THE SILHA Bulletin

A PUBLICATION OF THE SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW | WINTER/SPRING 2015

Charlie Hebdo Attack Leaves Several Dead, Sparks International Debate on Limits of Free Speech

On the morning of Jan. 7, 2015, brothers Said and Cherif Kouachi forced their way into the offices of the satirical French newspaper *Charlie Hebdo* in Paris, France. Armed with assault rifles, the brothers killed 12 people and injured 11 others in the attack. Among the victims were *Charlie Hebdo* editor and cartoonist Stephane Charbonnier and cartoonists Jean Cabut, Bernard Verlhac, Georges Wolinski, and Philippe Honore. Also killed were psychoanalyst and columnist Elsa Cayat, economist and columnist Bernard Maris, proofreader Mustapha Ourrad, caretaker Frederic Boisseau, Charbonnier's bodyguard Franck Brinsolaro, and Michel Renaud, who was visiting the office. The gunmen also killed a police officer, Ahmed Merabet, as they left the building where *Charlie Hebdo* was located.

After the attack, the gunmen fled in a stolen vehicle, setting off a three-day manhunt. On Jan. 9, 2015, the manhunt ended when French authorities surrounded the fugitives as they were hiding in a print shop in a suburb of Paris. Both Kouachi brothers were killed when they emerged from the building while firing at police. Meanwhile, another gunman, Amedy Coulibaly, threatened to kill several hostages at a kosher supermarket in East Paris unless the Kouachi brothers were allowed to go free. Minutes after the print shop siege, French authorities stormed the market, killing Coulibaly and freeing 15 hostages. Four hostages were found dead at the supermarket. According to a Jan. 11, 2015 *New York Times* report, Coulibaly declared allegiance to the Islamic State militant group in a video posted on Twitter. In the video, Coulibaly states that he and the Kouachi brothers acted both together and separately. According to the *Times*, Coulibaly's choice of words suggested that the Kouachi brothers conceived the assault on the newspaper independently and that Coulibaly separately added to their attack.

According to a Jan. 14, 2015 *New York Times* article, in an 11-minute video posted to Twitter by an al-Qaeda affiliate in Yemen, the militant group claimed responsibility for the deadly attack on the *Charlie Hebdo* office. In an initial statement provided to the Associated Press (AP) on Jan. 9, 2015, the Islamist terrorist group said that the attack was intended as "revenge for the honor" of the Prophet Muhammad, whose depiction is forbidden by Islamic tradition, yet whom *Charlie Hebdo* cartoonists often satirized.

Charlie Hebdo is known for its controversial lampoons of religion and religious figures in general. At the time of the 2015 attack, the newspaper was already under regular police guard after being targeted for separate attacks in the past. *Charlie Hebdo* gained notoriety in 2006 for its cover depicting a sobbing Muhammad under the headline "Mahomet débordé par les intégristes," which translates as "Muhammad overwhelmed by fundamentalists." In November 2011, the newspaper's offices were firebombed after it published a caricature of the Prophet Muhammad and ironically named him as its "editor in chief" for the issue. In September 2012, the paper received threats after publishing a cartoon criticizing religious Muslims and Jews. According to a story in *The Washington Post* on January 7, *Charlie Hebdo*'s Twitter account published a cartoon only hours before the 2015 attack titled "Still No Attacks in France," showing Islamic State leader Abu Bakr al-Baghdadi giving a new year's greeting.

French President Francois Hollande described the attack as an act of terrorism and vowed to protect press freedom. "No barbaric act will ever extinguish freedom of the press," Hollande said in a January 7 statement. "We are a country which will unite and stand together." President Obama also condemned the attacks and offered his support in a statement. "We are in touch with French officials and I have directed my Administration to provide any assistance needed to help bring these terrorists to justice," he said in a January 7 press statement.

According to data from the Committee to Protect Journalists (CPJ), the murders of the *Charlie Hebdo* employees were the deadliest attack on journalists since 1992, when the CPJ began tallying such figures. In a January 7 statement posted on the Society of Professional Journalists (SPJ) website, SPJ president Dana Neuts said that while "extremists feel emboldened to attack and kill journalists anywhere in the world for lampooning religion or reporting on political and governmental activities, such outrageous attempts to silence journalists will not be tolerated or successful."

Charlie Hebdo, *continued on page 3*

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

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

Inside This Issue

Winter/Spring 2015: Volume 20, No. 2

Silha Center Staff

***Charlie Hebdo**, continued from page 1*

In a Jan. 7, 2015 interview about the attacks with CBS Minnesota, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said, "Freedom of the press, like any other freedom, is not free. Sometimes people have to pay the ultimate price to defend it."

In spite of the deadly attacks on their office, surviving staff members continued to work on the newspaper's upcoming issue to ensure it was published on schedule, according to a January 11 report by the *The Guardian*. While their offices were roped off as a crime scene, the remaining staff worked out of a conference room at Paris' left-wing daily paper, *Libération*. "I know that [our murdered colleagues] didn't want us to be quiet," Patrick Pelloux, a columnist for *Charlie Hebdo* told CNN in a January 11 interview. "They would be assassinated twice, if we remained silent."

COVER STORY

According to a January 14 story by the BBC, *Charlie Hebdo*'s staff increased the printing to 5 million copies for its issue following the January 7 attack, up from the usual 60,000. The new cover depicted a caricature of the Prophet Muhammad shedding a tear and holding a sign reading "Je suis Charlie," which is translated as "I am Charlie." The new issue also contained cartoons poking fun at the terrorists. One cartoon illustrated two hooded terrorists pictured in heaven with one asking the other "where are all the virgins?" The other replies, "They're with the *Charlie* staff, loser." The post-attack issue sold out within hours, according to the BBC's report.

After the attacks, massive demonstrations, using the slogan "Je suis Charlie," filled the streets of Paris in order to show solidarity with the slain journalists and to support the principles of free speech and press. On Jan. 11, 2015, more than 1.5 million people took part in a unity march led by relatives of the victims of the attacks. World leaders, including French President Francois Hollande, British Prime Minister David Cameron, German Chancellor Angela Merkel, Israeli Prime Minister Benjamin Netanyahu, and Palestinian President Mahmoud Abbas joined the demonstration during the beginning of the march. Rallies also took place outside of France, with thousands gathering in various national capital cities worldwide.

News Organizations Grapple with Reprinting Controversial Cartoons

After the attacks, news outlets struggled with questions about whether they should republish the controversial *Charlie Hebdo* cartoons, including the depiction of Muhammad in the post-attack issue. Several organizations published the cartoons to help readers understand the context of the Paris attacks. After deciding to republish *Charlie Hebdo*'s cartoons that inspired the 2011 firebombing attack, *Washington Post* editorial page editor Fred Hiatt wrote in a January 8 column, "I think seeing the cover will help readers understand what this is all about." Likewise, *Slate*'s editor-in-chief Julia Turner defended the choice of the online magazine's decision to republish the controversial cartoons in a January 9 post, writing that *Slate* readers deserve an "unobscured view of what's going on." *The Huffington Post* also published some of the most disputed cartoons on January 7 under the title, "These Are The *Charlie Hebdo* Cartoons That Terrorists Thought Were Worth Killing Over."

Other journalists argued that the real value in republishing *Charlie Hebdo*'s controversial cartoons was to defend democracy and press freedom. In a leaked January 8 email thread among Al-Jazeera staff members obtained by the *National Review*, Al-Jazeera U.S. correspondent Tom Ackerman wrote that "if a large enough group of someones is willing to kill you for saying something, then it's something that almost certainly needs to be said, because otherwise the violent have veto power over liberal civilization."

However, many other news organizations were reluctant to publish any of *Charlie Hebdo*'s cartoons, citing their editorial policies of not promoting hate speech or security reasons. The AP cropped an image of deceased editor Charbonnier holding a copy of the paper with the controversial cover that inspired the 2011 firebomb attack, leaving only Charbonnier's face visible. "We've taken the view that we don't want to publish hate speech or spectacles that offend, provoke, or intimidate, or anything that desecrates religious symbols or angers people along religious or ethnic lines," AP Vice President Santiago Lyon told *The Washington Post* in a January 7 interview. Lyon explained that the AP didn't "feel that [the cartoons were] useful" to the larger context of the story and that the policy would be similar regardless of religious creeds. Tom Kent, standards editor for the AP, also said that the "AP tries hard not to be a conveyor belt for images and actions aimed at mocking or provoking people on the basis of religion, race or sexual orientation… While we run many photos that are politically or socially provocative, there are areas verging on hate speech and actions where we feel it is right to be cautious."

> "Freedom of the press, like any other freedom, is not free. Sometimes people have to pay the ultimate price to defend it."
>
> **— Professor Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Similarly, Philip B. Corbett, *The New York Times*' associate managing editor for standards, told the *Post* in the same story that the *Times* does not publish material "deliberately intended to offend religious sensibilities." He said that *Times* editors decided that describing the cartoons rather than showing them "would give readers sufficient information to understand the story." In a Jan. 13, 2015 post on its website, The Ethical Journalism Network, a global media member organization that promotes ethics in journalism, argued news organizations should be cautious when considering publishing *Charlie Hebdo*'s cartoons, writing that "the publishing of the cartoons must be seriously weighed for its news value and the dangers of creating atmosphere for further hate."

Other organizations cited security concerns for their decision not to republish the cartoons. According to a Jan. 7, 2015 CNN story, CNN Worldwide President Jeff Zucker opened an editorial meeting by stating, "journalistically, every bone says we want to use and should use the cartoons,

***Charlie Hebdo**, continued on page 4*

***Charlie Hebdo**, continued from page 3*

but as managers, protecting and taking care of the safety of our employees around the world is more important right now." On January 7, Stephen Pollard, editor of the United Kingdom's *The Jewish Chronicle*, highlighted his organization's internal debate through his personal Twitter account. "Easy to attack papers for not showing cartoons," he tweeted. "But here's my editor's dilemma. Every principle I hold tells me to print them… what right do I have to risk the lives of my staff to make a point?" One news outlet's decision to republish the cartoons proved to be dangerous. On January 11, unknown individuals firebombed *Hamburger Morgenpost*, a German newspaper, after the news organization published some of *Charlie Hebdo*'s cartoons. "Fortunately no one was injured in the fire, and the damage is very limited," the paper wrote afterward.

Journalists have also faced legal backlash for printing the cartoons. According to the AP, two Turkish journalists were charged on April 9 with "openly insulting the people's religious values" for featuring a *Charlie Hebdo* cover with the image of the Prophet Muhammad in their columns.

On May 1, 2015, London-based freedom of expression advocacy group Article 19 called on governments worldwide to provide greater support for expression in the wake of the *Charlie Hebdo* attacks. The statement published on the group's website was signed by several other global free speech advocacy groups, including the Center for Media Freedom and Responsibility, the Committee to Protect Journalists, Media Rights Agenda, and the World Press Freedom Committee, among others. "Perhaps the most long-reaching threats to freedom of expression have come from governments ostensibly motivated by security concerns. Following the attack on *Charlie Hebdo*, eleven interior ministers from European Union countries including France, Britain and Germany issued a statement in which they called on Internet service providers to identify and remove online content 'that aims to incite hatred and terror,'" the groups wrote. "This kind of governmental response is chilling because a particularly insidious threat to our right to free expression is self-censorship. In order to fully exercise the right to freedom of expression, individuals must be able to communicate without fear of intrusion by the State." The groups' full statement is available at http://www.article19.org/resources.php/resource/37950/en/not-in-our-name:-world-press-freedom-day-116-days-after-charlie-hebdo.

Controversy in France After the Attacks

In the weeks following the attacks, French authorities arrested more than 100 people, including a comedian, for appearing to praise or agree with the terrorists, according to a January 29 AP report. French prosecutors employed a new law passed in November 2014 that was designed to crack down on terroristic speech. According to the BBC, the new law makes speech directly provoking or publicly condoning terrorism in France illegal and establishes a five-year jail term and a fine of €75,000. If the speech is conducted online, the penalty can be extended to seven years of imprisonment and fines up to €100,000. Under the law, individuals do not have to actually threaten violence in order to be arrested.

According to a January 15 BBC report, famous French comedian Dieudonné M'bala M'bala was charged with condoning terrorism after he wrote a Facebook post that read "I feel like Charlie Coulibaly" after the attack on *Charlie Hebdo*'s offices. The post was a merger of the names of the newspaper and Amedy Coulibaly, the attacker who killed four hostages at the supermarket in January. Dieudonne argued that the fact he was being silenced was hypocritical. "You consider me like Amedy Coulibaly when I am no different from Charlie," he wrote in an open letter on his Facebook page to French Interior Minister Bernard Cazeneuve. M'bala was convicted on March 18, 2015, and received a suspended two month jail sentence and a €37,000 fine.

The arrests unleashed accusations by critics that France was applying a double standard in its treatment of speech, by applying free speech principles to those who mock Islam while penalizing supporters of Islam for expressing their own views. Many Muslims complained that France aggressively prosecuted anti-Semitic slurs but that similar protections did not apply to racist speech against Muslims. Myriam Doudech, a French Muslim, told NPR during a February 10 interview that while she condemned the attack on *Charlie Hebdo*, she saw uneven treatment of individuals when it comes to French notions of free speech. "You know, in France you cannot attack some religions, but they laugh about Islam. We all need respect, but the rules have to be the same for everybody," Doudech said.

> "If a large enough group of someones is willing to kill you for something, then it's something that almost certainly needs to be said, because otherwise the violent have veto power over liberal civilization."
>
> **— Tom Ackerman, Al-Jazeera U.S. Correspondent**

Although France has developed protections for people to freely express their opinions, the law places greater limitations on speech that insults others based on their race, religion, or gender. Christopher Mesnooh, an American attorney who practices law in France, told NPR in its February 10 story that the French parliament passed laws making it a crime to deny the Holocaust during the late 1980s. "Hate speech laws were inspired by the horrors of the Second World War, and in particular the Nazi Holocaust against the Jews," Mesnooh said. However, some scholars have noted that people are confusing hate speech with blasphemy, which was abolished as a crime after the French revolution. The difference, Mesnooh said, is between criticizing a belief and attacking individuals.

"A lot of people say that it's unjust to support *Charlie Hebdo* and then allow Dieudonné to be censored," Mathieu Davy, a French lawyer who specializes in media rights, told *The New York Times* in a January 15 article. "But there are clear limits in our legal system. I have the right to criticize an idea, a concept or a religion. I have the right to criticize the powers in my country. But I don't have the right to attack people and to incite hate."

Debates Surround the Value of Free Speech and Press in Aftermath of Attack

The attacks on *Charlie Hebdo* ignited debates about the limits of free speech and a free press around the world, and whether the satirical newspaper went too far

in criticizing religious beliefs. American cartoonist and Pulitzer Prize winner Garry Trudeau questioned the ethics of *Charlie Hebdo*'s harsh criticisms of religion in an April 11, 2015 commentary on *The Atlantic*'s website. "At some point free expression absolutism becomes childish and unserious," he wrote. *The Atlantic* senior editor David Frum challenged Trudeau's remarks in an April 13, 2015 post pointing out that Trudeau himself had penned many controversial cartoons. Other commentators also argued that limits should possibly be placed on free expression. Elsa Ray, the spokeswoman of the Paris-based Collective Against Islamophobia in France, told *The New York Times* on January 13 that "freedom of expression may be guaranteed by the French Constitution, but there is a limit when it goes too far and turns into hatred, and stigmatization."

According to *The Guardian*, author Salman Rushdie defended the importance of free expression during a speech at the University of Vermont in Burlington on January 15. Rushdie had lived under a fatwa or death threat for years after his book, *The Satanic Verses*, angered Iranian leaders for its depiction of the Prophet Muhammad. He said some believed speech should be free but should not upset anyone or go too far. "Both John F. Kennedy and Nelson Mandela use the same three-word phrase which in my mind says it all, which is, 'Freedom is indivisible,'" Rushdie said during the speech. "You can't slice it up otherwise it ceases to be freedom. You can dislike *Charlie Hebdo*… But the fact that you dislike them has nothing to do with their right to speak."

On April 27, 2015, NPR reported that six writers announced they would withdraw from the May 5 annual gala of the PEN American Center, a free speech advocacy organization, in protest against the organization's decision to give *Charlie Hebdo* its annual Freedom of Expression Courage award. The writers who withdrew from the event included Peter Carey, Michael Ondaatje, Francine Prose, Teju Cole, Rachel Kushner and Taiye Selasi, according to a *New York Times* story on April 26.

According to the *Times*, Kushner told PEN's directors in an email that she was withdrawing from the gala because she was uncomfortable with *Charlie Hebdo*'s "cultural intolerance" and promotion of "a kind of forced secular view." Those views, the *Times* added, were echoed by the other writers who pulled out of the event. According to NPR's April 27 story, PEN released a statement saying, "We do not believe that any of us must endorse the content of *Charlie Hebdo*'s cartoons in order to affirm the importance of the medium of satire, or to applaud the staff's bravery in holding fast to those values in the face of life and death threats."

Sarah Wiley
Silha Research Assistant

Silha Center Co-Sponsors Panel Discussion on Free Expression in Wake of Attacks

The debate over the limits of free expression made its way to the University of Minnesota during a panel discussion held on Jan. 29, 2015. The event, "Can One Laugh at Everything? Satire and Free Speech After *Charlie*," was co-sponsored by the Silha Center for the Study of Media Ethics and Law as well as other University organizations, including the School of Journalism and Mass Communication, the Center for Holocaust and Genocide Studies, the Center for Jewish Studies, the Institute for Global Studies, and the Departments of French and Italian, Anthropology, History, Art History, Political Science, and Sociology. The panel's discussion focused on how to respect pluralism and diversity while also protecting the principles of free expression. Panelists included Silha Professor of Media Ethics and Law and Silha Center Director Jane Kirtley, William Mitchell law professor Anthony Winer, University of Minnesota professor and anthropology department chair William Beeman, 2013 Pulitzer Prize-winning *Star Tribune* editorial cartoonist Steve Sack, and University of Minnesota French professor Bruno Chaouat.

Beeman discussed the history of the Prophet Muhammad, showing slides of images, some going back to the 14th century. Sack reflected on the protections for American cartoonists, contrasting their rights with cartoonists around the world. "Every cartoon will upset someone, even a cartoon about the weather," he said. "But we have it really good, we have free speech and we use it." Sack also identified cartoonists all over the world who have been persecuted for their work.

Kirtley focused on the value of free speech and the benefit of airing controversial speech. "I would much rather have hateful views put out for public comment and public consumption because, as we say in the marketplace of ideas, our hope is that good ideas will eventually conquer the bad. But that is never going to happen if they are driven underground and we don't address them directly," Kirtley said. The audio for the panel discussion is available at http://www.mprnews.org/story/2015/02/03/mpr_news_presents.

News Organizations Backpedal after Failures to Fact Check, Anchor's False Stories

MEDIA ETHICS

During late 2014 and early 2015, several news organizations found themselves facing scandals surrounding the authenticity of their reporting. *Rolling Stone* and *New York* magazine apologized to readers after failing to complete full fact-checking processes on two different high-profile stories. NBC News suspended its popular news anchor Brian Williams after it was discovered he had given false accounts of his experiences reporting from Iraq in 2003. All of the scandals have prompted commentators to raise questions over the news organizations' credibility.

***Rolling Stone* Faces Criticism after Publishing Story on Campus Rape Allegations**

On Nov. 19, 2014, *Rolling Stone* published a story, titled "A Rape on Campus," detailing an alleged gang rape during a 2012 fraternity party on the campus of the University of Virginia (UVA). The story, by Sabrina Rubin Erdely, traced the account of "Jackie," a third-year student, who alleged that she was brutally attacked at Phi Kappa Psi's fraternity house during her freshman year at UVA. It also described the subsequent physical and emotional trauma she faced following the attack. Erdely's piece examined the relationship between sexual assaults and UVA's fraternity life, suggesting that they were closely intertwined. The story also criticized the university's administration support services for rape victims and punishments for perpetrators of rape as being inadequate due to officials' concerns about the campus' reputation. The *Rolling Stone* story is available at http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119.

Rolling Stone's story quickly caught national attention with much of the focus on the campus fraternity culture of UVA. According to a November 22 *Washington Post* story, UVA President Teresa Sullivan suspended all fraternity and sorority social activities on campus during the remainder of the Fall 2014 semester. Sullivan also stated that police in Charlottesville, where UVA is located, had initiated an investigation of the alleged rape depicted in the *Rolling Stone* story and administrators were meeting to discuss the school's sexual misconduct policy in response to the story.

However, subsequent interviews with Erdely about "A Rape on Campus" raised several questions about the reporting process of the story. On the November 27 episode of *Slate*'s "Double X" podcast, hosts Hanna Rosin, June Thomas, and Katy Waldman spoke with Erdely about the *Rolling Stone* article. During the course of the interview, the hosts of "Double X" asked Erdely specific questions about whether she had contacted the accused perpetrator or any officers of the UVA fraternity where the alleged incident took place. Erdely explained that many of the people she wanted to interview were not available, but that she had briefly spoken with the fraternity chapter's president as well as a crisis manager with the fraternity's national organization. Both were surprised about the allegations but provided little comment, according to Erdely.

Rosin also asked Erdely why she believed Jackie's story was convincing. Erdely said that she thought Jackie was very credible. "I put her story through the ringer to the extent that I could," Erdely said. "I spoke to virtually all of [Jackie's] friends to find out what she had told them at various points… I found [the story] to be very consistent. [With] the degree of her trauma, there's no doubt in my mind that something happened to her that night."

Other news organizations also investigated Erdely's reporting, which confirmed that Erdely had not contacted any of the alleged rapists. On December 1, *Rolling Stone* Deputy Editor Sean Woods told *The Washington Post*, "We did not talk to them. We could not reach them." The *Post* also reported that Erdely told the newspaper that she did not identify any of the accused attackers per the request of Jackie. Woods defended the decision of not naming any of the alleged perpetrators because "we were telling Jackie's story. It's her story," according to the *Post*.

In a December 2 story on *Slate*, Rosin and Allison Benedikt noted the absence of any explanation in *Rolling Stone* for Erdely's failure to contact the accused. "In the course of 9,000 words, Erdely chronicles an administration's tepid response to a terrible crime. But what the piece is missing is one small thing: that single, standard sentence explaining that the alleged perpetrators of the crime deny it, or don't deny it, or even that they could not be reached for comment," Benedikt and Rosin wrote. "It's often a boring sentence, one that comes off as boilerplate to readers, but it's absolutely necessary, because it tells readers you tried your best to get the other side of the story. You notice when it isn't there."

In a December 5 story, the *Post* continued to report on questionable aspects of *Rolling Stone*'s original article. The *Post* interviewed several of Jackie's friends portrayed in the article who said they believed that something happened to her, but were not able to confirm important aspects of the attack, noting that the account of it had "changed over time." The *Post* also reported that the fraternity where the attack had supposedly taken place stated that it did not host a social event the weekend of the alleged assault. The fraternity noted that no members of its organizations worked as lifeguards at the university's aquatic center in 2012, which is how Jackie said she had met the purported attacker. However, the *Post* also interviewed Jackie, who continued to maintain the same account of events as portrayed in *Rolling Stone*.

That same day on the magazine's website, *Rolling Stone* Managing Editor Will Dana published an apology for the magazine's failure to fully investigate Jackie's story. Dana explained that the magazine was honoring Jackie's request that Erdely not contact any of her alleged assailants. "In the face of new information, there now appear[s] to be discrepancies in Jackie's account, and we have come to the conclusion that our trust in her was misplaced," Dana wrote. "We were trying to be sensitive to the unfair shame and humiliation many women feel after a sexual assault and now regret the decision to not contact the alleged assaulters to get their account. We are taking this seriously and apologize to anyone who was affected by the story." However, *Rolling Stone* later amended its statement to explain that it did not blame Jackie for the discrepancies. "The mistakes are on *Rolling Stone*, not on Jackie," Dana said in the amended statement. *Rolling Stone* also added a note from Dana explaining the controversy before the story on its website.

Several commentators criticized *Rolling Stone* for its poor reporting in "A Rape on Campus." In a December 8 interview on Southern California Public Radio's "AirTalk," Silha Professor of Media Ethics and Law and Silha Center Director Jane Kirtley said that Erdely and the magazine's editors had failed to adhere to basic reporting processes. "To

my mind, this is a violation of elementary journalistic principles," Kirtley said. "To have a single source for a story of this nature is just completely irresponsible."

Kirtley also explained that the uncorroborated story could also create additional problems. "As we've seen in the brouhaha in the last week or so, people will be looking at these kinds of holes [in *Rolling Stone*'s reporting] and calling them to account," Kirtley said. "It really undermines not just the credibility of the magazine, but, frankly, the credibility of the victims' rights movements and many other advocacy groups which presumably have common interest in what *Rolling Stone* seems to have had here."

In a December 10 story for the *Columbia Journalism Review*, Alexis Sobel Fitts criticized the magazine's response to the follow-up stories by *The Washington Post* and *Slate*. "*Rolling Stone*'s subsequent apology is doing nothing to restore confidence in its critics and readers. [Dana] first blamed Jackie, writing that 'our trust in her was misplaced,'" Fitts wrote. "Then he backtracked, updating the apology to make clear that it was *Rolling Stone*'s fault for not checking out her story. The post has been updated, with no disclosure of the changes, several times since."

Fitts suggested that *Rolling Stone* should have considered following the lead of other news organizations that faced controversies over their journalism, such as *The New York Times* handling of fabulist Jayson Blair and Grantland's controversial story outing a transgender woman. (For more on Jayson Blair, see "Developments in Media Ethics: Jayson Blair and *The New York Times*" in the Summer 2003 issue of the Silha *Bulletin*, and for more on the Grantland incident, see "News Coverage of Transgender Individuals Raises Ethical Reporting Issues" in the Winter/Spring 2014 issue.) "[Erdely] made a large mistake… by basing entire swaths of narrative on a single source's account — a mistake critics have noted may well impact people's belief in future accusations of sexual assault, which, despite consistently low rates of a false reports, are easily undermined by a single lapse in accuracy," Fitts wrote. "That's what makes it so important for *Rolling Stone* to rigorously re-report the facts of the story, disclosing how it was vetted, what went wrong, and which parts of the piece are trustworthy."

The fallout of *Rolling Stone*'s story continued into 2015. *The Washington Post* reported on March 23, 2015 that the Charlottesville Police Chief Timothy Longo said that an extensive five-month investigation had found no evidence that the alleged rape depicted in the *Rolling Stone* article actually took place. "We're not able to conclude to any substantive degree that an incident occurred at the Phi Kappa Psi fraternity house or any other fraternity house, for that matter," Longo said during a press conference, according to the *Post*. "That doesn't mean something terrible didn't happen to Jackie… We're just not able to gather sufficient facts to determine what that is."

> "*Rolling Stone*'s repudiation of the main narrative in 'A Rape on Campus' is a story of journalistic failure that was avoidable. The failure encompassing reporting, editing, editorial supervision and fact-checking."
>
> **— Sheila Coronel, Steve Coll, and Derek Kravitz, Columbia University, Graduate School of Journalism**

On April 5, 2015, *Rolling Stone* formally retracted "A Rape on Campus" after the *Columbia Journalism Review* published an extensive report by Columbia University Graduate School of Journalism Dean of Academic Affairs Sheila Coronel, Columbia University School of Journalism Dean Steve Coll, and postgraduate research scholar Derek Kravitz on the failures of the journalistic process for "A Rape on Campus." *Rolling Stone* had commissioned Coll to conduct the investigation into the magazine's reporting of the story. The Columbia School of Journalism report found that *Rolling Stone* had failed on many fronts. "*Rolling Stone*'s repudiation of the main narrative in 'A Rape on Campus' is a story of journalistic failure that was avoidable. The failure encompassed reporting, editing, editorial supervision and fact-checking," the authors of the report wrote. "The magazine set aside or rationalized as unnecessary essential practices of reporting, that, if pursued, would likely have led the magazine's editors to reconsider publishing Jackie's narrative so prominently, if at all."

The report highlighted several specific errors. One of the most prominent errors was *Rolling Stone*'s reliance on Jackie as a sole source of the incident without completing due diligence to corroborate her story. The authors of the report also pointed to other failures that created serious problems for the story, such as the story's use of pseudonyms that obscured key information, Erdely's failure to corroborate derogatory information about several people depicted in the story, and the magazine's failure to provide complete information about its story to the fraternity when asking for a response to the rape allegations.

"The problem was methodology, compounded by an environment where several journalists with decades of collective experience failed to surface and debate problems about their reporting or to heed the question they did receive from a fact-checking colleague," the authors wrote. The full report can be found at http://www.cjr.org/investigation/columbia_journalism_school_rolling_stone.php.

In an April 6 interview on Southern California Public Radio's "AirTalk," Kirtley said that Columbia School of Journalism's report confirmed much of what observers had already suspected, but it had provided some additional explanations of what happened with *Rolling Stone*'s story. "What we didn't know was about the breakdown in the fact-checking process, the fact that editors apparently decided not follow their own internal guidelines for checking the veracity of a story and for giving a fair opportunity to those who are criticized to respond," Kirtley said. "I was just troubled by the sense that, at least as far as *Rolling Stone* is concerned, they seem to be in a mode that suggests that they think that the blame rests on the feet of Jackie… Whatever problems or issues that that young person might have, to me, are ultimately irrelevant because what we had was a failure in the journalistic process. And *Rolling Stone* has to own that. That's all there is to it."

On April 6, *The New York Times* reported that Phi Kappa Psi issued a statement announcing that it would seek "to pursue all available legal action against *Rolling Stone*" for the impact that "A Rape on Campus" had had on the fraternity. However, Charles D. Tobin, the head of the national media practice at the law firm Holland & Knight, suggested that the fraternity would have a hard time pursuing a successful defamation lawsuit. Tobin said that Phi Kappa Psi would need to show that any false claims in the *Rolling Stone* story were "of and concerning" the fraternity as an entity.

Backpedal, *continued on page 8*

Backpedal, *continued from page 7*

Tobin also noted that if a court deemed that the fraternity was a public figure, Phi Kappa Psi would be required to prove that the magazine acted with "actual malice," meaning that *Rolling Stone* knew that the story was false or acted with reckless disregard of the truth, as required by U.S. Supreme Court decisions in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "It would be colossally difficult for them to make a successful claim," Tobin said.

According to the *Times*' story, *Rolling Stone* declined to provide a comment on Phi Kappa Psi's possible lawsuit. As the *Bulletin* went to press, the fraternity had not yet taken formal legal action against the magazine.

New York *Magazine Apologizes for Failing to Fact Check Story on Millionaire Teen*

On Dec. 14, 2014, *New York* magazine published its annual "Reasons to Love New York" issue. The issue contained several human-interest feature stories focusing on unique aspects of New York City. One of the features, "A Stuyvesant Senior Made Millions Picking Stocks" by Jessica Pressler, told the story of Mohammed Islam, a 17-year-old high school student who was reported to have made $72 million trading stocks. The story explained that Islam had begun trading penny stocks at a young age. As he grew older, he began to study finance and became more efficient at trading, eventually earning significant profits. "Though he is shy about the $72 million number, he confirmed his net worth is in the 'high eight figures,'" Pressler wrote. Pressler also interviewed Islam's high school friends, Damir Tulemaganbetov and Patrick Trablusi, who also claimed that Islam had made large amounts of money trading stocks.

However, the story began to unravel the following day as news organizations began to question the facts of the story. In a December 15 story, *Business Insider* reported that people who knew Islam believed that the $72 million figure was fabricated. The business news website also interviewed Tulemaganbetov, who would not confirm an exact amount of Islam's worth. Instead, Tulemaganbetov said that he believed Islam was a good stock trader and was a "genius." *Business Insider* also reported that Pressler had defended the story in a tweet saying that she had seen a bank statement confirming Islam's bank account claims.

That same day, Scott Wapner, host of CNBC's "Fast Money Halftime Report," reported that Islam had arrived at their studios for an interview but backed out after questioning during a pre-television interview. Wapner wrote that Islam said the $72 million figure was not accurate, but that the figure was closer to a few million dollars. Islam also attempted to steer the focus away from the specifics of his worth. "The attention is not what we expected," Islam told CNBC during the pre-interview, according to Wapner. "We never wanted the hype. This was about friends trying to make something exciting together." Wapner also reported that *New York* magazine had released a statement saying that it had seen bank statements confirming the eight-figure amount.

> "There's a term for this impulse, in fact: 'confirmation bias', which is what experts call the common human tendency to seek out only information that confirms what we already think — or want to think."
>
> **— Susie Poppick, *Time* magazine journalist**

On the evening of December 15, *The New York Observer* reported that Islam and Tulemaganbetov told the tabloid during an interview in the offices of a crisis public relations firm, 5wpr, that the entire story was made up. During the interview, Islam explained that he had never invested any money nor made any profits. The most significant trading that he had done was participating in simulated trades while running an investment club at Stuyvesant High School.

In a follow-up interview on December 16, Islam and Tulemaganbetov told the *Observer* that the fact-checking process for the *New York* magazine story was limited. Islam said that he had shown a doctored bank statement to a fact checker for the magazine while standing outside the Stuyvesant High School. Islam also claimed that no one at *New York* magazine seemed to check other statements attributed to him in the story, such as renting a Manhattan apartment or owning a BMW.

After it was revealed that the story was a hoax, *New York* published an apology to its readers on December 16 and added a note to the online story about Islam. "We were duped," the note explained. "Our fact-checking process was obviously inadequate; we take full responsibility and we should have known better. *New York* apologizes to our readers." *The Washington Post* reported the same day that 5wpr also released a video of Islam apologizing for creating the fictional story. "I'm sorry to anyone who may have been hurt by this story," Islam said in the video. "I didn't fully realize the consequences of my actions." *The Huffington Post* also reported on December 19 that Bloomberg News rescinded a job offer that it had given to Pressler prior to the publication of the story about Islam.

Several commentators criticized *New York* magazine for believing Islam's story. On the December 16 episode of CNBC's "Squawk Box," Wapner said that the story should have been doubted from the beginning. "You know, you read this story and say, 'I don't know if this passes the smell test from the get-go,'" Wapner said. Wapner also explained that after he asked Islam and Tulemaganbetov some basic questions about their investments, "the whole [story] just started to spiral out of control."

Also on December 16, *Time* magazine's Susie Poppick speculated how *New York* magazine might have been so easily tricked. "From hobbyists to professionals, investors are thrilled by the idea that with enough smarts and hard work anyone can go from rags to riches, no matter where they start. If an industrious first-generation American can build a massive fortune between the age of 9 and 17, you can too, right?" Poppick wrote. "There's a term for this impulse, in fact: 'confirmation bias,' which is what experts call the common human tendency to seek out only information that confirms what we already think — or want to think."

However, Poppick noted that journalists should have simply done the math for Islam's story. "Imagine that someone had spotted Islam's prodigious talent and given him $100,000 to play with in the market. Even then he would have had to return an average of 108% annually. That's more than five times Warren Buffet's average returns of 20%. And he would have had to do it every year for nearly a decade," Poppick wrote. "In other words, Islam's story was preposterously unlikely even if we'd given him all of the benefits of all of our doubts."

NBC News Suspends Anchor after False Public Statements and Exaggerated Reporting

On Feb. 10, 2015, *The New York Times* reported that NBC announced that it had suspended Brian Williams, the network's lead news anchor and host of "NBC Nightly News." The six-month suspension without pay came on the heels of a controversy that had erupted around Williams' embellished accounts of his reporting during the 2003 U.S. invasion of Iraq. In 2003, Williams reported that he was riding in a helicopter as part of a convoy with several military personnel during the United States' initial Iraqi invasion. According to his 2003 report, a rocket-propelled grenade struck a helicopter in front of Williams' transport. Although the helicopter was damaged, military pilots were able to land the vehicle without any casualties. Williams' report showed footage of the downed helicopter, and he did not say that he was on the helicopter that was struck by the rocket.

However, Williams' account of the Iraq event changed over time, according to a February 5 *Times* story. During a 2013 appearance on "The Late Show with David Letterman," Williams told host David Letterman that he had actually been in the damaged helicopter. On Jan. 30, 2015, Williams ended his nightly broadcast showing a video of him taking U.S. Army Command Sergeant Major Tim Terpak, the pilot of Williams' helicopter in 2003, to a New York Rangers hockey game to honor the veteran the previous day. During the January 30 broadcast, Williams described the 2003 event as "a terrible moment a dozen years back during the invasion of Iraq when the helicopter we were traveling in was forced down after being hit by [a rocket-propelled grenade]."

Later, NBC posted the video of Williams honoring Terpak on Facebook, according to a February 4 *Times* story. Although the video prompted several compliments, commenter Lance Reynolds wrote on the Facebook post, "Sorry dude, I don't remember you being on my aircraft. I do remember you walking up about an hour after we had landed to ask me what happened." Reynolds' comment prompted military newspaper *Stars and Stripes* to conduct an investigation. In a February 4 story, *Stars and Stripes* reported that Williams admitted in an interview that he had "misremembered the events" and apologized. "I would not have chosen to make this mistake," Williams told the newspaper. "I don't know what screwed up in my mind that caused me to conflate one aircraft with another."

Later that evening, Williams also apologized to viewers during his nightly news broadcast. "This was a bungled attempt by me to thank one special veteran and by extension our brave military men and women veterans everywhere, those who have served while I did not," Williams said, according to the *Times*' February 4 story. "I hope they know they have my greatest respect and also now my apology."

> "No mainstream news organization can afford to have people saying 'your nightly news anchor is a liar.' You just can't afford to have it, and it's not a question of just a couple of crackpots coming out of the woodwork and making an accusation. At least as of now, there appears to be evidence that Williams was not telling the truth."
>
> **— Professor Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Despite the apology, Williams remained embroiled in controversy as people continued to criticize the anchor through social media, using Twitter to create "#BrianWilliamsMisremembers," satirical jokes with Williams claiming he was at several different historical events. *The Washington Post* reported on February 6 that NBC News was conducting an internal fact-checking investigation into Williams' statements he made about the Iraq incident. The investigation, led by NBC investigative editor Richard Esposito, also examined Williams' reporting on Hurricane Katrina in 2005. NBC News explained that it received questions about conflicting accounts of Williams' claims that he witnessed a suicide in New Orleans' Superdome as well as seeing dead bodies floating in floodwater during the aftermath of the hurricane. The following day, Williams announced that he would temporarily step aside as the anchor of NBC's "Nightly News," according to the *Post*. Days later on February 10, NBC announced its six-month suspension of Williams in an attempt to curb the rising criticisms of the anchor.

Before and after the suspension, commentators suggested that Williams' falsehoods had seriously damaged both his and NBC News' credibility. "No mainstream news organization can afford to have people saying 'your nightly news anchor is a liar,'" Silha Professor Jane Kirtley told the *International Business Times* on February 9. "You just can't afford to have it, and it's not a question of just a couple of crackpots coming out of the woodwork and making an accusation. At least as of now, there appears to be evidence that Brian Williams was not telling the truth."

In the same *International Business Times* story, former CNN correspondent and MediaWorks Resource Group founder Mark Bernheimer suggested that Williams had tarnished any chance at reporting on military ventures in the future. "What kind of credibility is he going to have the next time he deploys himself in a war zone and has to interface directly with the military?" Bernheimer asked. "Those people are not going to trust him and they're not going to want to give him their stories and they're not going to necessarily want him in their helicopters."

Commentators also questioned whether Williams' punishment was harsh enough. On February 11, *The Washington Post* reported that Steve Burke, chief executive officer of NBC Universal and an executive vice president with Comcast, NBC's parent company, had considered firing Williams over the exaggerated and self-serving accounts of Iraq and Hurricane Katrina. Others suggested that Burke would have been justified in firing Williams. In an interview with *The Washington Post* on February 10, Mark Feldstein, a professor of broadcasting at the University of Maryland, observed that he was surprised that Williams retained his job. "Anyone else at NBC who engaged in this conduct would have been fired immediately," Feldstein said. "Did NBC really complete a thorough investigation of all the allegations of false reporting by Williams in just one week? I don't think so."

Casey Carmody
Silha *Bulletin* Editor

Hack of Sony Pictures Raises Legal, Ethical Questions for Reporting on Stolen Information

On Nov. 24, 2014, Sony Pictures suffered a severe data breach. Hackers, who identified themselves as the "Guardians of Peace," stole and disclosed a vast array of Sony's internal corporate information, including private emails and sensitive employee data. The group uploaded large caches of this data to file-sharing and torrent programs such as BitTorrent and continued to periodically upload more data in the weeks that followed. It also emailed many media outlets to provide access to sites hosting other stolen documents. Initially news organizations characterized the story as hackers illegally accessing the data of a large corporation, similar to earlier stories about other large companies like Target and Home Depot. Commentators speculated the hack was the North Korean government's retaliation against Sony for the release of the comedy film "The Interview," which depicted a successful plot to assassinate North Korean dictator Kim Jong Un. However, as the focus of news coverage shifted from the breach itself to the contents of the leaked documents, media outlets were forced to make ethical and legal decisions about the scope of their reporting. As a result of the breach, media outlets had access to private emails and information about Sony employees, covering a spectrum from mundane to salacious to potentially newsworthy. All of this raised two important questions for journalists: Was publishing the information stolen from Sony legal? And if so, was it ethical?

DATA PRIVACY

According to a Dec. 14, 2014 report by *The New York Times*, attorneys representing Sony sent a cease and desist letter to the *Times* and several other media outlets which had reported on the leaks. The letters stated that Sony did not consent to any use of the information released after the hack, which it referred to as "Stolen Information," and demanded that any leaked information in their possession be destroyed. The attorneys also wrote, "If you do not comply with this request, and the Stolen Information is used or disseminated by you in any manner, [Sony] will have no choice but to hold you responsible for any damage or loss arising from such use or dissemination." This threat sparked a debate about the law governing reporting on such leaks. The letter is available at http://www.scribd.com/doc/250124033/Sony-Letter-to-Re-code.

In 2001, the U.S. Supreme Court decided *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which gives journalists the right to publish illegally obtained information about matters of public concern so long as the reporters did nothing illegal to obtain it. In the case, an unknown party surreptitiously recorded the telephone conversation of two leaders of a Pennsylvania teachers' union who were discussing a possible strike and the need to "blow off [opponents'] front porches" to attract attention to their cause. The unknown party anonymously delivered the tape to the head of a local taxpayer association, who then gave it to a local radio host. The host played the tape during his radio broadcast with various sound effects added in order to criticize the union. The union leaders brought an action against the radio host, claiming that his decision to publicize the tape violated both Pennsylvania's and the federal wiretap laws. The Supreme Court ruled that, as applied to these defendants, the wiretap laws violated the First Amendment. It held that "[w]here the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully" the government cannot punish publication of information of "public concern." (For more on the *Bartnicki* case, see "*Bartnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture" in the Fall 2001 issue of the Silha *Bulletin*).

> "As long as a news organization didn't participate in the Sony attack itself, it has a First Amendment right to report on newsworthy information it finds in the documents."
>
> **— Todd VanderWerff, Culture Editor for *Vox***

Based on this precedent, University of Minnesota Law Professor Bill McGeveran told the *Wall Street Journal* for a Dec. 15, 2014 article, it would be "very hard for Sony to block media outlets from publishing most anything that's in the public interest." He observed that courts "are quite deferential to the established media and its judgment about what's newsworthy." Todd VanderWerff of *Vox* wrote in a Jan. 20, 2015 report that the *Bartnicki* decision meant that "[a]s long as a news organization didn't participate in the Sony attack itself, it has a First Amendment right to report on newsworthy information it finds in the documents." The *Bartnicki* decision suggests that Sony's broad threat regarding publication of any of the materials may not be legally sound.

However, in light of the great variety of information about Sony that was disclosed by the hack, the issue may not be so clear. In addition, courts may find that legal standards must change in order to keep pace with technology. McGeveran told the *Wall Street Journal* that because "so much more of our communication is stored and transmitted in a way that makes it much more vulnerable to theft," older precedents may not be sufficiently protective of private information. "You can analogize between Internet world and pre-Internet world, but the scale is totally different," McGeveran said.

Others have suggested different ways that publication of Sony's stolen information could plausibly be subject to legal action. In a Dec. 15, 2014 article for *The Washington Post*, UCLA School of Law Professor Eugene Volokh noted two types of information that may violate the law if disclosed. First, facts about particular individuals that could be considered private could be subject to the tort claim of publication of private facts. This type of private information would likely be outside the scope of the *Bartnicki* holding because it is unlikely to be of public concern. However, Volokh added, "this would apply only to a fairly narrow sliver of material, a sliver that most mainstream publications wouldn't cover in the first place." Second, Volokh wrote that works contained in the disclosure are still subject to copyright. Publications that posted copies of large blocks of writing, such as the script for an upcoming James Bond film that was among the stolen information released, could be exceed fair use protections.

The Sony hack also sparked a debate about the ethics of reporting the contents of the stolen information. Several film industry celebrities publicly criticized media outlets for publicizing the illegally-disclosed content. Seth Rogen, star of the "The Interview," compared journalists reporting on the stolen information to the hackers who breached Sony's servers. He

told radio host Howard Stern in a Dec. 15, 2014 interview that outlets publishing the information were "doing exactly what these criminals are doing… It's stolen information that media outlets are directly profiting from." Film and television writer Aaron Sorkin published a Dec. 14, 2014 op-ed in *The New York Times*, which criticized news outlets for publishing Sony's stolen information. Sorkin, whose works were part of the information disclosure, also compared those publishing the leaks to the hackers responsible. "If you close your eyes you can imagine the hackers sitting in a room, combing through the documents to find the ones that will draw the most blood. And in a room next door are American journalists doing the same thing," Sorkin wrote in the column. "As demented and criminal as it is, at least the hackers are doing it for a cause. The press is doing it for a nickel."

Many in the media argued that at least some portion of the stolen content could ethically be published. During a Dec. 19, 2014 broadcast of WNYC radio's "On the Media," Poynter Institute's chief ethicist Kelly McBride told host Bob Garfield that journalists could responsibly report on the contents of the Sony's data. Although she stated "some of the emails that have gotten a lot of attention are really of no significant value to the public," there was information gleaned from the illegal disclosure that could be ethically published. "As journalists, we have to consider where our primary loyalties reside, and our primary loyalties reside with our audience," she said. "So if information is available that will advance our audience's understanding of any particular issue that is of public interest" it is ethical to publish, regardless of the source.

Emily Yoshida of *The Verge* wrote in a Dec. 12, 2014 article that the hacked information contained a "revelation that Sony and the [Motion Picture Association of America (MPAA)] are engaged in a years-long secret campaign to essentially resurrect [the Stop Online Piracy Act (SOPA)], this time with better PR." SOPA was a controversial 2011 bill introduced in the U.S. House of Representatives that would have required Internet service provides to block access to foreign websites hosting copyright-infringing content. The House Judiciary Committee postponed the consideration of SOPA after widespread protests online. (For more background on SOPA, see "Internet Outrage Tables Online Piracy Legislation; SOPA/PIPA Supplanted by New Proposals" in the Winter/Spring 2012 issue of the Silha *Bulletin*). Yoshida argued that disclosure of the hacked information was an important public policy matter because of the possible ways that the often-controversial MPAA could influence how the Internet operates. She defended *The Verge*'s decision to make story-by-story evaluations of news value and to publish what it deemed of value. "It's not a matter of whether Sony now 'deserves' to be cyberterrorized or not, but rather whether the value of what we have learned outweighs how we learned it."

Even within news organizations, journalists clashed on the correct ethical approach. *Slate* editor-in-chief Jacob Weisberg wrote in a Dec. 15, 2014 article that "there's no ethical justification for publishing this damaging, stolen material," but clarified that this was his personal opinion, not *Slate*'s official policy. Weisberg wrote that because fear of disclosure can chill speech, "[j]ournalists resisting what they see as an attempt at censorship by Sony are cooperating in a larger act of censorship, directed at Sony."

> "As journalists, we have to consider where our primary loyalties reside, and our primary loyalties reside with our audience. So if information is available that will advance our audience's understanding of any particular issue that is of public interest, [publishing is ethical]."
>
> **— Kelly McBride, Chief Ethicist, Poynter Institute**

Meanwhile, *Slate* writer Justin Peters argued that the stolen content revealed valuable information about a powerful corporation, which represented a broad public good. In a Dec. 17, 2014 article he criticized those, including Weisberg, who had analogized the publishing information from the Sony hack to publishing photographs from the disclosure of the stolen naked photographs of female celebrities that had surfaced a few months earlier. (For more coverage of stolen digital data and privacy, see "Dissemination of Hacked Online Photos Demonstrates Challenges of Digital Privacy" in the Fall 2014 issue of the Silha *Bulletin*.) "Documents that illuminate the inner workings of a multibillion-dollar corporation are, in fact, not the same as leaked photos of a naked woman," Peters wrote. "Even if the leaker's intent in both instances is to embarrass or intimidate, a good reporter can differentiate between leaks that target individuals and ones that target institutions."

On April 16, 2015, WikiLeaks released a compiled database of over 200,000 Sony documents. WikiLeaks collected the documents from the various websites and networks the hackers released them to, organized the documents, and created a searchable database. In an April 16 press release, WikiLeaks argued that the documents contained important insights into Sony's corporate culture, its lobbying efforts on issues such as "internet policy, piracy, trade agreements and copyright issues," and its strong ties to the Democratic Party. In the press release, WikiLeaks founder Julian Assange said, "This archive shows the inner workings of an influential multinational corporation. It is newsworthy and at the centre of a geo-political conflict. It belongs in the public domain. WikiLeaks will ensure it stays there."

Attorneys for Sony condemned WikiLeaks's actions. On April 17, 2015, the attorneys sent a letter to various media outlets, including *The American Lawyer*, which published the letter in an Apr. 19, 2015 article. The attorneys wrote, "WikiLeaks is incorrect that this Stolen Information belongs in the public domain and it is, in many jurisdictions, unlawful to place it there or otherwise access or distribute it." It asked media to "help in protecting the First Amendment and declining to exploit the Stolen Information." The letter is available at https://pmcdeadline2.files.wordpress.com/2015/04/2015-04-17-boies-letter-wm.pdf.

Prior to the WikiLeaks disclosure, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, spoke about the ethics of reporting on the Sony hack and the problems with a bulk disclosure of documents during a Dec. 12, 2014, interview on KPCC radio's "Airtalk." She told host Larry Mantle that the ethical challenge of reporting on the Sony hack "is a balancing process that the media actually go through all the time." Kirtley explained that an ethical media outlet must do more than simply release documents in bulk, as WikiLeaks later did. "If our only purpose as new media is to be a giant document dump, who needs us?" Kirtley asked. "Anybody can do that… If we don't curate, if we don't ask these kinds of questions, we're not doing our ethical duty."

Alex Vlisides
Silha Research Assistant

Espionage Conviction Ends Lengthy Struggle to Compel Journalist's Testimony

On Jan. 26, 2015, *The New York Times* reported that Jeffrey Sterling, a former Central Intelligence Agency (CIA) officer, was convicted of several counts of violating the Espionage Act, 18 U.S.C. §793 *et seq.* The conviction concludes a lengthy legal process in which federal prosecutors spent years attempting to compel testimony from *New York Times* journalist James Risen. The prosecutors were ultimately unsuccessful. However, several press freedom advocates have criticized the U.S. Department of Justice (DOJ) for the lengths that it was willing to go in order to force Risen to testify in the case. Commentators have also expressed concern over the implications of Sterling's conviction for future whistleblowers and the press.

REPORTER'S PRIVILEGE

In 2010, federal prosecutors indicted Sterling under the Espionage Act, alleging that he had provided classified information to Risen for the reporter's 2006 book *State of War*. Risen's book contained information about the CIA's botched attempt to sabotage Iran's nuclear program, but Risen did not divulge the name of his source. In 2011, Attorney General Eric Holder authorized a subpoena that ordered Risen to testify at Sterling's trial. Prosecutors sought Risen's testimony because they claimed that the journalist was the only person who had direct knowledge about whether Sterling actually disclosed the information. In July 2011, United States District Court Judge Leonie M. Brinkema issued an order preventing prosecutors from asking Risen the name of his source, which the DOJ appealed to the United States Court of Appeals for the Fourth Circuit. *United States v. Sterling*, 818 F.Supp.2d 945 (E.D. Va. 2011). In 2013, a Fourth Circuit three-judge panel overturned Brinkema's order. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013). Risen petitioned the U.S. Supreme Court in June 2014 to review the Fourth Circuit decision, but the court declined to hear the case. (For more information on the background of Risen's case, see "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue of the Silha *Bulletin*, "Update: Supreme Court Declines to Hear Reporter's Privilege Cases" in the Summer 2014 issue, "Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources" in the Fall 2013 issue, and "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue.)

Several press observers were unsure of the DOJ's next move after the Supreme Court denied *certiorari* to Risen's appeal. *The Washington Post* reported on Oct. 10, 2014 that Assistant U.S. Attorney James Trump hinted that the government would subpoena Risen during Sterling's trial. On Jan. 5, 2015, the *Post* reported that Risen did appear in federal district court in Alexandria, Va., during a "moot" hearing designed to determine what types of questions Risen would be willing to answer during Sterling's actual trial. However, Risen was combative with prosecutors during the hearing and provided little information beyond confirmation that he wrote *State of War* and two other articles on national security issues, one of which quoted Sterling. "I am not willing to provide information that in any way would prove or disprove a mosaic that the government is trying to make," Risen said during the hearing, according to the *Post*. Federal prosecutors also did not directly ask Risen during the pre-trial hearing to name the source who provided the classified information about the failed CIA plan.

> "We said from the very beginning that under no circumstances would Jim [Risen] identify confidential sources to the government or anyone else. The significance of this goes beyond Jim Risen. . . Journalists need to be able to uphold that confidentiality in order to do their jobs."
>
> **— Joel Kurtzberg, Attorney for James Risen**

On Jan. 12, 2015, *The New York Times* reported that the DOJ would not seek Risen's testimony during Sterling's actual trial. "Mr. Risen's under-oath [January 5] testimony has now laid to rest any doubt concerning whether he will ever disclose his source or sources for Chapter 9 of *State of War* (or for that matter, anything else he's written). He will not," prosecutors wrote in a court filing, according to the *Times*. "As a result, the government does not intend to call him as a witness at trial." Sterling's trial began the following day, and he was subsequently found guilty on several felony counts of violating the Espionage Act despite federal prosecutors relying primarily on circumstantial evidence, according to the *Times*' January 26 story. *The Washington Post* reported on May 11 that Judge Brinkema sentenced Sterling to three and a half years in prison.

The DOJ's decision not to subpoena Risen was welcome news but remained frustrating for press advocates because of the lengthy legal battle the government was willing to pursue for the reporter's testimony. "We said from the very beginning that under no circumstances would Jim [Risen] identify confidential sources to the government or anyone else," Joel Kurtzberg, the lawyer for Risen, told the *Times* on January 12. "The significance of this goes beyond Jim Risen. It affects journalists everywhere. Journalists need to be able to uphold that confidentiality in order to do their jobs." That same day, *Times* Executive Editor Dean Baquet said in a statement, "I'm glad the government realizes that Jim Risen was an aggressive reporter doing his job and that he should not be forced to reveal his source."

Sterling's conviction also raised concerns among commentators about journalists' ability to report on national security issues in the future. In a January 26 post on the Freedom of the Press Foundation's blog, journalist Marcy Wheeler suggested that "[t]he verdict raises real questions about the economy of leaks in [Washington D.C.], in which people may point reporters to stories, only to have the reporters dig up damning evidence from other sources (which is what seems most likely to have happened here)." Wheeler added, "Jeffrey Sterling just got found guilty for causing James Risen to publish a story to (the government claimed) avenge his crummy treatment by the CIA. Sterling's guilty verdict allows no room for Risen to have decided to publish a story about [the] CIA's horrible record on WMDs."

However, as *The Washington Post* reported on Jan. 14, 2015 , Attorney General Eric Holder announced revisions to the DOJ's guidelines for issuing subpoenas to reporters despite that fact that the guide-

lines had been revised in 2013 for the first time in more than 25 years. (For more information on the 2013 revisions to the DOJ's reporter subpoena guidelines, see "Department of Justice Revises Guidelines for Investigating Journalists" in the Summer 2013 issue of the Silha *Bulletin*). Risen's legal battles, as well as other DOJ controversies with the press, prompted Holder to make further changes.

The 2013 guidelines required federal prosecutors to obtain authorization from the attorney general in order to subpoena journalists engaged in "ordinary newsgathering." The updated 2015 language dropped the word "ordinary" because critics had argued that the language was too vague in allowing investigators to subpoena journalists for pursuing stories that the government disapproved of, such as reports using classified material or on national security. The updates also clarified the processes that an attorney general should follow after the Director of National Intelligence certifies that a news report contains classified information, as well as expanded definitions of different types of journalists' records to include "work product and documentary materials." The guidelines still remain in-house rules for the DOJ without any actual force of law. The Reporters Committee for Freedom of the Press has provided a complete summary of the 2015 revisions at http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2015/revising-attorney-generals-.

Despite the changes in the subpoena guidelines, *The New York Times*' Jan. 22, 2015 editorial argued that the government's actions during the Risen affair were nevertheless troubling. "The Obama administration has taken two actions that seem a refreshing departure from six years of aggressively attacking investigative journalism. The Justice Department abandoned an attempt to force James Risen, a [*New York Times*] reporter, to testify about a confidential source. And it tempered internal guidelines for trying to obtain records or testimony from the news media during leak investigations," the *Times*' editorial board wrote. "But these developments are gallingly late, and they do not really settle the big issues raised by President Obama's devoted pursuit of whistle-blowers and the reporters who receive their information."

> "The abandoned pursuit of Mr. Risen leaves behind an atrocious legal precedent: a 2-to-1 ruling in 2013 by the United States Court of Appeals for the Fourth Circuit, in Virginia, which denied the existence of any reporter's privilege in the First Amendment or common law."
>
> **— *The New York Times* Editorial Board**

The *Times*' editorial board also suggested that the government's pursuit of Risen's testimony established troubling legal precedent for future journalists reporting on national security. "The abandoned pursuit of Mr. Risen leaves behind an atrocious legal precedent: a 2-to-1 ruling in 2013 by the United States Court of Appeals for the Fourth Circuit, in Virginia, which denied the existence of any reporter's privilege in the First Amendment or common law," the editorial board wrote. "That position was advocated by the Justice Department, and it was repeated in briefs asking the Supreme Court to deny Mr. Risen's request for review, which it did. The Fourth Circuit includes Maryland and Virginia, home to most national security agencies."

The *Times* concluded with two observations. "First, dedicated journalists like Mr. Risen are willing to protect the identity of their sources," the editorial board wrote. "The second is the need for a strong federal shield law broadly protective of reporters who do that under the pressure of a high-profile leak investigation."

Casey Carmody
Silha *Bulletin* Editor

30th Annual Silha Lecture to Feature James Risen, Joel Kurtzberg

On Oct. 19, 2015, the Silha Center for the Study of Media Ethics and Law will host *New York Times* journalist James Risen and his attorney Joel Kurtzberg as the featured speakers during the 30th Annual Silha Lecture. The lecture will be held in the University of Minnesota's Coffman Memorial Union Theater. The event is free and open to the public.

James Risen is an investigative reporter for *The New York Times* whose work focuses on national security and intelligence issues. He has won two Pulitzer Prizes. The first was for his work in 2001 as part of *The New York Times* reporting team covering the Sept. 11, 2001 terrorist attacks. The second was for his reporting with Eric Lichtblau in 2006 that revealed the National Security Administration's illegal wiretapping program. In 2006, Risen published *State of War*, which examined the George W. Bush administration's U.S. intelligence operations after the September 11 attacks. Federal prosecutors later subpoenaed Risen, demanding that he reveal his confidential source for specific information disclosed in *State of War*. Risen argued that he had a First Amendment right to protect his source and refused to testify after a federal circuit court of appeals decision ordered that he must. Despite the threat of being jailed, Risen never revealed his source during the years-long battle the federal government fought in pursuing his testimony.

Joel Kurtzberg is a partner at the law firm Cahill Gordon & Reindel LLP in New York who focuses on general commercial litigation. Kurtzberg has extensive experience in legal issues related to media organizations and the First Amendment. He also teaches a mass media law course as an adjunct professor at Brooklyn Law School as well as a course on Internet law as an adjunct professor at Fordham University School of Law. Kurtzberg formerly served as the New York State Bar Association's chair of the Media Law Committee and was an editor of the American Bar Association's First Amendment and Media Litigation Committee Newsletter. Kurtzberg graduated from Harvard Law School in 1996 and is admitted to the bar in New York.

Jury Awards $7.3 Million in "Blurred Lines" Music Copyright Infringement Suit

COPYRIGHT

On March 10, 2015, a federal jury in Los Angeles ruled that Robin Thicke's 2013 hit song "Blurred Lines" had copied elements of Marvin Gaye's 1977 song "Got to Give It Up," without permission in *Williams v. Bridgeport Music Inc.*, 2015 WL 1476803 (C.D. Cal.). The jury found that Thicke and musical artist Pharrell Williams, who share a songwriting credit on the track, committed copyright infringement and awarded $7,388,012 to Gaye's family. *Rolling Stone* reported on March 10, 2015, that the $7.3 million award is the largest judgment ever in a music copyright infringement suit. The previous record was a $5.4 million dollar award that Michael Bolton had to pay for using elements of the Isley Brothers' "Love Is A Wonderful Thing," according to *Rolling Stone*.

Thicke and Williams initiated the suit on Aug. 15, 2013, when they sought a declaratory judgment to protect them against infringement claims, which they said had been made in private conversations by the Gaye family. Family members Nona, Frankie and Marvin Gaye III countersued, claiming that Thicke's song was substantially similar to "Got to Give It Up." On Feb. 17, 2015, United States District Court Judge John A. Kronstadt ruled that any copyright infringement would be based purely on the substantial similarity of the sheet music of the two songs because Gaye's family owned the copyright in the composition of "Got to Give It Up" but not the actual sound recording of the song. This ruling meant that jurors could only base a decision upon the fundamental chords, melodies, and lyrics of the two songs in question rather than the sounds of the commercial recordings.

According to trial briefs, Thicke's attorneys argued that copyright protections have always been limited to the expression of an idea and that the law does not protect the idea itself. The brief noted that the similarity between the songs was slight and that Thicke's song had more to do with evocation of an era in which Gaye's song was originally created. Gaye's attorneys contended that Thicke knowingly took elements from Gaye's "Got to Give It Up" by highlighting Thicke's comments in a May 7, 2013 *GQ* article. According to the article, Thicke said that they drew on "Got to Give It Up" for the inspiration of "Blurred Lines." Thicke explained that Gaye's song was a favorite and that he told Williams while in the studio, "[W]e should make something like that, something with that groove."

In pre-trial depositions and during his testimony at trial, Thicke claimed that he was not actually the author of "Blurred Lines," but that Williams was the main author. "None of it was my idea ... [and] I'd say 75% of [the song] was already done when I walked in," Thicke said in his deposition. According to a March 10, 2015, *New York Times* article, Thicke also testified in court that "the biggest hit of my career was written by somebody else, and I was jealous and wanted credit." According to his deposition, Thicke also claimed to be "high and drunk every time I did an interview" during the period of the song's release and subsequent promotion, suggesting that any claims he made about the song's authorship could not be taken seriously. According to court documents, Williams testified that although Gaye's music was part of the soundtrack of his youth, he did not use any of it to create "Blurred Lines," which he crafted in 2012.

> "The verdict handicaps any creator out there who is making something that might be inspired by something else. This applies to fashion, music, design. . . anything. If we lose our freedom to be inspired we're going to look up one day and the entertainment industry as we know it will be frozen in litigation."
>
> **— Defendant Pharrell Williams**

Both parties had multiple expert witnesses testify as to the similarity of the songs. In an attempt to illustrate that songs can easily resemble others without any plagiarism, during testimony Thicke played piano versions of "Blurred Lines," "Got to Give It Up," and several songs by U2, the Beatles and Michael Jackson as part of his testimony. According to *Rolling Stone*, Gaye's lawyer later argued that Thicke's piano playing had "poisoned[,] perhaps irreparably[,]" the jury because the Gaye family were not allowed to play the recorded versions of "Got to Give It Up" because the family did not own the copyright of the sound recording. The judge ruled that Gaye's voice, the version's backup vocals and some of the percussion, all of which are not covered by the Gaye copyright, could sway the jury. Eventually, the Gaye family was allowed to play a stripped-down version of the song.

The financial success of "Blurred Lines" was also established during the trial. In addition to earning a Grammy nomination, Nielsen SoundScan figures showed that more than 7.3 million copies of "Blurred Lines" had been sold in the United States. Financial records indicated that Williams and Thicke had each earned more than $5 million from the song's success. The Creative Artists Agency's financial information had also reported that the total profits for the song as $16,675,690. Gaye's family sought more than $40 million in damages based on 50% of the published earnings of "Blurred Lines," the compensation for the reduction in the market value of licensing of "Got to Give It Up," and for a share of Thicke's touring income, according to court documents. The jury awarded far less than requested in deciding in the Gaye family's favor, but the $7.3 million remained the largest award ever in a copyright case.

The record award from the case prompted debate among musicians and copyright scholars about the difference between plagiarism and inspiration, as well as what impact the verdict may have on how musicians might create work in the future. In a March 19, 2015 interview with the *Financial Times*, Williams said that the jury's decision would reach beyond the music industry. "The verdict handicaps any creator out there who is making something that might be inspired by something else,"

Williams said in the interview. "This applies to fashion, music, design… anything. If we lose our freedom to be inspired we're going to look up one day and the entertainment industry as we know it will be frozen in litigation. This is about protecting the intellectual rights of people who have ideas." Country-music artist Keith Urban echoed Williams' concerns when he told the Associated Press in a March 15 interview, "my initial reaction to it, I was shocked, honestly. It seems more like a sound and a feel and a style and a genre and an era; none of which can be copy written."

Columbia Law School Professor Tim Wu wrote a March 12, 2015, *New Yorker* article arguing why the verdict should be overturned upon an appeal. He emphasized that Williams did not actually copy any particular sequence of notes from Gaye. Rather, Williams evoked the overall style of Gaye's songs. "That is why 'Blurred Lines' sounds very much like a Marvin Gaye song. But to say that something 'sounds like' something else does not amount to copyright infringement," Wu wrote. He also highlighted that important First Amendment concerns were also at issue in the case, such as the possibility of a ban on Thicke's song. "Copyright is ultimately subject to the limits imposed by the First Amendment; the borrowing of styles is too important an expressive freedom to be subject to federally enforced censorship," Wu wrote.

In a March 10 interview with *The New York Times*, Lawrence Iser, a partner specializing in intellectual property at the law firm Kinsella Weitzman Iser Kump & Aldisert LLP in Los Angeles, called the jury's decision "a bad result." "It will cause people who want to evoke the past to perhaps refrain from doing so," Iser said. "Rather than helping to progress the arts, it is a step backward."

Although some in the music industry claim the verdict represented a failure of copyright law, Sandra Aistars, the chief executive officer of the Copyright Alliance, an advocacy group that supports copyright protections for creative works, argued in a March 17, 2015, *New York Times* op-ed that the fundamental legal principles of copyright remain beneficial. "The line between inspiration and infringement may sometimes be blurry because it requires a judgment call by a jury, but the fundamental principles of copyright law are sound and creativity is clearly flourishing in the United States," she wrote.

Other music attorneys have pointed out that copyright suits are commonplace in the music industry, but most end in a settlement. Charles Cronin, a lecturer at the Gould School of Law at the University of Southern California who specializes in music copyright, told the *New York Times* in its March 10 report that, "Music infringement claims tend to be settled early on, with financially successful defendants doling out basically extorted payoffs to potential plaintiffs rather than facing expensive, protracted and embarrassing litigation." For example, *The New York Times* reported on March 1 that a January 2015 case involved disputes over whether Sam Smith's 2014 song "Stay With Me," a global hit that won two Grammy awards, was substantially similar to Tom Petty's 1989 hit song "I Won't Back Down." After Petty's attorneys publicly noted the similarities, Smith's publishers acknowledged that parts of the songs sounded alike. The publishers gave credit and royalties to Petty and his co-writer, Jeff Lynne.

> "The line between inspiration and infringement may sometimes be blurry because it requires a judgment call by a jury, but the fundamental principles of copyright law are sound and creativity is clearly flourishing in the United States."
>
> **— Sandra Aistars, CEO of the Copyright Alliance**

On May 3, 2015, music news website *Pitchfork* reported that lawyers for Thicke and Williams had filed a motion on May 1 in the federal district court asking that the jury's decision be overturned. The artists' lawyers argued that the jury had insufficient evidence for making their decision and received erroneous jury instructions. Specifically, the attorneys maintained that Thicke's interviews with the press about trying to create a similar "groove" as "Got to Give It Up" should have been excluded from evidence. The lawyers for Thicke and Williams argued that "groove" is not an element that can be found in sheet music, which is what the Gaye family owned.

Attorneys for the Gaye family also filed two motions on May 1. In the first motion, the Gaye family argued that several recording and music companies that sold, licensed, and distributed "Blurred Lines" should have also been held liable for copyright infringement. In the second motion, the Gaye family sought an injunction against the continued distribution of "Blurred Lines." If the court refused to grant an injunction, the Gaye family alternatively requested that they receive 50 percent of future revenues from the song. *Pitchfork* reported that Judge Kronstadt will hold a hearing on June 29, 2015 to consider the motions.

Sarah Wiley
Silha Research Assistant

Ninth Circuit Rules First Amendment Does Not Protect NFL Video Game from Right of Publicity Suit

On Jan. 6, 2015, the U.S. Circuit Court of Appeals for the Ninth Circuit ruled that former NFL players may sue video game developer Electronic Arts (EA) for violation of their right of publicity. The plaintiffs argued that EA had used their likenesses as animated football players in its Madden NFL Football video games. These games did not use these players' names, but created digital avatars that reflected the players' "position, years in the NFL, height, weight, skin tone and relative skill level." In *Davis v. Electronic Arts*, 775 F.3d 1172 (9th Cir. 2015), a unanimous Ninth Circuit panel rejected EA's arguments that their use of the players' likenesses was protected from suit by the First Amendment.

RIGHT OF PUBLICITY

The right of publicity gives individuals the right to control use of their names and likenesses. This right is limited by the competing First Amendment rights of content producers to publish their expressive material. Generally, right of publicity cases pit celebrities, whose appearances are often recognizable and valuable, against a content producer seeking to make commercial use of some the celebrity's name or likeness without consent. Different courts have applied different legal tests to determine when the First Amendment insulates the user from suit. In *Davis*, the Ninth Circuit relied on its own right of publicity precedent, which applies the "transformative use" test to determine whether the First Amendment defense applies. This test, established in the case *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 367 (Cal. 2001), asks whether the challenged work is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."

The court held that the arguments raised in *Davis* were "materially indistinguishable" from its 2013 ruling in *Keller v. Electronic Arts*. 724 F.3d 1268 (9th Cir. 2013). In *Keller*, former NCAA athletes brought a right of publicity claim based on EA's use of their likenesses in its NCAA Football video games, and the Ninth Circuit held that EA had not sufficiently transformed these likenesses to invoke First Amendment protection. (For more information about college athletes' right to publicity lawsuits against EA, see "College Athletes Mount Challenges Seeking Control of Likenesses" in the Summer 2013 issue of the Silha *Bulletin*.)

In *Davis*, a unanimous three-judge panel wrote, "Like NCAA Football, Madden NFL replicates players' physical characteristics and allows users to manipulate them in the performance of the same activity for which they are known in real life — playing football for an NFL team. Neither the individual players' likenesses nor the graphics and other background content are transformed more in Madden NFL than they were in NCAA Football." Therefore, the First Amendment did not provide a shield for EA's use of the NFL players' likenesses.

> "We believe in the First Amendment right to create expressive works — in any form — that relate to real-life people and events, and will seek further court review to protect it."
>
> **— EA Sports Statement on Ninth Circuit Court of Appeals' *Davis* decision**

The court used similar reasoning in rejecting EA's primary argument that had not been raised in *Keller*. EA alleged an "incidental use" defense, arguing that the use of the former players' likenesses was incidental to the primary purpose of the video games' expression, which was to create an entertaining simulation of NFL football. The three-judge panel identified at least four factors relevant to determining what would constitute incidental use: "(1) whether the use has a unique quality or value that would result in commercial profit to defendant, (2) whether the use contributes something of significance, (3) the relationship between the reference to plaintiff and the purpose and subject of the work, and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication." The court found that the likenesses contributed value to the commercial viability of the game relating directly its primary purpose: creating a realistic game with well-known players. Importantly, the court rejected EA's argument that because several thousand players are featured in the game, each individual alone contributed little value. It quoted the *Keller* court, which held, "Having chosen to use the players' likenesses, EA cannot now hide behind the numerosity of its potential offenses or the alleged unimportance of any individual player." Thus the court rejected the "incidental use" defense based on its four enumerated factors.

EA was predictably critical of the decision, arguing in a Jan. 6, 2015 statement that the decision was wrong on the facts of the *Davis* case and would create future problems for a wide range of expression. "We believe in the First Amendment right to create expressive works — in any form — that relate to real-life people and events, and will seek further court review to protect it," the company wrote in the statement. On Jan. 20, 2015, EA petitioned the Ninth Circuit to rehear the case *en banc*. As the *Bulletin* went to press, the Ninth Circuit had not ruled on this motion.

Others lauded the *Davis* opinion as reasonable based on the facts presented in the case. Jonathan Faber, an adjunct professor at Indiana University Robert H. McKinney School of Law in Indianapolis, wrote in a January 8 post on his *Right of Publicity* blog that the decision avoided the usual "'throw the baby out with the bath water' [reasoning] that too-often seems to accompany rulings concerning the Right of Publicity."

However, some legal commentators criticized the opacity of the ruling. Attorney Eric Brin, an associate at law firm Nossaman LPP, wrote in a Jan. 22, 2015 post on the firm's blog that although "this decision arguably adds some clarity to the right of publicity tug-o-war between media companies and talent, there is still little guidance as to what specific creative transformations will and will not provide protection." Brin advised "creators of video games, movies, books, or similar works, that use public figures' names and likenesses," to "be wary" due to the potentially unpredictable outcomes of a right of publicity suit against them.

The Electronic Frontier Foundation (EFF), which submitted an *amicus curiae* brief in *Davis* in support of EA, suggested that the decision followed a pattern of courts basing rulings on the expression at stake rather than the broader legal principles that should apply. "We suspect that what's really happening is that courts are disfavoring media — like

Ninth Circuit, *continued on page 17*

The Guardian Gains Major Victory in UK Freedom of Information Ruling in "Black Spider" Case

On March 26, 2015, the Supreme Court of the United Kingdom ruled that the British government must disclose the contents of several letters that Prince Charles sent to various department ministers during 2004 and 2005. *R (Evans) v. Attorney General*, [2015] UKSC 21. In 2005, *The Guardian* had requested that the government release the letters, nicknamed the "black spider memos" due to Prince Charles' spindly handwriting, under the UK's Freedom of Information Act (FOIA), 2000, c. 36, which was enacted in 2000 and became effective in 2005, and Environment Information Regulations (EIR), 2004, No. 3391, passed in 2004. Press advocates have praised the court's decision as a victory for information access in the United Kingdom. Others have expressed concern that the letters' contents could undermine Prince Charles' future kingship.

INTERNATIONAL NEWS

According to a March 26, 2015 commentary by *Guardian* reporter Rob Evans, the ten-year legal battle began in 2005 after *Guardian* editor Alan Rusbridger sent an e-mail to Evans asking whether they could use the FOIA to request letters that Prince Charles had sent to various government officials. Evans explained that the goal of asking for the letters was to test the limits of the newly implemented law. "When the [*Guardian*] submitted the request, the Freedom of Information Act, introduced by Tony Blair's government, was in its infancy," Evans wrote. "If I remember correctly, we wondered how useful this new tool would be to break open what has been one of the most secret areas of British politics."

> "If I remember correctly, we wondered how useful this new [Freedom of Information Act] would be to break open what has been one of the most secret areas of British politics."
>
> **— Rob Evans, Reporter for *The Guardian***

Evans noted that the newspaper knew that Prince Charles had been writing letters to ministers because some of the "black spider memos" occasionally had been leaked to the public. However, *The Guardian* was interested in how many letters had been sent, the topics of the letters, and whether Prince Charles' letters had any influence on public policy. Questions over the prince's lobbying in politics were particularly important to *The Guardian*. Any significant advocacy in the letters could raise concerns over Prince Charles' future reign as king because of the tradition that the British monarchy remains politically neutral. In April 2005, Evans, on behalf of *The Guardian*, used the FOIA to ask several different governmental departments to disclose any correspondence that ministers had received from Prince Charles between September 2004 and April 2005. Additionally, Evans requested the letters from the government under the EIR, which governs public access to environmental records held by the government, because some ministers who could have received letters

UK FOIA, *continued on page 18*

Ninth Circuit, *continued from page 16*

computer games and comic books — that they don't like," the EFF wrote in a Feb. 3, 2015 post on its Deeplinks blog. *Davis* and similar decisions, the EFF argued, would have unintended consequences even for more traditional protected expression such as documentaries or biographic films. "If the transformative use test becomes the standard approach, it will become harder to create any artistic work based on real people without their permission. The likely result: celebrities of all stripes (actors, politicians, businesspeople) can effectively veto any portrayal they don't like."

Others have argued that inconsistent decisions by courts can be explained by sympathetic plaintiffs in each case. Attorney Stacy Allen of Jackson Walker, LLP wrote in a post on the law firm's blog that right of publicity cases demonstrate a troubling lack of consistency. Allen contrasted the successful claims of plaintiffs in *Davis* and *Keller*, "All-American gridiron heroes," with the unsuccessful right of publicity claims of "former Panamanian dictator Manuel Noriega and Hollywood 'bad girl' Lindsay Lohan," plaintiffs whose claims that highly-profitable videogames used their likenesses without consent were rejected on First Amendment grounds. "These cases highlight a common criticism of the transformative use test: that its highly subjective elements permit courts to reach different conclusions on substantially similar facts," Allen wrote. If Allen's theory is correct, the rights of those seeking First Amendment protection for their creative works may depend on the reputation of the plaintiff suing them, which could make future right to publicity cases very unpredictable.

Attorney Josh Escovedo argued in a Jan. 26, 2015 post on *The IP Law Blog* that the issue presented in *Davis* is "ripe for Supreme Court review in light of the circuit split that is developing with respect to the misappropriation of likeness in video games," even though there are no directly conflicting precedents from a different federal circuit court of appeals. However, Escovedo contended in a Dec. 12, 2014 post that the Eighth Circuit's decision in *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, finding that a fantasy baseball game company's use of players' likeness was protected by the First Amendment, applied reasoning sufficiently different from *Davis* that it "[a]rguably" constituted a circuit split. 505 F.3d 818 (8th Cir. 2007). In *C.B.C. Distribution*, the Eighth Circuit reasoned that the information used to create the game "is all readily available in the public domain, and it would be strange law that a person would not have a First Amendment right to use information that is available to everyone." The court ruled that company's First Amendment rights overcame the publicity rights of the players. Escovedo concluded that the "confusion among the lower courts" on right of publicity issues might be enough to convince the Supreme Court to grant a petition for *certiorari* if EA chooses to seek review.

Alex Vlisides
Silha Research Assistant

UK FOIA, *continued from page 17*
oversaw departments regulating environmental policy. The time period was strategic, according to Evans. "We limited our correspondence to those eight months because freedom of information rules allow the government to refuse requests if you ask for too much," he wrote.

Initially, the governmental departments refused to disclose any letters that ministers had received from Prince Charles. The departments cited several exemptions that allowed the government to deny an information request, including exemptions covering information that was a communication with Her Majesty, records containing personal information, and documents with confidential communications and information. However, seven government departments acknowledged that their ministers overseeing the agency had received letters from Prince Charles during the time period in question.

Evans then requested that the UK Information Commissioner's Office (ICO) overturn the departments' decisions to withhold the information, but the office refused to grant Evans' request in 2009. Evans appealed the ICO's denial to the UK's Administrative Appeals Chamber of the Upper Tribunal in 2012, arguing that disclosure of the letters was in the public interest as it could highlight Prince Charles' advocacy in political affairs. In September 2012, the Upper Tribunal agreed with Evans' arguments and ruled that the departments must disclose the letters.

However, the language of section 53(2) of FOIA and regulation 18(6) of EIR permitted government officials in the executive branch to withhold information if they had "reasonable grounds" to determine that particular governmental records should not be made public. Under these provisions, then-Attorney General Dominic Grieve issued an official certificate that blocked the tribunal's decision from taking effect, citing concerns that the letters could undermine Prince Charles' "position of political neutrality" as they revealed his "deeply held personal views." Grieve's certificate acknowledged that there could be a public interest for "governmental accountability and transparency" in the disclosure of the letters, but he believed the interest in ensuring the confidentiality of the letters held greater weight in a balancing test.

In 2013, Evans filed a challenge to Grieve's certificate blocking the Upper Tribunal's decision in the High Court of Justice's Divisional Court. Evans argued that Grieve's certificate was invalid because his decision was not based on "reasonable grounds." Evans also contended that the attorney general's power to issue such a certificate under regulation 18(6) of EIR violated European Union Directive 2003/4/EC, which guaranteed the right of access to environmental information held by the government and was the basis for the EIR. The Divisional Court rejected Evans' challenge. However, on appeal in 2014, the Civil Division of the England and Wales Court of Appeal agreed with Evans and overturned Grieve's certificate. The court granted the attorney general permission to appeal the decision to the UK Supreme Court. *R (Evans) v. Attorney General*, [2014] EWCA Civ. 254.

On March 26, 2015, the UK Supreme Court ruled with a 5-2 majority that the attorney general did not have the authority to stop the Upper Tribunal's decision from taking effect under section 53 of the FOIA. Lord David Neuberger, who was joined by Lord Brian Kerr and Lord Robert Reed, wrote that two key constitutional principles factored into overturning Grieve's certificate. "First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive," Lord Neuberger wrote. "Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen."

> "[I]t is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive."
>
> **— Lord David Neuberger, Justice of the UK Supreme Court**

Lord Neuberger wrote that the wording of a law that permitted an official in the British government's executive branch to override a judicial decision must be "crystal clear." However, Lord Neuberger's analysis determined that the FOIA's language was not clear enough to allow the attorney general to overturn the Upper Tribunal's decision "simply because he does not agree with it." Lord Neuberger explained that government officials could use section 53 of FOIA to stop a court's decision from taking effect only in a very narrow range of circumstances, such as new facts coming to light after a tribunal's decision was made. The case before the Supreme Court was not one of the rare situations, he wrote.

In a separate opinion, Lord Jonathan Mance, joined by Lady Brenda Hale, agreed that the attorney general did not act within legal limits under the FOIA. Lord Mance wrote that for Grieve to have the ability to overturn the Upper Tribunal's decision, the attorney general would have needed to provide clear, well-reasoned explanations on any disagreements he had with a tribunal's finding of facts or the weighing of relevant interests. Lord Mance noted that the Upper Tribunal undertook extensive efforts to hold a trial, established relevant facts, solicited testimony from key witnesses on both sides of the case, and engaged in extensive legal analysis before making its decision. In contrast, Grieve did not take an exhaustive approach before making a final decision on what facts of the case should be considered most relevant.

Lord Mance noted that Grieve's certificate blocking the Upper Tribunal's decision did not engage in legal reasoning that was nearly as rigorous as the tribunal's decision. "It follows… that the Attorney General's certificate proceeded on the basis of findings which differed, radically, from those made by the Upper Tribunal, and in my view it did so without any real or adequate explanation," Lord Mance wrote. As a result, the attorney general's certificate was not legally valid.

As for Grieve's decision to block the Upper Tribunal's decision under regulation 18(6) of the EIR, Lord Neuberger, with whom Lord Anthony Hughes, Lady Hale, Lord Mance, Lord Kerr, and Lord Reed agreed, wrote that the point was moot because all of the letters would be disclosed after the court's decision on section 53 of the FOIA. However, the 6-1 majority agreed that had they needed to undertake the analysis, they would have found that regulation 18(6) of the EIR violated European Union Directive 2003/4/EC. Lord Neuberger wrote that the EU Directive was clear in allowing an individual to seek judicial review of a government official's decision to deny a request for government information related to environmental issues. The directive indicated that a court's decision was final and "binding on the public authority holding

the information." As a result, regulation 18(6) of the EIR was incompatible with the EU directive in situations when a government official attempted to block the government disclosure of environmental information after a court had ordered it should be released.

Several commentators praised the UK Supreme Court's decision to compel disclosure of Prince Charles' "black spider memos." In a March 26 press release, Maurice Frankel, director of British open-government advocacy organization Campaign for Freedom of Information, said the court's decision was an important boost for freedom of information in the UK. "This is a critical decision which strengthens the FOI Act. It says the courts not minsters normally have the last word," Frankel said in the press release. "If the government disagrees with a ruling on good grounds it should appeal. The veto is not a trump card to be slipped out of a minister's sleeve to block any embarrassing disclosure. Ministers will now have to argue their case[,] not impose it."

In a March 26 "Comment is Free" post on *The Guardian*'s website, associate editor Martin Kettle noted the importance of the newspaper's victory in the case. "The content of the ["black spider memos"] is… a total secret. It has been zealously guarded by the recipients of the letters themselves, and over the last few years, by the full might of the British state and government, as Whitehall has fought every step of the way to stop the Freedom of Information Act disclosure of the letters to Rob Evans of [*The Guardian*]," he wrote. "Today's decision by the supreme court to uphold publication is therefore a big win for Evans, the *Guardian*, and freedom of information. By the same token it is also a big defeat for Charles, the recipients of his letters and the British state."

The Guardian also published an editorial on March 26 chastising the former attorney general as well as speculating about how much information might actually be learned from the letters if the government makes significant redactions to the letters. "Mr. Grieve is a meticulous and intelligent lawyer, so it is particularly striking that — by dint of his seat in the government — he felt obliged to engage in this ridiculous dance to keep private the prince's meddling in public affairs," the editorial board wrote. "We don't know the contents of any of the letters just yet, nor even exactly what we will eventually see, after Downing Street's promised 'preparatory work' with the black marker pen. But on the strength of the effort expended on the right royal cover-up thus far, it seems a fair guess that officials and ministers will have given the prince's letters rather more favourable attention than routine correspondence with a member of the public."

"Today's decision by the supreme court to uphold publication is therefore a big win for Evans, the *Guardian*, and freedom of information. By the same token it is also a big defeat for Charles, the recipients of his letters and the British state."

— Martin Kettle, Associate Editor, *The Guardian*

However, others argued that the UK Supreme Court's view of the FOIA was misguided. In a March 26 statement, British Prime Minister David Cameron expressed concern over the decision and noted that parliament possibly might need to reconsider provisions of the FOIA. "This is a disappointing judgment and we will now consider how to release these letters. This is about the principle that senior members of the Royal Family are able to express their views of government confidentially. I think most people would agree this is fair enough," Cameron said in the statement. "Our FOI laws specifically include the option of a governmental veto, which we exercised in this case for a reason. If the legislation does not make Parliament's intentions for the veto clear enough, then we will need to make it clearer."

According to a March 26 story in *The Guardian*, a spokeswoman for Prince Charles said, "Clarence House [Prince Charles' official residence] is disappointed that the principle of privacy has not been upheld." Another royal aide told the newspaper that the prince's offices were not particularly concerned about any specific content in the letters that had been the focus of the 10-year legal fight. Rather, Prince Charles was concerned that the privacy between him and the ministers was not being recognized.

The Guardian's victory does not mean that all of Prince Charles' letters will be disclosed to the public, however. In 2011, the British parliament amended the FOIA to absolutely exempt any information that was considered a communication with the queen, the heir to the throne, or the second in line to the throne from being subject to requests under the law. Despite the amendment to FOIA, the BBC's Martin Rosenbaum noted in a March 26 commentary that some of Prince Charles' letters could still be publicly disclosed under the EIR. "[T]he absolute block [of royal correspondence under FOIA] does not apply to environmental information, which is governed by a different law. This is the Environmental Information Regulations, which stem from a European Union directive," Rosenbaum wrote. "Many of the prince's concerns are known to be environmental, from organic farming to genetically modified technology. So further revelations in these fields could follow, although every individual request would have to be assessed on its own merits in terms of the overall balance of the public interest."

As the *Bulletin* went to press, the British government had not yet released the "black spider memos" to *The Guardian*.

Casey Carmody
Silha *Bulletin* Editor

New FCC Rules Spur Heated Debate about Net Neutrality Regulation

On Feb. 26, 2015, the Federal Communications Commission (FCC) voted in favor of new rules that re-classify Internet service providers (ISPs) as "common carriers" under Title II of the 1934 Communications Act, allowing the agency to create strong regulations for Internet traffic.

NET NEUTRALITY

Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. 1). The new rules, proposed by FCC chairman Tom Wheeler, were seen as encompassing the principles of net neutrality, an idea that the government should require ISPs to treat all Internet traffic the same. These principles prevent ISPs from speeding up, slowing down, or blocking the delivery of lawful Internet data based on types of content, financial arrangements, users, or websites. Despite the reclassification, the debate over net neutrality and government regulation of ISPs seems far from over as companies, industry groups, politicians and even the White House weighed in with a range of views on the new rules as well as filed legal actions against the FCC's order.

The public debate over net neutrality has persisted for several years, and the FCC's new rules are not its first attempt to enforce the principles. In 2010, the FCC approved *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010), which established net neutrality requirements for ISPs. The order included several provisions, such as mandates requiring ISPs to disclose information about Internet traffic speeds; anti-discrimination requirements prohibiting ISPs from arbitrarily slowing down certain types of Internet content; and anti-blocking rules preventing ISPs from stopping consumers from receiving lawful Internet content.

However, broadband Internet provider Verizon challenged the 2010 order in 2014. In *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit struck down the anti-blocking and anti-discrimination provisions of the previous FCC order, finding that the commission had exceeded its statutory authority. Primarily, the panel concluded that the FCC's classification of ISPs as "information service providers" meant that the agency could not impose strict "common carrier" requirements on Internet companies. The decision spurred calls for the FCC to reclassify broadband ISPs as a public utility. President Barack Obama even took the unusual action of publicly urging the agency to approve strong regulation. (For more on the history of Net Neutrality and the debates surrounding the decision, see "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue of the Silha *Bulletin* and "Debates Continue Over Net Neutrality as FCC Nears Decision on an 'Open Internet'" in the Fall 2014 issue.)

> "If there are net neutrality rules, it's something to be done by Congress, not the FCC. They're on our turf, and we need to reclaim it."
>
> **— Rep. Marsha Blackburn (R.-Tenn.)**

On March 12, 2015, two weeks after approval, the agency released the nearly 400-page order explaining the new rules and detailing the legal justifications behind the agency's decision. The agency's order reclassified high-speed Internet as a "telecommunications carrier" provider under Title II of the Communications Act rather than an "information service provider." This reclassification puts ISPs under the same regulation scheme for "common carriers," such as telephone networks, which allows for heavier regulation and enforcement of the new rules.

With the reclassification, the FCC aimed to protect an open Internet by prohibiting broadband providers from elevating one kind of content over another. "Threats to Internet openness remain today," the commission wrote in the order. "The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don't like." However, the FCC's order noted that not all of the 700 rules and regulations found under Title II regulation would apply to ISPs.

Among the new rules is the provision that a broadband provider cannot block access to lawful content, applications, services or non-harmful devices. Furthermore, ISPs now need to provide technologically-based rationales for their justifications on how Internet traffic is managed, rather than making decisions based purely on business reasons. ISPs can no longer slow down the speed of content delivery for specific applications or services, a practice known as throttling, just because they believe certain applications, like Netflix, use too much bandwidth. The new rules also prohibit a broadband provider from offering paid prioritization, accepting fees for preferred treatment, and creating Internet "fast lanes." Currently, the new rules do not regulate broadband rates or require ISPs to get the FCC's permission before offering new rate plans or new services. The new rules are set to take effect in June 2015. The full text of the order is available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

The vote to adopt the proposed rules passed along a party-line vote with the three Democratic-appointed commissioners voting in favor and the two Republican-appointed commissioners voting against the rules. Both of the Republican Commissioners, Ajit Pai and Michael O'Rielly, released strongly worded dissents against the order. O'Rielly wrote that the FCC had not justified why the new rules were required and questioned whether the order would lead to the FCC regulating Internet service rates in the future. In addition to tensions within the FCC, the new rules could also lead to challenges between the authority of the FCC and the Federal Trade Commission (FTC), which historically has taken on the role of protecting consumers' privacy online. The FCC's new order claims that it has the authority to police Internet privacy issues.

After the FCC approved the new order, telecommunications companies and cable providers expressed concerns over the rules. On Feb. 26, 2015, Verizon released a statement that chided the FCC for deciding "to change the way the commercial Internet has operated since its creation." Comcast also said on the same day in a statement that although it supports the principles of an open Internet, it disagrees with the FCC's decision to reclassify ISPs. Comcast executive vice president David Cohen wrote in a statement, "We fully embrace the open Internet principles that have been laid out by President Obama and Chairman Wheeler and that now have been adopted by the FCC. We just don't believe statutory provisions designed for the telephone industry and adopted

when Franklin D. Roosevelt was president should be stretched to govern the 21st century Internet."

Republican politicians also criticized the FCC's decision to reclassify ISPs as "common carriers." In a February 26 letter, more than 20 Republican members of Congress argued that the new FCC rules "threaten the future viability of the Internet and America's ability to compete in the global technology marketplace." The lawmakers also promised to "not stand by idly." The full letter can be found at http://judiciary.house.gov/_cache/files/3e3b6936-e4bc-43fd-9a99-cb79ad0ae7cb/h-judic-cmte-letter-to-fcc-2-26-15-.pdf.

In response to the order, Rep. Marsha Blackburn (R-Tenn.) introduced the "Internet Freedom Act," H.R. 1212, 114th Cong. (1st Sess. 2015), in the House of Representatives on March 5, 2015. The act would overturn the FCC's new rules. "If there are net neutrality rules, it's something to be done by Congress, not the FCC," Rep. Blackburn told *The New York Times* in a March 12 interview. "They're on our turf, and we need to reclaim it."

Meanwhile, President Obama, who came out in full support of strict new net neutrality rules last fall, applauded the FCC for voting in the new standards. In a Feb. 26, 2015 statement, President Obama thanked the 4 million people who participated in an open comments period last year to voice their support of a "free and fair Internet." Other democratic politicians took to Twitter to voice their support for the FCC's new regulations. On the same day, Senator Al Franken (D-Minn.) tweeted "Today's #NetNeutrality ruling marks a huge victory for free speech. Thank you to everyone that stood up to keep the Internet open and free."

According to a February 26 BBC News report, Columbia Law School Professor Tim Wu, who originally coined the phrase net neutrality, welcomed the ruling. "It is a historic day in the history of the Internet. Net neutrality, long in existence as a principle, has been codified in a way that will likely survive court scrutiny," Wu said. "More generally, this marks the beginning of an entirely new era of how communications are regulated in the United States… I think both the Obama Administration and the Federal Communications Commission can consider the rule a legacy achievement."

Netflix, which has also been a vocal proponent of stronger net neutrality rules, issued a statement on Feb. 26, 2015, calling the FCC's vote a win for consumers. "The net neutrality debate is about who picks winners and losers online: Internet service providers or consumers. Today, the FCC settled it: Consumers win," Netflix said in the statement. "Today's order is a meaningful step towards ensuring ISPs cannot shift bad conduct upstream to where they interconnect with content providers like Netflix. Net neutrality rules are only as strong as their weakest link, and it's incumbent on the FCC to ensure these interconnection points aren't used to end-run the principles of an open Internet."

> "It is a historical day in the history of the [I]nternet. Net neutrality, long in existence as a principle, has been codified in a way that will likely survive court scrutiny."
>
> **— Professor Tim Wu, Columbia Law School**

Also, in a February 26 blog post, Reddit co-founder Alexis Ohanian praised the users of his website, whom he said helped to raise public awareness around net neutrality through a campaign to comment on the FCC's proposed Internet rules. In this case, he wrote, "the Internet rallied to create something that would protect our open Internet."

As many observers expected, legal challenges have already been filed against the FCC's order. Several trade groups, including the National Cable and Telecommunications Association (NCTA), the American Cable Association, the United States Telecom Association (USTelecom), and the Wireless Association (CTIA), have filed lawsuits against the FCC. Internet providers, such as AT&T and smaller Texas based provider Alamo Broadband, have filed lawsuits as well. Other large ISPs appear to be relying on trade groups to represent their interests. Comcast told *Ars Technica* on March 23, 2015, that they are "referring all questions to the NCTA."

Trade groups and ISPs objected to the FCC's decision to reclassify broadband providers as common carrier services in order to enforce net neutrality rules. Walter B. McCormick, the president of USTelecom, said in a March 23, 2015, statement, "We do not believe the Federal Communications Commission's move to utility style regulation invoking Title II authority is legally sustainable." McCormick did not elaborate on why he specifically thought the FCC's decision violated the law.

ISPs also argued that the concerns of prioritizing some content over others are unfounded. McCormick said, "Our member companies conduct their business in conformance with the open Internet principles." According to an April 15, 2015 *Ars Technica* story, AT&T's petition for judicial review accused the FCC of violating the U.S. Constitution and Communications Act by making an "arbitrary" and "capricious" decision.

On March 23, 2015, a spokesperson for the FCC told the *The New York Times* that "we believe that the petitions for review filed today are premature and subject to dismissal." Before the proposed rules were adopted, FCC chairman Wheeler told technology-news website CNET in a January 2015 interview that he was confident the new rules can stand up to the challenge. "We think we have a clear legal case," Wheeler said. "I can assure you that we are writing this with the full expectation that it will be reviewed by the court, so we will make sure that we are on sound footing."

As the *Bulletin* went to press, no rulings had been issued in any of the legal challenges.

Sarah Wiley
Silha Research Assistant

FAA Releases New Proposed Regulations for Private Drone Use; Commercial Ban Remains in Place

On Feb. 15, 2015, the Federal Aviation Administration (FAA) released a framework for the regulation of small drones, also known as unmanned aerial systems (UAS). *Operation and Certification of Small Unmanned Aircraft Systems*, 80 Fed. Reg. 9544-01 (Feb. 15, 2015).

JOURNALISM TECHNOLOGY

The framework would apply to small drones — defined as those weighing less than 55 pounds — conducting non-recreational activities. The regulations specifically allow operators to use drones for aerial photography, research, and other industrial tasks but operators must maintain a direct line of sight to the drone at all times. Key regulations included height and speed limitations, registration requirements, operating rules, and requirements for obtaining operational permits. The FAA opened up a public comment period for the regulations, which can be expected to be further revised after this period. In 2012, Congress mandated that the FAA enact final drone regulations before September 2015, but a June 2014 report by the Department of Transportation stated that the FAA would not be able to meet the deadline.

Under the proposed rules, small drones would be able to fly at no more than 100 miles per hour and at a height of no more than 500 feet. Operators cannot use drones if weather or light conditions prevent them from maintaining a direct line of sight to the drone, and operators are prohibited from flying a drone above a person not involved in the flight. The new regulations also required potential drone operators, who must be at least 17 years old, to pass an aeronautical knowledge test in order to acquire an FAA UAS operator certification. However, operators will not need a traditional pilot's license, and the fees for a drone license are expected to be considerably less than other FAA licenses.

On Feb. 15, 2015, *The Washington Post* reported that "FAA officials said they are considering a separate set of rules for 'micro-drones that weigh less than 4.4 pounds." According to the *Post*, the rules would allow operators to fly these smaller drones without passing any test. It would require only a "written statement to the FAA promising that they were familiar with basic aviation safety measures." The proposed regulations would not impact drones used only for hobby or recreation. (For more on non-regulation of model drones, see the section *Journalists Face Evolving, Uncertain Legal Landscape* in "'Drone Journalism' Presents Possibilities But Faces Legal Obstacles" in the Fall 2014 issue of the Silha *Bulletin*).

During a Feb. 15, 2015 press conference, FAA Administrator Michael Huerta said the proposed framework took account of key differences between operations of drones as compared to other aircraft. "A number of requirements that might pertain to being a private pilot simply don't apply when you are flying an unmanned aircraft," Huerta said. "But what does apply is your ability to operate within airspace with other aircraft." Huerta explained that the proposed tests for drone operators would focus on how to navigate drones in areas near other airborne objects.

Many commentators praised the framework regulations. Gretchen West, an executive at software developer DroneDeploy, told *The Washington Post* in a Feb. 15, 2015 interview that the regulations are "innovative" and concluded "This was a great day for the industry, and there's still a lot of work that has to be done." Brendan Schulman, an attorney specializing in commercial drone law at law firm Kramer Levin Naftalis & Frankel LLP, told *Mashable* in a Feb. 15, 2015 interview that the "proposed regulations are more reasonable than a lot of people feared." However, Schulman noted that the final regulations would likely not be released for another 12-18 months.

Several politicians welcomed the proposed regulations but also called on the FAA to act more quickly on drones. In a February 15 statement, Sen. John Hoeven (R-N.D.) said that the "proposed regulations are a start, but they have a ways to go before we will be able to apply this new and innovative technology in the realm of commerce." He also called on the Obama administration to take a more comprehensive approach to drones. "The administration still needs to outline an actual strategy for integration that does the research required for the [drone] industry to reach its full potential," Hoeven said in the statement. Sen. Chuck Schumer (D-N.Y.) also said, "These FAA rules are a solid first step but need a lot more refining," according to a February 15 statement released by his office.

Michael Drobac, executive director of the Small UAV Coalition, said in a Feb. 15, 2015 interview with *The Washington Post* that the requirement for operators to have a line of sight to the drone would restrict the most fruitful uses of drones. "That really does away with the whole concept of automation," Drobac said. Drobac explained that the private sector should add pressure to the government on this issue. "My belief is that it's incumbent upon the industry to demonstrate that automation and having to be truly unmanned is where we're going," he told the *Post*.

Despite the proposed regulations, the government is still restricting general commercial drone use. The FAA's blanket ban on such use remains in effect. In an April 5 post on the University of North Carolina Center for Media Law & Policy's blog, Kristen Patrow noted that "Until formal regulations are in place, most commercial entities — including news organizations — may not operate drones." However, news organizations are continuing to explore the possibilities of drone journalism. On Jan. 16, 2015, *The New York Times* reported that "A coalition of 10 news organizations, including *The New York Times*, *The Washington Post* and NBCUniversal, has formed a partnership with Virginia Tech to test drones for news gathering," According to a January 15 press release, the partnership is "designed to conduct controlled safety testing of a series of real-life scenarios where the news media could use small U.A.S. technology to gather the news." These organizations will conduct research at an FAA test site to help determine how news drones could be used in real-life situations. (For more on the development of media drone use, see the section *Media, Researchers and Advocates Explore "Drone Journalism"* in "'Drone Journalism' Presents Possibilities But Faces Legal Obstacles" in the Fall 2014 issue of the Silha *Bulletin*).

Others have expressed privacy concerns arising from the possible expansion of drone use. On March 31, 2015, the Electronic Privacy Information Center (EPIC), an independent non-profit research organization, filed suit against the FAA based on the proposed regulations. EPIC petitioned the D.C. Circuit Court of Appeals to "hold unlawful the FAA's withholding of proposed drone privacy rules which Congress required the agency to issue under the FAA Modernization and Reform Act of 2012." In a March 31 press release, EPIC argued that the FAA had "purposefully ignored privacy concerns" in formulating the regulations.

Drones, *continued on page 23*

Obama Calls for Data Security Reforms

In his Jan. 20, 2015 State of the Union address, President Barack Obama urged Congress to focus on several emerging problems in data protection and cybersecurity. Obama outlined various cybersecurity issues and concluded, "[T]onight, I urge this Congress to finally pass the legislation we need to better meet the evolving threat of cyber-attacks, combat identity theft, and protect our children's information. If we don't act, we'll leave our nation and our economy vulnerable."

CYBERSECURITY

These statements followed a Jan. 12, 2015 White House press release detailing a variety of proposed cybersecurity reforms. The release explained that the proposals were aimed toward "enhancing consumers' security, tackling identity theft, and improving privacy online and in the classroom." The policy proposals included: the Personal Data Notification & Protection Act, a law intended to harmonized laws governing data breaches which vary widely among the states; the Student Digital Privacy Act, a law intended to place greater restrictions on advertising in schools and use of student data; and an executive order promoting information sharing between the government and private sector.

Forty-seven states have passed laws regulating what actions entities must take when their servers are improperly accessed or individuals' personal information is exposed. These data breach laws contain varying definitions of what constitutes a breach, when entities must provide notice, and what form that notices should take, among other requirements. In a Jan. 12, 2015 speech at the Federal Trade Commission (FTC), Obama emphasized the need for a single, nation-wide standard governing data breaches. "Right now almost every state has a different law on this and it's confusing for consumers and it's confusing for companies — and it's costly too, to have to comply with this patchwork of laws," said Obama. (For more on state data breach laws, see "Companies Must Provide Increased Notification to Consumers Under Amended Data Breach Law" in the Fall 2013 issue of the Silha *Bulletin*).

The same day, the Obama administration released the legislative proposal for the Personal Data Notification & Protection Act. The accompanying White House press release explained that the act was intended to "clarif[y] and strengthen[] the obligations companies have to notify customers when their personal information has been exposed, including establishing a 30-day notification requirement from the discovery of a breach, while providing companies with the certainty of a single, national standard." The proposal included a "safe harbor" provision which would exempt an entity from disclosing a data breach to consumers by notifying the FTC that it performed risk assessment and concluded consumers were not at risk from the disclosures. It would also promote data sharing between the private sector and government, and it would require notice to the Department of Homeland Security for data breaches affecting federal databases of more than 5,000 individuals. The law would supersede any state data breach law.

Following the administration's proposal, sponsors introduced a data breach bill in each chamber of Congress. The proposal was introduced in the House of Representatives as the Data Accountability and Trust Act (DATA Act), H.R. 580, 114th Cong. (1st Sess. 2015), sponsored by Reps. Joe Barton (R-Texas) and Bobby Rush (D-Ill.) and in the Senate as the Data Security and Breach Notification Act, S. 177, 114th Cong. (1st Sess. 2015), sponsored by Sens. Dianne Feinstein (D-Calif.), John Rockefeller (D-W.Va.), Mark Pryor (D-Ark.), and Bill Nelson (D-Fla.). According to a Feb. 4, 2015 report by Caleb Skeath of *Inside Privacy*, both bills are similar to the Obama administration's proposal. The efforts to create a federal data breach standard have received some bipartisan support. According to a Jan. 22, 2015 article in *Defense Daily*, Rep. Tom Cole (R-Okla.) said that "this is an area where I think [Republicans] can work with the president, we should work with the president. I think we've had enough incidents recently that people are genuinely concerned."

Reforms, *continued on page 24*

Drones, *continued from page 22*

EPIC disputed the FAA's position that "issues are beyond the scope of this rule making." EPIC's full petition to the United States Court of Appeals for the D.C. Circuit can be found at https://epic.org/privacy/litigation/apa/faa/drones/EPIC-v-FAA-DC-Cir-Petition.PDF.

President Obama also released an executive memorandum on February 15 titled "Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems," which instructed federal agencies on how they should manage drone use while protecting civil liberties. The memorandum ordered agencies to review privacy and civil rights protections before deploying drone technology and to "prohibit the collection, use, retention, or dissemination of data in any manner that would violate the First Amendment." Agencies shall not retain personally identifiable information recorded by drones longer than 180 days, "unless retention of the information is determined to be necessary to an authorized mission of the retaining agency." The memorandum also required the National Telecommunications and Information Administration to engage with the private sector organizations "to develop and communicate best practices for privacy, accountability and transparency issues regarding commercial and private UAS use."

Former Justice Department official Lisa Ellman, who helped prepare the presidential order, told *The Washington Post* in a February 15 article that the memorandum was "a very big deal and a very positive step." Ellman said it is an indication that agencies "understand that even with all the benefits of drones, the American public has concerns — concerns about privacy and concerns about accountability."

Rachel Levinson-Waldman, Counsel to the Brennan Center's Liberty and National Security Program, wrote in a March 16, 2015 post on the legal blog *Just Security* that the memorandum left two significant yet unanswered questions about federal agency drone use. First, Levinson-Waldman asked, "will law enforcement agencies be held to a higher standard than other governmental agencies such as the Bureau of Land Management (and if not, as seems to be the case, why not)?" Law enforcement use posed special risks for civil liberties, she wrote, and should therefore be subject to different restrictions. Second, she asked "what restrictions govern when federal agencies buy drone-collected information from third parties?" Levinson-Waldman argued that this is a crucial aspect of any meaningful limitation on drone use because "[g]overnment entities increasingly rely on private databases."

Alex Vlisides
Silha Research Assistant

Reforms, *continued from page 23*

However, many have expressed concern that a federal law may actually lower the level of protection for some consumers. What President Obama derided as the "patchwork" approach to data breach regulation, others see as an advantageous "laboratory of democracy" effect of state-by-state regulation. In a Jan. 22, 2015 op-ed on *Slate*, Illinois Assistant Attorney General Erik C. Jones explained the danger of a federal law that preempts state law protections. "While a national law on data breach notification is long overdue and very much needed, a perverse outcome is possible, in which Congress pre-empts states and at the same time passes a weak notification law that provides consumers with notice of data breaches only when very specific conditions are met," Jones wrote. "If not narrowly tailored, a pre-emption provision could place a wedge between consumers and the very state agencies that serve them."

Others have expressed similar concerns that the Obama administration's proposal would have a negative effect. Pam Dixon of the World Privacy Forum told *The Philadelphia Inquirer* in a Jan. 22, 2015 article that currently, most national companies follow the most stringent state regulations. Because the Obama proposal is less protective of consumers than "the strongest state law," Dixon explained that "the best thing would be to leave state protections in place." For example, the Obama proposal would not require companies to disclose a breach where "there is no reasonable risk of harm or fraud to such individual." Privacy advocates see this as an avenue for possible abuse. Dixon contrasted this proposed provision with a "great feature" of state laws such as California's, for which harm is not a prerequisite for mandatory disclosure.

Paul Martino, Vice President of the National Retail Federation, discussed the corporate lobby's support for the proposal in a Feb. 23, 2015 interview with *Security Info Watch*. Martino agreed with Obama's sentiment that a federal standard would simplify regulations for large companies. "One uniform standard would not only speed compliance, but would make notices to consumers more concise, timely and clear," Martino said.

Obama Signs Executive Order Encouraging Information Sharing Between Government and Private Sector for Cybersecurity

On Feb. 12, 2015, Obama signed an executive order, *Promoting Private Sector Cybersecurity Information Sharing*, intended to promote greater information sharing among the private companies and with the government when cybersecurity breaches do occur. The order stated that the government will "strongly encourage" the creation of private information sharing organizations. It also intended to give the Department of Homeland Security greater authority to work with the private sector on cybersecurity issues and grant private companies access to classified cybersecurity materials. The order required agencies to implement "appropriate protections for privacy and civil liberties" in making these changes.

Congressional Cybersecurity Caucus co-chair Rep. Jim Langevin (D-R.I.) wrote in a Feb. 26, 2015 post on his official Facebook page that the information sharing provisions of the executive order are "a first step, but an important one, and will allow us to broaden the conversation to other important cybersecurity policy matters." Additionally, Martino told *Security Info Watch* in the February 23 interview that the executive order was an important change in encouraging sharing of cybersecurity information because it "would provide liability protections and other protections for industry to encourage greater sharing of cyber threat information among businesses and with the federal government."

> "I urge this Congress to finally pass the legislation we need to better meet the evolving threat of cyber-attacks, combat identity theft, and protect our children's information. If we don't act, we'll leave our nation and our economy vulnerable."
>
> **— U. S. President Barack Obama**

But others in private industry have disputed the usefulness of these information-sharing provisions between the government and private organizations. Jeff Moss, president of DEF CON Communications, told the *Christian Science Monitor* for a Feb. 25, 2015 article that if information sharing could solve the problems of data breaches, "then the market would have addressed it years ago… but [it] hasn't. Information sharing allows better and faster bandaids but doesn't address the core problem." In the same article, Martin Libicki, a senior management scientist at military research organization RAND, argued that information sharing efforts attempting to identify hackers will ultimately do little to prevent or track breaches. He argued that the information sharing provisions' "primary effect will be to force hackers to modify their signatures. After the hackers do so, this expensively-wrought measure will be fairly useless."

U.S. Representatives to Introduce Bill Protecting Student Data

According to a March 22, 2015 report by *The New York Times*, Rep. Jared Polis (D-Colo.) and Rep. Luke Messer (R-Ind.) plan to introduce the Student Digital Privacy and Parental Rights Act, a bill that "would prohibit companies that operate school services… from knowingly using or disclosing students' personal information to tailor advertisements to them." This is also one of the issues Obama addressed during his State of the Union address, and according to the Jan. 12, 2015 White House press release, the president supports legislation intended to "prevent companies from selling student data to third parties for purposes unrelated to the educational mission and from engaging in targeted advertising to students based on data collected in school." A March 23, 2015 report by *The Hill* explained that the bill "dovetails closely" with the White House proposals by including similar provisions that would allow parents to request that third parties delete or correct records about their children. As the *Bulletin* went to press, the bill had not yet been introduced, but according to an April 10, 2015 press release by his office, Polis was "soliciting feedback on a draft" of the bill.

However, several privacy advocates who have read the draft of the bill were critical of it. Leonie Haimson, co-chair of the Parent Coalition for Student Privacy said in a March 22, 2015 press release that the bill failed parents by not having privacy as a default. "The bill doesn't require any parental notification or consent before schools share personal data with third parties," Haimson said. Khaliah Barnes, director of the student privacy project at the Electronic Privacy Information Center, told the *Times* in its March 22 story that the "bill has some promising features," but "it ultimately fails to uphold President Obama's promise that the data collected in an educational context can be used only for educational purposes."

Alex Vlisides
Silha Research Assistant

States Continue to Grapple with Varying Issues Involving Communications Law

Media law often focuses on issues that federal courts and lawmakers must decide. However, the American states also have wide latitude in passing laws and creating regulations governing media within their own borders. During the past several months, state legislators and courts have faced a variety of issues involving statutes placing limitations on speech by convicts, social media privacy, "revenge porn," and limitations on news cameras in state prisons.

STATE LAW UPDATES

Pennsylvania Faces Legal Challenge to "Revictimization Relief Act"

In October 2014, *The Philadelphia Inquirer* reported that then-Pennsylvania Gov. Tom Corbett signed the "Revictimization Relief Act" into law. The law allows victims of crimes to "bring a civil action against an offender in any court of competent jurisdiction to obtain injunctive relief… for conduct which perpetuates the continuing effect of the crime on the victim." 18 Pa.C.S. §11.1304. The law permits a district attorney of a county to seek an injunction against a criminal offender's "conduct which perpetuates the continuing effect of the crime on the victim." The law then allows a judge to issue a "special, preliminary, permanent or any injunctive relief as may be appropriate." The law also allows victims to recover attorney fees and other legal costs if they were successful in obtaining an injunction.

The *Inquirer* reported that the Pennsylvania Senate and House of Representatives passed the law with overwhelming support after Mumia Abu-Jamal recorded a commencement speech that was played during a graduation ceremony at a small liberal-arts college in Vermont. Abu-Jamal, who was convicted of killing Philadelphia Police Officer Daniel Faulkner in 1981 during tense race relations and is serving a life sentence, is a controversial figure because he has publicly maintained his innocence through various high-profile books and recorded audio broadcasts. Pennsylvania lawmakers claimed that this type of public attention for convicted criminals often caused emotional pain and anguish for the victims and families of their crimes.

However, opponents of the legislation criticized the law, renaming it as the "Silencing Act" and claiming it infringed upon individuals' First Amendment rights. On Jan. 8, 2015, the American Civil Liberties Union (ACLU) of Pennsylvania announced that it had filed a federal lawsuit to block the enforcement of the state law. In a press release, the ACLU explained that it had filed the lawsuit "on behalf of journalists, news outlets, advocacy organizations, and community leaders who were formerly incarcerated" because the law "stifle[d] public debate on critical issues, such as deficient prison conditions, mandatory life sentences for juveniles, and innocence claims." The ACLU argued that the law's provisions granting judges broad powers to issue "injunctive relief as may be appropriate" could limit journalists' work. "[R]eporters covering these issues now fear they will be prevented from or even penalized for publishing interviews with prisoners," the ACLU wrote in the press release.

The ACLU filed the federal civil rights suit in the United States District Court for the Middle District of Pennsylvania under 42 U.S.C. §1983 against Pennsylvania Attorney General Kathleen Kane, alleging that the law violated the various plaintiffs' First and Fourteenth Amendment rights. *Prison Legal News v. Kane*, No. 1:15-CV-45 (M.D. Pa. filed Jan. 8, 2015). The organization argued that the law was "unconstitutionally vague, as a potential target can only guess what — or even whose conduct — falls within the statute's scope." The complaint alleged that the law unconstitutionally regulated speech based on content and was overbroad in restricting protected speech. The ACLU also argued that the law would allow judges to impose unconstitutional prior restraints. The full complaint can be found at http://www.aclupa.org/news/2015/01/08/aclu-pa-files-suit-block-states-silencing-act.

In a January 15 post on *The Daily Beast*, journalist Christopher Moraff, one of the plaintiffs in *Prison Legal News v. Kane*, explained his rationale for joining the suit. "Never mind that the Supreme Court has ruled on numerous occasions that the [possibility] of emotional distress is insufficient ground for quashing protected speech — the Silencing Act goes even further," Moraff wrote. "It violates constitutional prohibitions against prior restraint by censoring speech that has yet to be uttered based solely on the criminal histories of those planning to utter it. Adding insult to injury, the law makes no effort to define exactly what type of speech would qualify for an embargo, leaving that rather critical detail up to the discretion of individual judges."

Matthew Mangino, a defense attorney and former district attorney for Lawrence County in Pennsylvania, told *The Legal Intelligencer* in a January 20 story that newspapers would be likely targets for injunctions under the law because of particular aspects of the statute's language. "If a newspaper picks [up a story of a prisoner filing a petition that provides details of a crime], obviously newspapers have money, would a victim then file suit against that newspaper?" Mangino asked. "The thing that's going to bring this to a head is the part of the statute that says you can collect legal fees. That means lawyers are going to be interested in pursuing cases under the statute."

On March 30, *The Patriot-News* in Harrisburg, Pa. reported that federal district Chief Judge Christopher C. Conner heard oral arguments on the ACLU's request for an injunction. As the *Bulletin* went to press, Chief Judge Conner had not yet issued a decision.

Florida Trial Court Rules Individuals' Facebook Pages Have Minimal Privacy Interests

On January 7, 2015, the Fourth District Court of Appeal of Florida ordered Maria Nucci, a Florida woman who had initiated a personal injury lawsuit against the Target Corporation (Target) to produce photos from her Facebook account during pre-trial discovery. *Nucci v. Target Corporation*, 2015 WL 71726 (Fla. Dist. Ct. App. Jan. 7, 2015). Nucci filed the lawsuit in 2010, claiming that she suffered several injuries as a result of slipping and falling in a Target store. During pre-trial hearings in 2013, Target Corporation filed a motion to compel Nucci to provide more than 1,000 photos from her Facebook page after it submitted surveillance which called into question Nucci's claims. Nucci objected to the motion, arguing that Target's request invaded her privacy, was overbroad and vague, and was overly burdensome. The Florida trial court granted Target's motion despite Nucci's objections.

On appeal, Nucci asked the Florida appellate court to quash the trial court's order because it amounted to an unlawful invasion of privacy. Nucci argued that her Facebook privacy settings did not allow the general public to view her photos, which created a general expectation of privacy for her account. Nucci also argued that the Federal Stored Communications Act (SCA), 18 U.S.C § 2701 *et seq.*, protected her Facebook postings from discovery.

State Law, *continued on page 26*

State Law, *continued from page 25*

The SCA prohibits "a person or entity providing electronic communication service to the public" from disclosing the contents of electronically stored communications. Conversely, Target argued that a right to privacy did not protect social media users' content. It maintained that Facebook's terms and conditions explicitly stated that the social media company had discretion to disseminate users' content "at its discretion or under court order."

In its decision, the three-judge panel of the Florida Fourth District Court of Appeal sided with Target, noting that "the relevance of the photographs overwhelms Nucci's minimal privacy interest in them." Judge Robert Gross, writing for the unanimous panel, explained that before Nucci could claim a right to privacy, she needed to have a legitimate expectation of privacy. However, Gross wrote that Facebook was inherently a social arena. "Such posted photographs are unlike medical records or communications with one's attorney, where disclosure is confined to narrow, confidential relationships," Gross wrote. "Facebook itself does not guarantee privacy… By creating a Facebook account, a user acknowledges that her personal information would be shared with others."

The panel also rejected Nucci's claims that the SCA protected her posts because the language limited only "providers" of communication services from disclosing content. "The act does not apply to individuals who use the communications services provide," Gross wrote. Ultimately, the court allowed the trial court's order for discovery of Nucci's Facebook photos to stand.

Legal commentators argued that the Florida appellate court's decision could have broader implications for privacy on social media websites. In a Jan. 14, 2015 news alert on law firm Holland & Knight's website, Senior Counsel Robert L. Rogers III suggested that the decision was helpful for litigants and media defendants. "*Nucci v. Target Corp.* therefore provides key support for a litigant's right to discover personal content posted by litigants on their social media pages — even when those litigants maintain their pages under privacy settings that limit access to the general public," Rogers wrote. "*Nucci* is also a valuable case for media defendants charged with invading a Facebook user's privacy by publishing content posted on 'private' pages, since the decision explains why Facebook users do not have a reasonable legal expectation of privacy over content posted on 'private' pages."

California Continues to Aggressively Pursue Revenge Porn Distributors

On Feb. 2, 2015, *UT San Diego* reported that a jury in San Diego, Calif. found Kevin Bollaert guilty of several felony counts of identity theft and extortion for operating a revenge porn website. Revenge porn is the online distribution of nude images or videos of individuals without their consent. Typically, people distribute the images or videos in order to exact revenge on a former lover. California has been a frontrunner in combatting the unauthorized distribution of nude images and videos. In 2013, it was the first state to pass a law criminalizing revenge porn. (For more information about California's law, see "California Legislators Address Data Protection and New Technology on Several Fronts" in the Fall 2013 issue of the Silha *Bulletin*). However, Bollaert was not convicted under California's anti-revenge porn law. Rather, prosecutors had pursued several related charges.

> "Facebook itself does not guarantee privacy. . . By creating a Facebook account, a user acknowledges that her personal information would be shared with others."
>
> **— Judge Robert Gross, Florida Fourth District Court of Appeal**

California authorities arrested Bollaert in December 2013 for operating the now-defunct website YouGotPosted.com that allowed users to submit revenge porn photos to be displayed, according to a Dec. 12, 2013 story on *TechDirt*. The website would also display the depicted person's name and other identifying information as well as links to the person's social media accounts. If victims contacted him, Bollaert would agree to remove the content from his website only if the person paid him large sums of money. *TechDirt* reported that California Attorney General Kamala Harris filed a criminal complaint against Bollaert on Dec. 10, 2013, alleging multiple counts of criminal activity, including conspiracy, identity theft, and extortion. The full complaint can be found at https://www.techdirt.com/articles/20131211/13125725531/scumbag-revenge-porn-site-operator-arrested-many-charges-are-very-problematic.shtml.

In January 2014, *UT San Diego* reported that Bollaert pleaded not guilty to all of the charges against him. Bollaert's trial began in January 2015, during which prosecutors called 21 victims to testify about how he operated the website. A jury subsequently convicted Bollaert of 21 felony counts of identity theft and six felony counts of extortion on February 2. However, the jury could not reach a verdict on one charge of conspiracy and one charge of identity theft. San Diego Superior Court Judge David Gill declared a mistrial on those two counts, according to the February 2 *UT San Diego* story. On April 3, *UT San Diego* reported that Judge Gill sentenced Bollaert to 18 years in prison. During the sentencing hearing, several victims made statements before the judge. "My life has just gone through a down[ward] spiral," one woman said, according to *UT San Diego*. "I'm homeless because of this. I lost my family." In addition to jail time, Judge Gill ordered Bollaert to pay restitution to the victims in an amount that would be determined later.

In a February 3 interview with Bloomberg BNA, University of Miami Law Professor Mary Anne Franks said the case appeared to be the first criminal conviction in the United States of a revenge porn website operator. Franks also called for further laws criminalizing the unauthorized distribution of nude images and videos. "While all of these cases indicate great progress against the destructive practice of non-consensual pornography, there is still a great need for a federal criminal law against the conduct that would assure consistency in these cases and achieve maximum deterrence," Franks told Bloomberg BNA. "The harms of non-consensual pornography can never be fully addressed after the fact."

After Bollaert's sentencing, Attorney General Harris praised the conviction in an April 3 press release and vowed to continue to pursue people who posted revenge porn. "Today's sentence makes clear there will be severe consequences for those that profit from the exploitation of victims online," Harris said in the press release. "Sitting behind a computer, committing what is essentially a cowardly and criminal act will not shield predators from the law or jail. We will continue to be vigilant and investigate and prosecute those who commit these deplorable acts."

However, others suggested that section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, which protects website operators from liability for the content that is posted by users on the site,

could be a possible avenue for Bollaert to overturn his conviction on appeal. In an April 6 post on *TechDirt*, Tim Cushing noted that Bollaert's website allowed users to post the nude images and personal information rather than actually doing the publishing himself. "As ugly as it seems, the protections afforded operators of sites hosting user-generated content could keep Bollaert from being incarcerated — or at least take a huge chunk out of his 18-year sentence. But that's the dual edge of these sorts of protections," Cushing wrote. "Much like the First Amendment protects ignorant, hate-filled racists and the Fourth Amendment protects child porn enthusiasts [from having their computers searched without a warrant], Section 230 can protect revenge porn site owners from the content submitted to their sites."

Cushing acknowledged that this argument had limitations, but the fact that Bollaert was convicted in a California court could influence the analysis. "Section 230 protections have previously only served to defend site owners in *civil* [*sic*] cases, rather than against criminal charges," Cushing wrote. "It's highly unlikely this will be applicable to appealing the criminal charges, but these are *state* [*sic*] charges rather than federal charges, so this may provide [Bollaert] an opportunity to test California's statutory interpretation of Section 230."

As the *Bulletin* went to press, Bollaert had not yet filed an appeal of his conviction.

Minnesota Bans News Cameras in State Prisons

In an April 18, 2015 column, the *Star Tribune*'s James Eli Shiffer revealed that the Minnesota Department of Corrections (DOC) had quietly updated its news media access policies in February 2015 to ban cameras in state correctional facilities. Previously, DOC policies would allow news organizations to videotape or take photographs of consenting inmates during interviews. The updated policy contained revised language to explicitly ban cameras. State officials told the *Star Tribune* that the change in the media access policy was meant to reflect the DOC's contraband policies, which ban items such as pornography, lighters, knives, and wrapped packages. State law permits journalists to have access to prisoners for interviews, but allows prison officials "to take reasonable precautions to prevent the introduction of contraband into a correctional facility." Minn. Stat. 241.251. Now journalists can bring only "a recording device (if approved), paper, and a writing utensil" when interviewing prisoners, according to the updated media access policy.

DOC spokeswoman Sarah Latuseck told the *Star Tribune* in an email that no specific events or news stories had prompted a change in the policy. Rather, the change was intended to help the victims of crimes as well as prison inmates. "Victims and their families are revictimized by seeing an offender's face in the media," Latuseck wrote in the email. "Having offender pictures on the Internet into perpetuity can be detrimental to [the ability of prisoners finding jobs after being released]." During a subsequent press conference about the changes, Corrections Commissioner Tom Roy explained that the agency was "adopting this policy in response to a rational approach consistent with statute," according to a KSTP April 22 story. "The only adjustment to the policy is the… disallowance of cameras," he said. Roy noted that no victim rights groups had asked for a change in the policy, but the change was intended to provide more sensitivity for crime victims.

Gov. Mark Dayton also told the *Star Tribune* on April 21 that he supported the DOC's new policy restrictions. "I don't require permission to approve everything that comes in," Dayton said. "I'm not going to micromanage the agencies. As long as they make the right decisions I'll support them all the way." Dayton acknowledged during the April 22 press conference that he was not consulted before the DOC implemented the new policy.

News media organizations and advocacy groups criticized the updated policies, suggesting that the changes could have several negative effects. In his April 18 column, Shiffer argued that the ban would create barriers for news organizations pursuing important crime stories. "The camera ban comes two years after the *Star Tribune* published a multimedia series, 'Young and Armed,' about the scourge of gun violence among juveniles," Shiffer wrote. "That project began with interviews in 2012 of two dozen offenders in Minnesota prisons. Many of them allowed us to take video or still photos, and the images of these young inmates, describing the wreckage of their lives, had a power that words alone would not capture."

Shiffer also noted that the ban on news cameras in correctional facilities could have unintended consequences for prisoners. "My concern about the camera ban goes beyond the implications for my own industry," he wrote. "It means that nearly 10,000 inmates of Minnesota prisons will recede even further from public view, their faces all but invisible."

In an April 22 interview with the Associated Press, Mark Anfinson, attorney for the Minnesota Newspaper Association echoed Shiffer's concerns about the visibility of prison inmates. "The public doesn't know enough about [prisoners], who they are, how they got there, how they think. It needs to know more because of the magnitude of this problem," Anfinson said. "To make these people… even more invisible than they already are is just really bad public policy."

Anfinson argued that the ban could raise legal issues over the constitutional rights of inmates. The U. S. Supreme Court has previously ruled that inmates retain a limited set of First Amendment rights while incarcerated so long as their activities do not disrupt the operations of the prison. *Turner v. Safley*, 482 U.S. 78 (1987). "Having video and audio of them is another thing. Whether that element infringes on their First Amendment right or not, I don't think that's really been resolved," Anfinson said. "I think there's a good First Amendment argument. But it's no slam dunk."

In an April 20 statement on its website, the Minnesota Pro chapter of the Society of Professional Journalists (SPJ) wrote that it was "outraged" over the DOC's decision to ban news cameras in prisons. "The Minnesota DOC is now equating both still and video news cameras with contraband items such as pornography and lighters, which is patently absurd," SPJ wrote. "Other DOC concerns could be dealt with through policies other than a full ban on cameras. We urge the Minnesota DOC to immediately reverse its camera ban."

KSTP's April 22 report also suggested that the ban on news cameras could potentially hinder law enforcement officials who are attempting to solve cold cases. The news station claimed that its interviews with prison inmate Joe Ture in 1996 helped the Minnesota Bureau of Criminal Apprehension solve a murder that had occurred 17 years earlier. The stepfather of the victim, Jack Munday, told KSTP that he believed the prisoner's media interviews were a crucial key to discovering that Ture had actually committed the crime. "[Ture's] face was extremely important because people said, 'oh, I know him.' I don't think it would have been solved without him sitting there in front [of journalists] and saying whatever he was saying," Munday said.

When KSTP asked the DOC commissioner during the April 22 press conference about the usefulness of on-camera interviews with prisoners for solving crimes, Roy did not appear to be persuaded. "I actually am not aware in the State of Minnesota if that is in fact a method for solving a cold case," Roy said. "I don't think we are interested in using news or popular media for solving crimes."

Casey Carmody
Silha *Bulletin* Editor

Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
(612) 625-3421

Non-profit Org.
U.S. Postage
PAID
Twin Cities, MN
Permit No. 90155

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

SAVE THE DATE!

October 19, 2015
7:30 p.m.
Coffman Memorial Union Theater

The 30th Annual Silha Lecture will feature a conversation between Pulitzer Prize-winning *New York Times* reporter James Risen and media attorney Joel Kurtzberg.

Additional information is on page 13 of this issue of the Silha Bulletin.

More details coming soon!