The War on Terrorism: Balancing National Security and Civil Liberties

The Homeland Security Act

On Nov. 19, 2002, Congress passed the Homeland Security Act, H.R. 5005, signed by President Bush on Nov. 25, 2002. (Text of the Act is available online at http://www.dhs.gov/interwebassetlibrary/hr_5005_en.pdf.) The legislation creates the Department of Homeland Security (DHS), a new Cabinet-level Agency, in response to the Sept. 11, 2001 terrorist attacks. Several agency components will be folded into the DHS, including the Immigration and Naturalization Service, the Coast Guard and the Border Patrol. The reorganization is the largest in the federal government since the creation of the Defense Department in 1947.

Critics of the Act object to provisions that allow the DHS to act in secrecy. For example, the DHS will be exempt from several openness requirements of the Federal Advisory Committee Act.

But perhaps most alarming to civil liberties advocates is the Act’s broad Freedom of Information Act exemption for “critical infrastructure” information voluntarily provided by private industries to the DHS. Critical infrastructure information, which includes information about telecommunications, chemical and energy plant locations and weaknesses, as well as the name of the company submitting the information, is not subject to the FOIA, a provision that was a flashpoint during the Senate debates last summer. Should there be a need for the federal government to share information with state or local authorities, those agencies must also keep the information secret, meaning that the DHS statute overrides state and local access to information laws. In addition, the Act makes it a crime to disclose critical infrastructure information to anyone who is not authorized to receive it.

Sen. Patrick J. Leahy (D-Vt.) has criticized the exemption, stating that the Act constitutes the most severe weakening of the Freedom of Information Act in its 36-year history.” Sen. Leahy’s statements on the Homeland Security Act are available online: http://www.senate.gov/~leahy/press/2002/11/11902c.html. Together with Senators Carl Levin (D-Mich.), James Jeffords (I-Vt.), Joseph Lieberman (D-Conn.), and Robert Byrd (D-W.Va.), Sen. Leahy submitted a bill, “Restore FOIA,” a new version of the compromise bill that was supposed to have been part of the DHS Act, but was superseded by another version with more secrecy provisions in it in March 2003.

Sen. Leahy’s “Restore FOIA” bill would limit the FOIA exemption to “records” that pertain to critical infrastructure, rather than the much broader category of “information.” The proposed bill also would protect the actions of legitimate whistleblowers, rather than criminalizing their efforts, and would “respect, rather than preempt” state and local FOIA laws.

A side by side comparison of the “Restore FOIA” bill and the Homeland Security Act was also posted on Leahy’s Web site at http://leahy.senate.gov/press/200303/031203a.htm. The comparison shows, for example, how broadly the Homeland Security Act defines critical infrastructure information, which the “Restore FOIA” bill would narrow, and how the “Restore FOIA” bill would permit withholding only records submitted directly to DHS, whereas the Homeland Security Act arguably would cover information submitted to any federal agency. More than 30 media and advocacy groups signed a letter supporting the “Restore FOIA” bill, available online at http://www.spj.org/news.asp?ref=10.

The Silha Center submitted comments on the proposed regulations governing how DHS will process FOIA requests. The comments are available online at http://www.silha.umn.edu/DHSComments.doc.

PATRIOT II, the “Domestic Security Enhancement Act”

In an attempt to further increase U.S. government power to fight terrorism, the Justice Department has drafted legislation titled the “Domestic Security Enhancement Act” (DSEA), also known as PATRIOT II. The proposed legislation would expand the generous powers already granted to law enforcement under the USA PATRIOT Act of 2001.


Drafted by Justice Department’s Office of Legal Policy, the DSEA would grant the government breathtaking powers. The proposals include allowing the government to:

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- Strip Americans of U.S. citizenship if they are suspected of terrorist activities or political associations with groups defined as terrorist.
- Exempt information about detainees, including the identity of both U.S. citizen and non-citizen detainees, from Freedom of Information Act disclosure, in the interest of national security and the detainee’s “privacy.”
- Create a DNA-sample database. DNA samples would be taken from suspected and convicted terrorists.
- Investigate individuals, not just groups, as “foreign powers,” subject to the Foreign Intelligence Surveillance Act standards (FISA). FISA standards for authorizing wiretaps of foreign powers are looser than “normal” criminal investigative standards, and allow for lengthier, speedier surveillance.
- Conduct electronic surveillance, physical searches, and use pen registers (a device which tracks outgoing telephone calls) to investigate any suspected terrorist or foreign agent for 15 days after the beginning of a military conflict or periods of national emergency, without court supervision. Current law allows such activity only after a formal declaration of war by Congress.

Several senators have expressed concern over the draft DSEA. Sen. Patrick J. Leahy (D-Vt.), ranking Democratic Member of the Senate Judiciary Committee said that: “If there is going to be a sequel to the USA PATRIOT Act, the process of writing it should be open and accountable. It should not be shrouded in secrecy.” Sen. Leahy’s comments are available online at: http://www.senate.gov/~leahy/press/200302/021003.html. A group of House Judiciary Committee members sent a letter dated February 10 to Attorney General John Ashcroft, stating their disappointment that the committee had not been consulted in drafting the DSEA.

Justice officials says that the DSEA is not final, but only a working copy. However, on Jan. 10, 2003, copies were sent to Vice President Dick Cheney, as president of the Senate, and House Speaker J. Dennis Hastert (R-Il), indicating that the draft is in its final stages.

Defense Secretary Rumsfeld Calls for Removing Information from DoD Website

On Jan. 14, 2003, Secretary of Defense Donald Rumsfeld, in a message circulated throughout the Department of Defense (DoD), warned that there is still too much sensitive information on the DoD website. After Sept. 11, 2001, thousands of DoD web pages formerly available to the public were removed or modified.

Entitled “Web Site OPSEC Discrepancies,” the memo cites an al-Qaeda training manual that states that gathering information about the “enemy” may be primarily accomplished by consulting public sources of information. The memo suggests, “One must conclude our enemies access DoD web sites on a regular basis.”

The memo contends that material is not reviewed with sufficient care before it is placed on the DoD website. More than 1,500 discrepancies were found where unclassified but “official” or “sensitive” documents were loaded onto the website. “This continuing trend must be reversed,” concluded Rumsfeld, who suggested that the DoD should think “about what may be helpful to an adversary prior to posting any information to the web.” The memo is available online at http://www.fas.org/sgp/news/2003/01/dodweb.html.

Total Information Awareness

A project that would accumulate vast quantities of personal data in an effort to create a database that would look for terrorist “patterns” will be restricted by a bipartisan amendment to the 2003 omnibus appropriations legislation adopted by Congress in February. The program, called the Total Information Awareness system (TIA) was being developed by the Defense Advanced Research Projects Agency (DARPA), headed by John Poindexter. Poindexter served as President Ronald Reagan’s national security advisor and was convicted of five counts of felony perjury during the Iran-Contra affair, convictions that were later overturned.

According to a Department of Defense (DoD) press release dated Feb. 7, 2003, TIA is intended to develop tools to track terrorists. However, the DoD press release denied that TIA has plans to create a “gigantic database” or to collect or gather “any intelligence information.” Two boards, an internal oversight board and an outside advisory committee, will work with DARPA, ensuring that TIA “develops and disseminates its products to track terrorists in a manner consistent with U.S. constitutional law, U.S. statutory law, and American values related to privacy.”

Furthermore, the press release continues, “TIA has never collected, and has no plan or intent to collect privately held consumer data on U.S. citizens. It is a research program designed to catch terrorists before they strike.”

In November, Defense Secretary Donald Rumsfeld told reporters: “Anyone with any concern ought to be able to sleep well tonight. Nothing terrible is going to happen.” Rumsfeld’s interview is available online at: http://www.defenselink.mil/news/Nov2002/11212002_t111821212.html.

Critics cited privacy concerns and called the project an inefficient waste of money and resources. Members of Congress questioned the project, which would develop a conceptual prototype for the database and make it available to other interested agencies. Sen. Charles Grassley (R-Iowa) wrote a letter to the Defense Department Inspector General asking for a complete review of the TIA system. In a letter dated Nov. 22, 2002, Sen. Grassley, who is the Chairman of the Senate Finance Committee, asked the Inspector General to answer questions, including “What is the statutory authorization for TIA?” and “How was Admiral Poindexter selected to head the TIA?” Finally, Sen. Grassley inquired: “What protections are in place to ensure civil liberties are not violated?” A copy of the letter is available online at http://www.fas.org/sgp/news/2002/11/gr112202.html.

On January 15, 2003, Sen. Ron Wyden (D-Ore.), a member of the Senate Intelligence Committee, said, “My concern is the program...is going forward without...
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Court Rules Detainees Have No Rights To Hearings

A three-judge panel of the U.S. Court of Appeals (D.C. Cir.) ruled on March 11, 2003 that suspected Taliban and al-Qaida fighters now held and interrogated at Guantanamo Bay in Cuba have no right to hearings in U.S. courts to challenge their detention. (See Al Odah v. United States, 2003 U.S. App. Lexis 4250 (D.C. Cir. 2003)).

The panel affirmed a federal district court ruling in 2002 that held that no U.S. court has jurisdiction over the detainees' claims. (Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002)). The opinion by Judge A. Raymond Rudolph cited Johnson v. Eisentrager, 339 U.S. 763 (1950), as precedent, a World War II case in which German nationals who were fighting alongside Japanese forces were captured in China after the surrender of Germany and before the surrender of Japan, then tried before a U.S. military tribunal in Shanghai. Upon conviction for espionage, the Germans appealed to the U.S. Supreme Court. The Supreme Court ruled that the petitioners lacked standing to invoke U.S. legal processes.

Because the Guantanamo prisoners are not on American soil, the civilian courts have no jurisdiction to consider their claims. "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty," Rudolph wrote. Furthermore, following the attacks of September 11, Congress recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," he noted.

The Washington Post reported that during the 90-minute oral argument in December 2002, attorneys representing the detainees' families had urged the panel to give the detainees access to U.S. courts, under either United States or international law. The court should grant the detainees the right of habeas corpus, the attorneys said, because arrested persons are entitled to have a court adjudicate the lawfulness of their detention. They distinguished the detainees from the German prisoners in Johnson, arguing that they are not "enemy aliens." The Geneva Convention protocols (which would grant detainees rights as prisoners of war) and the Alien Tort Claims Act also grant legal protections to the detainees, the attorneys argued.

The U.N. High Commissioner for Human Rights expressed concern over indefinite detention of the detainees. "It is the legitimate right of any government, including and in particular the United States, to do all it can to gather information (on terrorism)," Commissioner Sergio Vieira de Mello said. "But how long can you keep a person in legal limbo?"

Anthony Lewis, the 2002 Silha Lecturer, wrote a column anticipating the D.C. Circuit's ruling in the New York Times on February 24, 2003. "We rely on the courts to enforce what the Constitution promises us," Lewis wrote, citing the landmark case of Marbury v Madison, 5 U.S. 137 (1803), which established judicial review - the duty of the courts to say what the law is. But, Lewis continued, in time of war, U.S. courts have abdicated their function, "bowing to claims of national security." In the case of the detainees at Guantanamo Bay, "the government can impose solitary confinement, perhaps for life, if it simply avoids giving the prisoner a trial," Lewis wrote.

On Dec. 4, 2002, Camp Delta at Guantanamo Bay was opened to journalists for the first time. No photographs of the camp were permitted, but an Associated Press reporter and photographer were shown an empty sample cell where detainees are housed. The steel cells measure 8 by 6.8 feet and workers are building an additional 150 cells that should have been completed by the end of January 2003, increasing the total number of cells to over 960.

INS Final Rules Regarding Information About Detainees

On Jan. 29, 2003, the Immigration and Naturalization Service issued final rules requiring the identities of detainees housed in state and local jails to be kept secret. The agency regulations provide that all jails housing detainees pursuant to government contracts must not release any information about them. Instead, information may be "released in a uniform scheme" governed by the federal Freedom of Information Act (FOIA) and its exemptions, rather than by open records laws of the individual states.

The American Civil Liberties Union argued before a New Jersey state appeals panel in June 2002 that the INS had failed to follow administrative procedures to allow public notice and comment on the new rules. The INS responded that the rules were appropriate and were enacted quickly for "good cause."

Many of the detainees arrested in connection with the events of September 11 are incarcerated in state and local jails, including those suspected of terrorist involvement or violation of immigration laws as well as material witnesses.

ACLU files petition for certiorari

On March 6, 2003, the ACLU filed a petition on behalf of the North Jersey Media Group Inc. and the New Jersey Law Journal, asking the U.S. Supreme Court to decide whether the government violated the First Amendment when "special interest" hearings connected to terrorism investigations were closed. Rulings in Detroit Free Press v. Ashcroft, 303 F. 3d 681 (6th Cir. 2002) and North Jersey Media Group v. Detainees, continued on page 9
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congressional oversight and without clear accountability and guidelines. ... I am of the view the Senate has a special obligation to be vigilant in this area so we do not approve actions or condone actions by this particular office that could compromise the bedrock of this Nation — our Constitution.” His comments are available in the Congressional Record, online at www.fas.org/irp/congress/2003_cr/011503.html

On January 16, Sen. Russ Feingold (D-Wis.) introduced the Data-Mining Moratorium Act of 2003 (S. 188), which would require the Defense Department and the new Department of Homeland Security to suspend the use and development of data mining systems such as the TIA program. Sen. Feingold called data-mining a “dangerous step forward,” adding that “the Administration has a heavy burden of proof that such extreme measures are necessary.” TIA. Sen. Feingold stated, would capture information such as a person’s video rentals, or drugstore purchases related to “most private health concerns.” This information, then, could be “fed into a computer and monitored by the Federal Government.” Such data-mining could lead to “the ensnaring of innocents” when two or more people share a similar name.

Among other things, the Data-Mining Moratorium Act would require accountability from the federal government with regard to the content of reports, the use of reports, privacy protection for individuals, and assurances that only accurate information is collected. The bill was co-sponsored by Sen. Wyden, Sen. Jon Corzine (D-N.J.) and Sen. Bill Nelson (D-Fla.).

The following day, Sen. Grassley introduced additional amendments to the bill, stating that TIA should not be used to conduct intelligence or law enforcement activities against U.S. persons without consideration of their civil liberties and privacy rights.

The final version of the bill requires DoD to produce a report on TIA within 90 days, or else shut down the program. House leaders accepted the amended Senate provision with little dissent. Sen. Patrick J. Leahy (D-Vt.) told the New York Times, “If there is one thing that should unite everybody, from the very conservative member to the very liberal member, it is a concern that our own government should not spy on law-abiding citizens.”

Foreign Intelligence Surveillance Reporting Act of 2003

Senators Charles Grassley (R-Iowa), Patrick J. Leahy (D-Vt.) and Arlen Specter (R-Pa.) have introduced the Foreign Intelligence Surveillance Reporting Act of 2003 (S. 436), a bill that would improve congressional oversight and public reporting of domestic surveillance activities under the Foreign Intelligence Surveillance Act. The Bill would require the Attorney General to issue an annual report on the number of people subject to surveillance under FISA court order and that portions of FISA Court documents that contain legal reasoning be made public.

On October 24, 2002, the American Civil Liberties Union, the Electronic Privacy Information Center (EPIC), American Booksellers Foundation for Free Expression and the Freedom to Read Foundation filed suit against the Justice Department in federal District Court in Washington, D.C., seeking records related to the scope of the USA PATRIOT Act “that are critical to the public’s ability to evaluate the government’s use of vast new surveillance powers, and whose release can only serve national security, not undermine it.” (Text of the civil action is available online at http://www.epic.org/privacy-terrorism/patrot_foa_complaint.pdf.) On Nov. 26, 2002, district court Judge Ellen Huvelle ordered the Department of Justice to process the request for information and inform the ACLU and other plaintiffs on what basis the decision was made to withhold any documents by January 15, 2003. (See Civil Action No. 02-2077; order is available online at http://www.epic.org/privacy/terrorism/schedule_order.pdf.) Over 200 pages of material were handed over to the plaintiffs by that date, but “certain pages” were withheld and other portions were “so heavily redacted that it is meaningless,” said Jameel Jaffer, an attorney with the ACLU Technology & Liberty program in an article, “Groups Hit DoJ’s Data on Wiretap FOIA Request as ‘Meaningless.’” (See volume 4, issue 13 of the Washington Internet Daily.) The Department of Justice has now moved for summary judgment. (See EPIC’s Litigation Docket, available online at www.epic.org/privacy/litigation.)

The ACLU has released a report titled “Bigger Monster, Weaker Chains,” a detailed analysis of surveillance in the United States. The report concludes that technological advances have made surveillance simpler and more widespread, while the checks and balances on government power to use this technology have atrophied. The report is available online at http://www.aclu.org/Privacy/Privacylex/2003.html

Cities Protest PATRIOT Act

Municipalities around the country have passed resolutions barring city employees from enforcing provisions of the USA PATRIOT Act. In Seattle, Wash., Denver, Colo., Detroit, Mich., Santa Fe, N.M., Oakland, Calif., Northampton, Mass., and Fairbanks, Alaska, among others, the resolutions forbid police officers to tap phones or Internet connections, seize library records or secretly monitor political groups. So far more than 60 cities, towns and counties have passed such resolutions, and other cities are considering similar plans.

---Kirsten Murphy
Silha Fellow

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

The Silha Bulletin is a quarterly publication of the Silha Center for the Study of Media Ethics and Law.
Jonathan Clay Randel [not to be confused with the former Washington Post reporter Jonathan Randal, see “Qualified Privilege for War Correspondents Recognized by ICTY” on page 11 of this issue of the Silha Bulletin], an intelligence analyst employed by the Drug Enforcement Administration (DEA), was sentenced to a year in federal prison and three years supervised release for leaking U.S. government information to the Times of London from February 1999 until September 1999. Randel pleaded guilty to the charges on June 4, 2002, and was sentenced on Jan. 9, 2003 in the federal District Court in Atlanta.

According to Assistant United States Attorney Randy S. Chartash, one of the prosecutors in the case, Randel was prosecuted under federal laws 18 U.S.C. § 641 (selling public property or records), §1031 (obtaining money through false pretenses), and §1343 (fraud by wire, radio or television). Randel pled guilty to charges of selling public property or records. Last year, a report generated by an anti-leak task force under the direction of U.S. Attorney General John Ashcroft recommended that government administrators use laws already on the books to identify and punish employees who leak information.

According to the Fulton County Daily Report, Randel was approached by Times freelancer and British television correspondent Toby Follett about information concerning bank holdings in Belize belonging to billionaire Lord Michael Ashcroft, formerly the treasurer of Great Britain’s Conservative Party. Belize’s bank secrecy laws have enabled aided drug dealers and others to hide their financial activities from investigators. Because Ashcroft owns the Bank of Belize, his name had surfaced four separate times in DEA data bank reports involving at least one drug dealer who laundered money through that bank. The Daily Report quoted Steven H. Sadow, Randel’s attorney, as saying that Randel gave Follett the information because “he thought Ashcroft was getting a free ride for crooked activities.” The Times published a series of articles about the controversy in 1999.

Ashcroft then sued the Times for defamation. The London Observer reported that, in preparation for the suit, Times officials asked Follett to reveal the identity of his source, and he named Randel. According to Times officials, it was during this time that Randel traveled to London to meet with them and to give his testimony in the case.

Between Follett and News International, the Times parent company, Randel was paid $13,000, designated to cover travel expenses and missed wages. Times owner Rupert Murdoch eventually settled with Ashcroft in return for a front-page apology. The apology stated that the newspaper had no evidence that Ashcroft had been involved in either drug dealing or money laundering. According to the Guardian of London, the Times also agreed never to “aggressively investigate” Ashcroft again. But as a result of the controversy, Ashcroft was forced to resign his post as party treasurer. The London Daily Telegraph suggested that it was Ashcroft who tipped off federal prosecutors to Randel’s role in leaking the information to the Times.

The information that Randel provided the Times came from restricted DEA investigative databases. Court documents describe the information as “sensitive and confidential” but not classified.

William S. Duffey, Jr., the U.S. attorney for the Northern District of Georgia, said that the Randel sentencing is a warning to other government employees who might consider selling information. Leaking, he told the Daily Report, “jeopardizes the integrity of the justice system. Here is person who was hired in an intelligence-gathering function whom we entrusted with highly sensitive information. He had a duty and he agreed he had a duty to keep that information secret.”

Michael Sissions, a senior consultant at the literary agency Peters, Fraser & Dunlop, who served as an expert witness for the Atlanta U.S. Attorney’s office, wrote in an article published in the Daily Telegraph that at a briefing with the DEA prior to Randel’s hearing he was told, “The sole purpose of the DEA [officials said] was to pursue organized crime, which was intrinsically international. Confidential relationships with other agencies [like the DEA] were vital. There had been consternation at Scotland Yard at the Randel leaks. Indeed, the head of the DEA’s international division had been dispatched post-haste to London and Moscow to allay misgivings in the intelligence community.”

The gravity of the leaks were further emphasized by U.S. District Judge Richard W. Story at Randel’s sentencing, who said, “The risk you created was tremendous. This is like the drunk driver who gets home without killing anybody. Nobody got killed. But you should never have gotten in the car. No agent was killed and no investigation was compromised. But the risk was certainly there.”

However, the Guardian said that the information Randel leaked to the Times was “similar” to documents the Guardian obtained on Ashcroft through the United States Freedom of Information Act (FOIA). Under FOIA provisions, foreign entities may request and receive non-exempt government records.

Randel’s attorney has said the decision will be appealed. Meanwhile, Matt Born, writing for the Daily Telegraph, speculated that Times may be facing “fresh indictments” over the case. Born quoted an unidentified attorney who said that the “Times was part of a conspiracy in Britain to commit a crime in America.” As a result, Times executives may face charges of bribing a U.S. government official. If that were to happen, Jonathan Randel himself may be asked to testify against the newspaper in order to reduce his term. The unidentified attorney in Born’s story said that a U.S. judge could seek a British court order for News International to release its documents concerning the Randel case. If incriminating evidence were found, Times officials could face a request for extradition and criminal charges in the United States.

---ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR
Special to the *Bulletin*: Guest Ethicist Gary Schwitzer

Cloning Announcement Spawns Ethical Debate

News coverage of the Dec. 27, 2002 announcement by the Clonaid company that a cloned human baby had been born raises important ethical questions.

A former French journalist named Claude Vorilhon, who now calls himself Rael, founded Clonaid. He is the leader of a religious group that claims a human extraterrestrial race used DNA and genetic engineering to scientifically create all life on Earth.

Some ethical questions about the news coverage linger unanswered after the initial cacophony of stories has quieted. Many critics have focused their attention only on the question of individual journalistic ethics involving freelance journalist and former ABC News science editor Michael Guillen. Guillen made arrangements with Clonaid to handle a so-called “independent” investigation of the claims. He then attempted to sell his story to various news outlets. The code of ethics of the Society of Professional Journalists states: “Journalists should avoid conflicts of interest, real or perceived. . . (and) remain free of associations and activities that may compromise integrity or damage credibility.”

But this story presents much broader ethical questions than those surrounding Guillen’s actions. This is an important media ethics case study because of the journalistic responsibilities that may have been overlooked or never considered by many journalists clamoring for the cloning news. One tenet of the code of ethics of the Society of Professional Journalists reads: “Test the accuracy of information from all sources and exercise care to avoid inadvertent error.” What test of the accuracy of the information was done before the live news conference or before stories were written based on that news conference?

On the CNN program, “Reliable Sources,” CNN’s medical correspondent Sanjay Gupta attempted to defend the live coverage. “We didn’t know what they were going to say,” explained Gupta. “They didn’t tell us. We didn’t know whether they were going to have any proof. We didn’t think they were.” Yet they chose to carry it live, “I think if we had known in hindsight that there was going to be no proof at this press conference,” said Gupta, “I think that we probably would have pulled the plug.” But the very risk of live coverage of such an event under such circumstances is that a network will broadcast a message that it will not be able to put into context for viewers. That is what happened. Unverifiable claims were broadcast to a worldwide audience, leaving viewers to figure out whether the claim had any meaning or not.

Gupta also defended five interviews CNN had aired with Rael or Clonaid CEO Brigitte Boisselier, in one of which Connie Chung addressed Rael as “Your Holiness.”

Gupta said there was a lot of interest in the story and that it had “captured the public’s imagination.” Yet the code of ethics of the Radio-Television News Directors Association states, “Professional electronic journalists should guard against extended coverage of events or individuals that fails to significantly advance a story, place the event in context, or add to the public knowledge.” The repeated stories in many news outlets failed to significantly advance the story, put it into context, or add to public knowledge. Journalists were never able to conclude whether the claims reported were true or not. So the story just hangs in the air—empty, floating episode of minutiae—one worth lots of newprint and airtime, but now a media-hyped unanswered question.

St. Paul Pioneer Press columnist Joe Soucheray criticized the cloning coverage early. “At best,” Soucheray wrote, “I leave the press conference with a closed notebook after she [Boisselier] refused to provide any evidence of her claim.” He concluded his column: “We are tumbling in the same dryer—cable news, newspapers, talk shows, Web sites—with the end result that news and entertainment are so mixed together these days that you can’t tell the two apart.” Orville Schell, dean of the University of California-Berkeley’s Graduate School of Journalism told the *Los Angeles Times*: “The question of whether to run this story on your front page or evening newscast was a test of virtue for the media,” he said. “When so many people failed it, as they did, everybody associated with the media become a little less dignified. This story is a very obvious example of a larger, more worrisome problem, which is that there are a thousand ways every day in which the contemporary media doesn’t know how to make the dignified decision.”

In a column for MSNBC.com entitled “Media bungled clone claim coverage,” Arthur Caplan, Ph.D., director of the Center for Bioethics at the University of Pennsylvania, wrote, “the public comes away from the Raelian cloning story terrified by advances in genetics, the very science that holds the key to solving some of the biggest challenges human beings will face in this century. Despite 24-hour media attention to the story, the American people have been left confused, scared and clueless. Most Americans now believe that human cloning either has been done or will be done very soon, whereas most experts believe the opposite.”

There is an opportunity to learn from this embarrassing episode and to ensure that it is not repeated. Newsrooms should establish guidelines about live coverage of news conferences. These guidelines should consider such questions as: what is known about the qualifications of those hosting the news conference, and how, and how quickly, can the news team verify and put into context what is announced at the news conference? It is a fundamental journalistic responsibility to test the accuracy of information. Kovach and Rosenstiel, in *The Elements of Journalism*, list two elements that are particularly relevant to this case study. The essence of journalism, they write, “is a discipline of verification... it must keep the news comprehensive and proportional.” *Los Angeles Times* media columnist Tim Rutten said on the CNN “Reliable Sources” program: “It’s a great cautionary tale. Editing is supposed to occur in a deliberative atmosphere, not in an echo chamber. And this notion that once

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Recent Developments in Internet Law

Court Clears Yahoo!

A Paris criminal court on Feb. 11, 2003, threw out the case against Yahoo! by French human rights activists who claimed that Yahoo! and former Yahoo! chief executive Timothy Koogle should be held legally responsible for online auctions that offered Nazi paraphernalia. This could mark the end of a three-year legal battle.

The case began in 2000, when France’s Union of Jewish Students and the International Anti-Racism and Anti-Semitism League sued Yahoo! for allowing Nazi collectibles, including flags emblazoned with swastikas, to be sold on its auction pages. This led to a landmark ruling in France, with the court ordering Yahoo! to block Internet surfers in France from auctions selling Nazi memorabilia. French law prohibits the display or sale of racist material. (See “Yahoo! Bans Sales of Nazi Memorabilia After French Ruling” in the Spring 2001 Bulletin.)

Yahoo! eventually banned Nazi material in January 2001 as it began charging users to make auction listings, saying it did not want to profit from such material. The Associated Press reported that the company insisted that the decision had nothing to do with the proceedings in France as it continued to oppose the French case.

In November 2001, a federal judge in California ruled that speech by U.S. companies could not be regulated by countries that have more restrictive laws on freedom of expression.

Judge Jeremy Fogel of federal District Court in San Jose wrote in Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L’anti-semitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), “Although France has the sovereign right to regulate what speech is permissible in France, this court may not enforce a foreign order that simultaneously within our borders.”

Mary Catherine Wirth, senior corporate counsel in Yahoo!’s international division, told the New York Times in November 2001, that the company was very happy with the decision.

“It means that content hosted at U.S.-based Web sites will receive First Amendment protections,” she said, “and that is very important to us.”

This ruling brought about the second effort to sue Yahoo! by French Holocaust survivors and their families, including the Association of Auschwitz Deportees, and a group called the Movement Against Racism and for Friendship Between People, according to Agence France Presse. The parties sued for one symbolic euro.

The French court ruled that neither charge brought against Koogle, “justifying a crime against humanity” and the “exhibition of a uniform, insignia or emblem of a person guilty of crimes against humanity,” had been proven. The court defined “justifying war crimes” as “glorifying, praising or at least presenting the crimes in question favorably,” and concluded that Yahoo!’ and its auction pages did not fit that description, according to the Associated Press.

Agence France Presse reported that the former Yahoo! chief executive, who did not appear in court, risked a fine of 46,000 euros (about $49,150 U.S. dollars) and five years imprisonment if found guilty of the first charge, and a 1,500-euro fine for the second charge.

The Associated Press reported that neither of the groups that filed complaints against Yahoo! returned calls seeking comment about the decision. It was not immediately clear if they planned to appeal.

—ANNA NGUYEN
SILJA RESEARCH ASSISTANT

North Rhine-Westphalia Blocks Neo-Nazi Web Sites

The Washington Post reported on Dec. 20, 2002, that North Rhine-Westphalia, Germany’s most populous state, has required Internet Service Providers (ISPs) to block two U.S.-based neo-Nazi Web sites. The order follows a lengthy legal battle between the North Rhine-Westphalia government and 18 ISPs in the state, which claimed that they could not be held responsible for the sites’ content, according to the Associated Press. Instead, the courts ruled in favor of the government order, maintaining that the ruling does not impinge on the ISPs’ rights.

The Newswire (VNU), a part of VNU Business Publications, Ltd., reported that under German law it is a crime to publicly spread Nazi ideology. But the nature of the Internet allows neo-Nazi sites to be hosted abroad, thereby providing easier access to this type of information. German officials have attempted to block such content in recent years. The ISPs are appealing to a higher state court and have threatened to leave North Rhine-Westphalia for other German states which do not have limiting regulations of this kind.

—ANNA NGUYEN
SILJA RESEARCH ASSISTANT
The most frequently blocked Web sites were those covering topics on democracy.

Recent Developments in Internet Law

Publisher of Online Democracy Journal Detained in China;
Chinese Student Arrested for Critical Essays Online

The Nando Times reported on Dec. 19, 2002, that Li Yibin, the publisher of an online Chinese pro-democracy journal, had been detained by police, adding to the growing number of arrests of dissident Web site creators in China. The New York Times reported that Amnesty International recently said at least 33 people have been detained by the Chinese government on similar charges.

In a written statement, New York-based Human Rights in China, an international non-governmental organization founded by Chinese scientists and scholars in March 1989, said Li Yibin, believed to be 28, was secretly detained during November 2002 in Beijing. Li had not been able to contact his relatives since then, according to The New York Times. Human Rights in China reported that Li had a degree in computer science and was working in Beijing while publishing an online journal called “Democracy and Freedom.”

A spokesman for the Beijing police, Li Wei, told the Associated Press that he could not confirm that anyone with that name had been detained and did not have any other information.

Yibin was detained after Liu Di, a 22-year-old Beijing college student, was picked up for Internet activism on Nov. 7, 2002. Human Rights in China told the Associated Press that Liu’s university, Beijing Normal University, confirmed to the group that she had been formally arrested. Liu’s family and New York-based human rights group China Labor Watch told the Nando Times that Liu had posted essays on the Internet criticizing the Communist party’s control over society and urging Chinese people to live as “free people.”

Amnesty International and Human Rights in China appealed to a U.S. delegation in Beijing during the week of Dec. 19, 2002, to press for the release of people like Li and Liu. The head of the U.S. delegation, Assistant Secretary of State Lorne Craner, told the Associated Press that cases of several prisoners had been raised, but did not report the response of Chinese officials.

Study Shows What Web Sites Chinese Government Blocks

Researchers at Harvard Law School’s Berkman Center for Internet & Society released a study on Dec. 3, 2002, that determined the types of Web sites the Chinese government blocks. (The study is available online at http://cyber.law.harvard.edu/filtering/china/) The most frequently blocked Web sites were those covering topics on democracy, Tibet and Taiwan. Other sites that were blocked included those on health, education, news, entertainment, religion and philosophy.

Jonathan Zittrain, the Berkman Center’s co-director, and Ben Edelman, a Berkman researcher, tried repeatedly to access 204,012 Web sites and found more than 19,302 to be inaccessible from China, although they were still accessible from the United States. They found the sites through connections to the Internet by telephone dial-up link and through proxy servers in China.

Tests were run from May 2002 through November 2002 indicating at least four distinct and independently operable methods of Internet filtering by the Chinese government. The researchers documented a leap in filtering ability as of September 2002.

One method the researchers used was typing in phrases such as “democracy China” and “dissident China” into the Google search engine to determine how many sites were blocked in the 100 sites returned. Blocked sites included Amnesty International, Human Rights Watch and Direct Democracy Center.

The researchers also speculated that the Chinese government may not block some sites containing sexually explicit materials and law either because they have not found them or have decided that the Web sites were non-sensitive. For example, the United States Federal Courts Web site was blocked, but LexisNexis and Findlaw were accessible. Similarly, online magazine sites such as Playboy and Penthouse were blocked, but Hustler was not.

SiliconValley.com reported that the Associated Press used Berkman’s tools to access the Chinese Internet on Dec. 3, 2002 and found that Berkman’s site was inaccessible in China, although the wire service was able to access Harvard’s site. Edelman told SiliconValley.com that the Berkman site had been available before its report on censorship was posted.

Vietnam Sentences Man to 12 Years for Using Net to Help Dissidents

The People’s Court of Hanoi sentenced Nguyen Khac Toan, 47, to 12 years imprisonment and another three years of probation on the charge of espionage on Dec. 20, 2002, according to BBC Monitoring International Reports released over Global News Wire in Asia and Africa on Dec. 23, 2002. The BBC obtained the information from the Voice of Vietnam Web site.

Agence France Presse reported Nguyen was arrested about 11 months ago at an Internet cafe in the capital.

The BCC reported that Nguyen, a resident of Hanoi, received direct orders from members of an exiled Vietnamese organization in France to collect letters of complaints, denunciations and other information, documents and articles written by those discontented with, or who acted against, the Vietnamese government. Then he allegedly fabricated them, distorting the country’s political situation and slandering the Internet Users. continued on page 29
Recent Developments in Internet Law

**Council of Europe Criminalizes Internet Hate Speech**

The Council of Europe adopted a measure in November 2002 criminalizing Internet hate speech, including hyperlinks to pages that contain offensive content. Quoting a press release from the Council of Europe, the new measure is meant to "harmonise [sic] substantive criminal law" against racism, while improving international cooperation following the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms in 1950.

The measure criminalizes the dissemination of racist and xenophobic materials through computer systems. The measure also expands the definition of hate speech to specifically include threats and insults denying, approving, minimizing or justifying genocide or crimes against humanity, especially during the period from 1940 to 1945.

The offenses recognized by the amendment must be committed intentionally to trigger liability. To be held liable, an Internet service provider must have knowledge of serving or hosting a Web site or newsgroup with racist materials.

Wired News posted on the Wire.com Web Site (available online at http://www.wired.com/news/business/0,1367,56294,00.html) that the provision was passed by the Committee of Ministers, the council's decision-making body, which updated the European Convention on Cybercrime of November 2001. The Convention on Cybercrime addresses the types of legislation needed to develop a common criminal policy aimed at cybercrime. In 1997, the European Committee of Crime Problems gained support from the European Ministers of Justice to craft more effective means to investigate cybercrime.

As of Feb. 27, 2003, 33 of the 44 members of the Council of Europe had signed the Convention on Cybercrime, but only Croatia and Albania have ratified the treaty. A copy of the treaty is available online at http://conventions.coe.int/Treaty/en/searchsig.asp?NT=185&CM=&DF=.

The Council also called on other nations such as the United States, Canada and Japan to adopt the Convention on Cybercrime, specifically the new provision against Internet hate speech.

In the United States, hate speech is generally protected by the First Amendment. Wired News reported that the Council cited a report that found 2,500 out of 4,000 racist sites were created in the United States. Critics of the measure warn that more hate groups will begin operating out of the United States, according to Wired News. For example, in November 2001, federal District Judge Jeremy Fogel ruled in Yahoo!, Inc., v. La Ligue Contre Le Racisme Et L'antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) that Yahoo did not have to block French citizens' access to online sales of Nazi memorabilia that is illegal in France. The court said that the United States Web site was subject only to United States laws. (See “Court Clears Yahoo!” on page 7 of this issue of the Silha Bulletin.)

European countries have been left to block Internet sites themselves. Germany has ordered Internet providers to block access to U.S. Web sites that post publications denying the Holocaust as well as other materials that incite racial and ethnic hatred which are illegal in that country.

Drew Wade, a spokesperson for the U.S. Justice Department, told ZDNet News in November 2002 that “the United States cannot be a party to any convention that abridges a constitutional protection.” The United States does support those aspects of the Convention in Cybercrime that encourage countries to enact computer crime and intellectual property laws.

—Anna Nguyen

Silha Research Assistant

**Recent Developments in Internet Law**

**Detainees, continued from page 3**

Ashcroft, 308 F. 3d 198 (3rd Cir. 2002) resulted in a split in the Sixth and Third Circuits on the issue. (See “Sixth, Third Circuit Courts Split on Deportation Hearings Question,” in the Fall 2002 Silha Bulletin.)

**Richard Reid’s Letters Remain Sealed**

On Jan. 28, 2003 a judge in the federal district court in Boston ruled that the letters written by “shoebomber” Richard Reid will not be released to the public. Judge William G. Young decided that the letters will remain under seal, denying the request for access filed by the Boston Herald and the Boston Globe.

Judge Young accepted the government’s arguments, presented in an affidavit from FBI Special Agent Thomas Powers, who argued that release of the letters containing coded messages that would threaten national security.

In December 2001, Reid, a member of al-Qaida, was arrested after boarding a flight from Paris to Miami with a bomb hidden in his shoe. In October 2002, Reid was convicted of attempted use of a weapon of mass destruction and attempted murder. Judge Young sentenced Reid to life in prison without parole on Jan. 30, 2003. The letters are correspondence between Reid and family members.

—Kirsten Murphy

Silha Fellow

—Elaine Hargrove-Simon

Silha Fellow and Bulletin Editor
William Purdy, an anti-abortion activist who initially said he would run the risk of going to jail rather than give up Web site domain names that included such well-known corporate trademarks as the Washington Post, McDonald’s, Pepsi and Coca-Cola, did not go to jail on Feb. 5, 2003, but was instead held in contempt of a court order issued by federal District Court Judge Ann Montgomery. He was further ordered to pay $500 a day until he complied with her order.

Purdy, 52, of South St. Paul, Minn. has been using domain names to direct Internet users to anti-abortion Web pages. He has registered domain names such as drinkcoke.org, mycoca-cola.com, and my-washingtonpost.com. But in July 2002, the federal District Court in Minneapolis issued a temporary restraining order and preliminary injunction in Coca-Cola Co v. Purdy, 2002 U.S. Dist. LEXIS 13443 (D. Minn. 2002). Purdy was prohibited from using domain names similar to famous trademarks, and he was further ordered to notify domain registrars and instruct them to take action to stop his sites from functioning. He was also ordered to transfer ownership of the domain names to the proper trademark owner. (See “Developments in Internet Law: Cybersquatting” in the Summer 2002 Silha Bulletin.)

The cyberpiracy prevention section of the 1999 Anticybersquatting Consumer Protection Act, 15 U.S.C. 1125(d), prohibits use of, with a bad faith intent to profit from, a domain name that is identical or confusingly similar to a mark that is distinctive or famous at the time of defendant’s registration of the domain name. The law allows trademark holders up to $100,000 for each domain name. Typically, cybersquatting cases involve individuals who buy domain names resembling the names of famous companies or organizations hoping to sell them for profit.

Purdy lodged an emergency appeal to the U.S. Court of Appeals (8th Cir.) [Docket No. 13] which was denied [Docket No. 15]. Nevertheless, Purdy continued to violate the July order. Thomas Olson, an attorney for the corporations, said Purdy registered new names such as “washingtonpostspeaks.com” and “lovemcdonalds.com” that directed Internet users to Web sites that feature photos of what purport to be aborted fetuses, according to the Associated Press.

The corporations filed for a motion for clarification on Aug. 27, 2002, and a copy was sent to Purdy. In September, Montgomery issued an amended emergency restraining order and preliminary injunction against Purdy, prohibiting him from using the domain names drinkcoke.org, mycoca-cola.com, mymdconalds.com, mypepsi.org, pepsisays.com, my-washingtonpost.com, washingtonpostsays.com, washingtonpost.cc, and washingtonpost.ws. (See Coca-Cola v. Purdy, 2002 U.S. Lexis 17117 (D. Minn. 2002).) Purdy was also enjoined from registering or using any domain name that incorporates, is similar to a mark that is distinctive or famous at the time of defendant’s registration of the domain name. The law allows trademark holders up to $100,000 for each domain name. Typically, cybersquatting cases involve individuals who buy domain names resembling the names of famous companies or organizations hoping to sell them for profit.

Purdy decided to comply with Montgomery’s order after attorneys for the plaintiffs’ companies revealed that an unidentified person in Italy has registered 52 new domain names with famous trademark names, some of which are similar to the plaintiffs’. The Italian domain names also lead Internet surfers to anti-abortion sites. “I don’t know anything about [the Italian domain names],” Purdy told the Washington Times, “but I’m delighted.”

---Anna Nguyen
Silha Research Assistant
Qualified Privilege For War Correspondents Recognized by ICTY

Jonathan Randal, the Washington Post reporter who appealed a court order to testify before the International Criminal Tribunal for the Former Yugoslavia (ICTY), has won his case for a qualified war correspondent’s privilege. The ruling follows Randal’s Aug. 17, 2002 appeal, and the filing of an amicus brief signed by 34 media organizations. (See “Media Groups File Amicus Brief in International Criminal Tribunal” in the Fall 2002 Silha Bulletin and “Former Washington Post Reporter Subpoenaed by International Criminal Tribunal,” in the Summer 2002 Silha Bulletin.)

At the heart of the case is the question of reporter’s privilege — the right of a journalist to keep his sources, notes and papers confidential. Reporter’s privilege is an important commodity in a democracy where the right to know is a critical component of free speech. Amici claimed that the contribution of a journalist to a free society and even the work of the tribunal is on par with that of Red Cross and Red Crescent workers and the officers of the tribunal itself.

The Appeals Chamber, consisting of Judges Claude Jorda (President), Mohamed Shahabuddeen, Mehmet Guney, Asika de Z. Gunawardana, and Theodor Meron, for the most part agreed with the reasoning of the media groups. The Appeals Chamber considered the two questions — whether the Tribunal should recognize a qualified testimonial privilege for war correspondents, and whether such a privilege would lead to the quashing of the Randal subpoena.

The Appeals Chambers wrote that the issue involves not all journalists, but a “smaller group,” war correspondents — defined as “individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating that the conflict.” They further stated, “This decision concerns only this group.”

The case raises three questions. Is there a public interest in the work of war correspondents? If so, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If so, can there be a test to balance the public interest in the work of war correspondents against the public interest in presenting all necessary evidence to the court in order to see that justice is done, including the right of the defendant to challenge the evidence against him?

The Appeals Chamber wrote that the work of war correspondents is clearly in the public interest, relying on many national legislatures and court decisions which have recognized that “journalists” play an important “watchdog” role that is essential in democracies. Compelling journalists to testify may hinder the ability of the press to provide accurate and reliable information.

The Appeals Chamber also said that protecting the integrity of war correspondents is “particularly clear and weighty.” War correspondents bring information about death, destruction and suffering to the public which is “essential to keeping the international community informed about matters of life and death” and which “may also be vital to assisting those who would prevent or punishing crimes under international law.” The Appeals Chamber also credited war correspondents with “important leads” for ICTY investigations. For all these reasons, the Appeals Chamber judges concluded that war correspondents do “serve a public interest.” “Adequate weight,” they wrote, “must be given to protecting the ability of war correspondents to carry out their functions.”

Regarding the question, “Would compelling war correspondents to testify in a war crimes tribunal adversely affect their ability to carry out their work?” the Appeals Chamber adopted the arguments of the amici, who contended that journalists must be perceived as “independent observers” rather than “potential witnesses.” “What really matters,” the Appeals Chamber wrote, “is the perception that war correspondents can be forced to become witnesses against their interviewees. . . . To publish the information obtained from an interviewee is one thing — it is often the very purpose for which the interviewee gave the interview — but to testify against the interviewed person on the basis of that interview is quite another.”

When war correspondents are perceived as potential witnesses, it could become difficult for them to obtain information because interviewees would distrust them, and would either give them no interview, provide inaccurate information, or deny them access to areas of conflict. Additionally, those committing human rights violations could see war correspondents as potential targets, thereby putting journalists’ lives in danger, as may have been the case for Wall Street Journal reporter Daniel Pearl. Therefore, the Appeals Chamber wrote, “[C]ompelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact on their ability to obtain information and thus their ability to inform the public on issues of general concern.”

The Appeals Chamber ruled that before a war correspondent can be compelled to testify, the petitioning party must “demonstrate that the evidence sought is of direct and important value in determining a core issue in the case.” Secondly, the petitioning party must also demonstrate that the evidence sought of a war correspondent is not reasonably available elsewhere.

The Appeals Chamber cited Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (September 3, 1953), Article 19 of the International Covenant on Civil and Political Rights (March 23, 1976), article 13 of the American Convention on Human Rights (July 18, 1978), and Article 9(1) of the African Charter on Human and Political Rights (March 22, 1981). The appeals chamber also credited the media groups with “important leads” for the ICTY investigations. For all these reasons, the Appeals Chamber concluded that war correspondents do “serve a public interest.”

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Maryland Court Debates Electronic Access to Court Records

On Jan. 6, 2003, Chief Judge Robert M. Bell of the Maryland Court of Appeals named himself and Judges Lynne A. Battaglia and Alan M. Wilner as the members of a small panel to review and make suggestions to the full court regarding possible changes to the current policies on electronic access to court records, based on recommendations from a previous committee.

The crux of the debate in Maryland is whether and how to provide equal public access to paper and electronic documents. The issue first arose in March 2000, when Bell appointed an ad hoc committee to study and develop a draft policy on access to court records. The committee’s recommendations, which sharply restricted access to electronic documents, were aired at a public meeting on Dec. 13, 2000. Those recommendations were attacked by members of the business community and by the media.

In response to the negative reaction to the first recommended policy, Bell convened a new panel, composed of 18 members, including attorneys, bankers, landlords and members of the news media. The committee met throughout 2001 and on Feb. 5, 2002 posted a Final Draft Report on the Maryland Judiciary’s Web site, available online at www.courts.state.md.us/access/index.html.

The Final Report, which was presented in a public hearing on Dec. 9, 2002 and considered by the Court of Appeals on Jan. 6, 2003, recommends a policy of equal access to electronic and paper documents. The Report also recommends that equal access should be given to civil and criminal documents. The committee's recommendations, which sharply restricted access to electronic documents, were aired at a public meeting on Dec. 13, 2000. Those recommendations were attacked by members of the business community and by the media.

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Recent Developments in Copyright Law

Recording Industry Association of America v. Verizon Internet Services

On Jan. 21, 2003, a federal District Judge for the District of Columbia ordered Verizon Internet Services (Verizon), an Internet Service Provider (ISP), to reveal the identity of a subscriber suspected of illegally downloading over 600 music recordings in a single day.

The case, Recording Industry Association of America v. Verizon Internet Services, No. 02-MS-0323, arose in July 2002 when the Recording Industry Association of America (RIAA), a music industry trade group, subpoenaed Verizon under the Digital Millennium Copyright Act of 1998 (DMCA) for the identity of the subscriber. The DMCA allows copyright holders to subpoena ISPs for the names of subscribers suspected of copyright infringement.

Verizon refused to reveal the subscriber’s name, and the RIAA went to court to enforce the subpoena. Verizon argued that the Act did not apply in this case, because the illegal material was only transmitted over its network, rather than stored on the network. The RIAA countered that the Act’s subpoena power applies to all ISPs, regardless of whether the information is transmitted or stored on the network.

Judge John D. Bates agreed with the RIAA, holding that the language and purpose of the DMCA directs that the subpoena power applies to all ISPs and that Verizon must provide the subscriber’s name. Moreover, Bates wrote, the legislative intent of the DMCA supports broad subpoena power for copyright owners: “Congress not only sought to limit the liability of service providers under the DMCA, but also intended to assist copyright owners in protecting their copyrights.”

Verizon argued that an alternative process, a “John Doe” action, should be used to identify copyright infringers, one that would better protect the privacy of anonymous Internet subscribers. The “John Doe” action would allow RIAA to file a complaint against the unknown infringer, with a third-party subpoena issued to Verizon, who would then inform the subscriber of the lawsuit. Bates rejected this alternative as a burden on the federal court system.

Verizon and amici also urged the court that the subpoena powers under the DMCA violate the First Amendment right to anonymous expression. Bates rejected this argument, contending that “this is not a case where Verizon’s customer is anonymously using the Internet to distribute speeches of Lenin, Biblical passages, educational materials, or criticisms of the government – situations in which assertions of First Amendment rights more plausibly could be made.”

Bates concluded that the Supreme Court’s decision in Eldred v. Ashcroft directs that courts should not second-guess Congressional policy decisions regarding copyright legislation. (See “Copyright Term Extension Upheld as Constitutional” on page 15 of this issue of the Silha Bulletin.) Verizon immediately appealed the decision and asked Judge Bates to stay the ruling.

Internet Service Provider AOL Must Reveal Subscriber’s Identity

In a similar case, America Online, Inc. v. Nam Tai Electronics, Inc., 264 Va. 583 (2002), America Online (AOL) was ordered to reveal the identity of a subscriber charged with libel and unfair business practices by a Hong Kong-based electronics company. On Nov. 1, 2002, the Virginia Supreme Court ruled that AOL, located in Dulles, Va., must reveal the identity of the subscriber, pursuant to an out-of-state discovery request by Nam Tai Electronics, Inc.

Nam Tai brought the lawsuit in a Los Angeles court against an AOL subscriber who uses the screen name “scovey2.” The company alleged that scovey2 and another 51 unknown defendants posted disparaging messages on California-based Yahoo! about Nam Tai’s stock, claiming that the stock was sinking and discouraging investors. The California court allowed Nam Tai to conduct out-of-state discovery in the case to seek the identity of scovey2. As a result, a Virginia circuit trial court issued a subpoena to AOL, requesting scovey2’s identity.

AOL attempted to quash the subpoena on June 22, 2001 and failed. The company appealed the trial court decision, arguing that AOL members have the right to anonymous speech and privacy online.

The Virginia Supreme Court, in an opinion by Judge Lawrence L. Koontz, Jr., dismissed the First Amendment claims, saying they were for the California court to consider. “The First Amendment concerns applicable to the law of California considered by the California court in this case are the same concerns applicable to the law of Virginia. Those concerns remain to be ultimately determined in the California courts rather than in the Virginia courts,” Koontz wrote.

AOL has asked the Virginia Supreme Court to reconsider the decision. If the request is denied, AOL may seek U.S. Supreme Court review.

—Kirsten Murphy
Silha Fellow
Attorneys for the industry have aggressively sought to prevent the spread of DeCSS.

**Recent Developments in Copyright Law**

**DeCSS Update**

**New technology that makes it possible to crack the codes used by Hollywood to protect its copyrights has led to the battle of the entertainment industry versus so-called “hackers” and smaller computer software companies. In a frenzy to block the spread of decryption codes that threaten to gouge profits from the sales of DVDs, attorneys for the industry have aggressively sought to prevent the spread of a technology called DeCSS (DeContent Scrambling System).

“**DVD Jon**”

Jon Lech Johansen, or “DVD-Jon,” as he is commonly known, wrote the program DeCSS when he was 15 years old. He posted it on the Internet in 1999.

Johansen claims that he created DeCSS in order to watch DVDs on a Linux-based computer that lacked the software to play DVDs. The program unlocks DVDs, and reverse engineers CSS (Content Scrambling System). CSS is Hollywood’s method of preventing illegal copies from being made of DVDs and is licensed by the DVD Copy Control Association (DVD CCA), a trade group based in California.

Norwegian prosecutors charged Johansen, now 19, with digital burglary on May 10, 2002. The charges were filed after the prosecutors received a complaint from the Motion Picture Association of America and the DVD CCA. Johansen was charged under section 145 of Norway’s penal code, which makes it illegal to break into data protection technology or devices. If convicted, Johansen could face a possible jail term of one to two years.

Johansen was acquitted on all counts on January 7, 2003, in a unanimous ruling by the three-member Oslo City Court. Head judge Irene Sogn ruled that because Johansen had legally bought the DVDs that he copied, he could not be convicted of breaking into them; they were his property. An English version of the opinion is available at [http://www.eff.org/IP/Video/Johansen_DeCSS_case/20030109_johansen_decision.html](http://www.eff.org/IP/Video/Johansen_DeCSS_case/20030109_johansen_decision.html).


This is the first case in Norway involving a prosecution for use or proliferation of reverse-engineering technology under the data break-in laws. The European Union has introduced a directive similar to the United States Digital Millennium Copyright Act (DMCA). Norway, although not an EU member, is expected to implement the directive. So far, the directive has been adopted by only two member states: Denmark and Greece. Media and software companies have complained bitterly about the failure of the directive to take hold, claiming that digital pirates continue to erode their profits.

**Pavlovich v. Superior Court**

In a surprising move, within one week Justice Sandra Day O’Connor granted a stay of a California Supreme Court ruling, Pavlovich v. Superior Court, 58 P.3d 2 (Cal. 2002) and then reversed the stay after reviewing the response from Matthew Pavlovich’s attorney, which criticized DVD CCA’s reasons for urging Justice O’Connor to stay the decision.

The case arose when DVD CCA sued Texas resident Matthew Pavlovich for violation of California’s state law governing trade secrets. The claim alleged that in 1999, while Pavlovich was a computer-engineering student at Purdue University in Indiana, he posted DeCSS on the Internet. DVD CCA also claimed that Pavlovich intended to harm the computer hardware industry involved in producing CSS-encrypted DVD players.

A California trial court rejected Pavlovich’s argument that the state did not have jurisdiction over him and issued an injunction, preventing him from distributing DeCSS on the web. The California Court of Appeals upheld the trial court decision. In a 4 to 3 decision, the California Supreme Court reversed the lower courts on Nov. 25, 2002, concluding that the state of California did not have jurisdiction over Pavlovich, nullifying the lower court injunction.

The California high court ruled that because Pavlovich is not a California resident and he did not “expressly aim” his activities towards California, he cannot be sued in California courts. Justice Janice R. Brown, writing for the majority, rejected DVD CCA’s argument that Pavlovich should have known that his conduct would harm California industries: “Pavlovich’s knowledge that DeCSS could be used to illegally pirate copyrighted motion pictures on DVDs and that such pirating would harm the motion picture industry in California does not satisfy the express aiming requirement.”

DVD CCA appealed to Justice O’Connor, who is the Supreme Court justice responsible for cases that arise out of the state of California. Justice O’Connor opined for the majority in Eladred v. Ashcroft, 123 S. Ct. 769 (2003), in which the Court upheld a law extending copyright terms, a decision widely applauded by Entertainment corporations. (See “Copyright Term Extension Upheld as Constitutional” on page 15 of this issue of the Silha Bulletin.) The DVD industry and movie studios had hoped that the Justice would stay the California Supreme Court ruling, pending review by the entire Supreme Court.
Recent Developments in Copyright Law

Copyright Term Extension Upheld as Constitutional

Congress sought to extend the term of copyrights in 1998, by passing the Copyright Term Extension Act (CTEA), also known as the Sonny Bono Copyright Term Extension Act. On Jan. 15, 2003, in Eldred v. Ashcroft, 123 S.Ct. 769 (2003), the Supreme Court upheld the constitutionality of the Act. As a result, film classics such as "Snow White," "The Wizard of Oz" and "Gone with the Wind" will not pass into the public domain.

The Act, which amends the 1976 Copyright Act, extends copyright protection from the creator’s life plus 50 years to the creator’s life plus 70 years for most works, and to 95 years for anonymous and corporate works. Thus, many works created in the early 20th century, set to expire within the next few years, are now protected from unauthorized use for another twenty years.

In a 7 to 2 decision, Justice Ruth Bader Ginsburg, writing for the majority, upheld the U.S. Court of Appeals (D.C. Cir.) decision that Congress acted constitutionally in extending copyright protection, pursuant to its Article I, Section 8 power to secure for "limited times" the rights of creators to their works. Congress has discretion, Ginsburg wrote, to determine the length of copyright protection, so long as it specifies a period of time.

The petitioners, a group of scholars, publishers and Internet archivists led by online publisher Eric Eldred, argued that the extension makes copyright protection effectively perpetual, in violation of the "limited times" provision of the Constitution. Petitioners specifically challenged the Act as applied to existing copyrights, contending that the Act cramps future creativity and deprives the public of works created in the period from 1923-1943, which should now fall into the public domain.

The majority rejected petitioners’ arguments, citing Congress’s reasons for passing the Act. These include efforts to harmonize U.S. copyright law with a 1993 European Union directive, which establishes a life-plus 70 year period of copyright protection, as well as encouraging creative activity and the restoration of old movies. The wisdom of these policy arguments is not subject to judicial review, wrote Ginsburg. “We are not at liberty to second-guess congressional determinations and policy judgments of this order, however, debatable and arguably unwise they may be,” she wrote.

Petitioners also challenged the Act on First Amendment grounds, arguing that the Act restricts freedom of expression, which the Court should review under a heightened standard of scrutiny. The Court rejected this argument, finding that copyright law contains built-in First Amendment protections by distinguishing between ideas and expression, covering only the latter and by establishing a "fair use" defense available to users of a copyrighted work. The "fair use" defense provides limited protection for use of copyrighted material in several circumstances including criticism, reporting, teaching and scholarship.

However, Ginsburg recognized that the First Amendment and copyright laws must, to some degree, work in tandem: “We recognize that the D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment,’” she wrote.

Justices John Paul Stevens and Stephen G. Breyer filed separate dissents.

Justice Stevens sided with the petitioners on the issue of the copyright clause "limited times" prescription. The Act, wrote Stevens, contradicts the purpose of the copyright clause by granting ex post facto extensions, which results in gratuitous enrichment of copyright heirs and successors in interest.

Furthermore, argued Stevens, extending existing copyrights does not encourage the creation of new work; it simply continues to reward already existing work. Stevens admonished the majority, writing: “By failing to protect the public interest in free access to the products of inventive and artistic genius – indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause – the Court has quite claimed to Congress its principal responsibility in this area of law.”

Justice Breyer agreed with the petitioners that the CTEA makes copyrights “virtually perpetual” and stressed the importance of the interrelationship between the copyright clause and the First Amendment. The statute is both an economic regulation and a regulation of expression and “what may count as rational where economic regulation is at issue is not necessarily rational when we focus on expression – in a Nation constitutionally dedicated to the free dissemination of speech, information, learning and culture,” wrote Breyer.

Online learning and education will suffer under the Act, urged Breyer, as computer databases will not be able to include certain cultural content from the early 20th century. Breyer wrote that excluding this content would condemn it to “a kind of intellectual purgatory from which it will not easily emerge.”

The decision was applauded by supporters of the Act, including entertainment giants Disney, AOL Time Warner and the Motion Picture Association of America. The corporations will now continue to receive royalties for any works that they own that were created in the early 20th century.

The Act prevents the expiration of the original Mickey Mouse copyright, and many commentators have mocked the CTEA as an effort to save the cartoon mouse from the public domain.

—KIRSTEN MURPHY
SILHIA FELLOW
Recent Developments in Copyright Law

**DVDs Update, continued from page 14**

On Dec. 26, 2002, O’Connor granted an emergency stay, then reversed herself on Jan. 3, 2003, after she reviewed the response from Pavlovich’s attorney, Allonn Levy. Levy criticized the DVD CCA for misleading O’Connor into issuing the stay under the pretext that it was necessary to keep DeCSS a secret: “DVD CCA’s assertion that relief is necessary to maintain the secrecy of DeCSS and/or CSS is demonstrably false . . . . For more than a year now, DVD CCA has been aware of the evidence conclusively demonstrating the falsity of its contention to this Court that DeCSS and CSS remain secret and undisclosed.” Declaration of Allonn E. Levy in Opposition to DVD CCA’s Application for Stay of Judgment, available online at http://www.eff.org/IP/Video/DVDCCA_case/20030102_USSC_opposition.pdf. Levy chronicled numerous sources for information about DeCSS, including University courses. O’Connor immediately rescinded the stay.

Justice O’Connor’s reversal may affect DVD CCA’s future plans to pursue Pavlovich. The group could sue Pavlovich in Texas or petition for review to the entire Supreme Court, although commentators suggest prospects are dim, given the group’s apparent factual misrepresentation. Pending a new order, Pavlovich is no longer barred from distributing DeCSS.

The case against Pavlovich is just one part of DVD CCA’s litigation strategy. The group originally consolidated over 500 defendants from around the world and obtained an injunction to prevent any of them from distributing DeCSS. Pavlovich was one of the original defendants.

Another defendant, Andrew Bunner, a California resident, also fought the injunction on different grounds. Bunner claimed that he had a First Amendment right to publish DeCSS. In November 2003, a California state appellate court agreed, calling the injunction a prior restraint on Bunner’s freedom of speech. An appeal of that decision is pending before the California Supreme Court. (See “Silha Center Files Brief in Bunner Case” in the Summer 2002 Silha Bulletin.)

**United States v. Elcom**

In another battle over technological protections of copyrighted material, a federal court jury in San Jose, Calif., acquitted Elcom (a.k.a. ElcomSoft), a Russian software company, of criminal charges of making a program that can circumvent technological protections on electronic books. Elcomsoft manufactures and sells Advanced eBook Processor (AEBPR), which can be used to circumvent encryption technology on eBooks.

The Dec. 17, 2002 decision, United States v. Elcom Ltd., No. CR01-2-138, verdict returned (N.D. Cal. Dec. 17, 2002) marks the end of a case that began in July 2001 with the arrest of ElcomSoft programmer Dmitry Sklyarov, a Russian national, while he was attending a Defcon hackers conference in Las Vegas, Nev. Sklyarov was charged with violating the Digital Millennium Copyright Act (DMCA) and jailed for several weeks until he agreed to testify for the state of California against his employer.

Under the DMCA, passed in 1998, it is illegal to create or distribute technology that can be used to circumvent copyright protections on software, movies and music, even if the user intends to use the software legally, to copy legitimately purchased products. Violation of the DMCA may carry criminal penalties. The Elcomsoft case is one of the first criminal cases to be brought under the DMCA.

Prosecutors charged that the company knowingly violated the DMCA by creating software designed to crack protections on eBooks. In order to prove their case, the government had to show that Elcom knew that their actions were illegal and intended to violate the DMCA.

Elcomsoft claimed that the DMCA was unconstitutionally vague and that the Act violated the First Amendment because it illegally restricted speech based on content and fair use rights. The software company also claimed that Congress exceeded its powers when it enacted the DMCA.

U.S. District Judge Ronald M. Whyte held that the DMCA is not vague and that Congress acted within its Commerce Clause power when it enacted the statute. Although Whyte agreed that computer code is speech for purposes of the First Amendment, he rejected Elcomsoft’s other First Amendment arguments. The restrictions on speech are justified by the government’s interest in preventing trafficking in technology that circumvents technology used to protect copyrights, Whyte wrote. Of Elcomsoft’s fair use argument, Whyte said: “Although certain fair uses may become more difficult, no fair use has been prohibited.”

However, the federal jury cleared the company of the criminal charges. Critics of the DMCA hailed the acquittal as a blow to the Act because Elcomsoft’s victory left many speculating that enforcement of the criminal provisions of the DMCA would rarely succeed, if ever. Nevertheless, attorneys watching the Elcomsoft case warn software companies that they remain vulnerable to prosecution if they make or sell products that could violate the DMCA.

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Recent Developments in Defamation Law

Dow Jones & Company Inc. v. Gutnick

The High Court of Australia, that country's highest court, unanimously dismissed an appeal by Dow Jones on Dec. 10, 2002, seeking to stop the progress of a defamation suit by Australian magnate Joseph Gutnick. The decision in Dow Jones & Company Inc. v. Gutnick (2002) HCA 56 means that Gutnick can sue New York-based Dow Jones in his home state of Victoria, Australia. The High Court ruled that the Internet story was published where it was read, but did not address the merits of the libel case. A copy of the case is available online at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html.

Gutnick contended that a 7,000-word article entitled “Unholy Gains,” appearing in Barron’s October 2000 issue, portrayed him as a schemer who engaged in stock scams, money laundering and fraud. He also claimed the article described him as having business associations with suspicious characters such as a convicted tax evader. The Barron’s article was also published on the magazine’s Web site.

This is the first time a country’s highest court has defined where Internet publication takes place in a libel case, according to Reuters. Dow Jones’ petition had already been dismissed in two other Victorian courts before the High Court granted review. In the first case, Gutnick v. Dow Jones & Co Inc [2001] VSC 305 (28 August 2001), before the Supreme Court of Victoria at Melbourne, Justice Hedigan ruled that Victoria was “both the appropriate forum and convenient forum” where Gutnick should have his case heard.

Hedigan concluded that the alleged defamatory statements were “published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones’s payment and performance conditions and by the use of their passwords.”

“Using this definition, Hedigan said the most important justification for Victorian jurisdiction is that the suit was brought by a “Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this State, suing only upon publication in this State and disclaiming any form of damages in any other place.”

Dow Jones appealed the decision to the Supreme Court of Victoria-Court of Appeal in Dow Jones Inc. v. Gutnick [2001] VSCA 249, which affirmed the previous opinion. Dow Jones then appealed to the High Court.

In December 2002, the seven-member High Court unanimously dismissed the Dow Jones appeal. Chief Justice Anthony Gleeson, joined by three other justices, wrote the majority opinion. Justice Michael Kirby, Justice Ian Callinan and Justice Mary Gaudron wrote separate concurring opinions.

Dow Jones argued that the case should be heard in the United States, where libel laws are considered relatively liberal compared to other countries. But the Australian High Court did not agree with Dow Jones that the alleged defamation occurred in New Jersey, the location of Dow Jones’ Web servers and editorial offices. Instead, the court said it occurred in Victoria, Australia, where a few readers downloaded the story.

Gleeson further ruled that the location of the servers in New Jersey did not play a significant role in the case, writing “… it is defamation’s concern with reputation, and the significance to be given to damage (as being of the gist of the action) that require rejection of Dow Jones’s contention that publication is necessarily a singular event located by reference only to the publisher’s conduct. Australian common law choice of law rules do not require locating the place of publication of defamatory material as being necessarily, and only, the place of the publisher’s conduct.”

In a separate opinion, Justice Kirby found the use of the long-arm jurisdiction of the Supreme Court of Victoria appropriate since Victoria would be where Gutnick would suffer the most damage. He noted, “that the Internet is such a new and different medium of human communication that it demands a radical reconceptualisation [sic] of the applicable common law, specifically with respect to the tort of defamation.”

Kirby continued, “When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for.” He added that any modification of the law would be the task of the legislature.

Kirby also observed that it would be costly and impractical for most litigants to bring a lawsuit against a foreign publisher. Even if a plaintiff received a damage award, a publisher without assets could ignore it and wait to see whether a court in its own country would enforce it. In the United States, judgments of this type would most likely be declared unconstitutional.

In a separate opinion, Justice Callinan commented, “Publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable, then the greater the need to exercise care in publication.” Justice Gaudron’s separate opinion rejected Dow Jones’ concern that multiple defamation cases could arise from one publication. Defamation claims should be decided in a single jurisdiction, she wrote, adding that a claim could be brought only if the person had a reputation in the place where the material was published.

Stuart Karle, a Dow Jones associate general counsel, told the Boston Globe that the case involved a “United States media publication which is really focused on United States markets and United States investors” and “a journalist who operated completely out of the United States. This dramatically

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Recent Developments in Defamation Law

Print, Internet Newspapers Wrestle with Questions of Jurisdiction

The U.S. Court of Appeals (4th Cir.) in Richmond, Va. decided on Dec. 13, 2002, that a Virginia prison warden may not bring a libel suit in Virginia over articles appearing on the Web sites of two Connecticut newspapers.


The court considered its own precedent in ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F. 3d 707 (4th Cir. 2002), to determine its authority to exercise personal jurisdiction over an out-of-state person who places information on the Internet. In ALS, the court held that “specific jurisdiction in the Internet context may be based only on an out-of-state person’s Internet activity directed at [the forum state] and causing injury that gives rise to a potential claim cognizable in [that state].”

Judge M. Blane Michael, writing for the appeals court, explained, “a court in Virginia cannot constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their Web sites or the posted articles at a Virginia audience.”

The stories written by the two newspapers focus on Connecticut’s overcrowding in its maximum security prisons in the late 1990s. Connecticut established a contract with Virginia to house Connecticut prisoners in Virginia correctional facilities to ease the problem. In late 1999, Connecticut transferred about 500 prisoners, mostly African-American and Hispanic, to the Wallens Ridge State Prison in Big Stone Gap, Va. where Young is the warden.

On March 30, 2000, the New Haven Advocate published a news story about the transfer. The article by Camille Jackson discussed the allegedly harsh conditions of Virginia prisons and that the long trip to southwestern Virginia to visit would be difficult or impossible for the prisoners’ families. She also mentioned a class action that inmates from Connecticut had filed against Young and the Connecticut Commissioner of Corrections. The inmates alleged a lack of proper hygiene and medical care, and denial of their rights to engage in religious practices. The last paragraph of the articles expressed the concern of a Connecticut state senator about Confederate Civil War memorabilia in Warden Young’s office.

At about the same time, The Hartford Courant published three columns by Amy Pagnozzi, questioning the relocation. In one column, Pagnozzi called Wallens Ridge a “cut-rate gulag.” Warden Young was not mentioned in any of Pagnozzi’s columns.

On May 12, 2000, Warden Young sued the two newspapers, their editors, and the two reporters for libel in a diversity action filed in the federal District Court in Big Stone Gap, Va. Young claimed that the articles implied that he “is a racist who advocates racism” and “encourages abuse of inmates by the guards” at Wallens Ridge. He emphasized that the two newspapers circulated the allegedly defamatory articles throughout the world by posting them on their Web sites.

The newspaper defendants filed motions to dismiss the complaint, claiming that the district court lacked personal jurisdiction over them. The two newspapers provided evidence that the reporting of the story was not done in Virginia. The New Haven Advocate had no subscribers in Virginia, while the Hartford Courant had eight subscribers. The content of their Web sites was not aimed at Virginia residents, they argued. The district court had denied the defendants’ motion to dismiss under Virginia’s long arm statute because the Internet activity in Connecticut resulted in an injury to Young in Virginia. The panel concluded that Connecticut, not Virginia, was the focal point of the articles and Internet activity.

Similarly, the U.S. Court of Appeals of New Orleans (5th Cir.) in Revell v. Lidov 317 F.3d 467 (2002), held on Dec. 31, 2002 that Oliver “Buck” Revell, a former FBI agent, could not bring a libel suit in Texas over an article posted by Hart G. Lidov on a Internet bulletin board operated by Columbia University in New York. The case was on appeal from the federal District Court in Dallas (Revell v. Lidov; 2001 U.S. Dist. LEXIS 3133 (N.D. Tex. 2001)), which granted motions to dismiss because defendants lacked minimum contacts with the forum state. Revell lived in Texas when the article was posted on the Internet.

The article charged members of the Reagan administration with having previous knowledge of the terrorist attack of Pam Am flight 103 which exploded over Lockerbie, Scotland, in 1988. Lidov accused Revell of being involved in the conspiracy and of making sure that his son, who was booked on flight 103, changed his flight.

Circuit Judge Patrick E. Higginbotham wrote that Revell failed to plead a prima facie case of personal jurisdiction over Columbia University or Lidov. The court affirmed the district court’s decision based on the “effects” test of Calder v. Jones, 104 S. Ct. 1482 (1984). In Calder, an editor and a writer for the National Enquirer, both residents of Florida, were sued in California for libel arising out of an article published in the Enquirer about Shirley Jones, an actress. The Supreme Court upheld the exercise of
Recent Developments in Defamation Law

Utah Supreme Court Strikes Down Nineteenth-Century Law

In a unanimous ruling on Nov. 15, 2002, the Utah Supreme Court struck down the state’s 1876 criminal libel statute. The case, *I.M.L. v. Utah*, 2002 UT 110, arose when a 16-year-old in Milford, Utah posted defamatory statements on the Internet.

The teenager, Ian Lake, was arrested and jailed in May 2000, charged with criminal libel and slander for posting statements on his Web site that accused the Milford High School principal of being the “town drunk” and calling female classmates “sluts.”

The slander charge was dropped, but Lake was convicted of criminal libel in juvenile district court. Lake relocated to California shortly afterwards. Lake appealed to the Utah Court of Appeals, which referred the case to the Utah Supreme Court. The statute, Lake urged the court, was unconstitutional on its face and should be invalidated.

Chief Justice Christine M. Durham, writing for the majority, held that the statute violated the First Amendment. The statute is overbroad, the court concluded, because it covers speech that is protected by the First Amendment.

Moreover, it does not incorporate the “actual malice” standard that is constitutionally required in order to prove defamation of a public figure. “Quite obviously, the plain language of Utah’s statute does not comport with the requirements laid down by the United States Supreme Court . . . . The statute punishes all statements made ‘maliciously,’ but the common law definition of ‘malice’ is quite different from the ‘actual malice’ contemplated by the United States Supreme Court,” wrote the court. Actual malice is defined by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as knowledge that a statement is false, or reckless disregard for whether the statement is false or not.

Furthermore, the court recognized, the statute lacks any defense of truth, permitting even true statements to be the basis for prosecution.

After the Utah Supreme Court ruled, former Beaver County prosecutor Leo Kanell charged Lake under a 1973 criminal defamation law, which defines defamation to include the constitutional requirement of “actual malice,” unlike the 1876 law. Newly elected Beaver County Attorney Von Christiansen dropped the charges and the case was dismissed.

---KIRSTEN MURPHY
SILHA FELLOW

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changes how you can communicate within this country.” Several observers expressed fears that the ruling would subject American journalism to legal challenges in countries with a far more restrictive view of the First Amendment.

The *Guelph Mercury* of Canada reported that Gutnick told Australia’s Channel Nine television, “It will certainly be re-established that the Net is no different than the regular newspaper. You have to be careful what you write.”

Brigitte Trafford, a Dow Jones spokeswoman, said the ruling will not change the magazine’s Internet offerings or the types of stories it pursues. “We have no intention of changing our high editorial standards,” she told the *The Guelph Mercury*.

Dow Jones also said in a statement that it would continue to defend the case brought by Gutnick.

In the United States, federal appeals courts in the Fourth (*Young v. New Haven Advocate*, 315 F. 3d 256 (4th Cir. 2002)) and Fifth (*Revel v. Lidov*, 317 F. 3d 467 (5th Cir. 2002)) circuits, and the highest state court in Minnesota (*Griffis v. Luban*, 646 N.W. 2d 527 (Minn. 2002)) have adopted Dow Jones’ argument. These courts agree that even though a story can be downloaded anywhere in the world, the publisher can only be sued in places where it intended to target. (See “Print, Internet Newspapers Wrestle with Questions of Jurisdiction” on page 18 of this issue of the Silha Bulletin.)

---ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Newspapers, continued from page 18

personal jurisdiction over the two defendants because they had “expressly aimed” their conduct towards California.

Applying the *Calder* test to Revell’s claims, the panel concluded that the low-level of interactivity of the Internet bulletin board showed a lack of contacts with Texas. Therefore, it was insufficient to establish jurisdiction for its courts.

In addition, Texas was found not to be the focal point of the Lidov’s article. The article did not contain any references to Texas and was not aimed at Texas readers. Columbia’s Web site had fewer than 20 subscribers from Texas in 2000 and 2001, according to the court.

*Griffis v. Luban* update

The U.S. Supreme Court denied a petition for *certiorari* in *Griffis v. Luban*, 2002 Minn. LEXIS 461 (Minn. 2002) on March 10, 2003. (See “Minnesota Supreme Court Rules on Internet Libel Case” in the Summer 2002 Silha Bulletin; see also http://www.supremecourts.gov/orders/courtorders/031003pzor.pdf.)

---ANNA NGUYEN
SILHA RESEARCH ASSISTANT
The parties, judges and jurors may curtail the coverage if they believe it jeopardizes the trial in any way.

ABC News has started reviewing cases for a Colorado version of “State v.,” a national television program that offers a behind-the-scenes look at a criminal trial from the prosecution and defense preparation work through the verdict.

The Colorado Supreme Court granted ABC access to Colorado criminal proceedings on Dec. 12, 2002, according to the Denver Post, giving the network permission to film testimony, jury reaction, jury deliberations and attorney strategy discussions. ABC News will pay nothing for the right to broadcast the cases.

Karen Salaz, a spokeswoman for the state court administrator’s office in Denver, told The Reporters Committee for Freedom of the Press that the seven state Supreme Court justices reviewed the network’s filming of “State v.,” in Phoenix last summer and decided a similar educational project in Colorado would serve public interest. A special order from the Arizona Supreme Court gave “State v.” total access to a series of homicide cases in Phoenix. (See http://abcnews.go.com/onair/DailyNews/State_v_020619.html) Five cases were followed in their entirety.

In a written order on Oct. 10, 2002, Colorado Chief Justice Mary J. Mullarkey altered the Colorado Code of Judicial Conduct Canon 3 (A) (7)–(8) that limited electronic and photographic access to court proceedings. Trial judges may now waive provisions of the canons to permit filming of “State v.” All parties including defense attorneys, defendants, prosecutors, victims and jurors must consent to the waiver.

The parties, judges and jurors may curtail the coverage at any point if they believe it jeopardizes the trial in any way. A videotape of the trial could air only after a decision has been reached in each case.

David Kaplan, a Colorado public defender, said his office would not participate in “State v.,” according to the Denver Post, citing concerns about the attorney-client privilege. He will reconsider his decision on a case-by-case basis.

However, in Texas, the Court of Criminal Appeals ruled that jury deliberations could not be videotaped in a capital murder trial, even if the operators were not present, but running the cameras by remote. In Texas v. Poe (2003 Tex. Crim. App. LEXIS 37), the court reversed the decision of State District Judge Ted Poe. He had decided in 2002 to allow WGBH-TV’s program “Frontline” to tape deliberations in the trial of 17-year-old Cedric Harrison, who allegedly shot a man during a carjacking. The camera would be operated by remote control, so no one besides the jury would be physically present in the room. “Frontline” further agreed that the trial and deliberations would not be aired live, but would be edited to about an hour and aired after the trial was completed.

Harrison himself agreed to the taping. “Frontline” then asked potential jurors if they would mind the taping. Thirteen of them were “excused by agreement” because “they had a problem about having the case videoed.” Prosecutors then appealed Poe’s decision to videotape the proceedings.

The majority of the criminal appeals court focused on the meaning behind the first sentence of Article 36.22 of the Texas Code of Criminal Procedure, which states, “No person shall be permitted to be with a jury while it is deliberating.” Judge Barbara Hervey, writing for the majority, stated, “[O]ur interpretation of the first sentence is also consistent with the ancient and centuries-old rule that jury deliberations should be private and confidential in order to promote ‘freedom of debate,’ ‘independence of thought,’ and ‘frankness and freedom of discussion and conference.’”

In a concurring opinion, Judge Tom Price wrote that even though the camera in the jury room would be operated by remote control, the jurors would not truly be alone. “The camera brings the viewers to the jury just as surely as it brings the jury to the viewers.” Judge Cathy Cochran, also concurring, noted that 13 jurors were peremptorily excused because they admitted the presence of a camera and the subsequent broadcast could affect their ability to come to a decision. “These jurors were eliminated for reasons wholly unconnected to their ability to follow the law or to fairly consider the evidence,” she wrote.

Furthermore, Cochran wrote, the practice of interviewing jurors for their comments on the decision-making process following a trial has threatened “our common-law policies of the sanctity and secrecy of jury deliberations . . . Popular culture is now grossly at odds with the jury’s history and function. Potential jurors are being taught that their deliberations will not be secret at all . . . To the media, the jury appears to be just another institution about which the public has a ‘right to know.’ A trial is a public event. But the jury deliberation room is not the courtroom.” (Emphasis in the original.)

Cochran suggested that “Frontline” could make a documentary that “emphasized, rather than intruded upon, the confidentiality of jury deliberations and the protection afforded the public from any abuses of that process.”

Judge Sharon Keller dissented, stating that a trial court generally has “broad discretion” to determine how the trial is to be conducted, “even to the point of implementing procedures . . . that are not expressly forbidden.”

Judge Michael Keasler also dissented, writing, “My heart is with the majority, but my mind cannot agree,” citing the fact that other courts, such as a criminal court in Milwaukee and several in Arizona, allow videotaping. Furthermore, Keasler added, Article 36.22 could not possibly pertain to television or radio recording of deliberations because the statute was enacted in 1925, when “television was the stuff of science fiction.”

—Anna Nguyen
Silia Research Assistant

—Elaine Hargrove-Simon
Silia Fellow and Bulletin Editor
Although he has declined to specify exactly how the communications system between the police and the media has failed, in early February 2003 Minneapolis Mayor R.T. Rybak ordered police officers to check with city hall before speaking to reporters. In a memo to Police Chief Robert Olson dated February 5, 2003, Rybak wrote: “The Communications Department will sign off on all external police communications, including but not limited to news releases and interviews.” The police department spokeswoman, Cyndi Barrington, resigned following the issuance of the memo. The media have expressed concerns over their need for accurate and timely information from police sources.

Rybak claimed he wrote the memo in an effort to centralize “all strategic decisions about how – and when – the Police Department communicates with the public via the media.” Rybak reportedly has said citizens have told him that rising crime is a problem, and that police are not trained to respond properly to calls for help. “That is simply not the case,” Rybak was quoted as saying in stories appearing in Minneapolis Star Tribune and the Associated Press. “We need to tell people the reality of what’s going on – the good, the bad, and the ugly.” He justified his action on the grounds that, “It was wasteful and confusing to citizens to have people in all different parts of the city involved in communications and not working together,” Rybak said. He denied that the action was “about muzzling cops.”

But Lt. Mike Sauro, head of the sex-crimes unit, was quoted as saying, “It’s censorship. End of discussion.”

Rybak’s February 5 memo also detailed plans for the police department’s spokeswoman job to be merged with the communications department. Had Barrington not resigned, she would now report to city spokeswoman Gail Plewacki, a former police officer and television reporter. Chuck Wexler, executive director of the Police Executive Research Forum in Washington, D.C., told the Associated Press that he is not aware of any other major U.S. city where the city communication office filters police information.

According to the Associated Press, Rybak partially backed down following a meeting on February 6 with police commanders. Officers will still need to notify City Hall when the “media questions city or police policy, when an officer’s conduct is in question, or when an officer is involved in a shooting.” Officers may, however, provide any other information at crime scenes.

The national Society of Professional Journalists urged Rybak to keep the lines of communication open, citing the model provided by Alabama governor Bob Riley. In early February, Riley issued a memo to his cabinet members telling them that public records should be released promptly upon request. Agency heads did not need to seek prior approval from Riley’s legal staff, the memo stated, unless there were questions of law. Such openness had not been the case with Riley’s predecessor, former Governor Don Siegelman, who, like Rybak, ordered requests for information routed through his press office for approval by his legal advisor.

“Mayor Rybak’s ham-handed attempt at limiting information to the public sets a bad example that other mayors will be tempted to follow,” said SPJ President Robert Leger, who is also editorial page editor for the Springfield (Mo.) News-Leader. “Rybak’s example, though, is a blow to representative government, which depends on information to work. That’s why he should rescind his policy, and why other mayors should resist following suit.” Secrecy and heavy-handed controls on information “offend a democratic people,” the statement continued. SPJ urged Rybak to revisit his policy on communication with the media, and encouraged him to facilitate and not hinder the flow of information to the community. The statement, dated Feb. 13, 2003, is available online at

Rybak, who was elected to the Mayor’s office in November 2002, is an Internet consultant and community activist. He has also worked as a reporter for the Minneapolis Star Tribune, and was publisher of the Twin Cities Reader, an alternative weekly that stopped publishing in 1997.

---ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR

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2003 SILHA CENTER SPRING FORUM
SPJ ETHICS IN JOURNALISM WEEK

“A NEW KIND OF WARFARE DEMANDS A NEW KIND OF JOURNALISM:
RETHINKING JOURNALISTS’ WARTIME ETHICS”

WITH PETER Y. SUSSMAN
APRIL 14, 2003 AT 6:00 PM
MISSISSIPPI ROOM IN COFFMAN UNION,
EAST BANK, UNIVERSITY OF MINNESOTA MINNEAPOLIS CAMPUS.

(For full details see back page of this issue of the Silha Bulletin.)
Local Governments Stifle the Press

Buying in Bulk Violates the Constitution

On Jan. 16, 2003 a three-judge panel of the U.S. Circuit Court of Appeals (4th Circuit) held in Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003), that local law enforcement officials in Maryland may be sued for violating the First Amendment rights of a St. Mary’s County, Md. newspaper by purchasing large quantities of the paper with the intent of squelching critical commentary.

The decision reversed a Maryland federal District Court’s summary judgment order, which dismissed the federal civil rights and state law claims against the public officials, holding that they could not be held liable because they were not acting “under color of law.”

The case arose in November 1998, when then-incumbent sheriff Richard J. Voorhaar and seven sheriff’s deputies conspired to buy all the copies of the alternative weekly newspaper St. Mary’s Today, throughout St. Mary’s County, on the eve of Election Day. Because of the weekly’s frequent biting criticism of the sheriff’s department, the deputies anticipated negative coverage of the department and the department’s chosen candidates.

The deputies set out in the early morning on Election Day to round up copies of the paper from stores and newsboxes. Although they were off-duty, two carried visible service revolvers and one wore a Fraternal Order of Police sweatshirt. The deputies bought at least 1,300 copies of the 2,600 printed and delivered to stores.

The sheriff’s office carefully videotaping their purchases in an effort to avoid legal trouble. But in November 1999, St. Mary’s Today publisher Kenneth Rossignol sued the deputies, St. Mary’s County and the sheriff’s office for violations of First, Fourth and Fourteenth Amendment rights, as well as Maryland State law.

After the defendants prevailed on their summary judgment motion, Rossignol appealed to the Fourth Circuit. The appellate court agreed with the newspaper, reversing the lower court and holding that the deputies acted under “color of law,” which is a requirement to succeed in a lawsuit against public officials under 42 U.S.C. § 1983, the federal Civil Rights Statute.

The deputies may have been off duty, wrote Chief Judge J. Harvie Wilkinson, but their conduct had a “sufficiently close nexus” with the State, because they sought to prevent criticism of themselves in their official capacity: “Where the sole intention of a public official is to suppress speech critical of his conduct of official duties or fitness for office, his actions are more fairly attributable to the state,” said Wilkinson.

The panel found that because some deputies visibly carried firearms, and many of the store clerks where the deputies purchased all available copies knew that they were county officials, the evidence indicated that the deputies intimidated some of the clerks. One clerk testified that the deputies “made it real apparent [that] they could make my life a living hell” if he didn’t sell them the papers. The panel also found that sheriff Richard Voorhaar knew of the plan and contributed $500 to help defray purchasing costs.

Significantly, the deputies’ actions deprived the public of access to a news publication. This is exactly the type of surreptitious activity the First Amendment is meant to prevent, the court concluded. Wilkinson chastised the deputies: “In suppressing criticism of their official conduct and fitness for office on the very day that voters were heading to the polls, [the deputies] did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart. . . . The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own.”

On Jan. 28, 2003, the defendants appealed the decision to the entire Fourth Circuit Court of Appeals.

—Kirsten Murphy
Silha Fellow
Local Governments Stifle the Press

Tape Seizure Permissible, Even Without Warrant

In a per curiam decision, a three-judge panel of the U.S. Court of Appeals (8th Cir.) found no error in a District Court’s ruling in a case involving the seizure of a journalists’ videotape of a farewell banquet for city council members. (See Berglund v. City of Maplewood and Zick v. City of Maplewood, 500 Fed. Appx. 805 (2002)). The two cases were appealed separately but were consolidated for consideration by the appeals court.

The case began on October 26, 2001, when Kevin Berglund and Robert Zick attempted to videotape a banquet honoring three departing members of the Maplewood city council for a public access cable television program. They refused to pay the $15 entrance fee and were asked by police officers to leave. A scuffle between Berglund and the police ensued, which Berglund caught on tape. When police arrested Berglund, he passed the tape to Zick. The police ordered Zick to turn over the tape, which police claimed contained evidence of the incident. When Zick refused, he was restrained and the tape confiscated without a warrant. Police made a copy of the tape and returned the original to Berglund within 48 hours. (See “Tape Confiscated from Maplewood Journalists” in the Winter 2002 Silha Bulletin.)

When the two journalists originally took their case to the federal District Court in Minneapolis (Berglund v. City of Maplewood and Zick v. City of Maplewood, 173 F. Supp. 2d 935 (2001)), Judge David S. Doty ruled that the police seizure of the tape without a warrant was permissible because of the possibility of its destruction by Zick; that the contents of the tape were not private because the events recorded had occurred in a public place; that there was no excessive use of force on the part of the police in seizing the tape; that the videotape was copied by police and returned within a reasonable time and could be aired on Zick and Berglund’s cable show; that the event was open to any member of the public willing to pay the $15 admission fee; and finally, because the event was social in nature and no official business was conducted that evening, the event was not subject to Minnesota’s Open Meeting Law.

John Borger, attorney for Zick, said that the two journalists may consider filing a petition for U.S. Supreme Court review.

—ELAINE HARGROVE-SIMON
SILIA FELLOW AND BULLETIN EDITOR

DVDs Update, continued from page 16

321 Studios

Seven major movie studios filed a countersuit in federal District Court in San Francisco on Dec. 19, 2002, claiming that 321 Studios (321), a small, Missouri-based company that manufactures and sells DVD copying programs, is violating the DMCA.

The countersuit comes in response to 321’s preemptive move on Apr. 22, 2002, asking the federal District Court to declare its products legal. 321 argued that because they allow consumers to make copies of DVDs that they bought legally, their programs, called DVD Copy Plus and DVD-Xcopy programs, do not violate the DMCA.

MGM Studios, Tristar Pictures, Columbia Pictures, Sony Pictures Entertainment, Time Warner Entertainment, Disney Enterprises, Universal City Studios, the Saul Zaentz Co. and Pixar Corp. are seeking an injunction to prohibit 321 from making or selling its DVD copying products and a court order to force 321 to hand over all copies its products so they may be destroyed. The studios also want the company to turn over all profits, which they claim result from cracking the CSS protection on DVDs.

321 and supporters contend that the DMCA violates the long-recognized “fair use” right under copyright law, which allows individuals to copy materials for their personal use. On Jan. 21, 2003, the studios moved for partial summary judgment, which will be argued on Apr. 25, 2003.

—KIRSTEN MURPHY
SILIA FELLOW
Sex Offender Registration
Ruled Not Punitive

Two separate cases, handed down the same day by the U.S. Supreme Court, both ruled that registration of convicted sex offenders in a publicly-accessible database that collected certain personal information about them did not constitute a punitive measure. The cases, *Smith v. Doe*, 123 S. Ct. 1140 (2003) and *Connecticut Department of Public Safety v. Doe*, 123 S.Ct. 1160 (2003), were argued on Nov. 12, 2002 and decided on March 5, 2003.

The question in the Connecticut case centered on the co-called “Megan’s Law” statutes (Conn. Gen. Stat. §§54-251, 252, 254 (2001)) that require the registration of persons convicted of sexual offences and dissemination of that information on the Internet. Doe asserted that the statutes violated, among other things, the Fourteenth Amendment’s Due Process Clause and “liberty interest” by causing harm to his reputation. When the case originally came before the District Court (see *Doe v. Lcc.,* 132 F. Supp. 2d 57 (2001)), Doe was granted summary judgment and the trial court permanently enjoined the law’s public disclosure provisions. The U.S. Court of Appeals (2d Cir.) affirmed (see *Doe v. Department of Public Safety*, 271 F. 3d 38 (2002)).

Chief Justice William H. Rehnquist, writing for the majority, reversed, citing *Paul v. Davis*, 424 U.S. 693 (1976), and held that “mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest.” He noted that Connecticut’s Department of Public Safety Web site carried warnings stating, “Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.”

As to the substantive due process question in the case, Rehnquist wrote that the government was not required to “accord the plaintiff a hearing to prove or disprove a particular fact or set of facts.” The state law’s registration requirements focused on whether the registrant was convicted of a sex crime, not whether that person is dangerous.

In his concurring opinion, Justice Antonin Scalia wrote that even if the statute implicated a liberty interest, a properly enacted law provides sufficient due process to protect it. “A convicted sex offender has no more right to additional ‘process’ enabling him to establish that he is not dangerous than . . . a 15-year-old has a right to ‘process’ enabling him to establish that he is a safe driver.”

Justice David Souter also wrote a concurring opinion, joined by Justice Ruth Bader Ginsburg, agreeing with the result but suggesting that Connecticut’s legislation might be challenged equal protection grounds.

In the Alaska case, Doe, a convicted sex offender, served his sentence and completed a rehabilitation program. Subsequently, the Alaska legislature passed its version of Megan’s Law, the Alaska Sex Offender Registration Act (1994 Alaska Sess. Laws ch. 41, § 12 (a); Alaska Stat. §§ 12.63.010 (a), (b), (c), (d)(2000) and § 18.65.087 (a), (b)), requiring convicted sex offenders to register with the Alaska Department of Public Safety. Doe and several other sex offenders sued in federal District Court in Anchorage, arguing that the new law violated the Ex Post Facto clause of the Constitution and the Due Process Clause of the Fourteenth Amendment as a punitive civil regulation because their photographs and addresses were accessible to the public on the Internet. The District Court granted them summary judgment. The U.S. Court of Appeals (9th Cir.) (see *Doe v. Otte,*, 259 F. 3d 979 (2001)) held that although the legislature did not intend the law to be punitive in nature, it did in fact have a punitive effect, and ruled in Doe’s favor.

Justice Anthony Kennedy found no evidence that the law was meant to further punish a convicted sex offender, and reversed the appeals court, remanding the case for further proceedings. Writing that the legislature drafted the law as a “civil, not a criminal sanction,” Kennedy found that the law was not intended to further punish convicted sex offenders by public shaming because the records concerning them were already public. Posting the information on the Internet is merely dissemination about a matter that was already part of a “public indictment, public trial, and public imposition of a sentence.” Kennedy continued, “Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.”

Kennedy further wrote that the Act does not “constrain activities sex offenders may pursue but leaves them free to change jobs or residences.” Although registrants must inform authorities before changing jobs or their physical appearance, the Act does not prohibit them from doing these things, he noted.

Kennedy wrote that there was only one incident where a convicted sex offender suffered harassment since the passage of the Act. Such harassment may have occurred despite the Act, since the information was a matter of public record. “[S]uch consequences flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record,” Kennedy wrote. Furthermore, the information is not readily available on the state’s Web site; an Internet user must make an effort to find it.
Two Newspapers Lose In Satire, Parody Cases

A Texas appeals court has ruled again that the First Amendment does not protect a weekly newspaper’s satirical piece. The 2nd Court of Appeals in Fort Worth, Texas on Nov. 21, 2002 rejected the Dallas Observer’s request to throw out a libel lawsuit filed by two Denton County officials in News Times, Inc. v. Isaacks, 91 S.W.3d 844 (Tex. Ct. App. 2002).

This is the second appeal the Dallas Observer has lost. The appeals court issued a similar ruling in May 2002 and then reconsidered the issue upon the Observer’s motion for rehearing. The same three-judge panel heard both appeals.

Citing New York Times v. Sullivan, 376 U.S. 254 (1964), the court determined that the newspaper failed to establish a lack of actual malice despite its claim that its article was protected as satire. The court cited statements from the appellants in their deposition testimony, including Isaacks and Whitten up for public ridicule, that she did not interview Isaacks and Whitten, and that the quotes attributed to them were fabricated. Farley denied the story was false, but admitted it was fictional.

The November opinion by Judge Anne Gardner concluded the newspaper had not sufficiently indicated that the article was meant to be satire. The court cited the placement of the article under the label “news,” together with the picture of the girl which added realism to the story. The situation described, Gardner wrote “was not of impossible nature,” referring to the Beamon incident the week before.

Gardner also referred to the affidavits from Farley, Williams and Lyons, who was the editor-in-chief at the time. All three denied any intention to knowingly make false statements of fact or act in with reckless disregard when they created on the satire. The newspaper wanted to show the absurdity with which Beamon was treated by taking it to the extreme and by ridiculing the actions of panicked adults, according to the affidavits.

But Gardner wrote, “Much of what is presented in the above-discussed affidavits about the affiants’ beliefs concerning how the article would be perceived is conclusory and is therefore not competent summary judgment evidence.” The court cited statements from the appellants in their deposition testimony, including Farley’s admission that the article was intended to hold Isaacks and Whitten up for public ridicule, that she did not interview Isaacks and Whitten, and that the quotes attributed to them were fabricated. Farley denied the story was false, but admitted it was fictional.

The court concluded the Dallas Observer knew or strongly suspected that the article was false and defamatory.

James Hemphill, an Austin attorney representing the newspaper, said his clients have asked the Texas Supreme Court to review the case, but there is no timetable for when the court has to decide whether or not to take the case. “It could be next week, it could be several months,” he wrote in an e-mail in response to questions.

—— Anna Nguyen
Silia Research Assistant

Judge Gardner concluded the newspaper had not sufficiently indicated that the article was meant to be satire.
Editors and news directors must decide how they will cover complex science, medical and health care stories. If they don’t have specially-trained journalists on staff and decide they can’t afford to offer training, serious consideration should be given to leaving some stories alone. That’s a difficult concept, though, if you can’t run the risk of getting scooped at the next Raelian news conference. After all, maybe the little green men will really be there next time.

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Gary Schwitzer is an assistant professor at the School of Journalism and Mass Communication at the University of Minnesota. He has worked for 30 years in health journalism, including seven years with CNN as the head of its medical unit, and was the founding editor of the Mayo Clinic’s mayoclinic.com, a Web site with consumer news and health information. He is also a member of the board of the Association of Health Care Journalists. Professor Schwitzer currently teaches Mass Media Ethics: Moral Reasoning and Case Studies at the University as well as television news writing and reporting. In the fall of 2003, he will help to launch a professional Master of Arts degree in health journalism at SJMC.

Registration, continued from page 24

In addressing arguments that the Act violated the Constitution’s Ex Post Facto Clause, Kennedy cited research that points to a high rate of recidivism among sex offenders, even years after their original conviction. The state is permitted to “[make] reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences...” Again, because the Act involves no punishment, the Ex Post Facto clause does not apply.

Justice Clarence Thomas wrote a concurring opinion, stating that he believed the court needed only review the statute “on its face,” and could have reached its conclusions regarding its civil, non-punitive character without having to take into consideration the dissemination of convicted sex offenders’ information on the Internet.

Justice David Souter agreed with the judgment of the majority, although he wrote that the intention of the Alaska legislature in drafting the Act may not have been so clearly civil in intent. However, the State has the benefit of the doubt on the “presumption of constitutionality normally accorded a State’s law.”

Justice John Paul Stevens dissented, concluding that the Act significantly restricted registrant’s freedom. He noted that a convicted sex offender has only one day to notify police before moving, before changing hair color, or borrowing a car. In addition, the Web site shows registrants’ pictures under the heading “Registered Sex Offender.” Such impositions on a registrant are punitive in that they “constitute a severe deprivation of the offender’s liberty, are imposed on everyone who is convicted of a relevant criminal offense, and are imposed only on those criminals.”

Justice Ruth Bader Ginsburg also wrote a dissenting opinion, joined by Justice Stephen Breyer, agreeing with Souter, but going further, saying that the Act did not take rehabilitation of the offender into consideration, nor did it allow the registration period to be shortened even when there is a certainty that there is no threat of recidivism. “He will remain subject to long-term monitoring and inescapable humiliation,” she wrote.

Currently, all 50 states have some sort of law that mandates the registration of convicted sex offenders.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR

The Silha Web site contains full-text links to amicus briefs, comments and other documents. Recent additions include:

Amicus briefs – Nike v. Kasky
Amicus brief – Weinberger v. Independent School District No. 622
“Statement of Principles” regarding war reporting
Comments regarding the Department of Homeland Security Freedom of Information Act and Privacy Act Procedures Interim Final Rule

For all these documents and more, go to www.silha.umn.edu and click on “Resources.”
Can Press Releases Be Considered Commercial Speech?

On Jan. 10, 2003, the U.S. Supreme Court agreed to review a controversial California Supreme Court decision, Nike, Inc. v. Kasky, No. 02-575, involving the shoemaker Nike and a California activist. The Supreme Court of California ruled on May 2, 2002, in Kasky v. Nike, 45 P.3d 243 (Cal. 2002) that Nike’s statements regarding its overseas labor practices constituted commercial speech. Because Nike’s speech was found to be commercial, and therefore entitled to less First Amendment protection, the California court ruled that a claim against Nike for violation of California unfair trade practice and false advertising laws could go forward. If the U.S. Supreme Court upholds the decision, corporations like Nike that sell products in California could be held liable under the California laws for statements considered commercial speech.

The controversy over Nike’s overseas factories began in 1996 when numerous reports emerged that Nike ran “sweatshops” in China, Vietnam and Indonesia, as well as allegations of substandard wages and physical abuse of factory workers. Nike responded by launching a public relations campaign: writing letters to editors, taking out full-page advertisements and handing out pamphlets.

San Francisco activist Mark Kasky brought a claim in Superior Court in San Francisco in April 1998 under California unfair trade practice and false advertising laws against the Oregon-based Nike for “false and misleading” statements relating to working conditions in the company’s Southeast Asia factories. The laws allow citizens to bring such lawsuits as private attorney generals on behalf of the public. Kasky argued that because Nike made false statements in order to sell its products, the company should be forced to disgorge all profits made in California.

Nike claimed that the case should be dismissed because the statements should be treated as political speech, protected by the First Amendment. The California Supreme Court disagreed. In a 4 to 3 decision, the court decided that the state law applied and the case could go forward because Nike’s statements were factual and promotional.

Nike’s statements constituted commercial speech, held the court, a category of expression that the U.S. Supreme Court traditionally has granted less First Amendment protection than noncommercial speech. One rationale for the dichotomy between commercial and noncommercial speech is that companies are in the best position to verify the truth of the public statements they make. Therefore, the theory is that corporate speakers do not need as much protection against liability for speech because they themselves can easily check to ensure that they are accurately representing their company or products.

The majority opinion written by Justice Joyce L. Kennard denied that the decision would potentially chill corporate speech on matters of public concern. “Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully,” Kennard wrote.

In their dissenting opinions, Justices Ming W. Chin and Janice R. Brown argued that Nike’s speech was political speech on an issue of global concern. Moreover, argued the dissenters, the majority decision leaves Nike defenseless against its critics. “Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate,” wrote Chin.

Nike hired Harvard Law School Professor Laurence Tribe and former Solicitor General Walter Dellinger to argue the case before the U.S. Supreme Court. The lawyers have contended that Nike must be allowed to speak out on a global issue with the same freedom granted to its critics.

Thirty-two media organizations joined an amicus brief urging the Supreme Court to accept review. The Silha Center was a signatory to the brief supporting the petition for certiorari, available online at http://www.dwt.com/practce/amıcı/kasky.pdf as well as the Silha Center’s Web page at http://www.silha.umn.edu/resources.htm. Other signatories to the brief include CNN, the New York Times and the Washington Post.

A second amicus brief was filed on the merits of the case on Feb. 28, 2003. Signed by forty media organizations including newspapers, magazines, broadcasters and professional organizations, as well as the Silha Center, the brief is posted online at http://www.dwt.com/pdfs/kasky-final.pdf.

The brief argues that the California Supreme Court’s decision would inhibit the ability of the media to cover issues of public concern regarding corporations. If the Court upheld the California court ruling, the brief urges, journalists would be hard pressed to find corporate representatives who would be willing to talk to them: “Businesses, big and (even more so) small, would be deterred from speaking on issues concerning their operations, or they would offer only bland, indisputable claims, for fear of being held liable for good faith errors or unintended but potentially ‘misleading’ implications.”

The brief also argues that the California court went too far in expanding the definition of commercial speech beyond statements that do no more than propose commercial transactions. The California Court’s expanded definition of commercial speech drastically limits the ability of corporations to make public statements on public issues, amici contend. “[A] company’s speech regarding its corporate culture, such as Nike’s speech here, is a public statement in which business is an essential but subordinate component. When a company’s public statements are designed in part to participate is such public debates, this Court

Nike, continued on page 22
International Journalists Face Danger, Censorship

Although journalists risk being caught in crossfire, most journalists are killed by armed groups.

Reports sans Frontiers (RSF), or Reporters Without Borders, a media advocacy group based in Paris, France, has released its annual report on worldwide freedom of the press. According to the report, 25 journalists were killed in 2002, down from 31 in 2001. Arrests of journalists increased from 489 to 692, and cases of censorship increased from 378 to 389 in 2002. The group reports that 1,420 reporters were physically attacked or threatened last year and 118 journalists are in prison as of the end of 2002. According to the report, China, Turkey, Iran, Russia, Colombia and Saudi Arabia are among the worst offenders.

The RSF report states that although journalists working in dangerous areas of the world risk being caught in crossfire, most journalists are killed by armed groups. “Death or injury of journalists in these conflicts is not always purely accidental. Sometimes the combatants, even from regular armies, deliberately target inconvenient witnesses to their deeds,” RSF’s report is available at http://www.rsf.org/rubrique.php3?id_rubrique=144.

The New York-based Committee to Protect Journalists (CPJ) reports that 19 journalists were killed in 2002, down from 37 in 2001. CPJ is also investigating the deaths of 13 journalists whose killings may have been related to their work. The report states that three journalists were killed in Colombia and two in Pakistan, including Wall Street Journal reporter Daniel Pearl. Three journalists were killed in Palestine and three were murdered in Russia in 2002. The report is available online at http://www.cpj.org/killed/killed02.html.

Chile

Eduardo Yáñez, a television commentator on Chilevisión’s debate show “El Termómetro” was convicted on Jan. 31, 2003 of “disrespect” and sentenced to 18 months in prison by the Chilean Court of Appeals under Article 263 of the Penal Code. Yáñez was ordered to pay the equivalent of $460 US dollars because of a Nov. 27, 2002 episode in which he called the Chilean judiciary “immoral, cowardly, and corrupt” for refusing to compensate a woman who had been in prison for a crime she did not commit. Yáñez plans to appeal on constitutional grounds.

(Compiled from reports from www.cpj.org and the New York Times.)

China

Chinese journalists on the mainland will have to take reassessment tests before they can be issued a license to work, the South China Morning Post reported on Dec. 7, 2002. The new system raises concerns that journalists who do not support the government will not receive a license.

Others fear that journalists who break the rules will be banned from working, according to a story posted on mediaguardian.co.uk on Dec. 10, 2002. A senior journalist from a government information service told the Sydney Morning Herald, “Working as a journalist in a non-democratic country, we have to have a high awareness of what to say, and what not to say.”

The tests will be administered this year by the Chinese State Press and Publication Administration with the Ministry of Personnel. Those who pass will receive a certificate allowing them to work as journalists, according to the Media Guardian. Those who fail the tests will be given a three to five year transition to retake the tests, and those who fail repeatedly within the deadline will be forced to leave journalism.

Lin Jiang of the Chinese State Press and Publication Administration told the South China Morning Post that the tests would cover publication regulations, news codes, and policies relating to press and publications as well as Chinese communist party ideology.

He told the Media Guardian that the measures taken will outlaw practices, such as bribery, which have plagued the Chinese media as the number of publications grew in recent years.

“The certification is not a life-long guarantee; violators’ certifications would be withdrawn, they might be barred from retaking the qualification examinations for a couple years of for life,” Lin told the South China Morning Post. He also said it would encourage competition between China’s half million journalists, raising the standards of the profession.

Colombia

On Feb. 1, 2003, Colombian rebels released to the Red Cross two journalists abducted on Jan. 21, 2003. Scott Dalton, a photographer from Texas and Ruth Morris, a British reporter, were kidnapped by the National Liberation Army (ELN) while on assignment for the Los Angeles Times in the eastern state of Arauca, Colombia.

On Jan. 27, 2003, Morris had stated over the rebel’s clandestine radio station, Voice of Liberty, that she and Dalton were in good health. The ELN announced on Jan. 28, 2003 on another radio station, RCN, that the reporters would be released within one or two days, but in a separate statement on the same day on Voice of Liberty, the ELN insisted that the government must stop attacks on the region in order for the journalists to be released. After 11 days in captivity, the reporters were released and flown to Bogota by the Red Cross. Both reporters stated that they were treated well by the rebels, considering the circumstances.

The conflict between the rebels and the government is nearly 40 years old. The CPJ and RSF recognize Colombia as one the most dangerous countries for journalists.

(Compiled from reports from the New York Times and the Associated Press)

Nigeria

Violence erupted in the northern Nigerian city of Kaduna on Nov. 20, 2002 over an article published in the Nigerian newspaper This Day on Nov. 16, 2002. The article, written by fashion writer Isioma Daniel, commented on the “Miss World” contest, scheduled to be held in the Nigerian capital of Abuja on Dec. 7, 2002.
Internet Users, continued from page 8
party and government before sending the information abroad. Reuters reported that the French group was not
identified.

From November 2001 to Jan. 6, 2002, Nguyen sent 24 e-mails and two computer discs to the organization in
France, as well as making mobile phone contacts with them. Earlier, Nguyen had been charged with property
theft and had also received two other sanctions for receiving and selling stolen goods from other offenders.

According to a representative of the communist party, Nhan Dan, Nguyen “slandered and denigrated the
executives of the Party and the State by sending electronic letters and by providing information to certain
exiled Vietnamese reactionaries in France.”

Amnesty International released a statement saying, “The branding of Nguyen Khac Toan as a ‘spy’ not
only stiffs freedom of expression through the use of loosely worded national security legislation but also
criminalizes activities which are regarded as perfectly legal under international law and in most countries of
the world.”

Human rights groups have also asserted that by charging Nguyen with espionage, the government was
able to punish him particularly harshly, according Agence France Presse.

On Dec. 20, 2002, Human Rights Watch (HRW), which originally brought Nguyen’s trial to world attention,
denounced the arrest of several dissidents in Hanoi and Haiphong, a port city about 60 miles east of the
capital.

“The Vietnamese government continues to arrest, imprison and harass people who are simply advocating
democratic reforms and government accountability,” the New York-based organization said to Agence France
Presse.

(Editors note: Nguyen is a common Vietnamese surname and the subject is not related to the author of
this article.)

—ANNA NGUYEN
SILIA RESEARCH ASSISTANT

Journalists, continued from page 28

In the article, Daniel suggested that the Prophet Mohammed would have approved of the Miss World contest
and might have chosen one of the beauty queens to be his wife. The article sparked outrage from the Muslim
community in Nigeria, many of whom believed Daniel’s comments insulted the Prophet Mohammed.

Riots ensued in Kaduna, during which over 200 people were killed. Over 1,000 people were injured during the
tree days of riots and 11,000 were made homeless by the destruction and violence. Twenty churches and eight
mosques were burned. Rioters also burned down This Day’s Kaduna office.

In the northern state of Zamfara, the local deputy governor Mamuda Aliyu Shinkafi issued a fatwa calling for
Daniel’s death and instructing Muslims that it was a religious duty to kill the reporter. Nigerian President Olusegun
Obasanjo contended that the riots were the result of irresponsible journalism, but the Nigerian government
nevertheless said that the fatwa is void and will not be enforced because it is unconstitutional. However, the
government took no legal action against Zamfara’s deputy governor.

Tensions have run high in Nigeria since 2000, when the mostly Muslim northern states adopted Sharia law. The
country is divided between Muslims in the north and Christians in the southern states. An attempt to introduce
Sharia law in 2000 in the northern state of Kaduna resulted in riots in which more than 3,000 people died.

This Day published several apologies for the article and Daniel resigned from the paper and is reportedly hiding
in the United States. The Miss World contest was moved to London.

Associated Press)

Zimbabwe

Two American journalists and a Zimbabwean freelance photographer were arrested in Bulawayo, Zimbabwe on
Jan. 28, 2003 and held for by the Zimbabwe government. The reporters, Dina Kraft of the Associated Press and
Jason Beaubien of National Public Radio were arrested for being in an unauthorized area while on a U.N. World
Food Program trip. The journalists were not mistreated and were released after seven hours. However, authorities
cancelled the photographs taken by the freelance photographer, Tsvangirayi Mukwazihi.

Foreign journalists must be accredited by the government, according to draconian new press laws in Zimbabwe.
On Jan. 24, 2003, police arrested five foreign church workers suspected of working in Zimbabwe as unaccredited
journalists. The group, composed of citizens of the United States, Germany, Finland, and Kenya, were traveling in
Zimbabwe as part of a Lutheran World Federation, reporting on hunger, AIDS and development work in Zimbabwe.
They were released on January 28.

(Compiled from reports from the www.voxnews.com, www.abc.net.au and Lutheran Magazine.)

—KIRSTEN MURPHY
SILIA FELLOW
—ANNA NGUYEN
SILIA RESEARCH ASSISTANT
Since the September 11 attacks, journalists face new ethical challenges. Concerns about national security, personal safety and tighter restrictions on government and law enforcement information have prompted some reporters to ask how they can do their jobs and still be good citizens.

Peter Sussman, co-author of the original code of ethics for the Society of Professional Journalists, will present “A New Kind of Warfare Demands a New Kind of Journalism: Rethinking Journalists’ Wartime Ethics,” on April 14, 2003 in the Mississippi Room of the newly-refurbished Coffman Union on the University of Minnesota (Twin Cities) campus.

Sussman says that reporters, editors, and journalists are asking:

- How do you balance accountability against independence?
- How can seeking truth and reporting it be balanced against minimizing harm?
- To whom are reporters, editors and journalists responsible? To their news organization? To their government?
- When can – or should – patriotism get in the way of reporting news in war time?

Sussman’s workshop will address topics such as “Assessing our motivation in publishing or suppressing information;” “Assessing the Government’s motivation in seeking suppression;” and “Assessing the reliability of the information.” He has held his “balancing factors” workshops at the SPJ regional conference in San Francisco, and at the 2002 SPJ national convention in Fort Worth, Tex.

Light refreshments will be available starting at 6 p.m., followed by the program at 6:30 p.m. This workshop marks the observance of SPJ’s inaugural “Ethics in Journalism Week,” and is co-sponsored by the Silha Center for the Study of Media Ethics and Law, the Minnesota Pro Chapter of the Society of Professional Journalists, the Society of Professional Journalists, and the Minnesota Journalism Center.

The workshop is free and open to the public. For additional information, contact Elaine Hargrove-Simon in the Silha Center at (612) 625-3421 or by e-mail at

Peter Sussman, who for 29 years served as an editor of the San Francisco Chronicle, is a recipient of the Wells Key award, SPJ’s highest honor. He also is co-author of Committing Journalism: The Prison Writings of Red Hog, a book about Dannie Martin, who served time in a California prison for robbery and faced retaliation for attempting to publish his prison memoirs. Sussman’s other works include chapters in Censored 1997: The News That Didn’t Make the News – The Year’s Top 25 Censored News Stories, by Peter Phillips and Project Censored. He has also written two foundation-funded reports: Three Strikes: The Unintended Victims for the Center on Juvenile and Criminal Justice, and Reaching for the Dream: Profiles in Affirmative Action for a coalition of California civil rights organizations.

Sussman has also taught journalism courses at California State University, Harvard, and San Francisco State University. He has served as a volunteer writing coach/mentor at San Francisco State’s Center for the Integration and Improvement of Journalism. He was recently awarded the California First Amendment Coalition’s Beacon Award after refusing to comply with a sweeping subpoena for his editorial, political, financial, and other documents on the issue of media access to prisoners.