalist if he or she breaks a big story on Twitter, he said. "Facts and entertainment are not

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first under the OPPA since its passage in 2004. The claim under California's unfair competition law alleges Delta engaged in unlawful, unfair, or fraudulent business practices by continuing to fail to post a privacy policy in its app and failing to comply with the privacy policy posted on its website. Delta spokesman Paul Skrbec said in a Dec. 7, 2012 statement to *BNA* that Delta "does not comment on pending litigation." The complaint requests a permanent injunction preventing Delta from engaging in similar unlawful conduct and asks the court to order that Delta to pay \$2,500 for each violation. The attorney general's office has also made a request that the court award attorneys' fees and costs of investigation.

Harris' office also released a report on mobile privacy, "Privacy on the Go: Recommendations for the Mobile Ecosystem," on Jan. 10, 2013. The report recommends a "surprise minimization framework" that would only collect data an app's users would anticipate it would collect, and provide special notice to users if the app collected more information than the user should have expected. The report highlights that the "mobile ecosystem" is new and rapidly growing, and the report aims to educate those who work in the industry about the privacy implications of their products. The recommendations in the report, like the FTC's report, are non-binding, and they seek to offer consumers

a level of protection above and beyond OPPA. The full report is available online at http://oag.ca.gov/sites/all/files/pdfs/privacy/privacy_on_the_go.pdf. The Electronic Frontier Foundation suggested mobile app developers would be wise to offer more privacy protection than is necessary in a Jan. 10, 2013 post by activist Parker Higgins; both the EFF and the report state that mobile users are "increasingly concerned about their privacy when installing mobile apps."

Several advertising industry groups responded to the report with a letter of concern to Harris. The letter notes that the office has not interfaced with businesses that develop apps and expresses concern over regulating such a new industry. It comments that too much regulation could stifle innovation, raise the cost of doing business, and cause economic harm to the companies in general. Additionally, the letter notes that the action taken by the FTC in the mobile app sphere could conflict with California's approach. The letter is available online at <https://www.eff.org/document/ad-industry-letter-response-ca-ag-kamala-harris-privacy-go>.

California is not the only state to take its own action with regard to privacy. On Jan. 28, 2013, Maryland Attorney General Douglas F. Gansler formed a new unit within his office: the Internet Privacy Unit. Although the unit has not yet taken specific action, Gansler said, "I created this new unit to ensure that Marylanders

who use the Internet every day have someone on their side, watching out for illicit online activities and working with key stakeholders to improve gaps in privacy policies." The unit will reportedly ensure companies comply with state and federal consumer protection laws and analyze weaknesses in privacy policies, working with the industry to protect users' rights and meet challenges in the new industry. Gansler also said that the unit will address cybersecurity and cyberbullying concerns in an interview for a Jan. 28, 2013 *Washington Post* story.

The actions over recent months by a variety of regulators show that policymakers are paying attention to this new context of mobile devices and apps. Conversations and enforcement actions are likely to continue as regulators learn more about the industry and the ability to inform consumers of their privacy expands. The FTC and the states of California and Maryland have all indicated that the increasingly ubiquitous use of mobile technology and growing concerns from consumers about privacy on their mobile devices mean that conversations about mobile privacy have only just begun.

— CASSIE BATCHELDER
SILHA RESEARCH ASSISTANT

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mutually exclusive in sports journalism,” Brauer said. However, Armitz said sports reporters should be careful not to compromise their objectivity when using Twitter.

When asked how sports journalists avoid being used by organizations that may want to control a narrative by putting out selected information or even misinformation, Brauer said he believed all journalists must deal with the influence of public relations no matter what they cover. “Sports is not so different from politics,” he said. Long said that although sports journalists should pursue stories that challenge the image of organizations or athletes, they have to be careful of burning bridges. “If you get a story wrong, nobody will talk to you,” he said.

Kirtley asked the panelists to discuss why they thought journalists did not discover that Notre Dame linebacker Manti Te’o’s girlfriend was not a real person. Mitchell said that with the daily pressures of her job she would not have had the time to look into the story. She said that she was not surprised that the alternative sports blog Deadspin broke the story, because journalists who work for alternative news outlets like this generally have more time and are “eager to cut their teeth.” The time element in the Te’o story was critical, Mitchell said. “You have to be darn sure before you ruin a college kid’s life that you can get the story 100 percent right,” she said, adding that she would have had fewer qualms investigating a similar story about a professional athlete.

Brauer said that the fact that the AP did not get the Te’o story right was shocking. “The AP is basic blocking and tackling of journalism,” he said. Rand said that he could not blame journalists for missing the story because it was “not a story you would imagine someone would lie about.” Long said he was happy the Minnesota Vikings, who many thought would draft Te’o, did not select the linebacker. “I did not want to deal with Te’o, because I would have had to ask the questions that viewers would have wanted me to ask,” Long said, then

hypothetically and mockingly asked, “Hey Manti, so I know you’ve answered this question 200 times already, but can you tell our viewers about your fake girlfriend?” (For more discussion on the ethical issues involved in the Manti Te’o story and other controversial sports stories from early 2013, see “Te’o, Armstrong, Pistorius, and Collins Stories Raise Ethical Questions in Sports Journalism” on the cover of this issue of the *Silha Bulletin*.)

“You have to be darn sure before you ruin a college kid like Manti Te’o’s life that you can get the story 100 percent right.”

— Dawn Mitchell
Anchor and Sports Reporter,
KMSP TV

The panelists also discussed the issue of whether sports reporters should be fans of the teams they cover. Long said that he roots for local teams because it is good for business. For example, if the Minnesota Wild progressed in the Stanley Cup Playoffs, Long’s coverage of the team would get more exposure. However, Long said he would never go into a locker room and say, “Tough loss, guys, you’ll get them next time!” Rand said that a reporter could be a fan, but that “as a professional, you root for the story, not for the team.” Mitchell said that she does not refer to coaches by the title “coach” in order to maintain professional distance. “They’re not my coach,” she said.

Mitchell said that as a female reporter she feels her work is under more scrutiny than that of her male colleagues within an industry dominated by males. She said there are “unwritten ethics” for women in sports journalism. For example, Mitchell said that she always dresses professionally, does not go into a locker room without a photographer, and does not keep athletes’ phone numbers in her cell phone. “You do not want to give even a hint of impropriety,” she said.

As the event drew to a close, the panelists briefly shared their thoughts

on some recent stories in sports and their ethical implications. When asked to assess why journalists did not thoroughly investigate the high school athlete charged and found delinquent in the Steubenville rape case, Brauer said the story was complicated because it involved minors. “You can’t *not* cover it, but you also have to get it right,” he said. When asked about how to best cover the story of players sustaining concussions in football and hockey,

Rand said the story would be “weird” to cover because concussions are part of a broader issue regarding long-term health concerns for players. Rand said that the story has

also caused “audience fatigue,” leading to less coverage of the issue. However, Rand said the story is “massively important” and is “going to get bigger.”

When asked about how best to cover the decision of NBA player Jason Collins to be the first active player in one of the four major U.S. sports leagues (NBA, NFL, MLB and NHL) to come out as gay, Mitchell said that she would try to get reaction from athletes who would support playing with a gay player and those who would not. She said she would tie the story to broader national trends involving changing attitudes toward homosexuality, but she would not lead the audience to interpret the story one way or another.

Silha Center events are supported by a generous endowment from the late Otto Silha and his wife, Helen. The Spring Ethics Forum was cosponsored by the Minnesota Chapter of the Society of Professional Journalists. Video of the Spring Ethics Forum is available on the Silha Center’s website at <http://silha.umn.edu/events>.

— BRETT JOHNSON
SILHA RESEARCH ASSISTANT

Evidence and Privacy in a Digital World: Silha Spring Forum

When Google's users log onto their Gmail accounts, some believe their communications are "private." Others might not share that expectation, but think they are anonymous because only

SILHA CENTER EVENTS

their intended recipients are interested in their content. But to what extent can digital information be collected and used as evidence against them in court? At the Silha Center Spring Forum on March 13, 2013, Mary Horvath, an FBI Senior Computer Examiner, and Dick Reeve, General Counsel/Senior Chief Deputy District Attorney for computer crimes in Denver, Colo. considered questions about digital evidence and expectations of privacy. Stephen Cribari, a criminal and evidentiary law professor at the University of Minnesota Law School, moderated.

More than 90 attendees filled the auditorium at the University of Minnesota School of Journalism and Mass Communication for the forum, "Digital Evidence: Privacy, Acquisition, Proof." Cribari began by asking whether individuals can expect privacy in their digital communications, such as email. "There is no privacy in a digital world," Horvath replied. She emphasized that when individuals choose to use online service providers like Google or Facebook, they must agree to terms of service that allow the provider to hand over data to law enforcement. "The content of those contracts says what will be provided to law enforcement," Horvath said. "[By using the service], you've already agreed to give information away." Cribari observed that many terms

of service are lengthy and many users agree to these terms without reading them. Reeve said, "If you had read the policy, you would know you have signed away so much more privacy than you've ever realized." The panel emphasized that terms of service or contracts often specify that the user has waived

able to collect about individuals during an investigation. Horvath explained that in her role as a computer examiner, she can recover practically everything a user has ever done by looking at a computer's hard drive. "[Information] is not gone even when you implement processes to delete it," she said. Reeve pointed out

"There is no privacy in a digital world."

— Mary Horvath
FBI Senior Computer Examiner

remedies for violation of the privacy torts — intrusion on seclusion, false light, misappropriation, and publication of private facts. As a result, individuals may have little or no expectation of privacy when they use these services.

The panel also discussed how the United States courts have addressed privacy issues in recent years. According to the Supreme Court, "the expectation of privacy is based on what you keep secret," Cribari said. He argued that keeping personal information secret is more unpredictable and challenging in an increasingly digital world. He then posed the question, "Do we need to rethink this secrecy approach to privacy in a digital world?" Horvath pointed out that mobile devices and cell phones are constantly communicating information, even without users' knowledge. For example, cell phones often send out GPS information to websites and applications, even when the user is not using location services or aware that his or her location is being tracked. "Your cell phone is talking all the time," Cribari said.

Horvath and Reeve described the types of information the government is

that to retrieve an email, he and his investigators do not have to find the email on an individual's computer or cell

phone. Service providers also keep copies of emails on their servers. "The low-hanging fruit is on devices," Reeve said. "But an email being on a server is also pretty low-hanging fruit." Horvath and Reeve emphasized that search warrants must be tailored to searches for relevant evidence on computers, and examiners must not exceed the scope of the warrant. "In order for me to look for evidence, I have to look through much of the data on a computer, but what I can turn over [to the investigating agent] is limited by the warrant," Horvath said.

The panel concluded by offering their differing views on privacy. Horvath contended that sacrificing a little privacy for security reasons might be important. But Reeve emphasized that when lawyers and other professionals question the government's actions, it keeps government accountable. Reeve said, "Having people work hard and ask the tough questions is what makes the system work well."

Silha Center events are supported by a generous endowment from the late Otto Silha and his wife, Helen.

— CASSIE BATCHELDER
SILHA RESEARCH ASSISTANT

Donald M. Gillmor, Founding Director of the Silha Center and First Silha Professor, Dies at 86

Professor Emeritus Donald M. Gillmor, founding director of the Silha Center for the Study of Media Ethics and Law and its first Silha Professor, died on February 14, 2013. He was 86 years old.

From 1984 to 1995, Gillmor served as the Director of the Silha Center, a research center within the School of Journalism and Mass Communication that was endowed by the late Otto Silha, a former executive with The Minneapolis *Star* and The Minneapolis *Tribune*, and their parent company Cowles Media. In 1990, Gillmor was named the first Silha Professor of Media Ethics and Law, a position he held until his retirement from Minnesota in 1998. William A. Babcock, who followed Gillmor as Silha Director in 1995, and who is now Senior Ethics Professor at the School of Journalism at Southern Illinois University-Carbondale, said that Gillmor had worked with Otto Silha to make sure the words of the center's name were in proper order, with "study," being of primary importance, as scholarship and research were to be at the epicenter of the center's mission. Gillmor said at the time that even though he, the center's founding director, was a First Amendment scholar, it was important that "ethics" precede "law" in the center's title. Jane E. Kirtley, the current Silha Professor and director of the Silha Center, said, "Don was the inspiration for Otto Silha to endow both the Silha Center and the professorship. Don's research and teaching embodied the marriage between these two related but distinct aspects of media scholarship. His legacy continues to influence our research, publications, outreach and support for graduate and law students at the Silha Center."

Gillmor earned his bachelor's degree in liberal arts from the University of Manitoba in 1949, and a year later a master's degree in journalism from the University of Minnesota. He joined the editorial staff of the *Winnipeg Free Press* in 1950 where he was a reporter and copyreader. He was also a part-time copyreader for the *Fargo Forum*

and the *Grand Forks Herald* while serving on the faculty of the University of North Dakota from 1953 to 1965. While teaching at North Dakota, he developed the school's all-university honors program. He was awarded his doctorate in mass communication from the University of Minnesota in 1961, and joined Minnesota's faculty in 1965.

Gillmor was known internationally as a leading expert on media law and ethics. His many years of teaching and research "shaped the major contours of the field of mass communication law," said Daniel Wackman, former director of the School of Journalism and Mass Communication at the University of Minnesota. Gillmor's many publications include the seminal *Mass Communication Law: Cases and Comment* (with Jerome A. Barron), in its 6th edition in 1998, which is used throughout the country by students and scholars in the field. In 1970, the first edition received the Frank Luther Mott Research Award from Kappa Tau Alpha, the field's honor society.

In addition to *Mass Communication Law*, his many articles and books include *Power, Publicity, and the Abuse of Libel Law* (1992); *Media Freedom and Accountability* (co-editor, 1989); *Enduring Issues in Mass Communication* (co-editor, 1978); and *Free Press and Fair Trial* (1966). He was a frequent guest on radio and television regarding discussions of media and made dozens of presentations to community groups and academic and professional gatherings. In 1999 he received the Al McIntosh Distinguished Service to Journalism Award from the Minnesota Newspaper Association.

Gillmor's first award for distinguished teaching was made by students, faculty and alumni of the University of North Dakota in 1959. He received two similar awards from the Minnesota Press Club in 1975 and 1978. In 1993 he received the Horace T. Morse - Minnesota Alumni Association Award for outstanding contributions to undergraduate education. Ball State, Saint Cloud State and Washington and Lee universities gave him awards in 1984, 1992 and 1993 respectively, recognizing his commitment to First Amendment principles. He was cited for

"contributions to student experience" by the University of Minnesota student Alumni Board of Governors in 1985, and he received the George Hage/Mitch Charnley Award of Excellence from the Minnesota Daily Alumni Association in 1996. That same year he received the Constitutional Law Award from the Minneapolis law firm of Mansfield, Tanick and Cohen. In 2009, he received the University of Minnesota School of Journalism and Mass Communication Alumni Society's Award for Excellence. In 1990, Gillmor was selected as a Senior Fellow at the Gannett Center for Media Studies at Columbia University and assigned to Columbia's law faculty. He was also a visiting professor of American Studies and Mass Communication at the University of Munich in Germany and a visiting professor of political science at the University of Lund in Sweden. He also lectured in Russia, South Korea and Taiwan. He was always available to local and national publications and broadcasters for advice on questions of media ethics and law. He served on numerous professional and academic boards and committees.

Gillmor is survived by his wife of 63 years, Sophie; daughter, Vivian Cathcart of Toronto; son, Peter; and grandsons, Steven Cathcart, and Kevin and Geoffrey Gillmor. He is also survived by brothers Douglas and Alan. A memorial service took place at Roseville Memorial Chapel, 2245 N. Hamline Avenue, Roseville, MN, on Saturday, February 23, 2013. It was attended by many current and retired SJMC faculty members, staff, students, friends and family.

Memorial gifts may be directed to the Donald Gillmor Fund at the School of Journalism and Mass Communication. Checks should be made payable to the University of Minnesota and can be mailed directly to The Donald Gillmor Memorial Fund, c/o University of Minnesota Foundation, C-M 3854, PO Box 70880, Saint Paul, MN 55170-3854. All gifts will be matched by the School of Journalism & Mass Communication.

— *The School of Journalism and Mass Communication and the Gillmor family contributed to this story.*

Tributes for Donald M. Gillmor from Colleagues, Former Students

Tributes have come to the Silha Center and the School of Journalism and Mass Communications (SJMC) from colleagues and former students of Donald M. Gillmor, and have been posted on the Silha Center's website at <http://www.silha.umn.edu/about/SilhaPastDirectors.html>. The following are excerpts from some of them:

From Hazel Dicken-Garcia, Professor Emerita, SJMC, University of Minnesota

Don will be remembered as a model scholar and educator. When I reflect on the 19 years that we worked together on the SJMC faculty, I realize that working with him taught me much about how to be a teacher, scholar, colleague, friend, human being. During those 19 years before he retired in 1998, I observed Don at work in committees, classrooms, the Silha Center for the Study of Media Ethics and Law, graduate education and varying public arenas.

His [teacher's] demeanor alone encouraged class participation and students wanted to ask him good questions. In responding, he skillfully led students into discussions with follow-up questions, stimulating more questions and creating a "conversation." Following such an exchange, the pride of realized-success in a student's face and posture was clear. It was the way Don engaged students that empowered them intellectually and marked him as a master teacher. He had ways of subtly defusing students' embarrassment about their "mistakes" so they would not be inhibited in expressing themselves. While never allowing the importance of getting one's facts correct to slide, he put any student error into perspective, noting it was "easy to make," or telling an amusing anecdote to counter any self-negating feelings a student might have about making a "dumb mistake" in class.

From Everett E. Dennis, Dean and CEO, Northwestern University Qatar

For generations of graduate students at the University of Minnesota, Donald M. Gillmor was indispensable as their teacher, mentor, guide and friend. In the rumpled world of college teaching he exuded an elegance of style – and an eloquence in the classroom that offered a pathway to his substantive depth and passion for freedom of expression. Importantly he was a scholar, not an advocate.

He was generous and helpful, reading his students' work with a gimlet eye and never afraid to make the kinds of critical comments that drive learning and change. And to know Don was to know the magnificent Sophie as they opened their home to students and joined in the merriment of student parties and dinners. He was, of course, eminent in his field, much admired for his early work on free press-fair trial and best known for his casebook co-authored with Jerome Barron, but also for subsequent articles and a notable book on libel. Unlike some legal scholars, he informed his work with social science and had a masterful command of the literature of communications. He knew and connected well with scholars and faculty colleagues everywhere and never forgot his own humble academic beginnings as an assistant professor in North Dakota. While fiercely proud of his place in the academy, he had comfortable contact with media professionals always commanding their respect. He could be deadly serious, but had a finely tuned sense of humor.

From William A. Babcock, Senior Ethics Professor, School of Journalism, Southern Illinois University Carbondale

To those who knew him, it's no surprise Don considered ethics to be at the core of the First Amendment's protection of freedom of speech. Don viewed the law as a sort of institutionalized morality, and he considered laws without a strong moral underpinning to be vacuous.

He told me that he had worked with Otto Silha, the center's benefactor, to make sure the words of the center's name were in proper order, with "study," being of primary importance as scholarship and research were to be at the epicenter of the center's mission. He then said that even though he, the center's founding director, was a First Amendment scholar, it was important that "ethics" precede "law" in the center's title.

From Theodore L. Glasser, Professor of Journalism, Department of Communication, Stanford University

It was Don who insisted that "ethics" comes before "law" in the name of the Center, because he didn't want ethics to become a residual topic, taken up only when the law failed to address something. Don appreciated the significance of the difference between law and ethics – between what we have a right to do and what's right to do – but he also understood why questions of ethics precede questions of law, why what's ethical is a more foundational question than what's legal.

While Don wrote scores of articles and several books on various aspects of media law and ethics, *Mass Communication Law* stood out as his crowning achievement. More than a textbook or a work of reference, it provided a template for the field, a taxonomy of issues and ideas others could – and did – use to organize their own research and teaching. A remarkable source of information and insight, *Mass Communication Law* became a project and a process, an opportunity for Don to continually re-examine a rapidly changing field.

Don Gillmor won many awards for his teaching, research and public service. He also won my heartfelt affection, admiration and gratitude.

From Daniel Wackman Professor, SJMC, University of Minnesota

He gave respect to everyone with whom he was interacting, treating them to the gift of full attention. When Don was talking with a repairman at his home, a staff member in Murphy Hall, an undergrad student or a graduate advisee, he was just as attentive as when he was speaking with Deans or Vice Presidents at the University or top officials at media companies.

Don's greatest love at the University was his students. He always kept his door open to answer questions, serve as a mentor, provide guidance on projects, or feedback on ideas. Students responded to Don, respected him, and remembered the impact he had on them. Don frequently had a line of students waiting to talk: students from his classes, undergraduate advisees, graduate students working on theses and dissertations, staff members from the Daily.

Don was a role model, a mentor, a supporter, a friend, and much, much more.

From Bob Drechsel, Professor of Journalism & Mass Communication, University of Wisconsin-Madison

When I think of Don's influence, the words "excellence" and "principled" are the first to come to mind. Don gave me – and I'm sure countless others – a vision of excellence, an expectation that only the highest quality work of any kind is acceptable. He modeled this in his own teaching and scholarship, and it was clear he expected the same of his students and colleagues. And he had the courage of his convictions. He knew what he valued, he was unflinching, he practiced what he preached. He was indeed a man of principle. His influence is immeasurable.

From Shih-fan Steve Wang, Ph.D. 1983, former Dean, College of Communication, National Chengchi University, Taipei; former Dean, College of Social Sciences and Management, Fo Guang University, Yilan, Taiwan

Dr. Donald Gillmor has been internationally recognized as a distinguished expert on media law and ethics. His longtime devotion to communication teaching and research has undoubtedly set a shining example for communication scholars worldwide. Particularly, his outstanding contributions to communication scholarship in terms of legal and ethical perspectives has become an indelible and inestimable legacy in communication education and industry arenas. His efforts in helping international students as well as promoting communication education in the developing countries have certainly added more luster to his brilliant life history.

From Stephen Silha, Executive Producer, Big Joy Project / Frisky Divinity Productions, Vashon Island, Washington

I think most of you know that Don was the one who gave my father Otto Silha the idea to create a center that combined the study of media ethics with media law at the University of Minnesota nearly 30 years ago. The Silha family is so pleased that Don was the founder and created both the letter and the spirit of the Silha Center for the Study of Media Ethics and Law!

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SILHA CENTER
FOR THE STUDY OF MEDIA ETHICS & LAW
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& MASS COMMUNICATION

TWENTY-EIGHTH ANNUAL SILHA LECTURE

The Lessons of the Pentagon Papers: Has Obama Learned Them?



James C. Goodale
Photo by JCG Litchfield

Everyone has heard of the “Pentagon Papers” case. But only a few know what happened behind the scenes. The strategies, decisions and negotiations between the larger-than-life characters from the worlds of law, politics, journalism and the military that shaped the outcome of one of the most important First Amendment cases in U.S. history took place behind closed doors. Have we learned the lessons of the Pentagon Papers? Do the government’s claims of secrecy and national security stand up to scrutiny today?

James C. Goodale, author of the new book, *Fighting for the Press: the Inside Story of the Pentagon Papers and Other Battles*, was vice chairman and general counsel of *The New York Times* during the Pentagon Papers litigation. He will deliver the 2013 Silha Lecture.

October 16, 2013 • 7:30 p.m. - 9:00 p.m.

Cowles Auditorium, University of Minnesota West Bank

A book signing will follow the lecture.