Silha Center for the study of media ethics and law

Bulletin

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Silha Center Co-authors *Amicus* Brief in First Amendment Case

For the first time since its founding in 1984, the Silha Center for the Study of Media Ethics and Law has co-authored an *amicus curiae* ("friend of the court") brief in a First Amendment case.

The brief was filed Jan. 25, 2001 in the U.S. Court of Appeals for the Second Circuit in support of the defendants-appellants in the appeal of the Federal District Court's ruling in *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000). *Reimerdes* is a closely watched case whose outcome could substantially limit the ability of online journalists and other World Wide Web communicators to use hyperlinks to connect their audiences to Web content.

The issue in *Reimerdes* is whether courts may, consistent with the First Amendment, enjoin Web site operators who either post programs capable of decrypting copyrighted digital versatile disks (DVDs), or who provide hyperlinks to sites containing such programs. Universal and seven other studios joined forces to seek injunctions against Eric Corley, publisher of *2600: The Hacker Quarterly*, whose Web site contained the DVD decryption program known as DeCSS, and also against Shawn Reimerdes and Roman Kazan, operators of other Web sites containing the decryption program. DeCSS is a program that decrypts CSS, the encryption program used to protect DVDs from being unlawfully copied.

The Digital Millennium Copyright Act empowers judges to issue injunctions against those who "offer to the public" or "otherwise traffick" in decryption programs designed to circumvent copyright protections. 17 U.S.C. §1201 (a)(2). District Court Judge Lewis A. Kaplan held that by posting DeCSS on their Web sites, the defendants were offering the software to the public. Moreover, Judge Kaplan held, "posting ... and linking amount to very much the same thing." *Reimerdes*, 114 F.Supp. 339. As a result, injunctions can be issued against those who provide hyperlinks to sites containing DeCSS, provided: the person creating the link knows DeCSS is available on the linked-to site, knows DeCSS is illegal, and created the link for the purpose of disseminating DeCSS. *Id.* at 341. This language seems to provide some protection for certain kinds of links, but it remains unclear whether, for example, an online journalist doing a story about DeCSS could be enjoined or held liable for posting a link to a site containing the program.

The appellants contend that the District Court's interpretation and application of the DMCA is unconstitutional because it sanctions prior restraints of expression, punishes the communication of truthful information, disallows the "fair use" defense to copyright violations, and restricts expression without any evidence that an actual violation of protected copyrights occurred. The District Court's ruling equating linking with posting would leave journalists and others vulnerable to injunctions or civil liability for merely pointing their audiences to sources containing decryption programs, even if those programs were not used for an illicit purpose.

The Silha Center's *amicus* brief focused on this latter aspect of the case, and the possibility that the District Court's ruling, if upheld, would create a chilling effect on Internet expression, particularly for online journalists who use hyperlinks to augment their stories, and to provide readers with access to original source materials and useful supplemental information available elsewhere on the Web.

The *amicus* brief was authored by Silha Center Director Jane Kirtley and SJMC graduate student Erik Ugland, together with David Greene of the First Amendment Project in Oakland, Calif., and Milton Thurm of Thurm & Heller law firm in New York City. It was written on behalf of the Silha Center and several other journalism and free-press organizations, including the Newspaper Association of America, the Online News Association, the Reporters Committee for Freedom of the Press, the Student Press Law Center, Wired News, the Pew Center on the States and the College of Communications at California State University, Fullerton. All of these organizations are concerned about the

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University of Minnesota

Amicus Brief, *continued from page 1*

prospect of online journalists and others being punished or shut down for providing links to information over which they exercise no editorial control.

The *amicus* brief addressed three broad concerns. The first was the importance of the Court's ruling in establishing not only the legal boundaries of linking, but also the extent of the judiciary's respect for online journalism and the growth of the Web as a source of news and information. An affirmation of the District Court's ruling not only would substantially limit the rights of online journalists and other Web communicators, but would also inhibit the use of links – the defining feature of the Web – at a time when their value as journalistic tools is just beginning to be tapped.

...[the] outcome could substantially limit the ability of online journalists...to use hyperlinks to connect their audiences to Web content.

As the brief notes, "When Judge Starr issued his report on allegations against President Clinton, and when the Florida Supreme Court issued its recent election rulings, online accounts were accompanied by links to the actual documents." These are the kinds of uses that are now commonplace. But what about linking to information that was confidential or that was obtained illegally? The brief notes that "if the Web had been available in 1971, journalists for the *Washington Post* and *New York Times* may have linked to the Pentagon Papers in addition to publishing their own interpretations of those controversial documents." Although the Pentagon Papers would not be covered by the DMCA, upholding the District Court's framework would provide support for the adoption of parallel legislation targeting this kind of information, even if the information is true and in the public interest.

The second area addressed by the brief was the District Court's test for linking liability and its consistency with existing First Amendment standards. The authors argue that the District Court creates a double standard, treating Web publishers more harshly than those using other media in the face of the U.S. Supreme Court's insistence that publication on the Web be afforded the highest level of First Amendment protection. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The District Court relies on the notion that the speech in question in *Reimerdes* is "functional" – that it can be used to perform some operation or to complete some task. But, as the authors of the brief note, this is "no different from the pre-Web practice of identifying reference material that a reader could then retrieve from a library." The fact that someone might later use that information for an illegal purpose should not be the responsibility of the Web publisher. No one would contend, the authors argue, that a newspaper should be liable because its publication of details of a robbery was later used by a reader in committing a similar crime.

The brief's authors also contend that the District Court's ruling treats Web publishers more harshly by permitting prior restraints, which are nearly always found unconstitutional as applied to other media. Furthermore, it does so without any evidence that the linked-to information was actually used or that anyone was actually harmed.

"Banned from publication are links to a Web site containing DeCSS in a report on permissible efforts to reverse engineer CSS, or in a report on the way a film professor compiles film clips for exhibition in class, or in a report on the District Court's decision. Banned are links that inform the reader exactly what DeCSS is, even if the reader is advised not to 'use' DeCSS."

The brief concludes with the argument that the District Court erred by interpreting the publication of a link to another website to be "offering to the public" or "trafficking" in decryption technology. As the brief states, "The First Amendment requires that 'trafficking' be more than merely directing a reader to another source of information. Although a hyperlink may be evidence of actionable conduct, it cannot be the basis for liability in and of itself."

A decision in *Reimerdes* is probably still months away. But the briefs of the parties have been filed and oral arguments are scheduled for May 1. Whatever the outcome, *Reimerdes* will serve as a significant precedent in the still unsettled terrain of Internet law, and an appeal to the U.S. Supreme Court should be anticipated.

A copy of the Silha Center brief is available at http://www.silha.umn.edu/resources.htm. Briefs of the parties in the case can be found at http://www.eff.org.

—ERIK UGLAND

Silha *Bulletin* Available Online

The current Silha Center's *Bulletin* is available online at www.silha.umn.edu Previous issues of the *Bulletin* are also available at the Web site, along with other helpful information and Internet links.

British Court Issues Historic Privacy Decision

In a landmark ruling on December 21, 2000, the Court of Appeals in London recognized for the first time a right to privacy in British law. The court ruling might have far-reaching consequences for media in the United Kingdom.

Catherine Zeta-Jones and Michael Douglas had arranged an exclusive deal with *OK!* magazine to take and publish photos of their wedding ceremony at New York's Plaza Hotel on November 18, 2000. When they heard that rival magazine *Hello!* was about to publish wedding photos, days before the *OK!* issue would hit the shelves, the newlyweds and *OK!* went to court. The photographs *Hello!* was about to publish were taken without the knowledge or consent of the Hollywood stars, presumably by a guest or hotel worker at the ceremony. On November 21 they won an injunction from the High Court, prohibiting distribution of 755,900 copies of the magazine, but too late to retrieve 15,750 copies already on sale. The injunction was overturned on November 23, 2000 by the British Court of Appeal, stating that it would give its reasons in due course. It issued its opinion on December 21, in which it also stated that there is a "powerfully arguable case" that Douglas and Zeta-Jones "have a right to privacy that the English law will today recognize and protect." Accordingly, the couple's suit will be allowed to go forward to trial.

Prior to this ruling, unlike most other Western European countries, the United Kingdom had not yet established a right to privacy. When the Duchess of York tried, in August 1992, to block publication of pictures in English tabloids in which she could be seen topless and having her toes nibbled by her financial adviser, she was told that there was no right to privacy that could help her. In France, on the other hand, a publication which ran the compromising photos not only had to pay damages for infringing her right to privacy, but was also fined in criminal court. The newly-established right to privacy in Britain might give the celebrities in the United Kingdom a powerful weapon with which to defend themselves against intrusive journalism on British soil or to stop legitimate reporting about events of public interest.

The British right to privacy is derived from the Human Rights Act, passed in Britain in October of last year. The Human Rights Act incorporates into national law the European Convention on Human Rights, as required of all member states in the European Union. Article 8 of the ECHR states that "everyone has the right to respect for his private and family life," though the ECHR also recognizes the freedom of expression and of the press in Article 10. Lord Justice Sedley remarked, however, that the ECHR and the European Court of Human Rights do not give this freedom of the press, "the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts." The courts will have to decide on a case by case basis, on considerations of proportionality, in which direction the balance will tilt.

The Douglas and Zeta-Jones case, which is expected to be heard later this year, might be an important indicator of how the courts will balance freedom of the press with the newly-established right to privacy. Given that the couple sold the rights to publish their wedding photographs for 1 million pounds to a mass circulation magazine, Douglas and Zeta-Jones may not be the most credible claimants. The argument advanced by the court, however, states that the privacy violation resides in the fact that Douglas and Zeta-Jones had no veto power over which pictures would be published, a right they had negotiated in their contract with *OK!*. In effect, this ruling would mean that every picture that ran and was not selected by Zeta-Jones and Douglas invaded their privacy, irrespective of its actual content. Following this interpretation, *Hello!* and *OK!* could have published two identical photographs, one of which would have invaded the couple's privacy, while the other would not.

Media professionals in Britain have expressed concern about how the Human Rights Act and its subsequent interpretation in British courts might influence their ability to do their job. The BBC's senior editorial policy executive called for a carefully drafted privacy law that would respect individuals' privacy, but would also enable media to hold public figures accountable. He cited the Zeta-Jones case as an example where privacy is used as an excuse to safeguard pecuniary interests.

—Bastiaan Vanacker

The Douglas and Zeta-Jones case might be an important indicator of how the courts will balance the freedom of the press with the newly-established right to privacy.

Silha Center Joins Advisory Council of The Cornerstone Project

In January 2001, the Silha Center joined the Advisory Council of The Cornerstone Project. Located in Washington, D.C., The Cornerstone Project is a three-year public education campaign sponsored by the Media Institute. The focus of the Project is celebration of the First Amendment, and to bring awareness of the First Amendment to all Americans. The Project consists of three elements: media relations and promotion, education and public service announcements. According to Richard Kaplar of the Media Institute, "Every American has a stake in the First Amendment, and the independence of America is critical for free speech and media choice."

As a member of The Cornerstone Project's Advisory Council, the Silha Center will offer advice and counsel to the group.

For additional information on The Cornerstone Project, visit their website at www.mediainst.org or link to it through the Silha Center's website at www.silha.umn.edu.

Silha Forum Focuses on Film Restoration

"If you do not like where popular entertainment is going, you have the opportunity to influence change..."

—BARRY ALLEN

On February 8, 2001, the Silha Forum marked a creative departure from typical fora of the past which have dealt with issues relating to press law and ethics. Entitled "Lost and Found," the forum dealt with the rights and responsibilities of the film industry, in film restoration and preservation, as well as the rights all of us have to enjoy film as a significant part of our culture and history.

The Forum was presented by Barry Allen, Executive Director of Broadcast Services for Paramount Studios in Hollywood, whose work involves the rescue and restoration of film. According to Allen, an estimated ninety percent of the films made before 1920 have been lost, and fifty percent of the films made between 1920 and 1950 are gone. Losses are attributed to many things, such as studios going out of business, lack of concern for the artistic value in the films, simple carelessness, film deterioration, changes in film ownership, ignorance, and a lack of ownership trails with the result that a current owner's name is unknown. But there are other losses as well – some films have been purposely destroyed because the film had been based on a book or some other work, and the rights had expired. It was easier in some cases to destroy the film than to deal with the resulting liability. Parts of film can be lost as well, when segments are edited to shorten running time, or when the edges of pictures are cut so that wide screen frames can fit the smaller ratio of a television screen.

According to Allen, the film industry began from a need to tell stories, and stories were told out of a need to explain the mysteries of the world around us. In the beginning of time, such stories were not written down, but were passed from one to another orally. Today there are no new stories, Allen says, but the best of them are retold, especially when they reflect something eternal and universal.

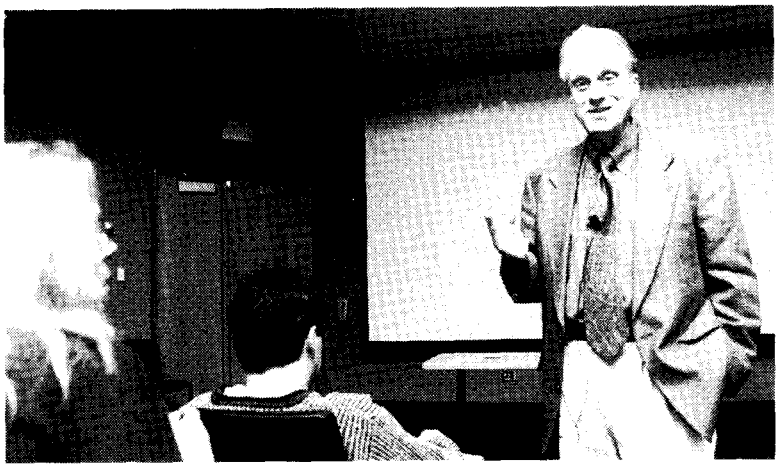
Directors are concerned that alterations, such as editing for language content or nudity, can alter or dilute their work when films move from the theater to network broadcast. It was especially problematic in the early days of television when there were so many more taboo areas than there are today. One film from this era, *Secret Ceremony*, starred Elizabeth Taylor as a prostitute. Before the film was aired on television, her occupation was changed. The director protested and finally demanded that his name be removed from the credits. Losses such as this and others diminish the director's message, as well as the efforts of the artists who participated in the making of the film.

In television's early days, the demand for programming was so great that many films that might have been lost found a new life on the air, and thereby were saved from obscurity. Even so, many of them needed to be preserved, or even restored. Allen's work at Paramount currently focuses on evaluating the assets of the recently acquired Republic film library; on evaluating the condition of its contents and determining which properties should have priority treatment based on the value of a title and its urgency for preservation. He further coordinates the task of gathering master film elements from archives worldwide, and he is also working with the UCLA Film and Television Archive, where the bulk of the nitrate negatives of the Republic library are on deposit.

Allen concluded his presentation with a challenge to the audience. "If you do not like where popular entertainment is going," he said, "you have the opportunity to influence change. Those of you who go into the real world to be writers, teachers, and parents have the power to influence your children, your readers, and your students....It will happen if enough of you care to make it happen."

In addition to leading the Silha Forum, Allen was interviewed by *Minnesota Public Radio* in a conversation about protecting and preserving film and home videos. In an event co-sponsored by the Minnesota Film Board, Allen presented the first public screening of a newly restored print of *The Red Pony* on February 9 at the Heights Theater in Northeast Minneapolis, itself a restoration-in-progress. The following evening, Allen presented a newly restored version of *Johnny Guitar*, also at the Heights. All three Silha events received detailed coverage in the Twin Cities' *City Pages*, and each event was open to the public.

—ELAINE HARGROVE-SIMON



Barry Allen speaks to students at the Silha Forum.

Silha Center Offers Comments on Access To Court Records

In an effort to encourage greater public access to court records in electronic formats, the Silha Center submitted formal comments on Jan. 26, 2001, to a subcommittee of the United States Judicial Conference, arguing that privacy concerns should not deter the courts from continuing their efforts to provide access to judicial records through computer networks, including the Internet.

In response to concerns raised by privacy advocates, the Judicial Conference's Committee on Court Administration and Case Management formed the Subcommittee on Privacy and Electronic Access to Court Files to address problems posed by electronic access, to solicit public comments and to draft a set of policies for the federal court system. The Judicial Conference, headed by the Chief Justice of the United States, William Rehnquist, is an administrative body that establishes rules and standards for the federal courts.

Silha Center director Jane Kirtley and SJMC graduate student Erik Ugland drafted comments to highlight for the subcommittee the constitutional problems posed by restricting access, and the practical benefits of broadening the means of access.

The percentage of all judicial records produced or stored in electronic formats continues to increase, and some courts have begun making those records available through computer databases, some of which are accessible via the Internet. The federal courts have been moving rapidly to implement a new case management system that allows attorneys to file court documents electronically, and plans are underway to provide public access to those documents over the Internet. Those plans are on hold, however, while the Judicial Conference weighs the privacy problems raised by such expanded access.

The Silha Center's comments argue, however, that the issues raised by privacy advocates are more illusory than real, and that to the extent that any legitimate privacy interests are put at risk, they can be easily protected through existing safeguards. Parties can always file motions with the court to conceal records that might intrude on their privacy.

Under one of the proposals under consideration by the subcommittee, however, the Judicial Conference would create certain categories of records, which would be presumptively closed to public examination. The Silha Center comments contend that this is inconsistent with court precedents, which suggest that judicial records are presumptively open.

"It is important for the courts and this Subcommittee to recognize that people's rights or interests in privacy are theirs to assert or waive," the comments state. "It is neither the responsibility nor the role of judges to assert these rights and interests on behalf of others, even though judges must ultimately decide which records are to be sealed and which are to be kept public."

The Silha Center comments add that access proponents are not seeking to expand the types of records available to the public; they are merely seeking broader and more efficient access to records that are already publicly available at federal courthouses. Doing this would not only increase the efficiency of the judicial process, it would substantially democratize the records system, allowing people and groups to conduct research and investigations and to monitor the fairness of the judiciary. Electronic access would simplify this task for public interest groups, and it would make it possible for those who lack the time and resources, or who do not live near federal courthouses, to participate in that process.

"In an open society in which people are charged with monitoring the performance of their government ... it would be a mistake to impose a new regime of court secrecy in which categorical and preemptive determinations are made on these matters," the comments state. "These decisions are best made on a case-by-case basis, upon a motion by the party seeking to seal the records."

For the most part, in the public records context, the courts and legislatures have adapted well to changes in technology. Most courts, for example, have interpreted the term "record" under freedom of information laws to include electronic files. "It would be particularly ironic," according to the authors of the Silha comments, "if the strengths of our new technology were used as a pretext for denying expanded access – taking the tools of accountability out of the hands of citizens, and forcing them to rely on surrogates who may or may not share their interests."

The Silha comments conclude that all of the evidence weighs heavily against any limitation on electronic access to records that are already publicly accessible, and the Court is sufficiently equipped to protect legitimate privacy interests when they arise.

How the Judicial Conference ultimately decides to handle these issues could establish an influential model for the state courts. The Maryland courts, for example, are already engaged in a similar fact-finding inquiry regarding electronic court records. No similar initiative has yet been undertaken in Minnesota, but it is probably only a matter of time. Although each county is different, most judicial records in Minnesota are not accessible online. In Hennepin County, case histories are available on the Internet, but no actual court documents can be accessed.

For more information about the Judicial Conference's inquiry, visit http://www.privacy.uscourts.gov. The Subcommittee conducted hearings on the proposals March 16, 2001. The comments submitted by the Silha Center can be accessed at http://www.silha.umn.edu/resources.htm.

—ERIK UGLAND

...privacy concerns should not deter the courts from continuing their efforts to provide access to judicial records through computer networks...

Yahoo! Bans Sales of Nazi Memorabilia After French Ruling

[This] allows a country to reach across its boundaries and impose its norms on other nations...

On January 3, 2001, Yahoo! decided to ban the sale of Nazi memorabilia on its auction site, six weeks after a court in Paris ordered the US-based company to bar French surfers from its auctions. Free speech activists and Internet scholars have argued that this case sets a dangerous precedent, because it allows a country to reach across its boundaries and impose its norms on another nation.

Paris Judge Jean-Jacques Gomez's ruling on November 20 stated that Yahoo! must put a filtering system in place that would prevent French users to gain access to Nazi-related goods on its auction site. The decision confirmed an earlier ruling dating from May 3, 2000, in which the judge ruled that Yahoo! violated the strict French anti-racism laws by allowing "the viewing of sites making an apology for Nazism and/or exhibiting journalism, insignia or emblems resembling those worn or displayed by the Nazi's, or offering for sale objects or works whose sale is strictly prohibited in France...." Judge Gomez dismissed First Amendment concerns, arguing that the sale of human organs, cigarettes, pedophilia related objects, living animals and drugs is forbidden as well, and that these actions do not receive First Amendment protection.

The November 20 judgment focused primarily on the technical feasibility of denying French citizens access to the auction site. A panel of three experts stated that it would be technically possible to block 70 to 90% of the French surfers from the specified websites. Earlier, Judge Gomez had also noted that it could not be that difficult for Yahoo! to identify French users, because it already provided them with French language banner ads. The judge gave the California based company three months to do so, warning that it would be fined 100,000 Francs per day for each day exceeding the deadline.

While the French anti-racism groups who brought the claim were enjoying their victory, some saw the judgment as yet another step in the direction of a government-controlled World Wide Web. Alan Davidson, Staff Counsel with the Center for Democracy & Technology in Washington D.C., said that this approach "would lead to a lowest common denominator world where the most restrictive rules of any country would govern all speech on the Internet."

This statement may have seemed exaggerated at the time, since the French court ruling had direct implications only for French users, but on January 3, 2001 Yahoo! decided to change its policy and ban all hate materials from its website. The new policy forbids the sale of: "Any item that is directly associated with or promotes or glorifies groups, such as Nazis or the Ku Klux Klan, that are known principally for hateful and violent positions directed at others based on race or similar factors. Official government-issue stamps and coins are not prohibited under this policy. Expressive media, such as books and films, may be subject to more permissive standards as determined by Yahoo! in its sole discretion." Yahoo! has stressed that the decision to change its policy was unrelated to the French ruling. It remains unclear whether the new policy fully complies with the court order, but it is expected that it will render the ruling moot.

In the meantime, Yahoo! is seeking a declaratory judgement in a Federal District Court in San Jose, California, claiming that the French decision is not enforceable in the United States and maintaining that it is technologically impossible to block access to the French netizens. It is not clear if Yahoo! would change its policy again if the California court were to rule in its favor.

—BASTIAAN VANACKER

FAIR Compiles Report of Pressures on Journalists

Although the United States Constitution guarantees the country's media freedom from government interference, some have argued that this freedom and independence are being endangered from a different threat: corporate interests and financial pressures are said to shape and determine news and media content. Polls among journalists by media watch groups such as the *Pew Center for the People & the Press* and *Fairness & Accuracy In Reporting* (*FAIR*), indicate that journalists often are compelled to put the economic interests of advertisers ahead of the public's right to know when writing or selecting news stories.

FAIR collected some examples of these kinds of pressures and their influence on the news of the year 2000 and presented them in a report released on February 14, 2001. The report is by no means an exhaustive overview, nor a scientific study of the phenomenon, but it provides the reader with an idea of the "behind the scenes" pressures exerted on journalists. The report is

Fair *Report, continued on page 8*

Terrorists and Criminals Seeking Media Access Sparks Ethics Debate

When, if ever, is it justified for the media to provide a forum to criminals and terrorists, and when, if ever, is it justified for journalists to cross the line between bystander and participant ? In Colorado Springs, a local TV station provided two dangerous fugitives free airtime in return for a peaceful surrender to authorities, while in Phoenix, a weekly newspaper published an interview with an alleged member of an environmentalist group responsible for setting eleven houses in Phoenix Preserve areas ablaze. Both events sparked debates in local and national media about the moral obligations of media towards their community and society as a whole.

In the early morning of January 24, 2001, Patrick Murphy Jr. and Donald Newbury surrendered to law enforcement officers after being cornered in a motel room in Colorado Springs. The two were the last of a gang of seven that escaped from a Texas prison 42 days earlier. The heavily armed fugitives submitted to authorities in exchange for a ten-minute televised interview. KKTV Channel 11 agreed to do the interview. Twelve year veteran anchor Said Singer interviewed the escapees by phone while sitting in an office at the motel. During the interview, the two refugees expressed their discontent with the Texas penal system. At the conclusion, they walked out unarmed and surrendered.

While Singer and the police were congratulating one another for the successful containment of a potentially explosive situation, others expressed concern about the ethical boundaries crossed by KKTV. Critics said that the television station should not have become an active participant in the event. According to Joanne Ostrow of *The Denver Post*, Singer's involvement "undermines his journalistic credibility and that of the media generally." Others claimed that in situations like this, where human lives are at stake, journalism ethics are trumped by the greater good for society. This argument was also used to justify the fact that media succumbed to the pressure from criminals to provide them with a forum. A similar rationale contributed to the decision of *The Washington Post* and the *The New York Times* to publish the Unabomber's manifesto in 1995. Critics, such as Marvin Kalb, then-director of the Joan Shorenstein Center on the Press, Politics, and Public Policy at Harvard University, maintain that the media should not yield to any of these pressures, even if human lives are at stake.

Similar issues arose over an interview published January 24 in the *Phoenix New Times*. The source, who had contacted the alternative weekly, was member of an environmentalist group claiming to be responsible for setting fire to eleven house construction sites in the Phoenix Preserve areas during the last three years. The group's actions are in protest of housing development and an attempt to influence public opinion in favor of growth restrictions. The self-proclaimed arsonist concealed his identity during the interview.

After the interview, the *Phoenix New Times* was criticized for providing a forum to a confessed criminal, rather than turning him over to the police. Scores of angry letters from citizens accusing the newspaper of letting its community down arrived on the editor's desk: " *The New Times* had the opportunity to assist the public in solving and stopping these crimes, and intentionally chose not to do so. That does not bode well for *New Times* portraying itself as being an asset or watchdog to the community," one person wrote. Other journalists in the Phoenix area criticized the interview. In an editorial, Steve Wilson of *The Arizona Republic* called upon the *Phoenix New Times* to identify its source: "The best journalists I know don't share the tunnel vision at *New Times* about protecting sources no matter what. They feel a responsibility to weigh what's in the best interest of their profession against what's in the best interest of their community.....There are some instances when doing what's right requires placing civic duty ahead of journalistic duty."

The newspaper defended its actions by stressing the role of journalists as independent reporters of facts, the importance of keeping promises to sources and the necessity of keeping a healthy distance between media and law enforcement. It called its colleagues who had condemned its actions "reactionaries [who] bend to the prevailing breezes of popular sentiment, to the detriment of their profession." Adding insult to injury, the newspaper was also subpoenaed by the County Attorney, demanding reporter James Hibberd's notes and other information that might help identify the arsonist. Hibberd had already cooperated with detectives by providing them with some information, such as parts of the interview that did not appear in print, but was not willing to turn over his notes or to work with a sketch artist.

Judge Galati, of the Superior Court of Maricopa County sided with the newspaper, ruling that the arsonist was a confidential source and that under the well established Arizona shield law (A.R.S. §12-2237) the newspaper could not be forced to reveal information that might help identify him. Although Galati made clear that his ruling did not constitute endorsement of the newspaper's actions, he also added a caveat in his opinion, stating that "a free press in a free society properly exercises its prerogatives without regard to whether any official in any branch of government 'approves.'"

Another question is whether or not Hibberd should have helped the authorities in the first place. Prosecutors argued that by doing so Hibberd waived his right to protect his source. Silha Professor Jane Kirtley is skeptical of Hibberd's cooperation with the detectives: "...you're either a journalist or an investigator; you can't be both and maintain your integrity."

These two recent cases and the debates they have sparked are a clear illustration of the lack of consensus regarding exactly what task the media ought to fulfill in society. On the one hand, a communitarian argument states that journalists are part of society and should serve its greater good. The libertarian perspective, on the other hand, considers the media to be a distinct pillar in society, whose principles and loyalties can not always be the same as those of law enforcement or civil society.

—BASTIAAN VANACKER

... is it justified for journalists to cross the line between bystander and participant ?

Silha Lecture 2001 To Focus on *Bartnicki v. Vopper*

Lee Levine, the prominent First Amendment attorney who represented the media defendants in *Bartnicki v. Vopper*, currently pending before the Supreme Court of the United States, will present the 2001 Annual Silha Lecture on Tuesday, October 2, 2001, beginning at 7 p.m. The Lecture will take place in Cowles Auditorium on the West Bank of the Minneapolis campus of the University of Minnesota, and will be followed by a reception in the atrium outside the auditorium.

The *Bartnicki v. Vopper* case has been one of the most closely-monitored cases by media groups in recent history. (For an in-depth look at the case, see the Silha Center Fall 2000 *Bulletin*. The issue can be found on the Silha Center's Web site at www.silha.umn.edu). A cellular telephone call between two union activists was intercepted, and subsequently broadcast during Fred Vopper's radio talk show. Although no allegation was made that the radio show host had anything to do with the interception, he was sued based on language in state and federal wiretapping laws (*see* 18 Pa. Cons. Stat. §5701 et seq., and 18 U.S.C. §2510 et seq.) making it illegal to disseminate, as well as to tape, cell phone conversations without the consent of the parties. The high court's resolution of the case is likely to consider not only how the tape recording was obtained, but the newsworthiness of the conversation, as well as the potential impact on journalists' ability to collect and report news.

Levine is a founding partner of the Washington, D.C. law firm Levine Sullivan & Koch, LLP and is an adjunct professor of law at Georgetown University Law Center. He is a past chair of the American Bar Association's Forum on Communications Law, the principal national association of attorneys practicing in the fields of media and communications law,

Lee Levine

and is recognized in *The Best Lawyers in America* as a leading expert in media law.

In addition to *Bartnicki v. Vopper*, Levine also argued *Harte-Hanks Communications, Inc. v. Connaughton* before the United States Supreme Court. He has litigated in the courts of more than 20 states and the District of Columbia and has appeared in most federal courts of appeal and in the highest courts of ten states. He is one of the authors of the textbook, *Newsgathering and the Law*, and has written several articles, among them, "Branzburg Revisted: Confidential Sources and First Amendment Values" and "The Myth of Pre-Trial Publicity."

Levine is a past chair of the Editorial Board of *The Communications Lawyer*, a quarterly publication of the American Bar Association, and is a member of the Advisory Board of the *Media Law Reporter*. He is a member of the American Bar Association and received his law degree from Yale University, where he was the managing editor of the *Yale Law Journal*. He received his B.A. and M.A. degrees from the University of Pennsylvania.

The Silha Lecture is free and open to the public. For additional information, please visit the Silha Center Web site at www.silha.umn.edu or contact Elaine Hargrove-Simon by e-mail at silha@tc.umn.edu or by phone at (612) 625-3421.

Fair *Report*, *continued from page 6*

divided into five sections: pressures from advertisers, how power players and their influential PR machines try to steer the news, the sometimes less than critical coverage local sports teams receive, corporate ownership of the media and official and government pressures on the media.

While the report is a laudable initiative, the anecdotal evidence only scratches the surface of what is a very complex, but understudied issue. The report by *FAIR*, which can be found at the organization's website, www.fair.org might be a first step in to a more in depth study of the true scope of an important problem facing American journalism in the 21st century.

—Batiaan Vanacker

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