

Legislators Seek Increased Consumer Privacy Protections; FCC and FTC Investigations of Online Companies Continue

The proliferation of companies engaged in the buying and selling of user information gave rise to calls in 2011 for increased regulation of what are often characterized as deceptive practices. In March 2012, the Federal Trade Commission (FTC), the government's chief consumer protection agency, released a framework for addressing consumer privacy concerns that mandates adoption of "do-not-track" features. The framework was developed in the wake of several FTC charges that Facebook and Google made use of their customers' personal information through their introduction of new services without full disclosure. Settlements of these disputes forced the companies to increase the transparency of personal information sharing and ensure that users are given opportunities for informed consent. Nevertheless, legislators and consumer groups continue to push for greater user control of personal information, alleging failure by these companies to comply with settlements, to implement effective privacy policies, and to gather user information only with consent.

FTC Issues Consumer Privacy Guidelines Following White House "Privacy Bill of Rights"

On March 26, 2012, the FTC issued a report enumerating best practices for businesses to protect American consumers' privacy while simplifying and increasing the level of control consumers have over collection and use of personal data. Titled "Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers," the Commission's report stated that industry self-regulation has been insufficient, and called on Congress to pass "baseline privacy legislation." The Commission's report listed five focus areas: the implementation of a do-not-track system, improved privacy protections on mobile services, data broker transparency, privacy concerns surrounding large platform providers like Internet Service Providers, and promoting enforceable self-regulatory codes. The report also focused heavily on mobile cell phone data, citing a need for limits on mobile data collection,

use and disposal because of the "rapid growth of the mobile marketplace."

Limiting jurisdiction to online companies collecting data from more than 5,000 consumers a year, the report's privacy protection recommendations focus on simplifying consumers' ability to opt out of having their online activities tracked. The Commission further called for increased transparency surrounding collection practices and use of consumers' data. Attention was also given to implementation of "privacy by design," a process that requires consideration of consumer privacy at every stage in product development, rather than inclusion of privacy mechanisms as an afterthought. In summarizing the current state of such consumer protections, the FTC wrote in its March 26, 2011 report that "[a]lthough some companies have excellent privacy and data securities practices, industry as a whole must do better." The FTC's report is available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

One target of the framework is so-called "data brokers"—entities that buy, compile, and sell profitable information about consumers to marketers. In an effort to increase the transparency of these entities' practices, the report calls for legislation providing consumers access to data broker databases and suggests the creation of a centralized website where consumers may learn about the practice and how to control data use.

Addressing an issue that has been at the forefront of the online consumer privacy debate, the Commission warned that if companies did not voluntarily provide an adequate do-not-track mechanism, it would support additional laws mandating one. Speaking to *The New York Times* in a March 26, 2012 article, FTC Chairman Jon Leibowitz explained that such an option entails a means for consumers to opt out of data collection, and said that "[i]f a real Do Not Track option doesn't come to fruition by the end of the year, there will be, I don't want to say a tsunami of support for Do Not Track legislation next Congress, but certainly a lot of support." The Commission hopes to avoid the need for legislation through working with web companies

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and advertisers to implement an industry-designed do-not-track technology.

A do-not-track option conflicts with the desire of online companies to collect, use, and share information about consumers who utilize their services. Speaking to the *Times* for its

COVER STORY

March 26 story, Michael Zaneis, senior vice president and general counsel for the industry trade group Interactive Advertising Bureau, stressed that such legislation should not be so broad in scope that it would include “virtually every publisher site, advertiser, ad network, or analytics firm.” He said that the sharing provided by these entities “makes the digital economy work” and cautioned against legislation “that would harm the most fundamental operations of the Internet.”

Privacy advocates concerned about consumer control over the amount of data being collected and its uses regard the FTC’s statements as representing substantial progress on data privacy. Speaking to the *San Francisco Chronicle* on March 27, 2012, John Simpson, director of Consumer Watchdog’s Privacy Project, called the report “a net positive,” and said that “the takeaway is, we at least seem to be moving forward.”

As an enforcement agency and not a rule-making body, the FTC relies on authority from Congress to create new compliance codes, and under the Federal Trade Commission Act may intervene only in cases of “unfair or deceptive acts or practices in or affecting commerce.” Federal Trade Commission (FTC) Act, 15 U.S.C. § 45. Some analysts favor a mandatory set of rules to be enforced by the FTC, believing that industry self-regulation is insufficient to safeguard consumer data. In a February 23 interview with *The Washington Post* following the White House’s release of privacy guidelines that did not mandate a do-not-track feature, Professor T. Barton Carter of Boston University’s College of Communication said that “[t]hese companies’ track records on privacy do not instill confidence that they are the appropriate guardians of consumers’ privacy.”

The Obama administration unveiled its “Consumer Privacy Bill of Rights” framework nearly one month before the FTC issued its best practices report. Jeffrey Chester, executive director of the consumer protection group Center for Digital Democracy (CDD) said in the *Chronicle*’s March 27 story that the Commission’s report “is putting flesh on those privacy bones” and “putting companies on notice.”

The White House’s “Consumer Privacy Bill of Rights” was issued on Feb. 23, 2012 as part of “Consumer Data Privacy in a Networked World,” a report providing a framework for privacy protection. The report was the result of a year of negotiations, and its privacy guidelines require curbing some tracking activities but stop short of mandating “do-not-track” technology. In the report’s executive summary, the Obama administration said it intends for the report to provide a baseline of clear data privacy protection for consumers and greater certainty for companies, acting as a starting point for drafting federal data privacy legislation.

Among the major tenets of the administration’s privacy bill of rights are transparency in privacy and security practices, security, right to consumer access to personal data, reasonable limits on personal data collected by companies, and account-

ability. It also calls upon data brokers to “prominently and explicitly” tell consumers they collect and sell personal data and “provide consumers with meaningful opportunities to prevent these disclosures.” The White House has directed the Department of Commerce’s National Telecommunications and Information Administration (NITA) to develop enforceable codes of conduct based around these goals and values. These codes of conduct would then be enforced by the FTC. The administration’s privacy bill of rights proposal can be found at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

“American consumers can’t wait any longer for clear rules of the road that ensure their personal information is safe online,” said President Obama in a statement accompanying the privacy bill of rights framework. “By following this blueprint, companies, consumer advocates and policy makers can help protect consumers and ensure the Internet remains a platform for innovation and economic growth.”

Consumer privacy groups remain cautiously optimistic, with Simpson telling the *Times* for a Feb. 23, 2012 story that “The real question is how much influence companies like Google, Microsoft, Yahoo, and Facebook will have in their inevitable attempt to water down rules that are implemented and render them essentially meaningless.” However, a number of charges brought against these companies over the past year by the FTC show that the Commission is willing to take these companies to task for violating their own stated privacy policies.

Facebook Settles FTC “Unfair and Deceptive Practices” Charges

On Nov. 29, 2011, the FTC announced the settlement of charges it brought against the social networking website Facebook in 2010. At the center of the dispute were changes Facebook made to its privacy practices in December 2009 that made users’ names, city, gender, and friend list public by default. The Commission asserted these changes repeatedly made information that users had chosen to classify as private on their Facebook accounts publicly accessible, behavior that constituted “unfair and deceptive” practices. Among the eight counts enumerated in the its complaint, the FTC accused Facebook of sharing user information with advertisers, making false representations that it had verified the security of certain “verified apps,” and continuing to provide third parties with access to a user’s profile information even following account deletion.

Facebook will need to improve transparency in its privacy practices under the settlement, refraining from deceptive privacy practices and obtaining its users’ approval before changing the ways it uses their data, according to the FTC’s Nov. 29, 2011 press release. In particular, the settlement requires “affirmative express consent” from Facebook’s users before the company can enact changes affecting their privacy preferences. Facebook is also required to prevent access to a user’s data after his account has been deleted for 30 days. Further, the company is required to develop and maintain a privacy program that meets the requirements of the FTC’s order, and subject the program to third-party compliance audits every two years.

“Facebook is obligated to keep the promises about privacy that it makes to its hundreds of millions of users,” said FTC Chairman Jon Leibowitz in the Commission’s press release. “Facebook’s innovation does not have to come at the expense of consumer privacy.”

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Discussing the settlement in a post on Facebook's blog, company CEO Mark Zuckerberg admitted to making "a bunch of mistakes," but asserted the company's commitment to privacy. He wrote that "Facebook has always been committed to being transparent about the information you have stored with us — and we have led the internet in building tools to give people the ability to see and control what they share."

Though no fines were levied against the company for its past behavior, it faces a penalty of \$16,000 per day for each count of the settlement violated in the future. The preventive character of the settlement is further underscored by its 20-year duration, a length that the Commission hoped would remove the need to tailor future relief to changes in technology.

"The order is designed to protect people's privacy, anticipating that Facebook is likely to change products and services it offers," said David Vladeck, director of the FTC's bureau of consumer protections. However, the onus remains on users to remain vigilant about what they post on Facebook and agree to share with other users and third parties.

The coalition of consumer groups, including public interest research group Electronic Privacy Information Center (EPIC), was pleased with the outcome, but many regarded the individual settlement as a temporary solution to the problem facing online consumer privacy. Further, *The Wall Street Journal* said in a Nov. 11, 2011 report that the settlement does not dictate how Facebook should obtain user consent for new features.

Marc Rotenberg, executive director of EPIC, told *The New York Times* for a Nov. 29, 2011 story that because "we do not have in the United States a comprehensive privacy framework," there exists the risk that "other companies will come along and create new problems."

Regardless, the settlement indicates that the Commission intends to take a hardline against abuses of privacy by stepping up enforcement of privacy laws. In a Dec. 2, 2011 entry on its Business Center blog titled "Lessons from the Facebook settlement (even if you're not Facebook)" encouraging the adoption of clear, accessible privacy policies, the FTC wrote that "companies that want to stay off the law enforcement radar don't need a weatherman to know which way the wind blows."

Updated Google Privacy Policy Generates Concerns, Lawsuit

On Jan. 24, 2012, Google announced changes to its privacy policy and terms of service that would allow it to aggregate tracked user activity across its multiple services, including its search engine, Gmail email service, maps feature, and YouTube. Though Google said the move was intended to better tailor its services to individual tastes and streamline its privacy policies, the company did not give its users a choice whether or not to participate. The lack of an opt-out feature means that all of a user's data across multiple services will be integrated into one Google profile, potentially leading to individually targeted ads, maps suggestions, and calendar reminders. These concerns are exacerbated by the company's requirement that users of its Google+ social networking service operate under their given name.

In a Jan. 24, 2012 post on Google's official blog about the updates, Google's Privacy Director Alma Whitten wrote that

the new policy "makes clear that, if you're signed in, we may combine information you've provided from one service with information from other services," allowing the company to "treat you as a single user across all our products, which will mean a simpler, more intuitive Google experience."

Consumer advocates, however, anticipate that the policy will upset users unaware that their information would be shared across all of Google's websites. In a Jan. 24, 2012 story in *The Washington Post*, James Steyer, chief executive for "re-

"Although some companies have excellent privacy and data securities practices, industry as a whole must do better."

**— Federal Trade Commission Report:
"Protecting Consumer Privacy
in an Era of Rapid Change:
Recommendations for
Businesses and Policymakers"**

sponsible media" advocacy group Common Sense Media said that "[e]ven if the company believes that tracking users across all platforms improves their services, consumers should still have the option to opt out — especially the kids and teens who are avid users of YouTube, Gmail and Google Search."

Google implemented its new policies on March 1, 2012, after notifying its users of the change through an email message and postings on its websites. However, the company's level of candor in establishing the new policies failed to please privacy advocates, who, according to a Feb. 8, 2012 *Post* entry on its Post Tech technology blog, saw parallels to the "oversharing" of user data engendered by 2010 launch of the company's failed Buzz social network. Google settled an FTC complaint prompted by the Buzz service in March 2010, facing allegations that it violated privacy laws by exposing users' personal information without consent. Similar to the Commission's 2011 settlement with Facebook, the new agreement requires Google to be transparent in its use of users' information and build privacy protections into its products.

Jeffrey Chester, executive director of the CDD, told the *Post* for its January 24 story that "there is no way anyone expected this," and "[t]here is no way a user can comprehend the implication of Google collecting across platforms for information about your health, political opinions and financial concerns."

In response to the changes, consumer watchdog group EPIC filed a lawsuit against the FTC on Feb. 8, 2012, seeking a preliminary injunction that would compel enforcement of the Commission's 2011 settlement with Google. According to a Feb. 8, 2012 article in the *Los Angeles Times*, the group sought to hold the FTC accountable for protecting consumers it alleges will be "left without recourse if the commission fails to enforce its order" against Google, which it accused of aiming to boost online advertising revenue through streamlining its services. The complaint accused Google of misrepresenting its true intention of using combined data for behavioral advertising, ar-

guing that the company's insufficient admission that the privacy policy changes complement its advertising model qualifies as a violation of its 2011 settlement.

In a Feb. 8, 2012 Associated Press (AP) story, EPIC's Executive Director Marc Rotenberg said that Google's users should have the right to say no to the change in terms of service. "This has to be the user's choice, not Google's choice. And the FTC must enforce its consent order to protect the rights of users to make these choices," Rotenberg said.

For its part, Google refuted assertions that it had violated the FTC consent order, insisting that it has taken extra steps to notify users of changes to its privacy policy. The company provided the Commission with a self-assessment report in January that detailed its compliance with the October 2011 Buzz settlement and its efforts to tell its users what data it harvests and what it does with it. Google guaranteed in the document that any new information sharing would be accompanied by some form of express affirmative consent as required by the FTC.

The U.S. District Court for the District of Columbia agreed to EPIC's request to speed up review of the lawsuit on Feb. 9, 2012, and required the FTC to respond to EPIC's complaint by February 17. The court heard the expedited case on Feb. 24, 2012, ultimately ruling that courts lack jurisdiction over agency enforcement actions and could not compel FTC enforcement of the consent order. Nevertheless, the court acknowledged "serious concerns" with Google's changes. The court's opinion can be found at <http://epic.org/privacy/ftc/google/EPICvFTCCtMemo.pdf>.

Google and Privacy Advocates React to Fallout from Completed FCC Investigation

Google also continues to face challenges related to its Street View project, as federal regulators and privacy watchdogs seek to hold the company accountable for allegedly illegally collecting WiFi data as part of its endeavor to photograph and map streets worldwide. Among the information collected by Google's photo cars were emails, text messages, passwords, and other potentially sensitive personal information. After publicly acknowledging the data collection in May 2010, Google has maintained that it was accidental, an assertion now brought into question by some consumer protection groups in light of the company's persistent refusal to cooperate with investigators. Further, the company initially maintained that only fragments of online communications were collected, though it later admitted to having stored entire emails, passwords, and text messages. An FTC investigation of Street View ended in October 2010 after the company promised to improve privacy safeguards.

In an April 13, 2012 filing, the Federal Communications Commission (FCC) cleared Google of illegally collecting WiFi data after fruitlessly investigating the case since October 2010, according to an April 15, 2012 *New York Times* report. The FCC dropped the charges despite initially writing in a June 11, 2010

blog entry that collection of millions of users' personal information "clearly infringes on consumer privacy." Nevertheless, the FCC fined the company \$25,000 for obstructing the investigation into the Street View project. As a part of the inquiry, the FCC requested employee emails which Google refused to provide because it said it would "be time-consuming and burdensome task." Google also cited employee privacy concerns as a reason for not turning over the emails. Despite finding that the company did collect personal data, the FCC cleared it of charges that it had acted illegally. A copy of the FCC's order is available at <http://transition.fcc.gov/DA-12-592A1.pdf>.

A company spokesman released a statement that said Google disagrees with the FCC's characterization of their cooperation and plans to file a response. "As the FCC notes in their report, we provided all the materials the regulators felt they needed to conclude their investigation and we were not found to have violated any laws." Privacy advocates, on the other hand, regard the proposed penalty as insufficient to deter a company that, according to the *Chicago Tribune*, posted nearly \$38 billion in revenue in 2011.

"I appreciate that the F.C.C. sanctioned Google for not cooperating in the investigation, but the much bigger problem is the pervasive and covert surveillance of Internet users that Google undertook over a three-year period," Marc Rotenberg, executive director of the EPIC told the *Times* for its April 15 story.

On April 16, 2012, EPIC, which filed the original FCC complaint regarding Street View, sent a letter to U.S. Atty. Gen. Eric H. Holder Jr. calling the investigation inadequate. EPIC's Executive Director Marc Rotenberg wrote the letter calling on Holder to conduct further investigation, writing that the FCC investigation "did not address the applicability of federal wiretapping law to Google's interception of emails, user names, passwords, browsing histories, and other personal information."

According to an April 17, 2012 article in the *Chicago Tribune*, Rep. Edward J. Markey (D-Mass.) insisted Congress hold a hearing and "get to the bottom of this serious situation" because "the circumstances surrounding Google's surreptitious syphoning of personal information leave many unanswered questions." Sen. Richard Blumenthal (D-Conn.), who had in 2010, as Connecticut attorney general, tried to get Google to turn over its Street View consumer data, also urged an investigation by the Justice Department and states' attorneys general.

Street View investigations are ongoing in Connecticut and several other states, which launched inquiries in 2010. Further, the company continues to face international investigations in Europe. According to the *Tribune*, the French Commission Nationale de l'Informatique et des Libertés fined Google 100,000 euros for collecting personal information while gathering Street View data.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Courts Continue to Grapple with Online Student Speech Cases; Supreme Court Chose Not to Weigh In

Schools and universities nationwide are struggling with how far they can go to punish online student speech that takes place off campus.

The University of Minnesota defended its right to punish students for online, off-campus speech before the Minnesota Supreme Court on April 2, 2012, in a case in which a student was disciplined for posting allegedly disrespectful and threatening comments on Facebook.

STUDENT FREE SPEECH

The fundamental problem here is that [the University] is asking to adopt a speech code for professional students that applies not only on campus, but off campus,” argued Jordan Kushner, the attorney for student Amanda Tatro, who was disciplined for some posts she made on Facebook. This was the second time the Minnesota Supreme Court had heard the case. It was initially argued on Feb. 8, 2012, but Kushner asked for a re-hearing when a fourth justice recused himself after the initial oral arguments.

The case, *Tatro v. University of Minnesota*, arose after the University disciplined Tatro, a mortuary science student, in April 2010. It reflects courts’ struggles with how to balance students’ First Amendment rights with schools’ ability to maintain a distraction-free environment, even if the speech occurs away from school. First Amendment advocates argue that blurring the line between on-campus and off-campus speech jeopardizes students’ ability to speak their minds on the important issues of the day.

Tatro, who was taking laboratory courses and working with human cadavers, had participated in an orientation program that addressed appropriate conduct regarding anatomy-bequest-program donors, and had signed a disclosure form indicating that she understood and agreed to abide by the program’s rules, according to the Minnesota Court of Ap-

peals opinion, 800 N.W.2d 811 (Minn. Ct. App. 2011).

One of the Facebook posts at issue was directed toward a man who had just broken up with her, according to the court of appeals. Tatro wrote that she was tempted to “stab a certain someone in the throat” with a “trocar” — a sharp surgical instrument — and added that she would perhaps “spend the evening updating my ‘Death List #5’ and making friends with the crematory guy.” In another post, the opinion said, she said she was “looking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.” In a third, she discussed saying good-bye to “Bernie,” the name she had given to the cadaver on which she worked. “Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. ... Bye, bye Bernie. Lock of hair in my pocket.”

Tatro told *The Minnesota Daily* for a February 13 story that when she had written the Facebook posts, her fiancé had “dumped” her the night before and she had been up all night, crying. She posted on Facebook as a way of telling her family and friends that the relationship was over, she said.

The court of appeals opinion said that after another student reported her posts to the University, the school gave her a failing grade in her anatomy class, required her to undergo a psychiatric evaluation, and placed her on academic probation for the rest of her undergraduate career. Tatro appealed the decision through the University’s disciplinary system, and continued through the courts.

The Minnesota Court of Appeals ruled on July 11, 2011 that the University’s punishment of Tatro did not violate her First Amendment rights because her posts on Facebook “materially and substantially disrupt[ed] the work and discipline of the university.” Judge Louise Bjorkman said that “in a long line of cases, beginning with *Tinker*, the Supreme Court has held that schools may limit or discipline student expression if school officials ‘reasonably conclude that it will material-

ly and substantially disrupt the work and discipline of the school.” Tatro appealed to the Minnesota Supreme Court.

In 1969, the Supreme Court of the United States held in *Tinker v. Des Moines Independent School District* that K-12 schools can punish student speech when the speech materially disrupts classwork or involves substantial disorder. 393 U.S. 503 (1969). At the February oral arguments in front of the Minnesota Supreme Court, Kushner argued that Tatro’s conduct did not violate that standard. She was simply “engaging in literary expressions and venting some emotions.” He also argued that “she was venting her feelings and made some vague references to dissection. ... She’s expressing herself, expressing her feelings, and she has a right to do that.” Kushner argued that if the “limit of the University’s reach extends to what Ms. Tatro did,” students would face “real danger” where they are not allowed to express themselves online.

Kushner also argued that there was no “substantial interference” with the school environment, under the *Tinker* test because no class was delayed, and no students missed class because of the incident, except for Tatro, when she was barred from being on campus. “What does ‘substantial disruption’ on a major university campus have to look like?” he asked. “If this is it, it is overbroad authority for the university to regulate off-campus speech in the Internet age.”

In both the February and April oral arguments, University General Counsel Mark Rotenberg countered by citing 1988 U.S. Supreme Court decision *Hazelwood School District v. Kuhlmeier*, where the court held that K-12 school administrators have a certain amount of leeway to censor student speech when the school itself is sponsoring it, as long as the censorship is reasonably related to their legitimate pedagogical concerns. 484 U.S. 260 (1988).

Rotenberg argued that it does not matter that Tatro’s speech was not “on campus,” because, he said, the on-campus/off-campus dichotomy does not apply when the issue is whether the student is interfering with legitimate pedagogical

objectives. Rotenberg said that the “legitimate pedagogical objectives” disturbed in this case were teaching students how to be successful mortuary science students and funeral directors: Minnesota state regulations prohibit funeral directors from acting “unprofessionally,” for example. Rotenberg also said that those objectives include protecting the anatomy-bequest program from being undermined, and that there is a “substantial risk” that these programs would be undermined if the public refused to donate.

“This is not a general free speech case,” Rotenberg said during the April arguments. “The University has a substantial, ... even compelling interest in educating professionals.”

Although this case has focused on the applicability of *Tinker* and *Hazelwood* to online, off-campus speech, the U.S. Supreme Court has never applied these cases — both of which involved high school students — to speech taking place in a collegiate setting.

The Student Press Law Center (SPLC), an advocate for student speech rights, filed an *amicus curiae* brief in support of Tatro. “Whatever [the Minnesota Supreme Court] may think about Amanda Tatro’s sense of humor, unleashing colleges and schools to punish their students’ speech — no matter when and where it is uttered — because of a belief that the speech may damage the school’s image in the eyes of its supporters sweeps far beyond any legitimate conception of school authority,” the SPLC argued in its friend-of-the-court brief. “A license to punish off-campus expression will unavoidably become a vehicle for some schools and colleges to pursue illegitimate ends.”

The court did not say when it plans to issue its decision. In an interview with *The Minnesota Daily* for a Feb. 13, 2012 story, Tatro said that if the state Supreme Court does not rule in her favor, she will try to get the U.S. Supreme Court to hear her case. She said she wants to clear her name, as she has had trouble getting jobs and internships since the case began. “I hope that I’ll finally get closure to what I didn’t start and that the University will finally leave me alone,” she said. (For more on the Tatro case, see “Student Speech: Off-Campus, Online and in Trouble” in the Summer 2011 issue of the *Silha Bulletin*.)

Minnesota Middle School Student Sues School District Over Facebook Search

On March 6, 2012, with the help of the American Civil Liberties Union of Minnesota, a mother filed a lawsuit against Minnewaska Area School District in U.S. District Court for the District of

“The fundamental problem here is that [the University] is asking to adopt a speech code for professional students that applies not only on campus, but off campus.”

— Jordan Kushner,
Attorney for Amanda Tatro

Minnesota for disciplining her daughter for two Facebook posts she made while away from school. The girl is identified as “R.S.” in the court filings.

According to the complaint, the district violated R.S.’s First Amendment right to free speech after she posted on Facebook that she “hated” a school hall monitor who had been mean to her. The school’s principal received a copy of the post, which had been made on the girl’s own computer away from school. The principal, however, said that the Facebook post constituted “bullying,” and sent her to detention for being “rude” and “discourteous” and had her write an apology to the adult hall monitor.

The complaint also alleged that in a separate incident, the school violated her First Amendment rights as well as her Fourth Amendment right to be free of unreasonable searches and seizures. After the first incident, she made a Facebook post that said “I want to know who the f%\$# [sic] told on me.” She was disciplined for “insubordination” and other offenses and given a one-day, in-school suspension and forbidden to go on her class ski trip.

Soon afterward, when a parent complained that her son was communicating with R.S. about sex via Facebook, school employees and the Pope County Deputy Sheriff demanded that R.S. give them her e-mail and Facebook login information and passwords, and went through her accounts while she was in the room “but ... could not see the computer or

control what the three adults were viewing.” “[The deputy] and school officials did not have a warrant to search R.S.’s private accounts for speech and communications made off-campus, outside of school hours, and without a school computer. ... R.S. continued to be detained and sat in the room humiliated while

Deputy Mitchell, Counselor Walsh, and [an unnamed person] scoured her Facebook account and private information.” The complaint is available at http://www.aclu-mn.org/index.php/download_file/view/306/.

In a March 9, 2012 statement on the school district’s website, Superintendent Gregory F. Ohl said that the district “did not violate R.S.’s civil rights, and disputes the one-sided version of events set forth in the complaint written by the ACLU. The district is confident that once all facts come to light, the district’s conduct will be found to be reasonable and appropriate.”

He said that “R.S. participated in Facebook conversations that contributed to a disruption of the learning environment and caused some people within the school community to feel unsafe. The actions taken by the school district to R.S. were intended to prevent suspected harm to self or others and to prevent disruption.”

Amy Bissonette, a Richfield, Minn.-based attorney and author of *Cyber Law: Maximizing Safety and Minimizing Risk in Classrooms* told Minnesota Public Radio (MPR) for an April 4, 2012 report that “we don’t have great law right now in regard to student free speech and the internet.” MPR reported that she has advised schools across the country on their social media policies, telling schools to make clear that students will be held responsible for what they write online, on and off campus.

Charles Samuelson, executive director of the ACLU of Minnesota, said in a March 6, 2012 press release that “students do not shed their First Amendment rights at the school house gate.

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The Supreme Court ruled on that in the 1970s, yet schools like Minnewaska seem to have no regard for the standard.”

The ACLU of Minnesota also prepared a handout to distribute to students outlining their privacy rights when using social networking sites. It addresses common questions students have like “Can I get in trouble for something I post online?” and “Can my school force me to log onto my Facebook (or email) to view my activity?” It can be found at http://www.aclu-mn.org/index.php/download_file/view/305/.

An Iowa Court’s Anti-Hazelwood Ruling Encouraging to First Amendment Advocates

Advocates for student speech have been celebrating a November decision by the Iowa Court of Appeals that held that a school district could not discipline a high school newspaper adviser for allowing students to publish material that “upset the administration,” according to a Nov. 10, 2012 Associated Press (AP) report.

The case arose when a journalism teacher received reprimands from the school’s principal for allowing students to publish what the administration thought were inappropriate articles in two issues of the high school newspaper, according to the opinion. One of the issues was the school’s parody April Fools’ Day Edition, complete with an article about a meth lab found in the biology lab and quotes from a student who said he would “like to go to a Chippendale’s tryout” after graduation. Administrators also objected to another issue of the newspaper, which included an article about smoking and tobacco use accompanied by a picture of a baby smoking a cigarette. *Lange v. Diercks*, 808 N.W.2d 754 (Iowa Ct. App. 2011).

After *Hazelwood* was decided in 1998, several states — including Iowa — passed state statutes expanding the free expression rights of students, the opinion said. Iowa’s law grants public school students the right to publish without school administrators’ censoring the material as long as it is not obscene or libelous and does not encourage students to break the law, violate school regulations or disrupt school operations, according to the AP.

In its opinion, the Iowa court decided the content at issue did not fall under any exceptions listed under the law. The court found that the newspaper did not encourage students to break the law, violate school regulations or disrupt school operations. And it said the district was “imprecise regarding which materials they believe encouraged students to engage in undesirable acts.” The opinion is available at www.splc.org/pdf/lange.pdf.

The Iowa statute was the first of the seven state “anti-*Hazelwood*” statutes to be interpreted by American courts, according to the Student Press Law Center (SPLC).

“It’s a really good day for journalism teachers and journalism students everywhere,” Frank LoMonte, the group’s executive director, told the AP. “This is just an incredibly, incredibly important reaffirmation of the rights of students. It was an absolute must-win for the independence of student journalism and we’re very thankful the court got it right.”

In a Nov. 9, 2011 SPLC article, the attorney for teacher Ben Lange, Jay Hammond, said the Iowa decision recognizes the expanded rights student journalists receive in Iowa because of its “anti-*Hazelwood*” statute. “When Ben was reprimanded for allowing the publication of those two articles, we believed the articles were authorized under the Iowa law and that he was being sanctioned for something that he was required to let his students do,” Hammond said.

The Iowa Supreme Court decided not to hear the case on Jan. 19, 2012, which means the decision will stand. According to the court of appeals opinion, the school will have to remove the reprimands from Lange’s personnel file.

U.S. Supreme Court Rejects Student Speech Cases

This term, the U.S. Supreme Court declined to hear several student speech cases, despite divergent rulings in the lower courts.

The Court chose not to review the case of Avery Doninger, who criticized school officials online during a dispute about a battle-of-the-bands concert while she was a junior at Connecticut’s Lewis B. Mills High School in 2007, according to a Oct. 31, 2011 SPLC blog post written

by Executive Director Frank LoMonte. In the blog post, she said the “douchebags in central office” had cancelled the event. The school’s principal then responded by disqualifying Doninger from running for secretary of her senior class, and from taking office when she won anyway as a write-in candidate. The U.S. Court of Appeals for the 2nd Circuit held that school officials were entitled to qualified immunity from the lawsuit, which is a doctrine that protects public officials from liability when the law is not clearly established. *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

The U.S. Supreme Court also declined to hear the cases of *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District*, both involving students who ridiculed their principals with jokes on fake MySpace profile pages. The U.S. Court of Appeals for the 3rd Circuit found that the schools could not punish the students’ off-campus speech without violating the constitution. *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011); *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011).

“That the Court has left lawyers, schools and students with no clear guidance — the same behavior that is constitutionally protected in Delaware today may be unprotected in Maryland — may understandably provoke frustration. But sometimes expedience is no value,” LoMonte wrote in response to the court’s refusal to hear the cases.

“America is in the grips of media-hyped hysteria over ‘sexting,’ ‘cyberbullying,’ and other acts of online stupidity, and yet little objective research confirms whether these phenomena are as widespread as the headlines — and the make-a-buck charlatans trying to sell ‘prevention courses’ to schools — would suggest. Writing policy for a generation — or a century — requires a reliable evidentiary foundation that doesn’t yet exist,” LoMonte concluded. (For more on student speech issues, see “Student Speech: Off-Campus, Online and in Trouble” in the Summer 2011 issue of the *Silha Bulletin*.)

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

The Obama Administration Takes on Government Leakers; Transparency May Be a Casualty

Recent charges filed by the Obama administration against a former Central Intelligence Agency (CIA) officer have renewed cries from civil libertarians and groups supporting

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whistleblowers and press freedom that the administration's crackdown on government leakers could have long-term negative effects on government transparency in the United States.

The charges bring the total number of current or former government officials charged with providing classified information to journalists to six, which is twice as many as all previous presidents combined, according to a Jan. 23, 2012 story in *The New York Times*. As new revelations show the Obama administration reportedly holds a sealed indictment of Julian Assange, the founder of website WikiLeaks, which took part in the biggest classified information breach in U.S. history, journalists and open-government advocates are questioning the wisdom of the prosecutions.

"It increases the level of paranoia," Steven Aftergood, an expert on government secrecy for the Federation of American Scientists, told *The New York Times* for a Feb. 11, 2012 story about the leak prosecutions. "As security has been ratcheted up, so has the anxiety of many government officials about dealing with the press and the public."

According to the *Times*, the increase in charges against leakers has upset a decades-long accommodation between national security and press freedom, when the government did its best to protect its secrets but exercised discretion before resorting to subpoenas and criminal charges when it failed. The Justice Department has largely relied on advanced technology to track the leaks.

"Safeguarding classified information, including the identities of CIA officers involved in sensitive operations, is critical to keeping our intelligence officers safe and protecting our national security," U.S. Atty. Gen. Eric H. Holder, Jr. said in a Jan. 23, 2012 statement released by the

Department of Justice. "Today's charges reinforce the Justice Department's commitment to hold accountable anyone who would violate the solemn duty not to disclose such sensitive information."

Jake Tapper, the White House correspondent for ABC News, took the Obama administration's press secretary, Jay Carney, to task for the Administration's record when Carney opened a press conference in February by noting the deaths of journalists Marie Colvin and Anthony Shadid, two reporters who had died "in order to bring truth" while reporting in Syria.

"How does that square with the fact that this administration has been so aggressively trying to stop aggressive journalism in the United States by using the Espionage Act to take whistleblowers to court?" Tapper asked Carney. He then suggested that the administration seemed to believe that "the truth should come out abroad; it shouldn't come out here."

Obama Administration Prosecuting Former CIA Officer

On Jan. 23, 2012, the Obama administration charged former CIA officer John Kiriakou with repeatedly giving journalists classified information, including the name of a covert CIA officer and information revealing the role of another CIA employee in classified activities.

Kiriakou was charged under the 1917 Espionage Act, 18 U.S.C. § 793 *et seq.*, with disclosing classified information to journalists about the capture and brutal interrogation of Abu Zubaydah, a suspected member of Al Qaeda, according to a Jan. 23 story in *The New York Times*. Kiriakou was a leader of the team that captured Abu Zubaydah. The CIA started an inquiry in 2009, when government officials learned that defense attorneys for Guantánamo detainees were trying to identify CIA interrogators so they could find witnesses to testify about abusive treatment as mitigating evidence against death sentences.

Officials within the CIA called for an investigation, and Attorney General Eric Holder appointed Patrick J. Fitzgerald,

the U.S. Attorney who led the investigation into the unauthorized disclosure of the identity of Valerie Plame, to investigate. Fitzgerald's efforts led to Kiriakou. Investigators found that he had been a source for several news articles, and that one of the journalists involved revealed the identity of another CIA interrogator to one of the Guantánamo defense teams.

Peter Van Buren, a career U.S. Foreign Service Officer, wrote a Feb. 13, 2012 report for Al-Jazeera's English-language website that called Kiriakou's case "but one more battle in a broader war to ensure that government actions and sunshine policies don't go together." He said that "by now, there can be little doubt that government retaliation against whistleblowers is not an isolated event, nor even an agency-by-agency practice. The number of cases in play suggest an organized strategy to deprive those in the U.S. of knowledge of the more disreputable things that their government does. How it plays out in court and elsewhere will significantly affect our democracy."

Kiriakou was also charged with violating the Intelligence Identities Protection Act, 50 U.S.C. §§ 421–426, for allegedly disclosing the identity of a covert intelligence officer to a journalist. Aftergood wrote for a Jan. 25, 2012 blog post that the Act was enacted in 1982 to "combat the efforts of Philip Agee" — a former CIA officer who became an outspoken Agency critic — "and his colleagues to expose CIA personnel around the world." The Act made it a felony to reveal the names of "'covert agents,' i.e. intelligence officers who are under cover and whose identities are classified information."

According to a Congressional Research Service report written about the Act last year, the Act has never been used in a contested prosecution, although one person pleaded guilty to a violation in 1985. Aftergood pointed out that the Act "is one of the very few classification-related statutes that purport to apply to anyone, not only to government officials who possess authorized access to classified information."

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Kiriakou was charged in a five-count indictment returned by a federal grand jury in the Eastern District of Virginia on April 5, 2012. According to an April 5, 2012 press release from the Department of Justice, he was charged with “repeatedly disclosing information to journalists, including the name of a covert CIA officer and information revealing the role of another CIA employee in classified activities.”

The indictment charges him with one count of violating the Intelligence Identities Protection Act and three counts of violating the Espionage Act “for allegedly disclosing national defense information to individuals not authorized to receive it,” the press release said. The indictment also charges him with one count of making false statements for allegedly lying to the CIA’s Publications Review Board “in an unsuccessful attempt to trick the CIA into allowing him to include classified information in a book he was seeking to publish.”

The press release said that violation of the Intelligence Identities Protection Act, as well as each count of violating the Espionage Act, each carry a maximum penalty of 10 years in prison and a maximum fine of \$250,000. Making false statements carries a maximum prison term of five years, as well as a maximum fine of \$250,000.

The Government’s Use of the Espionage Act to Prosecute Leakers

Most of the current and former government officials being charged with leaking information to journalists are being charged under the Espionage Act, a World War I-era law enacted “to punish those who gave aid to our enemies,” according to David Carr’s “Media Equation” column in the Feb. 26, 2012 *New York Times*. Espionage Act cases have involved leaks from the CIA, U.S. military, U.S. State Department, and National Security Agency (NSA) to the media. In two of the cases, the government issued subpoenas to reporters or media companies as part of their investigations. (For more information on the Obama administration’s prosecution of leakers, see “Open Government Advocates Criticize Obama’s Prosecution of Leakers” in the Winter/Spring 2011 issue of the *Silha Bulletin*.)

But, Carr pointed out, “the majority of the recent prosecutions seem to have everything to do with administrative secrecy and very little to do with national security. In case after case, the Espionage Act has been deployed as a kind of ad hoc Official Secrets Act, which is not a law that has ever found traction in America, a place where the people’s right to know is viewed as superseding the government’s right to hide its business.”

On Jan. 23, 2012, the day Kiriakou was charged, CIA Director David Petraeus issued a statement to employees of the Agency, reminding them that “this is the second such prosecution of a former CIA officer in the last year,” and assuring them that “the CIA fully supported the investigation from the beginning and will continue to do so.”

“Unauthorized disclosures of any sort — including information concerning the identities of other Agency officers — betray the public trust, our country, and our colleagues,” he wrote. Given the sensitive nature of many of our Agency’s operations and the risks we ask our employees to take, the illegal passage of secrets is an abuse of trust that may put lives in jeopardy.”

To many, the prosecutions seem inconsistent with the openness promised by President Obama when he first took office. Obama released a memo on Jan. 21, 2009 — his second day in office — saying that under his administration there would be a “presumption of disclosure” for all federal Freedom of Information Act requests, reversing a Bush administration directive that called for withholding any requested documents if there was a “sound legal basis” for doing so, according to previous *Bulletin* coverage. (For more on Obama’s 2009 memo, see “Obama Promises More Government Openness; Skeptics Demand Immediate Results” in the Winter 2009 issue of the *Silha Bulletin*.)

Leak Prosecutions Receive Considerable Media Attention

One leak prosecution — that of former CIA officer Jeffrey Sterling — has received considerable media attention in the past year because the Justice Department is trying to force James Risen, a reporter for *The New York Times*, to testify and identify Sterling as a source who has given him classified information.

(For more on the Sterling prosecution, see “Judges Rebuke Government on Leak Prosecutions” in the Summer 2011 issue of the *Silha Bulletin*.)

The government issued a trial subpoena to Risen, demanding that he testify and identify his sources for his stories about an alleged Central Intelligence Agency program aimed at undermining Iran’s attempts to build a nuclear weapon. Sterling allegedly leaked information to Risen about “Operation Merlin,” a failed plan to pass flawed blueprints to Iran via a former Russian scientist. Sterling was indicted in December 2010 for the unauthorized retention and disclosure of “national defense information” in violation of the Espionage Act, as well as mail fraud, “unauthorized conveyance of government property,” and obstruction of justice. *United States v. Sterling*, 818 F. Supp. 2d 945 (E.D. Va. 2011).

On July 29, 2011, U.S. District Judge Leonie Brinkema granted most of a motion on behalf of Risen to quash the trial subpoena. She said that the 4th Circuit recognizes a qualified privilege for journalists to refuse to testify about confidential sources, and that the government did not satisfy a three-part balancing test used to determine whether a subpoena against a reporter should be upheld. On the other hand, Brinkema said Risen does need to testify to confirm that he was the author of a particular newspaper article or book chapter, that the newspaper article or book chapter is accurate, and that certain statements in that article or chapter were, in fact, made by an unnamed source. The government has appealed, and the case is now before the United States Court of Appeals for the Fourth Circuit.

A large group of media organizations and media advocates — including *The New York Times*, The Associated Press, National Public Radio, *The Washington Post*, and the Reporters Committee for Freedom of the Press — filed a friend-of-the-court brief on Feb. 21, 2012, arguing that none of the nation’s circuit courts have ever endorsed the government’s contention that the reporter’s privilege does not protect against the compelled disclosure of confidential sources in criminal trials in federal courts, and that protecting confidential sources is vital to ensuring the free flow of information to the public.

“This nation’s historical practice of respecting the confidentiality of journalists’ communications with their sources has been vital to ensuring that the press effectively performs its constitutionally protected role of disseminating information to the public, including information about the conduct of our government in the name of protecting the national security,” the brief argues. “... An inventory of those crimes that have gone unpunished because a journalist was permitted to protect a source would be a very short list indeed, and would pale in comparison to the number of significant criminal prosecutions made possible directly as a result of news reporters containing information gleaned from confidential sources. As the Supreme Court has observed, although ‘[t]he right to remain anonymous may be abused when it shields fraudulent conduct,’ it remains the case that, ‘in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.’”

U.S. Government Considering Assange Indictment

The leak prosecution that has received the most attention is that of U.S. Army Pvt. Bradley Manning, who was charged with leaking thousands of military and diplomatic documents and other information to WikiLeaks and its founder, Julian Assange. But a more controversial step in that case may be imminent — WikiLeaks, with the help of several partner news organizations, has reported that the U.S. government may be on the verge of indicting Assange.

According to a confidential email obtained from the private U.S. intelligence company Stratfor, U.S. prosecutors have charges against Assange, *The Sydney Morning Herald* reported on Feb. 29, 2012. In an internal email to Stratfor analysts on Jan. 26, 2011, the Company’s Vice-President of Intelligence, Fred Burton, responded to a media report concerning U.S. investigations targeting WikiLeaks with the comment: “We have a sealed indictment on Assange,” the *Herald* reported. Burton is the former deputy chief of the counter-terrorism division of the U.S. State Department’s diplomatic security service. His email was released by WikiLeaks in February 2011, when WikiLeaks began releas-

ing more than 5 million Stratfor emails which it said showed “how a private intelligence agency works, and how they target individuals for their corporate and government clients.”

The Center for Constitutional Rights, a New York-based civil libertarian nonprofit that represents WikiLeaks and Assange, issued a statement on Feb. 28, 2012, decrying the reported indictment. “A sealed indictment against Julian Assange would underscore the very thing WikiLeaks has been fighting against: abuses the government commits in an environment of secrecy and expansive, reflexive calls for ‘national security.’ This would also mark perhaps the first time a journalist has been prosecuted for allegedly receiving and publishing ‘classified’ documents. Indicting Julian Assange would represent a dramatic assault on the First Amendment, journalists, and the public’s right to know.” (For more on Assange and the investigation into WikiLeaks see “Open Government Advocates Criticize Obama’s Prosecution of Leakers” in the Winter/Spring 2011 issue of the *Silha Bulletin*. Mark Stephens, the 2011 *Silha* Lecturer, is former counsel to Assange; his lecture was titled “Free Speech and the Digital Challenge Around the Globe: A Conversation with Mark Stephens.” See “*Silha* Lecture Highlights Free Speech in the Digital Age” in the Fall 2011 issue of the *Silha Bulletin*.)

Manning is awaiting a trial at Fort Leavenworth Joint Regional Correctional Facility in Kansas, according to a previous *Bulletin* report. He has been charged with numerous violations of the Uniform Code of Military Justice (UCMJ) including Article 104, “aiding the enemy,” a charge which can carry the death penalty. Prosecutors have stated that they do not intend to seek the death penalty in Manning’s case, however.

Blogger Glenn Greenwald said that the grand jury investigation happening in Arlington, Va. — which was purportedly looking into Assange — was “a rare effort to prosecute those who publish secrets, rather than those who leak them.” Greenwald, who writes for online political magazine *Salon.com*, reported on June 9, 2011 that those subpoenaed to testify included David House, a researcher at the Massachusetts Institute of Technology and founder of the Bradley Manning Support Network, Man-

ning’s ex-boyfriend Tyler Watkins, and Nadia Heninger, a cryptography expert at the University of California San Diego. Greenwald reported that at least some of those subpoenaed had vowed not to cooperate with the grand jury. (For more information about Manning, see “Judges Rebuke Government on Leak Prosecutions” in the Summer 2011 issue of the *Silha Bulletin*, as well as “Open Government Advocates Criticize Obama’s Prosecution of Leakers” in the Winter/Spring 2011 issue of the *Silha Bulletin*.)

Technology Makes It Easier for Government to Discover Sources

Part of journalists’ consternation about the leak prosecutions stems from worries about how the government is investigating these leaks, not just the number of leakers investigated. Increased government surveillance activity means that some day soon, the government will not have to ask journalists who their sources are for these stories, because government investigators will already know.

The complaint in the Kiriakou case, for example, references the contents of an email sent by an unnamed journalist. The complaint says that “At 11:31 a.m. on Aug. 19, 2008, approximately two hours after [Kiriakou] disclosed Covert Officer A’s last name to Journalist A, Journalist A sent an email to the defense investigator referenced above that contained Covert Officer A’s full name in the subject line. The email further stated: ‘His name is [first and last name of Covert Officer A].’ At 1:35 p.m., Journalist A sent a final email to the defense investigator in which he stated: ‘my guy came through with his memory.’”

A March 16, 2012 First Amendment Center story discussed a meeting held at Washington D.C.’s Newseum about whistleblowing, and quoted one reporter as sharing advice with potential leakers, saying that if he were a government employee with information to share, “I’d never talk on the phone or through e-mail” with the news media. A moderator at the discussion asked Matthew Miller, the former director of the Office of Public Affairs for the Department of Justice, why there have been so many prosecutions of leakers during the Obama administration, when it has a

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Defamation Lawsuits Pose Threat to Journalists as Online Communication Complicates First Amendment Analysis

Several recent court rulings provide a lesson in contrasts concerning protection accorded to allegedly defamatory online speech. As state and federal courts grapple with issues ranging from the right of anonymous speakers to conceal their identities to the ability of bloggers to claim protection under journalist shield laws, the state of defamation law as applied to online expression remains uncertain. State courts continue to consider defamation issues for the traditional media as well, with one Minnesota TV station facing liability for more than \$1 million in damages.

DEFAMATION

D.C. Court of Appeals Shields Anonymous Speaker from Defamation Claim

On Jan. 12, 2012, the D.C. Court of Appeals issued an opinion delineating the right to anonymous online defamatory speech. The court ruled that a trade organization was not obligated to disclose the identity of a tipster who alleged that a software company engaged in copyright infringement. *Software & Information Industry Association v. Solers, Inc.*, 36 A.3d 398 (D.C. 2012).

The case centered upon the Software & Information Industry Association

(SIIA), a software industry trade association that maintained a “Corporate Anti-Piracy System” allowing anonymous tipsters rewards in exchange for reporting verifiable corporate piracy. “John Doe” sent a report to SIIA in March 2005, asserting that Solers, a software development company, was using copies of SIIA-member software products in excess of the number of licenses purchased for the software. SIIA responded by sending a letter to Solers threatening litigation and demanding that the company conduct an internal audit to detect unlicensed software. After complying with SIIA’s instructions and concluding that it “possessed no unlicensed software,” Solers filed a complaint in the Superior Court for the District of Columbia against the pseudonymous “John Doe,” alleging defamation and tortious interference with “prospective advantageous business opportunities.” Solers issued a subpoena the following day requiring SIIA to disclose all information related to John Doe’s identity. SIIA refused, noting that throughout the two decades of its program’s existence it has never disclosed the identity of anonymous informants. It filed a motion to quash the subpoena, basing its actions on John Doe’s First Amendment right to anonymous speech.

In this initial iteration of the case in 2009, the District of Columbia Court of Appeals concluded that Solers’ com-

plaints “sufficiently state[d] claims for defamation and tortious interference.” However, the court adopted a protective standard for anonymous speech and held that a plaintiff “must do more than simply plead his case” in order to justify subpoenas seeking the identity of defendants. “Before enforcing a subpoena for identifying information, a court must conduct a preliminary screening to ensure that there is a viable claim that justifies overriding an asserted right to anonymity,” the court said. As part of this screening, the court of appeals established a five-step framework for courts to consider when evaluating a defendant’s right to anonymity. This framework requires trial courts to “(1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control*, and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit.” *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009) (“*Solers I*”). (For further discussion of this iteration of the *Solers*

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purported goal of greater government transparency. Miller said there is a perception in Washington that much more leaking is going on now than during previous administrations, but it may be that it’s just “easier to catch leakers” now because of the advances in surveillance and the use of electronic records.

In an interview for a Jan. 24, 2012 article for the *Columbia Journalism Review (CJR)*, Jane Kirtley, director of the Silha Center and professor of media

ethics and law at the University of Minnesota said that she tells her journalism students to drop the expectation that their communications are secure, advising them to do their best to have “face to face communication.” “It seems ironic to go back to something so old fashioned, but it’s the only way you can ensure the security of the communication,” she told *CJR*. A Feb. 11, 2012 story in *The New York Times* quoted Lucy Dalglish, executive director of the Reporters Committee

for Freedom of the Press, as saying that reporters should adopt Bob Woodward’s methods from the 1970s — made famous in his book recounting his reporting on Watergate — *All The President’s Men*. “For God’s sake, get off of e-mail,” she said. “Get off of your cellphone. Watch your credit cards. Watch your plane tickets. These guys in the [National Security Agency] know everything.”

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

case, see “Subpoenas to Unmask Anonymous Internet Users Continue to Challenge News Media and Courts,” in the Summer 2009 issue of the *Silha Bulletin*.)

On remand to the Superior Court for the District of Columbia, the trial court determined that “the company to this day has never articulated how its reputation has been damaged....” and that the Solers, by its own admission, was unable to “identify evidence proving departed customers and additional lost business opportunities.” Nevertheless, the court enforced the subpoena following the court of appeals’ 2009 finding that Solers had sufficiently pleaded claims.

SIIA once again sought review by the District of Columbia’s highest court, which found that enforcing the subpoena in this instance “would mean that a corporate plaintiff may overcome a speaker’s First Amendment right to anonymity with little more than an allegation of defamation and its own decision to expend money in response.” The court held that Solers failed to identify damages beyond internal expenses suffered as a consequence of the alleged defamation, which meant that the fourth factor of *Solers I*’s five-part test was not satisfied. The Superior Court’s judgment was thus reversed. Supporters of SIIA praised the decision, with the group’s chief litigation counsel Scott Bain asserting that “[t]he decision is important to the rights of whistleblowers because it is an important safeguard to ensure this kind of activity isn’t chilled” in a Jan. 18, 2012 interview with the Reporters Committee for Freedom of the Press (RCFP). In a press release the same day as the decision, Bain said that the decision “sets a solid First Amendment precedent that will benefit SIIA, other associations, and publishers here in D.C., and is a persuasive roadmap for other jurisdictions.”

Christopher Barnett of the Southlake, Texas intellectual property and technology firm Scott & Scott, LLP wrote in a Jan. 12, 2012 blog post on the firm’s website that while the D.C. Court of Appeals’ decision is not binding precedent outside of the District of Columbia, “it nevertheless is persuasive and could make it difficult for motivated companies to move forward with tort claims against anonymous audit informants,” except possibly in instances where businesses could show that the likely informant was an employee subject to a non-disclosure or confidentiality agreement.

Indiana Court of Appeals Allows Newspaper to Protect Anonymous Commenters

Responding to what it described as “an issue of first impression,” the Indiana Court of Appeals reversed the order of the Marion Superior Court compelling discovery of the identity of an anonymous commenter on the website of *The Indianapolis Star*. The former chief executive officer of Junior Achievement of Central Indiana, Jeffrey Miller, brought suit on March 31, 2010, against the newspaper, alleging that comments posted on its website by the user “DownWithTheColts” were defamatory. The comments responded to a 2010 *Star* article that investigated Junior Achievement’s finances and reported that the organization faced “questions about missed payments to contractors on a building project” and \$764,000 in “unaccounted-for grant money.” The anonymous comments stated that the newspaper needed to “look at the [former] president of JA and others on the [Enterprise foundation] board. The ‘missing’ money can be found in their bank accounts.” Miller subpoenaed the paper, seeking to identify who registered the account “DownWithTheColts” in order to sue for what he characterized as “malicious defamation.” The newspaper argued in defense that the First Amendment right to anonymous speech prevented it from having to turn over the identity of the account.

In overturning the lower court’s order to disclose, the appeals court first considered whether “DownWithTheColts” was “the source of any information” and thus within the purview of the state’s reporter’s shield law. Determining that the newspaper did not use information provided by the commenter in any way during the newsgathering process, the court declined to apply the shield law.

In its opinion, the Indiana Court of Appeals cited Silha Professor of Media Ethics and Law and Silha Center Director Jane Kirtley to illustrate the consequences of a newspaper’s decision to allow anonymous commenting. The court drew from Kirtley’s 2010 *Minnesota Law Review* Article *Mask, Shield, and Sword: Should the Journalist’s Privilege Protect the Identity of Anonymous Posters to News Media Websites?* to note that while anonymous commenting has become commonplace

and may facilitate robust discussion, the development has encouraged “moronic, anonymous, unsubstantiated and often venomous [speech].” Also quoted from the article was an argument by Edward Wasserman, the Knight Professor of Journalism Ethics at Washington and Lee University, that “anonymous posters are nothing like confidential sources” because “the identities of the posters are ‘truly unknown,’ and ‘no one even tries to verify the information from the anonymous poster.” *Mask, Shield, and Sword: Should the Journalist’s Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 *Minn. L. Rev.* 1478, 1488 (2010).

The court further said that although it “did not want defamatory commenters to hide behind the First Amendment protection of anonymous speech,” it must “balance the prospect of too readily revealing the identity of these anonymous commenters.” The court adopted a modified version of the standard created in the 2001 case of *Dendrite International, Inc. v. Doe No. 3*, which requires plaintiffs seeking anonymous posters’ identities to notify them via the website in question that they are subject to a subpoena, identify the exact statements believed to be defamatory and produce prima facie evidence to support every element of the cause of action. Because Indiana’s defamation law requires all plaintiffs to prove actual malice, the court modified the *Dendrite* test to require the plaintiff to produce prima facie evidence to “support only those elements of their cause of action not dependent on the commenter’s identity.” If all three of these factors are satisfied, the trial court is then required to “balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.” The case was remanded to the trial court to apply the modified *Dendrite* test to the facts and determine if Miller had satisfied requirements necessary to reveal the commenter’s identity. *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

Both sides in the case found positive aspects in the court’s ruling. Speaking to the *Star* in a Feb. 21, 2012 article announcing the decision, Miller’s counsel

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Kevin W. Betz focused on the determination that the identities of anonymous posters are not protected by the state's shield law. Betz characterized the decision as saying that "protecting online commenters with the Shield Law is a bad idea, and it can injure journalism. ... Jeff and Cindy Miller deserve the thanks of everyone who values their good reputation." Paul Alan Levy, attorney for Washington-based Public Citizen advocacy organization, instead emphasized the ruling's vindication of a First Amendment right to remain anonymous. "With this decision, Indiana joins the growing consensus in state and federal courts around the country that [the balancing test] is the best way to reconcile the free speech rights of anonymous Internet speakers against the interest of plaintiffs who have been wronged by online speech," Levy commented to the *Star*.

Star Editor and Vice President Dennis Ryerson underscored the importance of protecting sources' identities. "Without that protection, people may not feel free to talk to us," Ryerson said, including "people who communicate to us on our websites." *In re: Indiana Newspapers Inc. v. Junior Achievement of Central Indiana, Inc.*, 963 N.E.2d 534 (Ind. Ct. App. 2012).

Oregon District Judge Declines to Grant Journalist Status to Accused Montana Blogger

The determination of what forms of online expression constitute journalism was once again brought into question when an Oregon federal district court declined to grant a blogger protection under the state's reporter's shield law on Nov. 30, 2011. The ruling, however, did not turn exclusively on the distinction between blogging and journalism, but rather the way the defendant invoked the Oregon shield law.

On Jan. 14, 2011, Obsidian Finance Group, LLC filed a defamation lawsuit in the U.S. District Court for the District of Oregon against Montana blogger Crystal Cox. A self-described investigative blogger, Cox operates a number of websites that include "obsidianfinancesucks.com," where she publishes criticisms of the investment firm and Kevin Padrick, its senior principal. Among the statements singled out by Obsidian in its complaint were allegations that Padrick had com-

mitted "fraud against the government," paid off the media and politicians, and a post by Cox asking "Did Oregon attorney Kevin Patrick hire a hitman to kill me?"

In an order filed July 7, 2011, District Judge Marco A. Hernandez dismissed the plaintiffs' request for summary judgment, concluding that "under the totality of the circumstances, the statements at issue

"With this decision, Indiana joins the growing consensus in state and federal courts around the country that [the balancing test] is the best way to reconcile the free speech rights of anonymous Internet speakers against the interest of plaintiffs who have been wronged by online speech."

— Paul Alan Levy,
Attorney for Public Citizen

are not actionable assertions of fact, but are constitutionally protected expressions of opinion" shielded by the First Amendment. Hernandez noted that the statements were "replete with scatter-shot, hyperbolic accusations untethered to factual data," and were "not sufficiently factual to be susceptible of being proved true or false."

Plaintiffs filed a memorandum opposing the grant of summary judgment on July 22, 2011, including additional blog posts omitted from their original request. Judge Hernandez subsequently issued an order on Aug. 23, 2011, where he concluded that a Dec. 25, 2010 post on "bankruptcycorruption.com," could cause "reasonable readers" to "reach differing conclusions about whether the statements contain or imply an assertion of objective facts." In refusing to grant summary judgment and dismiss the defamation claim, Judge Hernandez wrote that "as to this post, and in particular as to the statements made regarding tax fraud, a different reader could reasonably understand the statements to imply provable assertions of fact." Cox maintained that the reason this post was more factual than the others was that she had an inside source leaking her information, and sought to prevent its disclosure under Oregon's shield law.

The case subsequently went to trial, where Judge Hernandez held that Cox was not protected by Oregon's reporter's shield law. The shield law, O.R.S.

44.520(1), provides that no person "connected with, employed by or engaged in" any "medium of communication" shall be required to disclose any confidential source of information. Noting that the statute's provision that "'Medium of communication' has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical,

book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system," Judge Hernandez found that Cox's blog did not fit in any of these categories, but declined to address the language expanding the definition

beyond the enumerated examples. Most importantly, however, Judge Hernandez held that Cox's expression was not covered by the statute because asserting the existence of an anonymous source of factual statements in a defamation action effectively allows a defendant to use the privilege as both a "sword and shield," a tactic expressly prohibited by the shield law. This strategy would have allowed Cox to claim that a source was consulted in writing the blog post, shielding her from negligence liability, while simultaneously refusing to disclose the source's identity. *Obsidian Finance Group, LLC v. Cox*, 2011 WL 5999334 (D. Or. Nov. 30, 2011).

Despite Cox's assertions that as a blogger she qualified as "media," the court found that she had failed "to show that she is affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." Judge Hernandez offered a list of seven factors that would demonstrate journalistic activity, concluding that Cox did not qualify as "media" because she had failed to present "evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5)

mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting 'the other side' to get both sides of a story."

Further, Cox was not entitled to seek shelter from defamation even under Supreme Court precedent such as *Gertz v. Robert Welch, Inc.*, a case holding that under the First Amendment, a private plaintiff need only show negligence before he may recover compensatory damages from a media entity. This contrasts with the higher standard of "actual malice," a finding that a statement was made with knowledge of its falsity and reckless disregard for the truth, which must be shown before a public plaintiff may prevail on a defamation claim against a media entity. *Obsidian Finance Group, LLC v. Cox*, No. CV-11-57-H (D. Or. Nov. 30, 2011). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Cox was thus found liable, and a jury ordered her to pay \$2.5 million to Obsidian and Padrick.

The decision reignited a debate by bloggers and news publications over who is a journalist. Writing for Citizen Media Law Project, Eric. P. Robinson noted in a Dec. 12, 2011 blog post that Judge Hernandez was correct to observe that no court has found bloggers to be journalists and blogs to be media in the context of seeking a negligence standard for a defamation determination. However, Robinson pointed out that cases making these determinations in situations involving shield laws and reporter's privilege do exist. Robinson wrote that "it is unreasonable ... to expect there to have already been an Oregon case holding that a blog or web site was 'media' for the *Gertz* rule regarding the plaintiff's burden of proof in cases against media defendants... [T]he Internet ... is still too new, and appellate decisions involving the web are still too few (though growing), for that issue to have already been litigated." Robinson's commentary can be found at <http://www.citmedialaw.org/blog/2011/no-sky-not-falling-explaining-decision-oregon>.

In an interview for the *New York Times*' "Media Decoder" blog on Dec. 8, 2011, Bruce Sanford, a First Amendment lawyer at the Washington D.C. office of Baker Hostetler law firm, suggested that the case underlined the fact that

many shield laws were drafted prior to the advent of blogging. "Media law fashioned for the traditional press of the 1960s needs a considerable amount of renovation to apply to 21st-century digital communications.... Those state shield laws obviously need some updating." In an online story for *Forbes*

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First Amendment Attorney,
Baker Hostetler Law Firm

on Jan. 2, 2012, David Coursey wrote of a similar concern, taking issue with Hernandez' seven-step test by noting that "economics of web publishing and ease of blogging make editing and separate fact-checking a luxury that many, maybe most, online publications cannot afford." Instead, Coursey suggests that the line between bloggers and journalists "is best decided by giving benefit of the doubt to the journalist."

Cox underlined the significance of the verdict in an interview with *Seattle Weekly* on Dec. 6, 2011, saying that "This should matter to everyone who writes on the Internet." In a motion for a new trial filed on Jan. 4, 2012, Cox's new counsel Eugene Volokh and Benjamin Souede argue that clear precedent contradicts the Oregon District Court's conclusion that *Gertz*'s protections only apply to members of the media. Further, they contend that the plaintiffs should be treated as public figures, meaning "actual malice" must be shown before Cox may be liable

Minnesota Television Station Faces \$1 Million Liability in Wake of Defamation Ruling

In what may be the largest defamation award in the state's history, a Dakota County, Minn. jury imposed a \$1 million compensatory damages judgment consisting of \$100,000 in lost earnings, and \$900,000 in reputational damages, against local broadcaster KSTP-TV for a news story it ran in March 2009. Susan Anderson, a Hudson, Wis. doctor of

naturopathy, sued the television station for airing a news story alleging that her attempts to wean a patient, Cheryl Blaha, from anti-anxiety medication resulted in a suicide attempt. Naturopathy is a form of alternative medicine, practiced by holistic healers and based upon the relief that bodily functions are regulated

by "vital energy" or "vital sources." The source of the station's story was Blaha herself, who according to a Nov. 8, 2011 Minneapolis *Star Tribune* story claimed in interviews with KSTP reporter Jennifer Griswold to have attempted suicide following Anderson's actions.

Anderson contradicted this reporting by asserting that medical records indicated that Blaha's own medical doctor reduced the medication, and noting the lack of proof of a suicide attempt.

KSTP attorney Paul Hannah argued that the damages award was unparalleled in past Minnesota defamation cases. Anderson's attorney, Patrick Tierney, contended that the station "created a report instead of reporting on something," and that "KSTP bought Blaha's story hook, line and sinker, and that's what this case is about." Tierney said that the jury's finding of actual malice, a finding that the statement was made with knowledge of its falsity and with reckless disregard of the truth, would make it very difficult to get the award overturned or reduced. Nevertheless, Hannah said the station will challenge the size of the damage award, and according to the AP, will argue on appeal that it was not negligent and reported both sides of the story.

Emotional Distress Verdict Upheld Against Truthful Minneapolis Blogger

Minneapolis blogger John Hoff, author of "The Adventures of Johnny Northside" blog, is appealing a jury's verdict awarding plaintiff Jerry Moore \$35,000 for lost wages and \$25,000 for emotional distress. The verdict was upheld by Hennepin County District Court Judge Denise Reilly on Aug. 22, 2011, rejecting Hoff's motion for judgment as a matter

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of law, and stemmed from a blog posting by Hoff that accused Moore of being connected with a “high-profile fraudulent mortgage.” The story resulted in Moore’s termination from his position with the University of Minnesota’s Urban Research and Outreach/Engagement Center the following day.

The jury found that what Hoff posted was true and therefore not libelous, but concluded that the statement “tortiously interfered” with Moore’s employment and resulted in lost wages and reputational damage. (For further discussion of the jury verdict, see “Outrageous Speech, ‘Trash Torts’ and the First Amendment” in the Winter/Spring 2011 issue of the *Silha Bulletin*). The \$60,000 award was affirmed by Judge Reilly, who wrote that Moore provided “direct and circumstantial evidence” that the blog posting led to his termination by the University.

Hoff’s attorney, Paul Godfread, filed an appeal to the Minnesota Court of Appeals on Jan. 30, 2012. An *amicus* brief, prepared by the Minneapolis office of law firm Faegre Baker Daniels LLP, argued that under Minnesota law, claims of tortious interference cannot be premised upon true statements, and that in this case, the jury found Hoff’s statements to be true. Further, the brief argues that Moore’s closing argument blurred the distinction between defamation and tortious interference claims. Finally, the brief contends that the trial judge failed to conduct an “independent examination of the whole record” and was instead too deferential to the jury’s findings of fact. Joined by Minnesota chapter of the Society of Professional Journalists, the Reporters Committee for Freedom of the Press, and Silha Center for the Study of Media Ethics and Law, the brief asks the court to “apply the same rules to publicly accessible online statements that it would to a print or spoken version of the same material.” Oral argument is scheduled for May 23, 2012.

Colorado Repeals Criminal Libel Law

On April 13, 2012 Colorado Governor John Hickenlooper signed a bill to repeal the state’s criminal libel law, effective

Sept. 1, 2012. According to a March 22, 2012 Associated Press (AP) article, the bill passed the Senate unanimously and was approved by a House committee on March 22, 2012. The law made it a felony to “knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the

“Criminal defamation laws today serve all too often to obstruct scrutiny of the actions of those holding power and to deprive the people of the information they need to make decisions that will affect their lives for years to come.”

— Anthony Mills,
Acting Deputy Director,
International Freedom of Expression Exchange

natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.”

The AP reported that Colorado’s law had been used seven times in the past two years, but wrote that “in some cases, the original charge was changed to something else like harassment.” Noting that most states do not punish libel criminally, the AP wrote that lawmakers supporting the repeal believed the law stifled free speech through serious punishments like prison time.

Noteworthy among the cases brought under Colorado’s law was that of Thomas Mink, who was accused of criminal libel by a University of Northern Colorado professor in November 2003 following Mink’s publication of a satirical online newsletter, *The Howling Pig*. Police searched Mink’s home and confiscated his computer and writings, but the district attorney’s office closed the file in early 2004 after deciding it could not constitutionally prosecute Mink under the criminal libel statute. The Silha Center, together with the Student Press Law Center, filed an *amicus* brief in Mink’s appeal to the 10th Circuit alleging that then-Deputy District Attorney Susan

Knox violated his Fourth Amendment protection from unreasonable search and seizure and his First Amendment freedom of expression. The 10th Circuit reversed and remanded on appeal in July 2010, concluding that Mink had plausibly alleged that Knox violated his clearly established constitutional rights. *Mink v. Suthers*, 613 F.3d 995 (10th Cir. 2010).

On remand, Judge Lewis Babcock of the U.S. District Court for the District

of Colorado ruled in Mink’s favor in July 2011, writing that “no reasonable prosecutor could . . . believe that it was probable that publishing such statements constituted a crime warranting the search and seizure of Mr. Mink’s property.” The eight-year legal battle was finally settled on Dec. 12, 2011. (For

a full discussion of Mink’s case against Knox, see “Update: Colorado Prosecutor Violated Student Editor’s Rights with Criminal Libel Search Warrant” in the Summer 2011 issue of the *Silha Bulletin*).

Advocacy group International Freedom of Expression Exchange (IFEE) released a statement on April 19, 2012 supporting Colorado’s repeal, writing that the organization “strongly opposes treating defamation as a criminal offence and believes that civil remedies are . . . sufficient to achieve justice when defamation is alleged.” IFEE’s Acting Deputy Director, Anthony Mills, said that “criminal defamation laws today serve all too often to obstruct scrutiny of the actions of those holding power and to deprive the people of the information they need to make decisions that will affect their lives for years to come.”

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Update: Copyright Firm Righthaven Suffers Debilitating Defeats in Federal Courts

Continuing a trend established through 2011, copyright holding firm Righthaven suffered several debilitating defeats in early 2012. Since the firm's inception in January 2010, it has launched a cam-

COPYRIGHT

campaign of lawsuits challenging what it characterized as unauthorized republication of its clients' copyrighted news stories, often bullying defendant website operators into settlements in the thousands of dollars. Its recent defeats stem from court findings that the firm lacks standing to bring infringement lawsuits over reproduction of copyrighted material, creating legal precedent undercutting the company's business model and putting it on its deathbed.

Conceived as a solution to declining newspaper revenue in the wake of the Internet, Righthaven entered into written agreements with newspapers including Stephens Media LLC and MediaNews Group Inc., owners of the *Las Vegas Review-Journal* and *The Denver Post*, that purported to assign certain copyrights to the firm. Righthaven then proceeded to file more than 275 no-warning lawsuits across three states throughout 2010 and 2011, alleging infringements of copyrighted material from the two newspapers. Because the firm's complaints typically sought \$75,000 in damages per infringement, many of these cases reached preemptive monetary settlements and did not proceed to trial. (For further details on the relationship between the firm and its clients, see "News Media Seek Legal Tools to Protect Original Content" in the Summer 2010 issue of the *Silha Bulletin*.)

Righthaven encountered substantial opposition in 2011 after the validity of its business model was brought into question. The firm's Strategic Alliance Agreement ("SAA") with Stephens Media was made public in April 2011 in its lawsuit against political forum Democratic Underground.com, and revealed that the firm did not actually own the

copyrights to the news stories it purported to protect. The agreement held that Stephens Media retained a right to terminate the copyright assignment and enjoy a complete reversion of ownership, confirming suspicions that its transfers to Righthaven were insufficient to grant the firm an enforceable interest. Subsequent findings of lack of standing to sue and the recognition of a fair use defense for reproduction of entire articles placed Righthaven's future on uncertain ground. Under a fair use analysis pursuant to Section 107 of the Copyright Act, 17 U.S.C. § 107 et seq., a court looks at four factors concerning a defendant's use of copyrighted content, including the nature of the work, the purpose and character of the use, the proportion of the work used, and the use's effect on the potential market for the copyrighted work. (For an account of Righthaven's legal difficulties through 2011, see "News Media Copyright Firm 'Righthaven' Suffers Critical Legal Setbacks" in the Fall 2011 issue of the *Silha Bulletin*.)

On March 9, 2012, Judge Roger Hunt for the U.S. District Court for the District of Nevada ruled that the posting of a five sentence excerpt from a 50 sentence news article to online discussion forum Democratic Underground constituted a fair use. Further, Judge Hunt held that the defendants "committed no volitional act" constituting infringing conduct, as they were not responsible for posting the material and remained unaware of the five lines' posting until the start of litigation. The decision indicates that blogs or websites who accept posts from users without examining the content cannot be held liable for republication of copyrighted content, and that the posting of a small portion of an article represents fair use. This decision follows the disclosure of Righthaven and Stephens Media's SAA earlier in the same case last year.

Further, on March 13, 2012, the U.S. District Court for the District of Nevada ordered that Righthaven forfeit all of its "intellectual property and intangible property" to cover debts the firm in-

curred after the court dismissed its 2011 suit against online message board user Wayne Hoehn. According to U.S. District Judge Philip M. Pro, this property included "[t]he copyright registrations to more than 275 works" in Righthaven's name, and could be transferred by the court and then auctioned. In the Hoehn case, Righthaven owes more than \$60,000 in attorney's fees, adding to what Wired's Threat Level blog estimated in a March 13 story is a debt of around \$200,000 to various defendants. In an email to Wired, Marc Randazza, Hoehn's lawyer, noted that as a result of Righthaven's auctioning of the copyrights, the *Review-Journal* would have to buy the rights back itself, or face licensing fees from the future owner for any continued hosting of the stories.

According to Las Vegas business news website Vegas Inc., Righthaven filed an emergency appeal in December 2011 to block the copyright auction, suggesting that the auction was aimed at dismantling the company. Shawn Mangano, one of Righthaven's outside attorneys, wrote in the filing that "By seizing and selling the copyrights at auction, Hoehn is seeking to eviscerate Righthaven's ability to prosecute several appeals pending before this court, as well as also compromising the company's ability to prosecute several pending district court actions," and that Hoehn is doing this because it "strikes at the heart of Righthaven's content-protection driven business model." The U.S. Court of Appeals for the 9th Circuit rejected this motion on January 10, 2012.

Finally, Righthaven suffered another defeat on March 22, 2012, in a case against Pahrump Life, a blog it accused of copying a *Review-Journal* story about problems at a private prison in the Southern Nevada town of Pahrump, without permission. Though the case had been dismissed in July 2011 following revelations that Righthaven lacked standing to sue under its SAA with the *Review-Journal*, it was unclear whether that

British Media Law Developments Positive for Press

Recent decisions in British courts, proposed British governmental policy changes, and judgments issued by the Grand Chamber of the European Court of Human Rights (ECHR) will provide the press with greater access to the courts

INTERNATIONAL PRESS FREEDOM

and allow for fuller coverage of celebrities' private lives. In May, the Queen's

Speech included a proposal to change current law to allow television coverage of criminal sentencing proceedings. Additionally, the UK Court of Appeal recently held that there is a common law right for the public and the media to access court documents. The press also gained more protection in its coverage of celebrities when the ECHR issued a pair of judgments upholding the media's right to cover celebrities over their right to privacy.

Queen's Speech Announces Plan to Lift Ban on Camera Access to Film Court Proceedings in UK

News broadcasters celebrated the announcement of a government undertaking to introduce legislation to allow cameras in some court proceedings in the May 9, 2012 Queen's Speech, *The Guardian* reported. The Queen's Speech is given annually to members of Parliament and outlines the government's agenda for the coming session. Downing

Street officials and the Ministry of Justice had repeatedly expressed support for a change in policy that would permit television cameras to film sentencing proceedings, which, it argues, "would help the public understand complex legal procedures," a March 28, 2012 *Guardian* story said.

In the initial phase, camera access would be granted to film a judge's

"Following years of campaigning, we welcome this historic reform that marks an important step for democracy and open justice. The presence of cameras in our courtrooms will lead to greater public engagement and understanding of our legal system."

— Sky News, ITN, BBC
Joint Statement Following Queen's Speech

summing up and sentencing remarks in the Court of Appeal — England's second highest court. If all goes smoothly, access would be extended to the Crown Court, similar to U.S. trial courts, which serves as the court of first instance for criminal cases, the story said. According to a May 9, 2012 BBC report, the television plan revealed in the Queen's Speech said television cameras will be allowed in some courts in England and Wales, but that the access will be confined

to limited circumstances and will not permit broadcasting of certain images of a defendant or witnesses.

Under the 1925 Criminal Justice Act and the 1981 Contempt of Court Act, cameras are currently forbidden in most courts. The Supreme Court of the United Kingdom, however, is already broadcasting proceedings live. As the highest court in the UK, it

does not conduct trial proceedings, and is governed by a different set of regulations, *The Guardian* reported. The change in the law is part of plans to improve transparency in public services, BBC reported.

In the months before the speech, there had been speculation it would include a plan to allow camera access to courtrooms, and news organizations welcomed the potential change in

the law. Penny Marshall, social affairs editor for ITV News, wrote in a March 28, 2012 piece that she hoped televised proceedings "will change the way justice is seen to be done and open one of the last bastions of privacy to public scrutiny." She said "there are some reservations about how the scheme will actually work, but few real opponents." Sky News, ITN, and the BBC issued a joint statement on May 9 after the Queen made her announcement to Parliament

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dismissal was, in fact, with prejudice, a distinction that would have prohibited Righthaven from continuing to bring copyright infringement lawsuits in the district. U.S. District Judge James Mahan ruled that the dismissal was, in fact, with prejudice, representing a potentially precedent-setting victory for groups opposed to Righthaven. In a March 24, 2012 story on Vegas Inc, Laurence Pulgram,

an attorney who had participated in the case as a friend-of-the-court, called the decision "another nail in the Righthaven coffin." Noting that the "with prejudice" ruling is based on a finding that the firm's claims were meritless, Pulgram said that "[d]ismissal with prejudice also gives those whom Righthaven sued an even stronger claim to be awarded their attorneys' fees."

Righthaven has said previously that it does not have the financial means to pay the attorney's fees imposed against it, Vegas Inc reported. This should prove even more problematic for the firm following the loss of its copyright registrations in its case against Hoehn.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

about the legislative plans to lift the ban on cameras. “Following years of campaigning, we welcome this historic reform that marks an important step for democracy and open justice. The presence of cameras in our courtrooms will lead to greater public engagement and understanding of our legal system,” the statement said.

But critics of camera access are concerned that crime “victims could be traumatiz[ed] by the prospect of taking the stand while the cameras roll, and argue it will be far easier to identify and intimidate witnesses and juries if cases are filmed,” a June 5, 2011 *Guardian* story said. However, the proposed legislation would not implicate these concerns because only the filming of sentencings would be allowed. Broadcasters ultimately would want to expand the amount of access permitted, the story said. Opponents have also expressed concern over the potential for sensationalizing high-profile cases, such as murders, in order to generate big ratings. Simon Buck, Sky News associate editor, denied this was a motivation for access. “If anyone thinks this is about making money — about being commercial — they should get real,” he said. “This is going to cost us money and I don’t see a huge rush of new viewers.” Buck told *The Guardian* that opening the courts is about the public interest and the ability to report fully about the democratic system that remains closed to television.

Judith Townend, a freelance journalist and Ph.D. researcher at the Centre for Law, Justice and Journalism at the City University London, said in an opinion piece for The International Forum for Responsible Media Blog (Inform Blog) that if televising court proceedings becomes legal, it does not always mean it will be synonymous with the ethical considerations that should be made. “[A] journalist may choose to withhold certain information on ethical grounds, even if it is legally permitted to publish,” she wrote. These ethical questions are important to consider in a digital era where a trial may be televised, live-blogged, and tweeted. It is necessary, she said, to consider what information may need more context, among other ethical considerations, the post said. Townend is promoting the discussion of these issues by coordinating the “Open Justice in the Digital Era” project.

UK Court of Appeal Decision Establishes Right to Obtain Court Documents

On April 3, 2012, the UK Court of Appeal established, for the first time, a common law right of the public and media to obtain documents that are used in court cases. The case, *Guardian News and Media Ltd. v. City of Westminster Magistrates Court* after *The Guardian* requested copies of court documents related to the extradition to the United States of two British citizens, Jeffrey Tesler and Wojciech Chodan, who face bribery charges. The men are alleged to have been involved in the bribery of Nigerian officials by Kellogg Brown and Root (KBR), a subsidiary of the U.S. oilfield services company Halliburton. British prosecutors and District Judge Caroline Tubbs refused to disclose the documents. In her April 20, 2010 judgment, Tubbs acknowledged the importance of the principle of open justice and emphasized that the press had not been excluded from any part of the proceedings. She expressed the most concern over the practical problems that would be associated with the right of the public and the press to access court documents. “The Court has very limited Court staff time and photocopying facilities. The practical problems in producing copies of voluminous correspondence ... would be immense and lead to inevitable delays and public expense,” she wrote.

The Guardian appealed the Magistrate Court decision to the High Court of England and Wales Administrative Division (High Court), which upheld the decision in December 2010. The High Court is one of the senior courts of England and Wales and is the first court to hear certain “high value” cases. It has supervisory jurisdiction over all subordinate courts which include the Crown Court, Magistrates’ Courts, County Courts, and many Tribunals. *The Guardian* then appealed the decision to the Court of Appeal.

The respondents in the case, the City of Westminster Magistrates’ Court, argued that the open justice principle is satisfied if the court proceedings are held in public and reporting of the proceedings is permitted. Further, the court argued that allowing *The Guardian*’s application would go further than courts have considered necessary

in the past, that the issues contained in the documents were raised fully in open court, and that allowing the press to have this unnecessary access to documents would “give rise to serious practical problems,” according to the Court of Appeal opinion.

The Court of Appeal rejected these arguments. In finding for *The Guardian* and holding that there is a common law right for the public and the media to obtain court documents, Lord Justice Toulson wrote, “The open justice principle is a constitutional principle to be found not in a written text but in the common law. ... It would be quite wrong in my judgment to infer from the exclusion of court documents from the Freedom of Information Act that Parliament thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be proper under the open justice principle.” The full decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/420.html>.

Even though the case was being argued in a UK court, the U.S. government was the only party opposing the release of the information, despite a presumption of access to court documents in the United States. The U.S. government cited the same arguments advanced by the UK courts. In an April 3, 2012 *Guardian* commentary, David Banisar, senior legal counsel for free expression advocacy group Article 19, characterized the United States’ involvement with the case as “strange.” “The documents that the *Guardian* were trying to obtain were so basic you really do have to wonder why there was any opposition to their release, especially since no arguments were made that their release would cause any harm,” he wrote. Banisar pointed out if the case had been tried in the United States, the documents would have been routinely made available to the public and the press. “Perhaps it was US fear of having to release evidence in more controversial future cases, such as the potential extradition of Julian Assange to the US,” he wrote. (For more on a possible U.S. indictment of WikiLeaks founder Julian Assange, see “The Obama Administration Takes on Government Leakers; Transparency May be a Casualty” on page 9 in this issue of the *Silha Bulletin*.)

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Article 19 submitted an *amicus* brief in support of *The Guardian* that outlined the presumption of open justice in Commonwealth countries around the world.

Banisar's April 3 commentary said the decision "has been a long time coming." The UK has undergone a transparency revolution over the past 10 years, with the Freedom of Information Act 2000 (FOIA) forcing more than 100,000 government bodies to make information they collect publically available, he wrote. But the FOIA had limited application to the courts. "[T]he growing practice of judges and lawyers moving to a more document-focused case system and referring to documents that are only partially read out triggered the need to change the rules. ... This decision will allow for better scrutiny of the arguments and the evidence, which is especially crucial in extradition cases where a foreign government is demanding the handing over of persons based on crimes different than under UK law," he wrote.

The Court of Appeal decision was based on common law rather than what Banisar characterized as "the still evolving case law on the right to access from the European Court of Human Rights," which is still being rejected by British courts. In its analysis, the court considered common law cases from Canada, the United States, New Zealand and South Africa, and determined that because the rest of the world had moved forward on this issue of court document access, it was wise to follow in their footsteps.

Two Rulings Uphold Media's Right to Report on Celebrities

On Feb. 7, 2012 the Grand Chamber of the European Court of Human Rights (ECHR) delivered two judgments that uphold the media's right to report on celebrities. In its decision in *von Hannover v. Germany (no. 2)*, the ECHR rejected an invasion-of-privacy complaint by Princess Caroline of Monaco. App. Nos. 40660/08 and 60641/08 (Eur. Ct. H.R. Feb. 7, 2012). Princess Caroline and her husband, Prince Ernst August von Hannover had filed a complaint with the court alleging that their privacy rights had been violated in Germany in 2002 after *Frau im Spiegel* magazine published

a photo of the couple skiing during a holiday, according to an ECHR press release issued the day of the decision. At the time the photos were taken, Princess Caroline's father, Prince Rainier, was ill, a Feb. 7, 2012 Associated Press (AP) report said.

The ECHR was established by the European Convention on Human Rights which was adopted by the Council of Europe in 1953. Individuals or nations who claim that a Council member has violated the Convention can file an appeal with the Court. Princess Caroline and Prince Ernst August challenged, under Article 8, the German court's refusal to prohibit further publication of the photos in dispute. Article 8 states that "everyone has the right to respect for his private and family life, his home, and his correspondence." They alleged in particular that the courts had not responded sufficiently to the ECHR's judgment in *von Hannover v. Germany*, App. No. 59320/00 (Eur. Ct. H.R. June 24, 2004).

Since the early 1990s Princess Caroline has tried to prevent the publication of photos of her private life in the press. In the 2004 case, the ECHR held that German court decisions had infringed on Princess Caroline's right to respect her private life under Article 8. Based upon that judgment, Princess Caroline and Prince Ernst August subsequently brought several actions before civil courts seeking injunctions against further publication of the photos showing them skiing, according to the ECHR press release.

On March 6, 2007 the Federal Court of Justice of Germany — the court of last resort in all criminal and civil law cases — granted Princess Caroline's claim regarding two of the photos in dispute, stating that they did not contribute "to a debate of general interest." But it dismissed her claim in regard to the 2002 photo that appeared in *Frau im Spiegel* magazine. The court found that the accompanying article that discussed Prince Rainier's poor health was a matter of general interest and that the press had been entitled to report the story. In a Feb. 26, 2008 judgment, the Federal Constitutional Court of Germany dismissed Princess Caroline's constitutional complaint, rejecting an allegation that German courts had ignored or taken insufficient account of case law. On June 16, 2008

the same court declined, without stating its reasons, to consider further complaints concerning the publication of the same photo in *Frau aktuell* magazine.

In its February 7 judgment, the ECHR unanimously upheld the German Federal Court of Justice's decision affirming the media's right to report on how the royal family was coping with Prince Rainier's illness and how his children were reconciling their obligations to the royal family with the needs of their private life. In the judgment, the court said Princess Caroline and her lawyers "had not provided any evidence that the photos had been taken in a climate of general harassment, as they had alleged, or that they had been taken secretly." Accordingly, the court held there had been no violation of Article 8. The Court emphasized that Article 8 and Article 10, which guarantees a right to free expression, are of equal value. The court set relevant criteria that member states should consider when considering how to strike a balance between the two rights. The factors include: whether the information contributes to a debate of general interest; how well-known the person concerned is and the subject matter of the report; the prior conduct of the individual concerned; consent to, form, and consequences of the publication; and the circumstances in which the photo was taken. The ECHR's judgment can be read in its entirety at <http://www.bailii.org/eu/cases/ECHR/2012/228.html>.

A Feb. 10, 2012 Inforrm Blog post about the case, written by trainee barrister Kristin Sjøvoll of London law firm Matrix Chambers, said the "judgment provides some useful guidance concerning balancing Articles 8 and 10 where photographs are published but recognizes that the way in which those criteria are applied will vary between member states." The post said the ECHR was "reluctant to impose a one-size-fits-all standard for Europe." Although the case does not clearly draw a line between who is a "private" individual and who is a "public" individual, Sjøvoll called the judgment "a welcome contribution to the English privacy debate." Princess Caroline's personal secretary, Véronique Simian, declined to comment about the case and deferred questions to the princess's German lawyer, Mattias Prinz, according

Federal Appeals Courts Hold Mug Shots Can Be Withheld Under FOIA Exemption

On Feb. 22, 2012, a three-judge panel of the U.S. Court of Appeals for the 10th Circuit held unanimously that federal mug shots can be withheld from the public under an exemption to the federal Freedom of Information Act (FOIA). The ruling deepens disagreement among the federal circuit courts about whether the public should have access to federal mug shots. In 1996, the U.S. Court of Appeals for the 6th Circuit held in *Detroit Free Press, Inc. v. Department of Justice*, 73 F.3d 93 (6th Cir. 1996), that the mug shots were public under FOIA.

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to the AP report. Prinz told the BBC for its February 7 report on the judgment that the publication of these photos amounted to a “permanent intrusion by the paparazzi” into the Princess Caroline and Prince Ernst August’s lives.

The second ruling issued by the ECHR in *Axel Springer AG v. Germany* on February 7 involved a Hamburg Regional Court injunction issued in 2005 to stop Axel Springer, the publishing house behind the German daily tabloid *Bild*, from further publishing articles about a well-known television star who was arrested on charges of cocaine possession. App. No. 39954/08 (Eur. Ct. H.R. Feb. 7, 2012). *Bild* had published a front-page article about the individual, referred to as “X” in court documents, being arrested in a tent at the Munich beer festival for possession of cocaine. It published a follow-up article in July 2005, which reported that “X” had been convicted and fined for illegal possession of drugs after he had confessed to the crime. In granting the injunction against further publication of articles, the Hamburg Regional Court held “X’s” right to protection of personality prevailed over the public’s interest in being informed of the arrest and conviction. It was upheld by the Federal Court of Justice of Germany in December 2006. In March 2008, the Federal Constitutional Court declined to consider constitutional appeals.

But the 11th Circuit held just last year that they were not in *Karantalis v. Department of Justice*, 635 F.3d 497 (11th Cir. 2011).

“Based on the purpose of the FOIA, there is little to suggest that disclosing booking photos would inform citizens of a government agency’s adequate performance of its function,” wrote Judge Paul J. Kelly, Jr. in *World Publishing Co. v. Department of Justice*. “There is little to suggest that releasing booking photos would significantly assist the public in detecting or deterring any underlying government misconduct.” 672 F.3d 1825 (10th Cir. 2012).

The case arose when the *Tulsa World* newspaper, owned by World Publishing Co., sent a FOIA request to the United

States Marshals Service (USMS) seeking the booking photos of six pretrial detainees, according to the 10th Circuit opinion. The USMS denied the request, citing Exemption 7(C) of the FOIA, which says the government can withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.” (The full list of FOIA exemptions is available in the text of the Act, 5 U.S.C. § 552).

The court applied a three-part test that has emerged through other cases to determine whether information is covered by Exemption 7(C). The test

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The ECHR found by a vote of 12 to 5 that the Article 10 rights of Axel Springer had been violated by the injunctions granted by the German courts and awarded the published of *Bild* damages and court costs. The court reiterated that the “right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life.” Article 8 only becomes relevant if the attack attains a “certain level of seriousness.” The right to privacy cannot be relied upon in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions, like the commission of a criminal offense, the court said. The court articulated a balancing test similar to the test announced in the *von Hannover* decision. The test articulated here included two different factors that should be considered: prior conduct of the person concerned and the severity of the sanction imposed. Looking at these factors, the court concluded that “the articles did not ... reveal details of X’s private life but mainly concerned the circumstances of and events following his arrest. ... They contained no disparaging expression or unsubstantiated allegation.” The judgment is available in its entirety at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=900156&portal=hbkm&source=externalbydocnumb>

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A Feb. 9, 2012 Inform Blog post called the result “hardly surprising from the point of view of English law,” said the case nevertheless “provides a useful re-statement by the Grand Chamber of the principles applied when balancing privacy and the freedom of expression.” Mark Dennis, a media lawyer at London law firm Taylor Wessing, told the AP in an email that the court’s decision could have broad implications in Europe, in particular in Britain, where a parliamentary committee on privacy is examining such issues. “The court has expressly recognized the essential role played by the press in a democratic society, and the importance of journalistic freedom,” Dennis wrote in his email to the AP. “The judgments will no doubt be a welcome relief for the U.K. media, given the current climate of scrutiny about press standards.” (For more on injunctions used to stop the reporting of celebrity news in the name of privacy, see “Social Media Challenge British Privacy Injunctions” in the Summer 2011 issue of the *Silha Bulletin*.)

— HOLLY MILLER
SILHA BULLETIN EDITOR

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asks (1) whether the information was gathered for a law enforcement purpose and (2) whether there is a personal privacy interest at stake. If both of those elements are met, the court then (3) balances the privacy interest against the public interest in disclosure. The newspaper did not dispute the fact that the photos were gathered for law enforcement purposes, but it argued that there was no personal privacy interest at stake, and even if there were, that the public's interest in disclosure outweighed that privacy interest.

The newspaper argued that booking photos are generally available from state law enforcement agencies, and that DOJ policies prohibiting their release perpetuate a "self-fulfilling prophecy" — DOJ establishes a rule that these photographs cannot be released except for law enforcement purposes, then uses its own rule to determine that the photos are not generally available.

Additionally, the newspaper asserted that the privacy interest in booking photographs has diminished in recent years because of the increase in camera phones and video which allow people to be photographed at any time. It also argued that allowing the public access to these photographs would give the public the ability to evaluate the performance of the government by, for example, seeing whether the police have arrested the correct detainee, detecting whether the detainee has been abused, and evaluating whether the police have used racial profiling.

The court disagreed. Despite the 6th Circuit holding that "there is no privacy interest in a booking photo given ongoing and public criminal proceedings," the court held that "persons arrested on federal charges outside of the Sixth Circuit maintain some expectation of privacy in their booking photos. ... While *Tulsa World* argues that the privacy interest in a booking photograph is diminished because 'there has been an explosion of camera phones and video which allow persons to be photographed ... at any time, this argument cuts against its position. Given easy access to photographs and photography, surely there is little difficulty in finding another publishable photograph of a subject," Kelly wrote.

The court also decided that the privacy interest in the photos outweighed

the public interest in disclosure. Despite *Tulsa World's* argument that law enforcement misconduct can be judged in booking photos, the court said that it agreed "with the district court that 'disclosure of federal booking photographs is not likely to contribute significantly to public understanding of federal law enforcement operations or activities.'"

In a footnote the court said that "it is possible to envision a narrow set of circumstances that might justify" releasing the photographs in certain situations. "If a request was made on the basis of case-specific 'compelling evidence' of illegal activity, release might be appropriate."

The court was not convinced by the 6th Circuit's reasoning in *Detroit Free Press v. DOJ* from 1996 that disclosures of mug shots "in an ongoing criminal proceeding" do not implicate any private rights of the defendants. In that case, the 6th Circuit held that public disclosure of mug shots in limited circumstances can subject the government to public oversight. "For example," that court wrote, "release of a photograph of a defendant can more clearly reveal the government's glaring error in detaining the wrong person for an offense than can any reprint of only the name of an arrestee. Furthermore, mug shots can startlingly reveal the circumstance surrounding an arrest and initial incarceration of an individual in a way that written information cannot."

But the 10th Circuit disagreed with the 6th Circuit's earlier ruling, noting that the 6th Circuit "is the only circuit to conclude that there is no privacy interest in a booking photo given ongoing and public criminal proceedings," and remarked that the 6th Circuit "was undeterred by the negative impression a booking photo conveys." Instead, the 10th Circuit agreed with the 11th Circuit, which held in *Karantsalis* that "mug shots carry a clear implication of criminal activity." The 11th Circuit wrote that "a booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties."

Despite the circuit split, the U.S. Supreme Court declined to hear an appeal from the *Karantsalis* case in late January 2012. Journalists have found a way to work around the circuit split by asking counterparts with offices in the 6th Circuit, such as the Associated Press, to make the requests for them, according to a January 2012 American Society for Newspaper Editors (ASNE) report. As long as the request comes through one of the USMS district offices in the 6th Circuit, the Marshall's service has regularly provided access to the mug shots regardless of where in the United States the arrest occurred.

But the recent cases may have unsettled that equilibrium. In its brief to the U.S. Supreme Court opposing Theodore Karantsalis's petition for *certiorari*, the Department of Justice wrote that it may start denying mug shot requests made in the 6th Circuit, or ask the 6th Circuit to reconsider its 1996 decision. "The recent division of authority has now supplied an appropriate reason for the Sixth Circuit to reconsider *Detroit Free Press* in an appropriate case," the USMS wrote.

Tulsa World's attorney, Schaad Titus, told the newspaper for a Feb. 23, 2012 story that the newspaper is reviewing the decision and exploring its options, such as whether it should ask the 10th Circuit to rehear the appeal or ask the U.S. Supreme Court to review the decision.

Jailing Journalists for Identifying Child Witnesses?

In Massachusetts, state lawmakers are considering a bill that would impose up to one year's imprisonment on anyone, including journalists, who discloses the identity of a witness in a criminal proceeding who is under 18, even if the witness testifies in open court.

The Senate bill, S.B. 785, provides that employees of the court, members of the jury, journalists and other attendees at criminal proceedings "shall not ... disclose or release documents, which divulge the name or any other information, concerning a child or the information in them that concerns a child except to persons who, by reason of their participation in the proceeding, have reason to know such information; or ... disclose or release a picture of the child, except to persons who, by reason of their participation in the proceeding, have reason to possess such a picture." The full text of the bill is available at <http://www.malegislature.gov/Bills/187/Senate/S00785>.

Media lawyer Jeffrey J. Pyle, a partner at Prince Lobel in Boston, told *The Patriot Ledger* for a Jan. 27, 2012 story that the bill does not stand up to First Amendment scrutiny. “The ready conclusion is that this bill is flatly unconstitutional,” Pyle said. “There is no question it is dead on arrival if challenged in court. And to suggest that criminal penalties include a year’s imprisonment for reporting on what happens in open court is so alien to our constitutional to our constitutional protections.”

Jeffrey Hermes, a staff member for the Citizen Media Law Project at Harvard University, wrote in a Feb. 2, 2012 blog post that the bill “seems more like a tactic designed to show that its supporters care about our children rather than a functional piece of legislation that actually has a chance surviving the first constitutional challenge that comes along. To borrow a turn of phrase from Lawrence Lessig, the bill ‘practically impale[s] itself on the First Amendment.’”

According to the Jan. 27, 2012 story in *The Patriot Ledger*, the bill is being pushed by child advocates. Mike Moynihan, the policy director for state Sen. John Hart, Jr., (D-Boston), who sponsored the bill, said the bill has the backing of victim-witness advocates and resembles guidelines for protecting the privacy of child witnesses in federal courts. But the newspaper pointed out that it would not just shield the names of child witnesses, it would also prohibit reporters from disclosing any information about the witnesses.

The Supreme Court of the United States has consistently struck down court orders prohibiting the disclosure of newsworthy information about minors and legislative bans on publication of material about judicial proceedings, Hermes pointed out. For example, in *Florida Star v. B.J.F.*, 491 U.S. 526 (1989), the court said that the First Amendment prevented the imposition of civil damages on a newspaper for publishing the name of a rape victim obtained from public records. And in 1977, the Supreme Court held that a court’s injunction prohibiting attendees and media from publishing the name and photograph of a minor defendant violates the First Amendment. *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977).

In 1982, the U.S. Supreme Court struck down a Massachusetts law that

categorically required trial judges, at all trials for certain sexual offenses involving minor victims, to exclude the press and the general public from the courtroom during the victim’s testimony. The court said that the law could not be justified on the basis of encouraging minor victims of sex crimes to come forward and provide accurate testimony, especially because the statute did not deny access to the transcript of the hearing. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

“The [new] bill, in short, would criminalize the reporting of newsworthy information about court proceedings,” Pyle wrote, in a Feb. 6, 2012 blog post on the website for his law firm, Prince Lobel. “The press and the public have a constitutional right to attend criminal trials, absent a compelling interest supporting closure of the courtroom. Although protecting the psychological well-being of children can constitute a compelling interest in some cases, that interest does not justify blanket rules such as those contained” in this bill.

The bill has been referred to the Joint Committee on the Judiciary, which held a hearing on Feb. 7, 2012. There has been no action on the bill since then.

Keeping Investigations Secret in Minnesota

In Minnesota, state law enforcement officials asked the Legislature to allow them to collect intelligence information on suspected terrorists and criminals without having to disclose who they are monitoring or why.

The head of the Minnesota Chiefs of Police Association, Dave Pecchia, told the Minneapolis *Star Tribune* for a Jan. 23, 2012 story that the proposal is essential to ensuring public safety. He said Minnesota is one of two states that does not allow law enforcement to collect and classify certain information as the law proposes, and that agencies outside of Minnesota are reluctant to share intelligence data with police in Minnesota because it could become public under current state law.

“We want to get it on the table so we can have this discussion at the state Legislature,” he said. “Take care of any misconceptions about what police are going to do with the data. ... We understand there is a concern, but the benefit will outweigh the concern.”

The bill, House File 2470, was introduced in the state House of Representatives on Feb. 23, 2012, by state Reps. Tony Cornish (R-Vernon Center), Tim Kelly (R-Red Wing), and John Lesch, (DFL-St. Paul). Rep. Sandra Peterson (DFL-New Hope) was later added as an author. According to a Feb. 29, 2012 story about the bill from public affairs website Public Record Media, proponents argue that because many police incident reports in the state are currently available as public data, requests could be made for such reports in order to glean details about police surveillance activities.

But the bill has drawn the ire of open government advocates who say that similar proposals have been opposed in the past because of concerns about accuracy and privacy. Don Gemberling, an open-government expert who serves on the board of the Minnesota Coalition on Government Information, told the *Star Tribune* that other proposals have mirrored federal law, which favors law enforcement, has weak auditing standards and sacrifices citizens’ right to know what information is being collected on them. “It’s just not right for people to be making decisions about us on bad information, based on secret information,” he said.

The bill would change state law to say that “criminal intelligence data are classified as confidential data on individuals or protected nonpublic data for a period of one year.” But if the source of the data is reliable, the data were collected lawfully, and the data are accurate and current (along with several other criteria), the data could stay classified forever as confidential data on individuals or protected nonpublic data.

According to the Public Record Media story, a 2009 version of the bill was met with opposition, and the legislature created a task force to review the legislation and suggest possible changes. The bill, the report said, contains sections meant to deal with some of the concerns raised, such as restrictions on the use of intelligence data and audit-related provisions.

The bill did not go up for a vote before the legislature adjourned for the year. The text of the bill is available at <https://www.revisor.mn.gov/bin/bldbill.php?bill=H2470.0.html&session=1s87>.

– EMILY JOHNS
SILHA RESEARCH ASSISTANT

U.S. Supreme Court Extends Copyright Protection To Millions of Foreign Works

In the face of challenges brought by groups as diverse as community orchestras, publishers, and educators, the Supreme Court of the United States held on Jan. 18, 2012 that Congress was within its power to grant retroactive copyright protection to writings, films, and musical compositions produced by foreign authors. Among the

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works affected by the law are paintings by Pablo Picasso and M.C. Escher, and books by George Orwell and J.R.R. Tolkien. In a 6-2 opinion in *Golan v. Holder*, 565 U.S. ___, 131 S.Ct. 1600 (2012), the Court upheld the Uruguay Round Agreements Act (“URAA” or “Act”) against assertions that the Act violated the First Amendment by removing works from the public domain. The ruling upholds Congress’ decision to extend protection to millions of foreign works produced between 1923 and 1989, requiring creator permission or the payment of licensing fees before future performance or publication of these materials.

The dispute arose out of the United States’ delay in joining the Berne Convention for the Protection of Literary and Artistic Works, an international copyright relations regime which requires member countries to grant the same copyright protections to foreign artists that they do to their own authors. A total of 165 countries are members of the Convention, including the United Kingdom, China, and India. Though the Convention took effect in 1886, the United States declined to join until more than 100 years later in 1989.

Congress enabled U.S. implementation of Berne in 1994 by enacting section 514 of the URAA, granting copyright protection to works of Berne member countries protected in their country of origin, but lacking protection domestically. The Act addresses three types of works: those from countries where works were not granted copyright protection by the United States at the time of their creation, works that are sound recordings and thus were not protected in the United States before 1972, and works whose authors neglected to comply with pre-Berne statutory formalities.

In 2001, Lawrence Golan, a University of Denver music professor and conductor, claimed that the URAA made performance of many popular works once accessible for free, such as Sergei Prokofiev’s 1936 composition “Peter and the Wolf,” prohibitively expensive for small orchestras. Other orchestra conductors, musicians, and publishers joined him in his efforts. In 2005, the U.S. District Court for the District of Colorado rejected the initial claim by Golan

interest.” Finding that 514’s removal of works from the public domain was not justified by asserted government interests such as compliance with the Berne Convention, securing greater protection for U.S. authors abroad, or repayment for the past treatment of foreign authors whose works lacked protection in the United States, the district court granted summary judgment for Golan. This was reversed by the Tenth Circuit on Sept. 4, 2007, who found the law narrowly

“[N]othing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.”

— Justice Ruth Bader Ginsburg,
U.S. Supreme Court
Golan v. Holder

and his fellow plaintiffs asserting that section 514 of the URAA transgressed First Amendment limitations exceeded congressional authority under the Copyright Clause of the Constitution, dismissing the case. The U.S. Court of Appeals for the 10th Circuit affirmed. However, the plaintiffs successfully argued that the case be remanded and given heightened First Amendment scrutiny, claiming that removing the works from the public domain violated a vested free speech interest. The Tenth Circuit agreed that section 514 “altered the traditional contours of copyright protection,” a standard for granting higher review of congressional decisions under the Copyright Act that was established in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). (For more on the early stages of the URAA challenge, initially known as *Golan v. Gonzales*, see “Artists Challenge Copyright Extension Law,” in the Fall 2007 issue of the *Silha Bulletin*.)

On remand, the district court again held that because section 514 does not regulate speech on the basis of content, the law would be upheld if “narrowly tailored to serve a significant government

tailored to fit the goal of protecting U.S. copyright holders’ interests abroad. The U.S. Supreme Court granted *certiorari* to resolve the dispute.

On appeal, the petitioners attempted to distinguish their case from *Eldred v. Ashcroft*, which upheld the constitutionality of the Sonny Bono Copyright

Term Extension Act’s (“CETA”) 20-year extension of existing copyright terms, by underscoring that the rights at stake had already “vested.” They argued that Congress’ intrusion into the public domain took away the unlimited rights they enjoyed prior to section 514’s enactment, and that the limited rights they retained under copyright law’s “built-in safeguards” were no substitute.

In rejecting Golan and his fellow petitioners’ First Amendment claim and upholding the legislation, Justice Ruth Bader Ginsburg wrote for the majority that “nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.”

Invoking the court’s decision in *Eldred*, Ginsburg wrote that restriction on expression “is the inherent and intended effect of every grant of copyright.” Ginsburg noted that *Eldred*’s description of copyright protection’s “traditional contours” consist of the “idea/expression” dichotomy and the “fair use” defense. The former is codified at 17 U.S.C. § 102(b),

and stands for the proposition that ideas, facts, and theories in a copyrighted work are immediately available for exploitation, although the author's expression alone gains copyright protection. The fair use doctrine, codified at 17 U.S.C. § 107, allows for use or reproduction of copyrighted materials for purposes ranging from criticism to scholarship and research. Because copyright law embraced these "speech protections and safeguards" and that URAA section 514 left both of these "built-in First Amendment accommodations" undisturbed, the majority denied heightened review under the *Eldred* standard. Additionally, the majority observed that Congress attempted to ease the transition from the national scheme to an international copyright regime, including deferring the date from which enforcement of the act runs and mitigating adverse effects on certain "reliance parties" affected by the legislation.

The majority opinion found that "the text of the Copyright Clause and the historical record scarcely establish that 'once a work enters the public domain,' Congress cannot permit anyone—'not even the creator—[to] copyright it.'" The Court also said that the petitioners' First Amendment argument was undermined by their failure to allege violation of a generally applicable First Amendment prohibition, such as hinging copyright protection on an author's viewpoint. Citing ample precedent ranging from Congress' extension of copyright protection to dramatic works in 1856 and its extension to architectural works in 1990, Ginsburg wrote that "[C]ongress recurrently adjusts copyright law to protect categories of works once outside the law's compass." Given that these past expansions of copyright law affected works previously in the public domain and freely usable by the public while failing to attract First Amendment scrutiny, the majority saw no reason to employ heightened review in an analogous situation and declined to consider the public domain as a category of constitutional significance.

Ginsburg wrote that Congress' efforts "plac[e] foreign works in the position

they would have occupied if the current regime had been in effect when those works were created and first published," and granting whatever protection would have remained of a work's original copyright term. As a result, the Act was not depriving the public of any vested right to "perform, copy, teach and distribute the entire work, for any reason," but merely requiring payment for such use of an author's expression or that such activities fall under the aegis of fair use, as with all other protected works, the opinion said. "Prokofiev's *Peter and the Wolf* could once be performed free of charge;

"[T]he text of the Copyright Clause and the historical record scarcely establish that 'once a work enters the public domain,' Congress cannot permit anyone — 'not even the creator — [to] copyright it.'"

—Justice Ruth Bader Ginsburg,
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Golan v. Holder

after § 514 the right to perform it must be obtained in the marketplace. This is the same marketplace ... that exists for the music of Prokofiev's U.S. contemporaries ... that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers."

Justice Stephen Breyer's dissenting opinion, joined by Justice Samuel A. Alito Jr., conceded that the statute did not violate the First Amendment by discriminating among speakers based on their viewpoints. Nevertheless, he wrote, First Amendment problems were presented through restriction of the use of previously available material. The withdrawal of material from the public domain was sufficient for the dissent to find that the "Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute." Justice Breyer would adopt the higher level of scrutiny rejected by the majority, and wrote that he "need only find that the First Amendment interest

is important enough to require courts to scrutinize with some care the reasons claimed to justify the Act in order to determine whether they constitute reasonable copyright-related justifications for the serious harms ... the Act seems likely to impose."

In response to the ruling, Ernest V. Linek of the Boston office of intellectual property law firm Banner and Witcoff, Ltd. wrote in a Jan. 20, 2012 news post for the firm's website that the breadth of the opinion may indicate that no "public domain" work could ever be shielded from congressional activity involving

copyright protection. Linek's full reaction can be found at <http://www.bannerwitcoff.com/news/776/>.

Golan himself expressed disappointment in an interview with the Associated Press (AP) the day of the decision, stating simply "It's now official that something that's in the public domain may be taken out of the public domain at a

later date." Melissa Levine, the University of Michigan's lead copyright officer, expressed dissatisfaction with the opinion's reinforcement of *Eldred* as the status quo in terms of congressional alteration of copyright law, as well as the majority's failure to establish a new legal principle, in a Jan. 25, 2012 post on the University of Michigan Library's MPublishing blog. Levine praised Breyer's dissent for acknowledging that the "administrative cost, indefiniteness, and fear of legal exposure" will produce a chilling effect among scholars and museums that make "often obscure or special materials of little commercial value available for educational purposes in digital form via the Internet." Levine's full post can be found at <http://publishing.umich.edu/2012/01/25/golan-holder-breyer/>.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Warrantless GPS Tracking Violates Fourth Amendment; White House Defends Warrantless Surveillance

The Supreme Court held in January that attaching a GPS tracking device to a car on public roads constitutes a “search” under the Fourth Amendment

On Jan. 23 2012, the Supreme Court of the United States unanimously overturned the drug conviction of a Washington, D.C. nightclub owner because the government violated the Fourth Amendment when it placed a GPS tracker on his car to monitor his movements for 28 days.

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The decision, in what a January 23 Wired.com blog post called “arguably the biggest Fourth Amendment case in the computer age,” was hotly anticipated because of what it would mean for law enforcement’s ability to follow American citizens via technology without prior court approval. Although the decision did not explicitly state that a warrant will always be required to track people, it warned law enforcement that its actions will be more closely scrutinized.

“The government physically occupied private property for the purpose of obtaining information,” Justice Antonin Scalia wrote on behalf of the court. “We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”

Warrantless GPS Tracking Violated Fourth Amendment

United States v. Jones arose from the arrest of Washington, D.C. resident Antoine Jones. The owner of D.C.’s “Levels” nightclub, police began to suspect Jones of drug trafficking. As part of an investigation by a joint FBI and Metropolitan Police Department task force, officers watched the nightclub, installed a camera focused on the front door of

the nightclub, and tapped Jones’s cell phone. The police obtained a warrant to install the GPS device on his car from a federal judge in Washington, D.C., but by the time it was installed on his car in Maryland, the warrant had expired. As a result, the government simply argued that a warrant was never required in this case, according to Scalia’s opinion. The government tracked the car’s movements for 28 days, and once had to replace

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— Justice Antoine Scalia,
U.S. Supreme Court
U.S. v. Jones

the tracker’s battery while the car was parked in Maryland. The device indicated the car’s location within 50 to 100 feet via cellular phone, and relayed more than 2,000 pages of data over the four-week period. 132 S.Ct. 945 (2012).

Eventually, Jones was convicted of conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. He was sentenced to life imprisonment by the federal D.C. District Court. The U.S. Court of Appeals for the D.C. Circuit reversed his conviction, holding that the police violated Jones’s Fourth Amendment rights when it used the tracker to gather so much information about his whereabouts.

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” unless the government has probable cause that a crime has been committed, something law enforcement has to

show before obtaining a warrant. After granting *certiorari*, the Supreme Court affirmed the D.C. Circuit, holding that that the installation of the GPS device on the Jeep and its use of the tracker to monitor the vehicle’s movements was a “search” within the meaning of the Fourth Amendment.

Scalia wrote that for several centuries, the court’s interpretation of Fourth Amendment violations was closely tied

to the idea of common-law trespass. In recent decades, as technology has advanced, the court has expanded that jurisprudence to include the idea of violating someone’s “reasonable expectation of privacy” even if no technical trespass has occurred. Citing the court’s decision in *Katz v. United States*, Scalia pointed out that “the Fourth Amendment protects people, not places” and found a viola-

tion in attachment of an eavesdropping device to a public telephone booth.” 389 U.S. 347 (1967).

But Scalia made clear that protecting someone’s “reasonable expectation of privacy” was not meant to supplant the traditional focus on trespass, but to provide additional protection. In a footnote, Scalia described an 18th-Century corollary to the government’s attachment of a GPS tracking device: “A constable’s concealing himself in the target’s coach in order to track its movements. ... There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search.”

The U.S. Court of Appeals for the D.C. Circuit held that Jones’s Fourth Amendment rights were violated because the police gathered such a massive amount of information about him by installing the GPS tracker: Even if he were not entitled to a reasonable expectation of privacy in an individual car trip because it was exposed to the public, he does have a reasonable expectation of privacy

in the “mosaic” created by tracking the entirety of his public movements for almost a month. *United States v. Maynard*, 615 F.3d 544 (2010).

“Repeated visits to a church, a gym, a bar or a bookie tell a story not told by any single visit, as does one’s not visiting any of those places in the course of a month,” Judge Douglas Ginsberg wrote.

But Scalia’s majority opinion did not adopt the same approach. In fact, he wrote that engaging in extensive surveillance without a warrant via manpower rather than technology would be constitutional. “[O]ur cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”

The government had argued that even if the installation of the device did constitute a “search,” it had probable cause and thus the Fourth Amendment was not implicated. The court rejected this claim. “We have no occasion to consider this argument,” Scalia wrote. “The Government did not raise it below, and the D.C. Circuit therefore did not address it. ... We consider the argument forfeited.”

Chief Justice John Roberts, and Justices Anthony Kennedy, Clarence Thomas and Sonia Sotomayor joined Scalia’s majority opinion, but separate concurrences from Justices Sotomayor and Alito suggest that a majority of the justices may also believe that even in the absence of the trespass required to install the device, the Fourth Amendment may have been implicated simply by the gathering of such an extensive amount of data from the device.

“GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations,” Sotomayor wrote. “... The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.”

According to a Jan. 23, 2011 report in *The New York Times*, a lawyer for the federal government argued that the number of times the federal authorities used GPS devices to track suspects was “in the low thousands annually.” Vernon Herron, a former Maryland state trooper now on the staff of the University of Maryland’s Center for Health and Homeland Security, told the *Times* that state and local law enforcement officials used

“[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.”

— Justice Sonia Sotomayor,
U.S. Supreme Court
Concurring in *United States v. Jones*

GPS and similar devices “all the time,” and added that “this type of technology is very useful for narcotics and terrorism investigations.”

Justice Alito’s concurrence, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan, argued that basing the Fourth Amendment violations solely on the trespass that occurred when the device was installed is insufficient. “[T]he Court’s reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked,” Alito wrote. “For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels?”

Alito said that “in circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. ... A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way. To date, however,

Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.” Applying that test, he said, “society’s expectation has been that law enforcement agents and others would not — and indeed, in the main, simply could not — secretly monitor and catalogue every single movement of an individual’s car for a very long period.”

The *Jones* decision was “a signal event in Fourth Amendment history,” said Walter Dellinger, a lawyer for the defendant and a former acting United States solicitor general, in an interview for a Jan.

23, 2012 story in *The New York Times*. “Law enforcement is now on notice that almost any use of GPS electronic surveillance of a citizen’s movement will be legally questionable unless a warrant is obtained in advance.”

Before the decision was issued, Gene Policinski, senior vice president and executive director of the First Amendment Center, suggested in a Nov. 11, 2011 blog post that allowing the government to pursue this kind of surveillance without a warrant could chill First Amendment freedoms such as freedom of speech and association. “The freedom to associate with others of similar and perhaps unpopular views, and to share controversial political or social concepts, fuels the marketplace of ideas that is essential to a democratic republic. It’s no stretch to see that such meetings and discussions are chilled by the fear that an unbridled “Big Brother” may be watching and recording our every move, without the need to convince a judge that such surveillance is permitted under the law.”

Obama Administration Defending Warrantless Electronic Surveillance of Americans

The Obama Administration has recently been on the defensive regarding a

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federal law that authorizes warrantless electronic surveillance of Americans without a probable-cause warrant if one of the parties to the communication resides outside of the United States and is suspected of a link to terrorism.

In March 2011, a three-judge panel of the U.S. Court of Appeals for the 2nd Circuit held unanimously that a group of non-profit organizations including Global Fund for Women, Global Rights, and Human Rights Watch would be allowed to challenge the law authorizing the surveillance, even though they could not demonstrate they were subject to the eavesdropping or suffered hardships because of it, according to a Sept. 21, 2011 post on Wired.com's Threat Level blog.

In 2008 Congress updated sections of a foreign surveillance law, creating new procedures for authorizing foreign intelligence electronic surveillance that targets non-Americans outside the United States, according to the opinion in *Amnesty International v. Clapper*. The updates, the panel found, meant that the government no longer needed to submit individual surveillance applications to the court that reviewed such applications. Instead, it could apply for mass surveillance authorization "by submitting to the [court] a written certification and supporting affidavits attesting generally that a significant purpose of the acquisition is to obtain foreign intelligence information and that information will be obtained from or with the assistance of an electronic communication service provider," Judge Gerard Lynch wrote for the panel.

Under the previous law, the court that evaluated the applications had to find "probable cause to believe both that the surveillance target is a 'foreign power' or agent thereof and that the facilities to be monitored were being used or about to be used by a foreign power or its agent ... [Under the new amendments, the court] simply verifies that the government has made the proper certifications. ... In practice, these new authorization procedures mean that surveillance orders can be significantly broader ... than they previously could have been." The panel held that the plaintiffs had standing

to challenge the statute because the government's new procedures caused them to fear that their communications will be monitored, and thus undertake costly measures to protect the confidentiality of their international communications. *Amnesty International v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

"[T]he government's surveillance practices should not be immune from judicial review. And this decision ensures that they won't be."

— Jameel Jaffer,
ACLU Deputy Legal Director

Wired.com's Threat Level blog reported, "after three years of litigation over whether the plaintiffs had standing, the merits of the case could soon be litigated in a New York federal court," David Kravets wrote. "That is, if the Supreme Court does not intervene or the administration does not play its trump card: an assertion of the powerful state secrets privilege that lets the executive branch effectively kill lawsuits by claiming they threaten to expose national security secrets."

On Sept. 21, 2011, the appeals court denied a motion for the entire court to rehear the case. According to a post on *The Washington Post's* "Checkpoint Washington" blog the same day, the ruling "marks the first time any group of plaintiffs has gotten so far in the effort to challenge the constitutionality of the law as it was revised in 2008."

ACLU Deputy Legal Director Jameel Jaffer hailed the ruling in comments to *The Washington Post*, saying that "the government's surveillance practices should not be immune from judicial review. And this decision ensures that they won't be."

California Governor Vetoes Bill Making Warrantless Cell Phone Searches Illegal

In October 2011, California Governor Jerry Brown vetoed a bill that would have made it illegal for police to search

an individual's portable electronic devices while arresting him or her unless they had a warrant for the search.

The bill, SB 914, was sponsored by the ACLU and written by state Sen. Mark Leno (D-San Francisco), according to a Oct. 10, 2011 story in the *Los Angeles Times*. It was drafted with the intention to overturn *People v. Diaz*, a January 2011 decision from the California Supreme Court that held that a warrantless search of an arrested person's text messages was valid as incident to a lawful arrest. The full text of the bill can be found at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_914&sess=CUR&house=S.

People v. Diaz, 51 Cal. 4th 84 (Cal. 2011).

The state's high court held that while searching arrested people without a warrant, police can treat the files on a suspect's cell phone just as they would treat the contents of his or her pockets. Peter Scheer, executive director of the California-based First Amendment Coalition, criticized the court's decision in an Oct. 10, 2011 blog post on the group's website. "That reasoning, of course, ignores the fact that cellphones contain sensitive and confidential files, both personal and professional, by the gigabyte. [The bill] was based on the idea that a search of a cellphone is equal in intrusiveness to a search of one's office desk or bedroom. Just as police must have a warrant to search a desk or bedroom, so they should have to get a warrant to search a cellphone."

Brown said in an Oct. 9, 2011 statement to the members of the California State Senate that he vetoed the bill because "the courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizures protections." The full veto message can be found at http://gov.ca.gov/docs/SB_914_Veto_Message.pdf.

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

Pentagon Says No Misconduct in Bush Era TV Military Analyst Briefing Program

A Pentagon briefing program established by President George W. Bush's administration designed to encourage TV and radio military analysts to put a positive spin on news coverage of the Iraq war was found to

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be in compliance with U.S. Defense Department directives and regulations despite ethical concerns involving conflicts of interest. The Pentagon's inspector general's office issued its findings in a December 2011 report after a nearly three-year investigation. The investigation was launched after a 2008 Pulitzer Prize-winning article in *The New York Times* described how, after the Sept. 11, 2001 attacks, the Pentagon developed close relationships with retired military officers who worked as analysts for TV and radio networks. Even after the report, critics are still concerned about the relationship between news networks and military analysts, but the practice appears to be continuing in the context of reporting on a potential conflict with Iran.

David Barstow's April 2008 *New York Times* story, "Behind TV Analysts, Pentagon's Hidden Hand," suggested that the relationship the Pentagon developed with military analysts as a part of this briefing program violated Pentagon rules against propaganda. The story further posited that the retired military officers trumpeted administration talking points in appearances on network and cable news broadcasts and opinion pieces in major newspapers in exchange for access to high-level military officers and Bush administration officials. The full 2008 *Times* story is available at <http://www.nytimes.com/2008/04/20/us/20generals.html?pagewanted=all>. (For more on the original *Times* story, see "Times' Story about Military Analysts Makes Ripples Not Waves" in the Spring 2008 issue of the *Silha Bulletin*.)

Following the story, the Pentagon suspended the briefing program and members of Congress — led by Senate Armed Forces Committee Chairman Sen. Carl Levin (D-Mich.) — asked that the Defense Department's inspector general to begin an investigation. In January 2009,

the inspector general's office released its first report finding no wrongdoing in the program, according to a Dec. 24, 2011 *Times* report. But soon after, the office retracted the report because it "was so riddled with inaccuracies and flaws that none of its conclusions could be relied upon." The inspector general launched a new inquiry in late 2009.

The Washington Times reported on Dec. 1, 2011 that the inspector general's final report on the briefing program again

"Although we largely had to rely on interviews, we found the intent of the RMA outreach activities was to provide information to the public through former military members, as credible third party subject matter experts."

— Pentagon Inspector General Report:
"Review of Matters Related to the Office
of Assistant Secretary of Defense (Public
Affairs) Retired Military Outreach Activities"

found no wrongdoing. The "Review of Matters Related to the Office of Assistant Secretary of Defense (Public Affairs) Retired Military Analysts Outreach Activities," completed on Nov. 21, 2011, confirmed that under Secretary of Defense Donald Rumsfeld, the Pentagon "made a concerted effort starting in 2002 to reach out to network military analysts to build and sustain public support for the wars in Iraq and Afghanistan," according to the Dec. 24 *New York Times* story. The newest inquiry found that from 2002-2008, the briefing program organized 147 events for 74 military analysts. This included 22 meetings at the Pentagon, 114 conference calls with generals and senior officials, and 11 Pentagon-sponsored trips to Iraq and Guantanamo Bay, Cuba. According to the report, Rumsfeld, the chairman of the Joint Chiefs of Staff or both were involved in 20 of the events.

The report also documented conversations between retired officers acting as military analysts and Pentagon officials. One retired officer said Rumsfeld told him, "You guys influence a wide range of people. We'd like to be sure you have the

facts." The report considered whether the Pentagon's outreach was an honest effort to inform the public, or rather, an improper campaign intended to manipulate the press. The inquiry confirmed that Rumsfeld's staff often provided military analysts with talking points before making network appearances. In some cases, the report said, analysts "requested talking points on specific topics or issues." One analyst described them as "bullet points given for a political purpose to

someone who is going to make a speech, or go on television, or radio, or write something." Another military analyst told investigators that the intent of the briefing program "was to move everyone's mouth on TV as a sock puppet," but that continuing to participate in the program did not require analysts to be a completely "parrot," or in other words, regurgitate what they had been told.

The inquiry also confirmed that Rumsfeld hired a company to track and analyze what was said during military analyst media appearances. Four analysts reported that they were removed from the briefing program "because they were critical" of the Pentagon, the report said. A former Pentagon official told investigators that when retired four-star Army general and NBC News military analyst, Barry McCaffrey, "started challenging" Rumsfeld during on air appearances, he was told that Rumsfeld wanted him "immediately" removed from the invitation list because McCaffrey was no longer considered a "team player," the report said. Rumsfeld told investigators he did not recall this incident. Similarly, retired four-star Army Gen. Wesley K. Clark, who worked as a military analyst for CNN, said that when he was no longer invited to special briefings, he "took it as a sign" that the Pentagon "was displeased with his reporting," according to the report. Clark also told investigators a CNN official told him that the White House had asked the news organization to release him from his contract as a commentator.

Military Analysts, continued on page 30

Military Analysts, continued from page 29

Several other top aides to Rumsfeld contradicted these accounts of the program and insisted the goal was to inform and educate the military analysts. Many of the other military analysts interviewed by investigators agreed. In response to conflicting interviews, the inspector general's office examined nearly 25,000 pages of documents related to the briefing program. Except for one "unsigned, undated, draft memorandum," investigators did not uncover any documents that described program motives or strategies. Therefore, the report said they had to rely heavily on interviews with Rumsfeld's former public affairs aides. "Although we largely had to rely on interviews, we found the intent of the RMA outreach activities was to provide information to the public through former military members, as credible third party subject matter experts." The report also said the program included a "reasonable cross section of media outlets" based on its analysis of in-Pentagon meeting attendance and travel events.

The report also addressed the issue of whether military analysts with ties to defense contractors used their Pentagon access to senior officials to gain a competitive business advantage. The inquiry revealed that at least 43 of the 63 military analysts were affiliated with defense contractors. Investigators asked 35 of those affiliated whether their participation in the program benefited their business interests and nearly all of them said it did not. According to the report, investigators did not identify military analysts who used the program activities "to gain new or expanded contract business or who profited financially, related to the contractor affiliation from information received" as a part of the program. "There are potentially other tangible and intangible benefits" that analysts may have gained as a part of their participation in the program, the report said, but emphasized this inquiry only addressed the potential benefits to defense contractors. The inspector general's redacted report can be found at <http://www.dodig.mil/Ir/reports/RMATheFinalReport112111redacted.pdf>.

According to the December 1 *Washington Times* story, the inspector general's report marked the fourth time the briefing program was found to be free of improper conduct. In addition to the two inquiries led by the Pentagon's inspector general's office, the Government Accountability Office's (GAO),

Congress' investigatory arm, also found that the program had followed regulations. The story also made reference to the Federal Communications Commission's (FCC) investigation into whether TV broadcasters broke rules dealing with the proper disclosure of sponsorship when military analysts appeared, but no report has been issued by the regulatory agency. Keith Urbahn, spokesman for former Defense Secretary Rumsfeld, told *The Washington Times*, "Two things ought to happen, though they never will. One, the *New York Times* should give back its Pulitzer for a story that is now proven to be a fabrication. And two, Sen. Carl Levin should reimburse the U.S. taxpayers for what must be the millions of dollars squandered in pursuit of repeated investigations that he ordered to fit his partisan agenda. And while they're at it, the *New York Times* and the senator from Michigan ought to apologize to the uniformed military officers whose reputations were maligned by their attacks."

Networks Shied Away From Reporting on Questionable Analyst Program

Despite Barstow's 7,600-word Sunday *New York Times* cover story on April 20, 2008, a May 8, 2008 Politico.com report noted the lack of attention the investigation into the Pentagon's military analyst program was receiving on television airwaves. "Even with countless media outlets available these days, a Sunday *New York Times* cover story could always be counted on to send a jolt through the television news cycle. But apparently that's no longer the case."

Bloggers "kept the story simmering" and Democratic congressional leaders called for investigations into the Pentagon briefing program. Reps. Rosa DeLauro (D-Conn.) and John Dingell (D-Mich.) sent a letter to the FCC urging former Chairman Kevin J. Martin to investigate the Pentagon's program and any potential violations of the law by networks or military analysts, the Politico.com story said. Now-former FCC Commissioner Michael J. Copps responded to Democratic efforts in a statement: "President Eisenhower warned against the excess of a military-industrial complex. I'd like to think that hasn't morphed into a military-industrial-media complex, but reports of spinning news through a program of favored insiders doesn't inspire a lot of confidence."

The FCC request followed DeLauro's letters to five network executives on

April 24, 2008: NBC News President Steve Capus, now-former ABC News President David Westin, CBS News President Sean McManus (now president of CBS Sports), FOX News chief executive Roger Ailes, and CNN News Group President Jim Walton. A response letter from ABC on April 29, 2008 said it employed two retired military analysts: Retired Gen. Jack Keane, former Deputy Chief of Staff to the U.S. Army, and retired Army Maj. Gen. William Nash. The letter said ABC News policy requires consultants to disclose any outside employment and both of them had done so. The network also said it was aware of Keane's support of military action in Iraq and his role in recommending it to the U.S. Government. "On several occasions when General Keane appeared in an ABC News program we specifically disclosed to our audience his position as an (unpaid) advisor on the subject," ABC News President David Westin wrote. The letter also clarified confusion over whether military analysts are held to the same ethical rules as full-time journalists. ABC said while reporters are not permitted to have outside employment, consultants may be free to do so, as long as it is disclosed and the network can take it into account when determining subjects they can address on network programming. "From what I know of our reporting involving our military analysts, I am satisfied that ABC News has acted responsibly," Westin wrote. ABC's letter can be viewed at http://www.politico.com/pdf/PPM44_080508_abc001.pdf.

CNN President Jim Walton also responded to DeLauro's letter on May 2, 2008, writing that CNN "maintains a firm commitment to the highest journalism standards." He said CNN is sensitive to the issue of conflicts of interest and requires all contributors to formally disclose of all business ties. In a periodic review of contributors, CNN looked into the disclosures of General Marks in 2007 and "discovered the extent of his dealings and immediately ended [their] relationship with him." Walton wrote that CNN holds "every contributor to the highest ethical standards." CNN's letter can be viewed at http://www.politico.com/pdf/PPM44_080508_cnn001.pdf.

The Project for Excellence in Journalism tracked the mainstream media coverage for a week after the *New York Times* story on the briefing program ran, and found that out of approximately 1,300 news stories, only two of them referenced the Pentagon analysts scoop,

according to the May 8 Politico.com story. Both aired on PBS's "NewsHour." Andrew Tyndall, an independent TV analyst who monitors nightly newscasts told Politico that "broadcast networks rarely do self-criticism stories." However, he said, "this is really the sort of thing that all of the networks should have addressed online." In April 22, 2008 *Los Angeles Times* story, Scott Collins argued the original *Times* story made "minimal ripples with the public because the TV networks ignored it and it had to compete with a democratic presidential primary in Pennsylvania." Collins also pointed out that none of the Sunday morning TV talk shows discussed the article. Brian Williams, anchor of "NBC Nightly News" responded to the *Times* story 10 days after it ran on his blog, Politico reported, and said he "read the article with great interest." Williams mentioned working alongside retired Gen. Barry McCaffrey and the late retired four-star Army Gen. Wayne Downing and said "All I can say is this: These two guys never gave what I considered to be the party line. They were tough, honest critics of the U.S. military effort in Iraq." Williams' full blog post response can be viewed at http://dailynightly.msnbc.msn.com/_news/2008/04/29/4371964-different-times.

Unlike some newspapers, most broadcast networks do not have ombudsman or public editors, which the Politico.com story said leaves "little room for transparency if they refuse to comment or commit to a follow-up story." CBS's Public Eye blog, created in the wake of Dan Rather's "Memogate," was intended to respond to viewer concerns about reporting and analysis. "Memogate" involved a report that relied on a series of documents regarding President George W. Bush's service in the National Guard which turned out to be fabrications. The blog was discontinued in 2008, following cutbacks, Politico reported. "This controversy about military analysts would have been right in our ballpark," said Dick Meyer, former editorial director of CBS News who spearheaded the Public Eye project in an interview with Politico. "It's irresponsible for a modern news organization to not have some kind of readers' advocate, some kind of public editor function."

Edward Wasserman, Knight Professor of Journalism Ethics at Washington and Lee University, challenged the use of these so-called military analysts on news coverage of all subjects because they blur the line between journalists and sources. "What they are is a new breed of newsroom mutt," Wasserman wrote in an April 28, 2008 *Miami Herald* column. Wasserman argued that the line between a journalist and a source should be clear. If an expert is necessary to speak with authority on a

"Two things ought to happen, though they never will. One, the *New York Times* should give back its Pulitzer for a story that is now proven to be a fabrication. And two, Sen. Carl Levin should reimburse the U.S. taxpayers for what must be the millions of dollars squandered in pursuit of repeated investigations that he ordered to fit his partisan agenda."

— Keith Urbahn,
Spokesman for former
Secretary of Defense Donald Rumsfeld

complicated issue, journalists should make sure they find a truly independent individual. "Institutionalizing the news consultant is no way to enrich the news; it's just another way to corrupt it. Consultants must go," Wasserman wrote. Wasserman spoke at the Silha Center's 2008 Spring Ethics Forum, which focused on strategies for remaining independent when covering politics and war. (See "Forum Explores Journalistic Independence, War and Politics" in the Spring 2008 issue of the *Silha Bulletin*.)

Gen. McCaffrey Privately Briefs NBC Officials on War with Iran

Reports in February indicate that TV and radio networks may not reduce their use of military analysts despite the controversy over whether they are giving an objective analysis. On Feb. 28, 2012, online political magazine Salon.com reported NBC has continued its relationship with retired Gen. Barry McCaffrey, who was a member of the

Pentagon's briefing program, and according to Barstow's reporting, deeply invested in war policies. According to the story, McCaffrey presented a seminar to approximately 20 NBC executives and producers, including NBC News President Steve Capus, entitled "Iran, Nukes, & Oil: The Gulf Confrontation" on Jan. 12, 2012. Salon.com obtained the Power Point presentation and said McCaffrey "all but predicts war with Iran within the next 90 days: one that is likely to be started by them" followed by further

discussion about the Iranian threat to the United States. Blogger Glenn Greenwald called this meeting and PowerPoint a "nice glimpse" into the "merger between the American media and the military" that was first illustrated in Barstow's Pulitzer Prize-winning coverage.

NBC released a response statement to Greenwald's report on Feb. 29, 2012, according to a Huffington Post story the same day. The network called the article "inaccurate,

ignorant," and an "insulting depiction of [NBC News'] editorial process," the story said. NBC did say McCaffrey presented his thoughts on Iran at a recent editorial board meeting. "In similar sessions, we have received the views of current and former US government officials. ... There is no singular view of editorial issues that permeate our editorial discussions. Indeed, editorial board meetings, with diverse representation are an important part of any open-minded journalistic enterprise." Greenwald responded through an update to his February 28 blog post and said it is "impossible to assess the validity of NBC's claim that they invite those with 'vastly different world views' when it comes to Iran..." He also said despite NBC's accusations of inaccuracies, it "does not even purport to identify a single inaccuracy in any thing I reported."

— HOLLY MILLER
SILHA BULLETIN EDITOR

Internet Outrage Tables Online Piracy Legislation; SOPA/PIPA Supplanted by New Proposals

What was characterized as a grassroots online protest in January prompted Congress to postpone indefinitely the consideration of two bills intended to target online piracy that critics contended would damage free speech on the Internet. In the wake of the

COPYRIGHT

backlash, alternative legislation aimed at protecting intellectual property rights on the Internet has emerged.

A “vast alliance” of chip makers, Internet service providers, rival web companies and digital rights groups targeted the bills that they believed would allow the censoring of the Internet, according to a Jan. 26, 2012 story in *The New York Times* on the protests. Some websites, including popular Internet encyclopedia Wikipedia, went dark for a day to protest the bills, and Congressional e-mail servers were “deluged with messages from citizens opposing the bills.”

The protest was aimed at the “Stop Online Piracy Act” (SOPA) in the House of Representatives and the “Protect Intellectual Property Act” (PIPA) in the Senate. Broadly speaking, the bills aimed “to cut off the oxygen” for foreign sites that engage in piracy. The bills focus enforcement efforts on U.S.-based search engines such as Google and Yahoo, payment processors such as PayPal, and ad servers that allow the piracy sites to function. The legislation was supported by business lobbies including the Motion Picture Association of America and the U.S. Chamber of Commerce. The full text of SOPA can be found at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3261;> and the full text of PIPA can be found at <http://www.gpo.gov/fdsys/pkg/BILLS-112s968rs/pdf/BILLS-112s968rs.pdf>.

The bills would have allowed Internet content creators to target copyright-infringing websites that are outside of the United States and thus not susceptible to traditional lawsuits in the United States to stop the copyright infringement. Under SOPA, the U.S. attorney general is authorized seek court orders against targeted offshore websites that would then be served on U.S. Internet

service providers (ISPs), according to the bill. Those ISPs would then, within 5 days after being served with a copy of the order, “take technically feasible and reasonable measures designed to prevent access by its subscribers located within the United States to the foreign infringing site (or portion thereof) that is subject to the order.”

Many groups and organizations expressed concern over the legislation. A Jan. 18, 2012 story about the bills on tech media website CNET described the process as “kind of an Internet death penalty.” A Nov. 2, 2011 blog post from the Electronic Frontier Foundation (EFF) said “[SOPA] threatens to transform copyright law, pushing internet intermediaries — from Facebook to your [Internet Service Provider] — to censor whole swaths of the Internet. SOPA could forever alter social networks, stifle innovation and creativity, and destroy jobs, which is why Rep. Zoe Lofgren [D-Calif.] wasn’t exaggerating when she said SOPA ‘would mean the end of the Internet as we know it.’”

PIPA aimed to target the domain name system providers, financial companies, and ad networks, rather than the ISPs. SOPA could also require ISPs to monitor customers’ traffic and block websites suspected of copyright infringement. According to a Jan. 17, 2012 PCWorld story, the bills could also apply to counterfeit goods and medications.

The bills allow copyright holders to seek these court orders if there is a “reasonable belief of copyright infringement,” and the orders would require payment providers, advertisers, and others to stop doing business with an infringing website.

That “reasonable belief” standard led opponents of the bill to believe that neither SOPA nor PIPA would do enough to prevent false accusations of piracy, because even if the claim turns out to be false, the website still suffers. The standard “is incredibly low and the potential for abuse is off the charts,” EFF told PC World about the bill. In a Jan. 28, 2012 editorial, *The New York Times* called SOPA and PIPA “flawed bills ... that could have stifled speech and undermined Internet safety.”

A group of more than 100 intellectual property law professors from across the country signed on to letters protesting SOPA and PIPA. In a letter dated July 5, 2011, the professors said SOPA would redefine the standard for copyright infringement on the Internet, allowing the government to block Internet access to websites that “‘facilitate’ copyright or trademark infringement — a term the Department of Justice currently interprets to require nothing more than having a link on a web page to another site that turns out to be infringing,” as well as “allow any private copyright or trademark owner to interfere with the ability of web sites to host advertising or charge purchases to credit cards, putting enormous obstacles in the path of electronic commerce.”

But “most significantly,” the professors argued, “it would do all of the above while violating our core tenets of due process. By failing to guarantee the challenged web sites notice or an opportunity to be heard in court before their sites are shut down, SOPA represents the most ill-advised and destructive intellectual property legislation in recent memory. It is directly at odds with the United States’ foreign policy of Internet openness, a fact that repressive regimes will seize upon to justify their censorship of the Internet. And it violates the First Amendment.” A copy of the letter can be found at https://www.cdt.org/files/pdfs/SOPA_House_letter_with_PROTECT_IP_letter_FINAL.pdf

After the outcry, the White House issued a statement stating that “Any effective legislation should reflect a wide range of stakeholders, including everyone from content creators to the engineers that build and maintain the infrastructure of the Internet. While we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increases cyber-security risk, or undermines the dynamic, innovative global Internet. Any effort to combat online piracy must guard against the risk of online censorship of lawful activity, and must not inhibit innovation by our dynamic businesses large and small.”

According to a Jan. 26, 2012 story in *The New York Times*, no one was more surprised by the sudden uprising against the bills than their backers. The story said that Christopher J. Dodd, a former Democratic senator from Connecticut who is now chairman of the Motion Picture Association of America (MPAA), marveled at the tech industry's ability to "organize and communicate effectively with consumers." Speaking at the Sundance Film Festival, he called the uprising "a watershed event," the likes of which he had not witnessed in his 30 years in politics.

"In some ways," the story said, "it was the awakening of a generation that has come to rely on its right to digital freedom. 'What this did show is as a citizen in the Internet age, you have to add the Internet and your digital rights and liberties onto the list of things you need to be worried about if you want to retain your political freedoms,' said Rebecca MacKinnon, a fellow at the New America Foundation."

Cary Sherman, the chief executive of the Recording Industry Association of America (RIAA), a trade group that represents music labels, wrote an op-ed for *The New York Times* on Feb. 8, 2012, criticizing the online protest as "an abuse of trust and a misuse of power." He said that in initially supporting SOPA and PIPA, "policy makers had recognized a constitutional (and economic) imperative to protect American property from theft, to shield consumers from counterfeit products and fraud, and to combat foreign criminals who exploit technology to steal American ingenuity and jobs. He asked whether the "flood of e-mails and phone calls to Congress" was "the result of democracy, or demagoguery?"

For those who supported the online protest, "no doubt, some genuinely wanted to protect Americans against theft but were sincerely concerned about how the language in the bill might be interpreted," Sherman continued. "But others may simply believe that online music, books and movies should be free. And how many of those e-mails were from the same people who attacked the Web sites of the Department of Justice, the Motion Picture Association of America, my organization and others as retribution for the seizure of Megaupload, an international digital piracy operation?"

According to a Jan. 19, 2012 report in *The New York Times*, federal authorities shut down the Hong Kong-based file-sharing website Megaupload and seized its domain name that day. Kim Dotcom, Megaupload's founder, is accused of running an international enterprise based on Internet piracy, and he and several other executives were arrested in Auckland, New Zealand by local police following an armed raid, during which millions of dollars in assets were also seized. In retaliation, the hacker collective that calls itself "Anonymous" attacked websites operated by the Justice Department, as well as those belonging to major entertainment companies and trade organizations.

The *New Zealand Herald* reported on March 18 that New Zealand High Court Judge Judith Potter ruled that the seizure of Dotcom's assets may have been procedurally flawed, and on April 23, *InformationWeek* speculated that attempts to extradite Dotcom to the United States to face prosecution for copyright infringement and racketeering may fail. Megaupload allowed users to anonymously transfer large film and music files, which critics claim abetted copyright infringement on a vast scale. But the *InformationWeek* article quoted Jeff Ifrah, co-chair of the American Bar Association's committee on white collar crime, who said that federal racketeering charges are usually limited to drug-related or gambling enterprises conducted by organized crime syndicates, and that Megaupload's activities were similar to those of Google's YouTube. "Certainly no one accused YouTube of having mob-like activities," Ifrah said.

Alternatives to SOPA/PIPA Emerged Amid Public Backlash

Sen. Ron Wyden (D-Ore.) and Rep. Darrell Issa (R-Calif.) authored a bill, titled the Online Protection and Enforcement of Digital Trade (OPEN) Act, in an attempt to deal with the problem of online piracy without the risk of also censoring the Internet. The text of the OPEN Act can be found at <http://wyden.senate.gov/imo/media/doc/Open%20Act%20As%20Filed%20by%20Sens%20Wyden%20Moran%20and%20Cantwell.pdf>.

According to a Dec. 17, 2011 press release from Wyden, the bill would fight copyright infringement by expanding the existing authority of the International

Trade Commission (ITC) to enforce copyright and trademark infringement as it currently applies to the importation of physical goods. It would empower U.S. copyright holders to petition the ITC to investigate cases of illegal digital imports just as they currently petition the ITC to investigate infringement cases involving physical goods.

"Butchering the Internet is not a way forward for America," Issa said in the press release. "The OPEN Act empowers owners of intellectual property by targeting overseas infringers while protecting the rights of lawful Internet entrepreneurs and users. The Internet is one of the fastest growing sectors of our economy, keeping it open is critical to job creation and our economic recovery."

To date, there has been no action on the bill. In a Jan. 28, 2012 editorial, *The New York Times* said it "offers a straightforward and transparent approach to the problem."

A new international agreement signed by the United States that is meant to protect intellectual property has also been widely criticized. The "Anti-Counterfeiting Trade Agreement" (ACTA), signed by the United States, Australia, Canada, Korea, Japan, New Zealand, Morocco and Singapore on Oct. 1, 2011, is meant to establish an international framework to "more effectively combat the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy," according to the Office of the United States Trade Representative.

According to a fact sheet put out by that office in March 2010, ACTA encourages cooperation among the countries who have signed it to address the challenges of cross-border trade in counterfeit and pirated goods. It establishes a set of enforcement "best practices" that are used by authorities, and it creates a legal framework of enforcement measures.

Countries that sign ACTA are required to enforce criminal copyright infringement laws and take steps to prevent counterfeit goods from entering their borders and to take actions against those distributing pirated digital goods, according to a March 6, 2012 story from PCWorld.

But many of the groups that criticized SOPA and PIPA have raised similar concerns about the ACTA. "Although the

Single-Source Stories Lead to Problems for Media

Two incidents in March 2012 reaffirmed the risks that journalists and editors face when a story is published based on one source without sufficient fact checking. Popular journalistic non-fiction radio show “This American

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Life” was forced to produce and air a retraction episode when

it discovered that large portions of an episode aired in January were fabricated by the episode’s subject. Similarly, an editor for *The Oregonian* came under fire after misleading the newspaper about the circumstances surrounding the death of the newspaper’s long-time editor of the editorial page. In each instance, further investigation of the story’s source could have prevented the need for corrections, allowing the outlet to retain credibility and uphold journalistic standards.

This American Life Apologizes, Retracts Apple Manufacturing Plant Story

On January 6, 2012, the WBEZ-Chicago public-radio program “This American Life” aired an episode entitled “Mr. Daisey and the Apple Factory.” The program focused on substandard working conditions in consumer electronics factories in China, with particular attention given to a solo stage show produced by monologist Mike Daisey detailing his 2010 visit to electronics manufacturer Foxconn’s Apple electronics plant in

Shenzhen, China. An excerpt from Daisey’s critically acclaimed one-man show, “The Agony and Ecstasy of Steve Jobs,” in which he described his supposed interactions with child laborers and crippled workers, was played during the first half of the broadcast. The second half of the broadcast was spent reacting to Daisey’s performance while attempting to corroborate his claims. The program’s news

accompanied him on his 2010 trip. Daisey claimed he had lost the interpreter’s name and said that the phone number associated with her no longer worked, and the show took him at his word. However, upon later investigation, the show’s producers were able to locate the interpreter, Cathy Lee, who contradicted many of the claims Daisey made about what he witnessed at the Foxconn plant.

“I can say now in retrospect that when Mike Daisey wouldn’t give us contact information for his interpreter, we should have killed the story rather than run it.”

— Ira Glass,
Executive Producer and Host,
“This American Life”

“This American Life” devoted the entirety of its March 16 program, entitled “Retraction,” to detailing the errors in Daisey’s story and its own error in judgment in airing the show without Lee’s account of the narrative. What came to light was that although many of the allegations made by Daisy

team combed Daisey’s script for material to investigate, and interviewed more than a dozen journalists and electronics industry workers about the Chinese electronics industry, and no one took issue with the narrative.

After broadcasting the episode, the show’s producers were alerted by Rob Schmitz, China correspondent for the public-radio program “Marketplace,” that certain aspects of Daisey’s first-person testimony were questionable. In conducting its initial investigation of Daisey’s story, the show’s producers had asked for the name of the interpreter who ac-

company and Apple were true, as affirmed by an investigative report published by *The New York Times* in January 2012 about Apple’s overseas manufacturing, “the most powerful and memorable moments in the story” were all fabricated. Although the original episode became the program’s most popular podcast and the attendant scrutiny convinced Apple to allow an outside third party to audit working conditions at its factories, it contained numerous fabrications, and the show’s producers were forced to retract the story.

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proposed treaty’s title might suggest that the agreement deals only with counterfeit physical goods (such as medicines), ... it will have a far broader scope and in particular will deal with new tools targeting internet distribution and information technology,” according to an EFF fact sheet on the agreement.

Constitutional scholars have also been questioning the procedures by which President Obama entered into the international agreement, questioning whether it is actually a “treaty” that needs to be approved by two-thirds of the Senate or whether it is another kind of internation-

al agreement that needs either congressional approval or simply presidential approval, according to an April 10, 2012 update on the agreement on the website for the EFF.

According to EFF, major U.S. and European Union copyright industry “rightsholder” groups have sought stronger powers to enforce their intellectual property rights worldwide. The goal of the agreement, EFF said, “is to create a new standard of intellectual property enforcement above the current internationally agreed standards.”

Rep. Issa (R-Calif.) said in a statement on his “Keep the Web Open” website that “stopping SOPA and PIPA was a historic victory for digital citizens, but ACTA potentially poses a similar threat to the global Internet community. While the agreement’s stated goal of strengthening intellectual property rights is one all should support, it does so by undermining individual privacy rights and by empowering an unaccountable enforcement bureaucracy.”

— EMILY JOHNS
SILHA RESEARCH ASSISTANT

"I can say now in retrospect that when Mike Daisey wouldn't give us contact information for his interpreter, we should have killed the story rather than run it," said Ira Glass, Executive Producer and Host of "This American Life" during the show's March 16 broadcast. "We never should have broadcast this story without talking to that woman. Instead, we trusted his word."

Apologizing for running a story that could undermine the credibility of public-radio journalism, Glass attempted to be completely transparent in revealing which portions of the story were fabricated, devoting a portion of the episode to separating the truth from Daisey's numerous fabrications. These fabrications included, among others, Daisey's contentions that he interviewed a 13-year-old girl who worked at the factory, spoke to an elderly former worker whose hand had been destroyed, and witnessed guards with guns outside the entrance to the Foxconn plant.

"Although he's not a journalist, we made clear to him that anything that he was going to say on our program would have to live up to journalistic standards," Glass said on the broadcast. "He had to be truthful. And he lied to us."

Daisey initially responded to "This American Life" by releasing a statement on his blog on March 16 stating that although he regretted allowing his work to be heard in the context of a factual program, "What I do is not journalism. The tools of the theater are not the same as the tools of journalism." Nevertheless, the theatrical production of his show at the Public Theater in New York City is described as "nonfiction," and Daisey himself does not acknowledge any embellishment of events he witnessed.

In an article for *The New York Times* on March 18, Charles Isherwood addressed Daisey's comments and distinguished theater from journalism. However, he wrote that "theater that aims to shape public opinion by exposing the world's inequities has no less an obligation than journalism to construct its larger truths only from an accumulation of smaller ones." Similarly, in a blog entry for Browbeat, online news magazine Slate's culture blog, Josh Voorhees draws a distinction between Daisey's expression and other literary devices like metaphor and unreliable narration. "Daisey lied, to his publisher and to his

audience, and he did so in order to present his version of reality as objective fact both to Ira Glass and to *TAL*'s 1.8 million listeners."

Daisey issued an apology for his misrepresentations on his blog on March 25, more than a week after "This American Life" aired its retraction episode revealing the inaccuracies in his narrative. Addressing journalists, he wrote "In my drive to tell this story and have it be heard, I lost my grounding. Things came out of my mouth that just weren't true, and over time, I couldn't even hear the difference myself." Daisey's full entry can be found at <http://mikedaisey.blogspot.com/2012/03/some-thoughts-after-storm.html>.

In his introduction to "This American Life's" "Retraction" episode, Glass expressed contrition about running the January story. "I and my co-workers on 'This American Life' are not happy to have done anything to hurt the reputation of the journalism that happens on this radio station every day," he said.

In a March 18, 2012 column for *The New York Times*, however, David Carr praised the deftness with which "This American Life" produced and aired its retraction episode. "There is nothing in the journalism playbook to prevent a determined liar from getting one over now and again," Carr wrote.

Marcel Pacatte, a professor at the Medill School of Journalism at Northwestern University, called "This American Life" "the gold standard when it comes to profound and provocative storytelling," so its having been burned by a "fabricator" or "distorter" has "profound ramifications," he wrote in a March 16, 2012 ChicagoBusiness.com column. "If it can happen on 'This American Life,' it can and probably does happen elsewhere, in little ways as well as fundamental ways, with debilitating frequency."

Pacatte recognized that, in an era of increased competition and the ability of anyone to publish information with an Internet connection, "journalism now has to compete with, and combat, the unprincipled." He cautioned editors "to exercise news judgment, be confident in that judgment, instead of erratically reactive to what they think people are interested in consuming — or, worse, to conclude that because people are clicking on dreck that we need to give them more dreck. Give them news and

truth, but make that news and truth as interesting as — or more interesting than — the dreck, and they'll find their way back."

Oregonian Editor Fired for Lying About Former-Editorial Page Editor's Cause of Death

On March 11, 2012, Portland, Ore. daily newspaper *The Oregonian* unknowingly published a factually incorrect obituary for its longtime editorial page editor, Robert J. Caldwell, who had died the previous day. Written by the paper's breaking news editor John Killen, the report said that Caldwell had suffered a heart attack and been discovered in his parked car by police, crediting a "family friend" for the information.

Although Caldwell did die of a heart attack, the circumstances surrounding his death were reported inaccurately. *The Oregonian* admitted in its print edition on March 12 that Caldwell had in fact died in the apartment of a 23-year-old woman after he engaged in a sex act with her and went into cardiac arrest. According to the report, the woman told police she had met Caldwell a year earlier at Portland Community College, and the two established a relationship that involved Caldwell providing money for textbooks and school materials in exchange for sex acts in her apartment. In reality, according to a March 21 article in Portland-based *Willamette Week*, the woman was employed as a full-time call girl who solicited clients from the Internet.

According to a March 15, 2012 *Willamette Week* story, the misinformation was published as a result of information given to the newspaper by Kathleen Glanville, an editor on the newspaper's breaking news team trying to prevent Caldwell's family from embarrassment. Credited as a "family friend" in the obituary, Glanville had been in contact with Caldwell's wife, Lora Cuykendall, who revealed the true circumstances of Caldwell's death. *Willamette Week* reported that Glanville revealed in a Facebook posting that she had been fired, writing that "I understand the need my newspaper felt to punish my violation of journalistic ethics in some way," but that "[t]here are times in people's lives when you have to make a decision about what is most important."

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Media Gaffes Prove Costly for News Organizations

Three lapses in editorial judgment proved costly in spring 2012, forcing media entities to engage in damage control.

In February, the perceived racial insensitivity of a headline on ESPN's mobile website and an off-the cuff comment by an ESPN on-air broadcaster resulted in the dismissal of an online editor and suspension of a news anchor. In March, syndicated radio show host Rush Limbaugh faced an advertiser boycott after hurling epithets at Georgetown law student Sandra Fluke for speaking out in favor of insurance coverage for contraception. In April, Boston University's student newspaper

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faced a backlash over its April Fools edition's satirical stories about rape. The events draw attention to the pressure to post stories quickly and keep up ratings, and serve as a reminder that associations with controversial news personalities and content can have consequences for media organizations.

ESPN Takes Heat for Controversial Lin Headline

In the early hours of Feb. 18, 2012, ESPN.com's mobile website ran a headline in a story referencing New York Knicks Point Guard Jeremy Lin. The headline, "Chink in the Armor," accompanied a large photo of Lin and came several hours after a Knicks loss put an end to a seven-game winning streak. In

the context of sports, the phrase is often used to refer to a weakness or deficiency responsible for a loss. The headline was quickly changed to "All Good Things..." but screen captures of the original headline soon circulated among social media services. In an apology released later in the day, ESPN acknowledged that the headline was up for around 35 minutes before being removed, and in the same statement promised to conduct a review of its "cross-platform editorial procedures" and pursue "appropriate disciplinary action to ensure this does not happen again."

The ESPN editor responsible for the headline, Anthony Federico, was fired by the network on February 19, one day after publishing the headline. Speaking

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On March 16, *The Oregonian's* Editor-in-Chief, Peter Bhatia, published a lengthy article describing the newspaper's mishandling the notice of Caldwell's death. In the account, he named Glanville as the source who fabricated the information initially included in the obituary after being contacted by Killen, noting that only when the newspaper obtained a copy of the police report did it learn the true circumstances surrounding Caldwell's death. Bhatia wrote, "we were unanimous in our conviction that we had to print the full story of our colleague's death, especially after reporting it incorrectly in that morning's paper."

When the newspaper published the truth about Caldwell's death, it immediately faced a negative reaction from readers that included accusations of a cover-up. Bhatia countered that "while we are used to sources lying to us, it is difficult to swallow when the source is a fellow *Oregonian* journalist ... none of us could have imagined a fellow journalist not telling us the truth." Bhatia nevertheless took responsibility for the fabrication, writing that "we can be faulted for not digging deeper. We should have pressed for the police report on Sunday."

Commenting on the situation in a March 16 blog post for *New York Magazine*, Joe Coscarelli wrote that "the fact

that the anonymous source in the original article was an editor at the paper is a questionable move in the first place," and a decision that "certainly passed through more than one person." Coscarelli said that Glanville should have stayed far from the story, stopping the potential debacle at its source. "With major emotions at play, calling it a simple conflict of interest doesn't really do justice to the icky complications surrounding this one," he wrote.

In a March 16, 2012 post on Reuters' Blogging Editor Felix Salmon's personal blog, he wrote that while he was "puzzled by the aggressive way that the Portland *Oregonian* covered the death," the newspaper put itself in the position of having to publish the details. Salmon wrote that Glanville's actions went far beyond mere withholding of information, as she deliberately fabricated information and placed it in the paper. "If a newspaper employee deliberately puts fiction into the newspaper, than that paper absolutely has to clear things up to the best of its abilities," Salmon wrote. Rather than falsifying its circumstances, Salmon said that Glanville should have told the newspaper the truth about Caldwell's death, or nothing at all.

Freelance technology and business journalist Michelle V. Rafter interviewed

Craig Silverman, author of Poynter's Regret the Error blog, for a March 19, 2012 WordCount blog post about the recent fabrications at "This American Life" and *The Oregonian*. Silverman said, apart from the individuals feeling that "their lies served a higher cause and purpose," that "[t]hey were able to justify their actions to themselves, so anything was fair game after that," and individuals lie because "everybody lies." "This doesn't excuse it, but it means we have to do a better job of sniffing out the lies," Silverman told Rafter.

Jack Shafer, a Reuters columnist covering politics and the press, wrote "I'm still waiting for somebody who got caught lying while practicing journalism to say why he did it," in a March 16, 2012 opinion piece. "I have my theory: 1) They lie because they don't have the time or talent to tell the truth, 2) they lie because they think they can get away with it, and 3) they lie because they have no respect for the audience they claim to want to enlighten. That would be an ideal subject for a one-man theatrical performance."

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

to the New York *Daily News* on February 20, Federico, 28, apologized for his lapse in judgment and insisted that the headline was not an attempt to be “cute or punny.” Though he understood why “ESPN did what they had to do,” Federico said that he had used the phrase “at least 100 times” in prior headlines without incident. Lamenting the loss of his career, Federico maintained that he was “devastated” that he “caused a firestorm” through what he called an “honest mistake.”

The network also suspended anchor Max Bretos for 30 days for recently using the same phrase on air. In an interview with former Knicks player Walt Frazier about Lin’s performance on February 15, Bretos asked, “If there is a chink in the armor, where can he improve his game?” Although the question initially failed to attract attention, the word choice was later acknowledged and Bretos offered his apologies via Twitter.

Onlookers universally regarded Federico’s choice of words as offensive and insensitive because of Lin’s Asian-American heritage. Rep. Judy Chu (D-Calif.) reacted to the headline on February 20 by telling MSNBC that the story was “appalling and offensive” and contending that the writer’s word choice was intentional. Criticizing the editor’s insistence that he had used the phrase many times before, she said that “[t]he word was used since the 1880s to demean Chinese Americans and deprive them of rights, and it is used on playgrounds specifically to humiliate and to offend Asian Americans.”

Lin himself, in contrast, gave Federico and Bretos the benefit of the doubt, accepting their apologies and expressing a willingness to move on. Commenting on the headline after leading the Knicks to victory on February 19, Lin said that “You have to learn to forgive, and I don’t even think that was intentional.” Lin took Federico out to lunch on Mar. 27, 2012, a little more than a month after the incident.

Others were less charitable in assessing Federico’s intentions, however, with sports commentator Cyd Zeigler, Jr. writing in a February 18 blog entry on *outsports.com* that “it’s impossible to believe the person who wrote that headline didn’t know exactly what they were writing.” In making this assessment, Zeigler drew attention to previous controversy surrounding ESPN’s usage of the same

headline in an August 2008 story about the USA men’s basketball game during the 2008 Summer Olympics in Beijing.

The incident caused the Asian American Journalists Association (AAJA) to release a set of advisory guidelines on Feb. 22, 2012, for reporters to consider when drafting news coverage of Jeremy Lin, seeking to promote “fair, accurate and sensitive portrayals of Lin and others who are Asian American.” The guidelines suggest that all journalists should ask themselves before publishing a story if a similar statement would be made about an athlete who is Caucasian, African American, Latino, or Native American.

“You have to learn to forgive, and I don’t even think that was intentional.”

— Jeremy Lin,
New York Knicks,
In response to ESPN Headline

They also enumerate a list of pejoratives and clichés to avoid, suggesting journalists “use caution when discussing Lin’s physical characteristics[.]”

In a February 21 report for online current affairs and culture magazine *Slate* titled “No More Chinks in the Armor,” Huan Hsu, although commending ESPN’s numerous apologies and prompt disciplinary action, wrote that “it’s time to retire *chink in the armor* from the lexicon for good.” Citing precedent for retiring words like “fagot” and “niggardly,” Hsu suggested that “if headline writers would oblige, we just might be able to wipe away the word completely.”

This sentiment was echoed by Jason Fry in his Feb. 21, 2012 story “How ESPN Published ‘Chink in the Armor’ Jeremy Lin Headline & What’s Happened Since” for journalism think-tank the Poynter Institute. Calling the phrase “shopworn and lazy,” Fry wrote that ESPN should demand that “its writers and on-air talent find richer language and fresh turns of phrase” because “the descriptive power of that phrase was leached away by overuse decades ago.”

Fry spoke to Rob King, senior vice president for editorial, print and digital at ESPN, who said that ESPN’s broadcast web and mobile divisions are technologically different and operate in parallel, rather than together. In addition, though mobile editors generally double-check

each other’s work, the other editor on Federico’s shift was busy updating a mobile NCAA bracket application, meaning that Federico’s headline decision was unilateral. King assured Fry that ESPN is “right in the middle of building a better process” allowing editors to publish cross-platform and aligning the efforts of its mobile team with their web counterparts.

“Tart” Comments Leave Bad Taste in Advertisers’ Mouths

In early March, conservative talk radio host Rush Limbaugh drew ire after repeatedly calling a Georgetown University law student a “slut” and a “prostitute.” Sandra Fluke, who had spoken publicly in favor of the Obama administration’s requirement that health insurance plans cover women’s contraceptives, was targeted on Lim-

baugh’s program for three consecutive days from Feb. 28 to March 2, 2012. The controversial statements intensified calls for a public boycott of Limbaugh’s show, and led to a massive advertiser exodus from the most popular syndicated radio program in the United States.

According to transcripts posted by progressive media research center Media Matters for America (MMA), Limbaugh said on Feb. 29, 2012 “What does it say about the college coed [Sandra] Fluke who goes before a Congressional committee and essentially says that she must be paid to have sex? ... It makes her a prostitute. She wants to be paid to have sex.” Limbaugh followed up these comments the next day by demanding that Fluke release videos of her having sex in as payment for the contraception she argued should be covered by employers, and saying that Fluke was “having so much sex, it’s amazing she can still walk” and that she was “having sex so frequently that she can’t afford all the birth-control pills that she needs.”

Roundly criticized as egregious and misogynistic, Limbaugh’s comments produced a swell of support for Fluke, as Georgetown University officials released a statement on March 2, 2012, calling her statements “a model of civil discourse.” The same day, President Barack Obama personally called Fluke to thank her

Media Gaffes, continued from page 37 for “speaking out about the concerns of American women.”

Reaction to Limbaugh’s comments was swift, as online critics mobilized to create a “Stop Rush” campaign on social networking websites and companies requested their advertisements be removed from Limbaugh’s program. According to a March 5, 2012 article by journalism think-tank Poynter, at least seven advertisers had withdrawn support for Limbaugh’s program by March 5, with many finding themselves faced with angry statements on Facebook and Twitter calling for withdrawal of support. Companies withdrawing advertisements sought to distance themselves from Limbaugh’s commentary. For example, online legal document services company LegalZoom said in a statement published in a Mar. 4, 2012 article in *The New York Times*, that the company “does not in any way support or endorse the recent comments of Mr. Limbaugh.”

Limbaugh issued a statement on his website on March 3, apologizing to Fluke for his word choice and excusing his discourse by saying that “For over 20 years, I have illustrated the absurd with absurdity ... I chose the wrong words in my analogy of the situation.” Limbaugh responded to the advertiser boycott by reassuring listeners that advertisers would be replaced. “They don’t want you or your business anymore,” Limbaugh said on March 5. “So be it.” Implying that advertising decisions had no effect on his decision to apologize, Limbaugh said that “Advertising is a business decision, it’s not a social one. Only the leftists try to use extortion, pressure, threats to silence opposing voices. We don’t do that.”

The number of advertisers leaving Limbaugh’s show continued to grow, however, with AOL becoming the eighth advertiser to withdraw from the program on March 5 in a statement saying that “Mr. Limbaugh’s comments are not in line with our values.” As of March 12, 142 companies, ranging from H&R Block to J.C. Penney Co., had dropped advertising from Limbaugh’s program. On March 22, MMA launched a campaign aimed at encouraging boycotts of Limbaugh’s program, planning to spend at least \$100,000 on anti-Limbaugh ads called “community service announcements.”

The pressure on Limbaugh’s show appeared to be abating by late March.

Speaking to *The Washington Post* for a March 28 article, Angelo Carusone, who has led anti-Limbaugh efforts for MMA, said that pressure had been reduced and that most of the withdrawn advertiser support appeared to be of companies with ads airing in regional or local markets. Predictions that radio stations would drop the program altogether never materialized, as only two small stations

“Our aim was to publish satirical material about Boston University as a whole, and we did not intend to perpetuate harmful stereotypes or inappropriately make light of serious issues.”

— Chelsea Diana,
Editor-in-Chief,
Boston University’s *Daily Free Press*

followed through at the peak of the controversy.

Speaking to *The Washington Post*, Steven Biel, director of liberal group MoveOn.org’s offshoot petition site SignOn.org, said the incident nevertheless would be likely to give pause to Limbaugh in the future. “I suspect his internal editing equipment is significantly amped up. ... I could easily imagine a scenario in which one more ill-timed comment will get him banished” to satellite radio.

Boston University School Newspaper Faces Criticism Over April Fools Issue

A college newspaper’s attempt to publish a lighthearted, satirical issue came under attack as critics accused the paper of joking about rape in the wake of numerous local sexual assault cases. *The Daily Free Press*, the principal student newspaper at Boston University (BU), released its annual April Fools edition on April 2, 2012. The issue had a “Disney” theme, but according to an April 9, 2012 *Boston Globe* opinion piece, it also featured headlines like “BROken egos: BU Fraternity Suspended for Assaulting Female Student” and “Cinderella in Political Prostitution Ring, Stepsisters Vie for Throne.” An April 5, 2012 blog on *The Washington Post*’s website said that the lead story centered on “seven

frat dwarves being arrested for allegedly drugging and sexually assaulting ‘the fairest of them all,’” detailing the fictitious assault, and that other stories included Alice in Wonderland taking LSD supplied by fraternity brothers.

The satirical publication came shortly after several incidents of violence against women at BU in February. On Feb. 19, 2012, the “star defenseman” of

BU’s hockey team was arrested for allegedly raping a female student, according to a Feb. 20, 2012 story in *The Boston Globe*. The *Globe* wrote that this made him the second BU hockey player within 10 weeks to face sexual harassment allegations involving a female student, after the December 2011 arrest of the team’s leading scorer.

The campus also experienced numerous instances of “Peeping Toms” during January and February 2012, with a Feb. 22, 2012 article in *The Metro-Boston Edition* reporting that a suspect allegedly took video of a coed while she showered. According to the *Metro*, the suspect fled with the phone used to take the video and was not identified.

Speaking to WHDH-TV Channel 7 in Boston, Mass., BU students uniformly agreed that the *Daily Free Press*’ joke was in poor taste. “It’s just really disturbing to me that this is a joke and that people are joking about this, especially in our culture at BU,” said BU student Grace Vonmaluski for the station’s April 2, 2012 story. Nevertheless, students recognized the newspaper’s right to free speech, with BU student Nick Pataky telling the station that “Whatever they want to write, that’s cool and we’re an open student population, it’s obviously interpreted as a joke.”

The newspaper apologized twice for running the edition in response to what an April 5, 2012 *Post* blog characterized as “furious uproar over the edition” and allegations that the newspaper promoted rape culture at the school. The paper initially apologized in a letter addressed “to the Boston community and whom-ever else it may concern,” written by the *Daily Free Press*’ Editor-in-Chief Chelsea Diana, and later in a letter to from the

International Journalists Face Censorship in Confronting Governments

Throughout 2011 and into 2012, international journalists under authoritarian rule faced difficulty critiquing their governments' domestic policies. As new information channels surface with advancing technology, some countries have updated their criminal codes to keep abreast of alleged press abuses. Others have simply retained antiquated defamation laws, providing no latitude for news outlets that disagree with their government's political agenda.

INTERNATIONAL PRESS FREEDOM

Presidential Libel Case Brings Conflict Between Ecuadorean Press and Government to a Head in Ecuador

A defamation case brought by Ecuadorean President Rafael Correa against a 90-year-old newspaper, *El Universo*, has become emblematic of his administration's fight against the international ideal of "free expression." Rising to power in 2007 on the back of promises to overturn what he perceived as a corrupt political establishment, Correa increased opposition to Ecuador's commercial media, lobbing accusations that its participants are guilty of "lying" and "ignorance," according to a Sept. 1, 2011 Committee to Protect Journalists (CPJ) story. This effort is aided by Correa's use of Ecua-

tor's criminal defamation laws, regarded by free speech and human rights advocates as outdated and unforgiving, to silence critics. Correa has also focused on marginalizing international institutions aimed at facilitating freedom of expression. These efforts result in what the CPJ called "a new era of widespread repression by filing debilitating defamation lawsuits in civil and criminal courts, pre-empting private news broadcasts, enacting restrictive legal measures, and smearing critics," in a Jan. 17, 2012 blog post. As the conflict escalates, Ecuador's reputation as "one of the hemisphere's most restrictive nations for the press" faces challenges from dissenting journalists and international human rights organizations, the blog post said.

Earning an important victory in what a Jan. 23, 2012 *New York Times* editorial characterized as a "relentless campaign against free speech," Correa successfully argued to maintain a criminal libel conviction against *El Universo*, Ecuador's second best-selling newspaper, on Feb. 16, 2012. Ecuador's penal code provides criminal punishment for those who "falsely accuse" a public official of a crime. Handed down by Ecuador's highest court, the decision affirmed an appeals court ruling from September 2011. The fines imposed by the conviction are likely to force *El Universo* into bankruptcy.

The charges stem from a Feb. 6, 2011 *El Universo* article titled "No to Lies" written by its opinion editor Emilio Palacio, which criticized the government's response to a Sept. 30, 2010 police revolt outside a police hospital that the government characterized as an attempted coup. Following this confrontation between the government and the striking police force led by Colonel Cesar Carrion, Correa attempted to manage the story by shutting down independent media and broadcasting his version of the events. Repeatedly referring to Correa as "the dictator" and accusing the leader of crimes against humanity, Palacio's article implied that Correa had ordered the military to open fire on striking police, resulting in the deaths of three people.

Correa filed suit in March 2011 in response to the article, bringing criminal libel charges against the newspaper's three owners — brothers Carlos, César, and Nicolás Pérez Barriga, and Palacio, who had resigned from the newspaper shortly before the trial began — in a court in the city of Guayaquil and in the hopes of Correa withdrawing the suit.

The presiding judge was changed four times before a "temporary magistrate" took over the case, and issued a 156-page ruling 33 hours after appointment in a move that a Jan. 11, 2012 editorial in *The Washington Post* called "worthy of a

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paper's board of directors. Diana's letter was published on the *Daily Free Press'* website the day the newspaper was published. "Our aim was to publish satirical material about Boston University as a whole, and we did not intend to perpetuate harmful stereotypes or inappropriately make light of serious issues," Diana wrote. Nevertheless, Diana admitted the decision to publish was "juvenile and insensitive" and stressed that "all of the ill-conceived jokes in Monday's issue in no way represent the true values of *The Daily Free Press* or any of its staff members." "We know that even though the stories were meant to be jokes, simply writing them perpetuated rape culture," she wrote.

The letter from the newspaper's board of directors was published on the following day, April 3, 2012, and called the April Fools issue "a black mark" on its reputation. "In making the ultimate decision to run many of the articles, however well-intentioned, fictional or joking they may have been, Editor-in-Chief Chelsea Diana in no way perpetuated our values as an organization," wrote Annie Ropeik, chairwoman of the *Daily Free Press'* Board of Directors. In the letter, Ropeik noted that the board had asked Diana to resign as editor-in-chief of the paper, and that she had obliged.

In an April 7, 2012 article about offensive April Fools humor in college newspapers, Frank LoMonte, execu-

tive director of the Student Press Law Center (SPLC), wrote that while "when done well, humor can be clever and enduring...the damage from a joke that isn't funny can be even more enduring." Although noting that it would be hard to conceive of a joke so damaging by a public university's newspaper that it would fall outside the protection of the First Amendment, LoMonte recommended avoiding "mockery of ethnic or religious minorities, disabled people, gays and lesbians, or other classes of vulnerable people who already may feel marginalized on campus," and wrote that "there's no such thing as a 'hilarious' rape joke."

— MIKEL J. SPORER
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banana republic.” (A banana republic refers to a politically unstable country that often economically depends upon the exports of a limited resource like fruits or minerals. The country usually has a poor, working class and is controlled by a ruling plutocracy of the elites in business, politics, and the military.) According to the *Post*, an independent investigation following the case determined that the opinion’s author was not the appointed magistrate, but probably Correa’s own attorney. The defendants were sentenced to three years in prison and fined a total of \$30 million on July 20, 2011, with the paper itself being fined another \$10 million in damages.

CPJ said in a Sept. 1, 2011 report that the initial ruling ran counter to a growing consensus among Latin American countries that civil remedies are adequate in defamation cases, and criminal defamation represents a relic of the colonial era. Regarding Ecuador as an outlier, it framed Correa’s suit as the latest instance of “outdated criminal defamation provisions” being “systematically used to punish critical journalists.” Further drawing out this distinction, CPJ quoted the Inter-American Commission on Human Rights in a March 31, 2011 story responding to Correa’s recent press abuses, citing a 1994 statement that: “Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence.”

London-based human rights organization Article 19 released similar comments on the ruling. In a Jul. 22, 2011 statement, the organization said that international human rights bodies like the United Nations and the Organization of American States recognize criminal defamation provisions as a threat to public debate, and have made it clear that public officials must tolerate more criticism than private individuals. The statement called upon Ecuador’s government to repeal defamation provisions and replace them with private law remedies, while refraining “from imposing disproportionate civil sanctions in cases concerning the exercise of freedom of expression.”

The fine and prison sentence were upheld by an appeal court in Guayaquil on

Sept. 20, 2011, moving *El Universo* closer to financial ruin and closure. Correa offered to grant the newspaper a pardon if it asked for one, stating that he would absolve the defendants of their prison sentences and might recapitalize the bankrupt newspaper upon payment of the fine. Calling the sentence “draconian” and expressing concern about the “grave legal precedent” it sets, Paris-based press advocacy organization Reporters Without

“In Latin America ... it seems very strange that there is no jail sentence for damaging a human being’s honor, although there is jail for those who are charged with mistreating a dog.”

— Rafael Correa,
President of Ecuador

Borders (RSF) called on Correa to accept *El Universo*’s offer of space in the newspaper in exchange for suspension of the jail sentences and fine in a Sept. 21, 2011 statement on its website. Carlos Lauría, CPJ’s senior program coordinator for the Americas, also opposed the appeal result in a Sept. 20, 2011 statement on its website, writing that “[t]oday’s decision gives cover to those seeking to silence a critical press,” and insisting that Ecuadorian authorities “debate measures to reform obsolete defamation laws so that they conform to international press freedom standards.”

Speaking at Columbia University on Sept. 23, 2011 following the appeal court’s affirmation of the conviction, Correa said that “the media ... has tried to replace the rule of law with the rule of opinion.” Indicating a greater respect for personal integrity of individuals than freedom of expression, Correa said that “[i]n Latin America ... it seems very strange that there is no jail sentence for damaging a human being’s honor, although there is jail for those who are charged with mistreating a dog.”

This outlook has manifested itself in revisions to Ecuador’s constitution implemented since Correa took office. Among controversial provisions are those allowing the government to “regulate the prevalence of informational, educational, and cultural content in the media’s programming,” According to Article 19’s Submission to the UN Uni-

versal Periodic Review, as a part of its Thirteenth session of the Working Group of the Human Rights Council. The constitution also grants individuals the right to “truthful” and “verified” information, provisions that have enabled the government to place restrictions on information it disputed. The submission can be seen in its entirety at [http://www.article19.org/resources.php/resource/2859/en/ecuador-article-19s-submission-to-the-](http://www.article19.org/resources.php/resource/2859/en/ecuador-article-19s-submission-to-the-un-universal-periodic-review)

[un-universal-periodic-review](http://www.article19.org/resources.php/resource/2859/en/ecuador-article-19s-submission-to-the-un-universal-periodic-review). According to a Sept. 1, 2011 CPJ article, Correa uses state-controlled media to discredit independent outlets in personal and derogatory ways, labeling opposition critics as “ignorant,” “trash-talking,” and “un-

ethical,” among other epithets. The government has gone from owning one radio station when Correa took office in 2007 to managing five television channels, four radio stations, two newspapers and four magazines, a Jan. 11, 2012 *Washington Post* editorial said.

With the potential for costly defamation verdicts acting as a deterrent, independent journalists in Ecuador have been inhibited. Speaking to CPJ for its Sept. 1, 2011 report, Executive Director of the Andean Foundation for Media Observation and Study César Ricaurte said “[i]t has become difficult for the press to work free of government interference” because official harassment of critical reports has increased.

After Ecuador’s highest court affirmed the conviction on Feb. 16, 2012, *El Universo*’s legal appeals in Ecuador were exhausted. Correa said he would consider pardoning the four men on trial, and expressed confidence that the case had “demonstrated that no one has the right to tarnish the truth.” Speaking to reporters during a break in the hearing, Correa said he hoped that the lawsuit “would unleash in Ecuador and throughout our Americas similar lawsuits and would represent a great step forward for the liberation of our Americas from one of the largest and most unpunished powers: the corrupt media.” In a letter to the editor published by *The New York Times*, Nathalie Cely, the Ecuadorian ambassador to the United States, wrote that the “government advocates press

freedom and the right of citizens to have access to truthful information, but harmful accusations without proof should be eradicated.”

Journalists and press advocates, by contrast, expressed concern and fear. César and Nicolás Pérez had fled to Miami prior to the verdict, and Carlos Pérez was granted political asylum by Panamanian President Ricardo Marti-nelli. Speaking to CPJ by telephone after the February 16 verdict, Nicolás Pérez predicted that the verdict “will have a chilling effect on journalists, editors, and newspaper owners,” who “will now practice self-censorship and will censor their columnists.” Article 19 reacted to the affirmation of the convictions in much the same way as to the initial convictions in 2011, quoting its Director for South America, Paula Martins, who said criminal defamation laws “often represent unnecessarily and unjustifiably broad restrictions on freedom of expres-sion, as in this case.” In an online editorial published the day of the verdict, the organization called on Correa and other authorities to cease these types of law-suits and abolish criminal defamation.

According to CPJ’s Feb. 16, 2012 report on the verdict, the case was already under review by the Inter-American Commission on Human Rights, part of the Organization of American States (OAS), as *El Universo* sought a “precautionary measure” to order Ecuador to suspend sentencing until international review of the case by the OAS. The first attempted request was rejected by Ecuador because of a clerical error on filing documents. Correa’s relationship with the OAS is already fractured, as his continued har- assment and silencing of his critics has drawn criticism from the Organization’s Special Rapporteur for Freedom of Ex- pression, an independent body charged with stimulating awareness of the importance of free speech. As a response to this criticism, Correa sought to strip funding and powers from the special rap- porteur and in December 2011, Ecuador presented the OAS with such recommen- dations labeled as “improvements,” the CPJ story said. These efforts have faced opposition from groups like the CPJ and newspapers, with a Jan. 23, 2012 *Miami Herald* editorial encouraging the OAS to stay resolute against the request and Correa’s attempts to “run roughshod” over democratic institutions “outside his borders.”

On Feb. 27, 2012, eleven days after the verdict was handed down, Correa announced that he would commute the four men’s prison sentences and forgive the \$42 million fine against *El Universo*. Describing the conviction’s affirmation as a victory over a “media dictatorship,” Reuters reported on the day of the ver- dict that Correa took the opportunity af- ter the trial to reassert his opposition to what he regards as an influential, corrupt media establishment biased in favor of the wealthy interests that control it. Cor- rea called the decision “a triumph for the freedom of expression and democracy,” according to a report in *The New York Times* the date of the verdict, stating that “[w]e never sought to bankrupt anyone or take anyone’s money. ... [t]he only thing we were seeking was the truth.”

In China, Online Censorship Struggle Moves to Microblogs

Media restrictions increased through- out 2011 in China as the country used widespread Internet surveillance technol- ogy to censor online expression. Crack- ing down on what it labels “subversion of state authority” and “anti-government thoughts,” the country’s authoritarian regime targets online dissenters accused of criticizing Communist Party rule in the wake of the Arab Spring. Stricter media regulations aimed at blogs have led to the detention and jailing of online activ- ists, as well as bloggers and editors who repost controversial content.

Issued on Nov. 10, 2011, China’s lat- est media regulations aim to limit the influence of domestic social media and Twitter-like “microblogging” services. According to the General Administration of Press and Publication (GAPP), the body that licenses domestic newspapers and reporters, information received by phone, mail, microblog, or blog that “has news value” must undergo “conduct veri- fication” prior to publication. CPJ said in a Nov. 14, 2011 blog post that while many regulations appear to simply reiterate journalistic best practices, they also pro- hibit second-hand accounts not indepen- dently verified as well as aggregation of news reports. The rules also require that all reporters be licensed, retain evidence that information has received and veri- fied, and decrease reliance on anony- mous sources. Placing the new regula- tions in the context of what it described as “a much broader campaign against the

spread of what Beijing characterizes as rumors and false reports,” CPJ observed that although violation of the rules car- ries penalties ranging from suspension of a journalist’s license to criminal liability, it was “unclear whether the rules will be tightly implemented or if news organiza- tions will be able to get away with the bare minimum of compliance.”

This uncertainty was tested on Feb. 17, 2012 when Shang Laicheng, an editor at online news forum *Tiantian Xin*, was detained for 10 days by authorities in Guangdong province after he reposted a message suggesting that two local pros- ecutors had visited prostitutes, accord- ing to a Mar. 5, 2012 CPJ story. Although someone else wrote the message, Shang was arrested by a team of police upon leaving work and held in criminal deten- tion without an opportunity to notify his family. Shang was moved from criminal detention to administrative detention after police discovered that he did not write the post, and the Foshan Procura- torate sought the identity of the original author for publishing false statements that had “damaged the reputations of authorities.” Shang remains the subject of police investigation. Bob Dietz, Asia program coordinator for the CPJ, charac- terized this “heavy-handed” treatment as “clearly intended to quell open discus- sion on the Internet” for the March 5 CPJ story.

Intent to place limits on microblog- ging was made even more transparent on March 16, 2012, after Beijing’s municipal government implemented regulations banning anonymity on popular mi- croblogging platform Weibo. The new rules mandate disclosure of users’ real identities at the risk of unspecified legal consequences, substantially limiting the freedom of debate. According to a March 12, 2012 post on Reporters Without Bor- ders’ website (RSF), “police accused Chi- nese Twitter of having a ‘bad influence on society,’” and the increased circulation of news “led the regime to take certain measures.”

Calling the increased controls “the most alarming development” on the Chi- nese Internet, Hong Kong-based China Human Rights Defenders (CHRD) said in its annual report released the week of March 5, 2012 that “[t]he thriving domes- tic microblogsphere has proved highly effective in exposing government mis-

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conduct during the past few years, but it is now threatened with curtailment as a result of this requirement.” The report noted that if adopted nationwide, the identification measure is likely to affect most of the country’s 250 million registered microblog users. Speaking to Reuters for a March 16 report, He Weifang, a law professor at Peking University, said that “China’s official media has done a very poor job of reporting criticisms of the government and exposing society’s weaknesses, so a country like ours needs to rely on the informal media.” In the same story, Zhang Ming, a politics professor at Renmin University in Beijing, said that the new rules were aimed at limiting “microbloggers’ ability to expose malpractice by the local governments and bring whistleblowers immediately under control.”

Political Dissidents Face Arrests and Prison Sentences for Online Publications

These developments follow a 2011 rife with Internet regulation in China. Inspired by unrest in the Middle East in the first half of 2011, online appeals for a “Jasmine Revolution” began to gain traction. Chinese censors blocked the word “Jasmine” in February 2011 amid user efforts on overseas news websites and social media platforms to mobilize street protests. Although the calls drew minimal response and resulted in no widespread protests, bloggers and journalists emerged as targets accused by police of subversion of state power, *The Guardian* reported in a Dec. 26, 2011 story.

Hundreds of citizens were detained throughout 2011 after calling for protests, with courts handing out a string of jail sentences beginning in the middle of December. The first such verdict was reached in the case of writer Chen Wei, who was sentenced to nine years in jail for publishing four online essays in support of freedom of speech and political reform. A Dec. 23, 2011 BBC report described Chen as a “veteran pro-democracy campaigner” who had previously been jailed for his part in the 1989 Tiananmen Square student protests. Reacting to

Chen’s sentence, Markus Ederer, the EU ambassador to Beijing, stated that “[t]he EU firmly upholds freedom of expression as a universal human right and we encourage political debate rather than the use of criminal law as a means to resolve diverging political opinions.”

A second dissenter, Chen Xi, received a 10-year jail sentence on December 26 after the same charge of inciting subversion against state power was levied at him by the Chinese government. According to the December 26 *Guardian* story, Chen was arrested while campaigning for local independent People’s Congress electoral candidates, with authorities citing 36 online articles published overseas as the basis for the arrest. Speaking to advocacy group Human Rights in China (HRC) the day of her spouse’s sentencing, Chen’s wife Zhang Qunxuan accused the prosecution of taking Chen’s writings out of context. “Actually, Chen Xi was calling for democracy and human rights,” she told HRC. “This wish was [his] whole crime!”

Chen Xi and Chen Wei were both signatories of Charter 08, a manifesto for democratic reform co-written by imprisoned Nobel laureate Liu Xiaobo. Liu is currently serving an 11-year jail term for inciting subversion following imprisonment in 2009. According to a Jan. 19, 2012 article about the arrests, *The New York Times* said that the state’s targeting of veteran dissidents suggests an effort by security officials to quell any link between Arab political uprisings and China’s 1989 political reform movement.

The extent of the suppression of speech was underscored by a third prison sentence for subversion of state power, once again for ten years, imposed on writer and human rights campaigner Li Tie. On Jan. 18, 2012, Li was found guilty based on his membership in alternative political group China Social Democracy Party and publication of a series of 13 online essays calling for political reform and respect for the dignity of ordinary citizens. Li’s sentence surprised fellow activists, who said that he had never taken part in any social activism. Speaking to nonprofit news organization Radio Free Asia on Jan. 19,

2012 about Li’s sentence, pro-democracy activist Qin Yongmin suggested that the harsh punishment was due in part to the spike in online protest appeals. “It just goes to show that it’s not what you write, it’s the circumstances in which you write it,” Qin said.

Rather than face the difficulties attendant remaining in China, prominent writer and freedom of expression advocate Yu Jie sought exile in the United States in January 2012. Yu is the founder of the press freedom advocacy group Independent Chinese PEN Centre. Speaking to Reuters for a Jan. 13, 2012 report, Yu said that he fled China because his “circumstances dramatically worsened, and [he] experienced extremely cruel torture,” including harassment, jail threats, torture, and intermittent house arrest. The Chinese tabloid the *Global Times* published a commentary on Jan. 13, 2013 titled “Self-imposed exile reflects one’s waning influence,” writing that Yu’s departure “contradicts the trend of diversifying public opinions growing here.”

However, Chinese journalists discussing sensitive national issues are just as likely to continue to face danger. Revisions to the country’s criminal code enacted on March 8, 2012 grant police the authority to hold journalists and others who discuss sensitive national issues in secret detention for up to six months. Police must notify families of a suspect’s detention, but need not disclose the location. Hailed by Chinese state media as progress for human rights, CPJ regarded the provision as an attempt to legitimize the practice of seizing people who discuss sensitive issues. The country’s restrictive media policies are poised to remain in place throughout 2012, as Bob Dietz reported in a Feb. 14, 2012 CPJ story, because the country’s current vice-president, Xi Jinping, is expected to become the new General Secretary of the Communist Party of China, and is likely to continue the practices of current leadership.

– MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Journalists Endangered Covering Syrian Protests as Government Turns to Arrests and Violence

As journalists attempt to cover Syria's popular uprising, they face opposition from a government that has responded violently to the political dissent. Led by President Bashar al-Assad, the regime accuses foreign

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journalists of being enemy agents and creates an environment of open hostility punctuated by the detention and murder of journalists. As the ongoing protests passed their one-year anniversary, the attacks on war correspondents continue, underscoring the dedication of those trying to report what is happening to Syrian civilians. The experience has caused some observers to re-evaluate the price war correspondents pay to perform their jobs.

The Syrian uprising, which marked its one-year anniversary on March 15, 2012, stems from the wider wave of 2011 demonstrations and protests across the Middle East and North Africa popularly referred to as the "Arab Spring." On March 15, 2011, the protest movement began to escalate, with several months' worth of protests and dissent culminating in simultaneous demonstrations in major cities across Syria. Participants in the revolt demanded the resignation of President Bashar al-Assad and the overthrow of his government, a result that would put an end to nearly half a century of Ba'ath Party rule. Assad's government deployed the Syrian Army in an effort to suppress the uprising, while civilians and army defectors mounted an insurgency against the army in late 2011. According to a March 15, 2012 Reuters report, the United Nations estimates that more than 8,000 people, primarily civilians, have been killed in the struggle. The conflict has caused tens of thousands of Syrians to flee their homes, raising the possibility of a refugee crisis and pushing the country further into what may become a protracted civil war.

In comparison to the accessibility of information related to Egypt's uprising and aftermath, the *Columbia Journalism Review (CJR)* described access to Syria's ongoing conflict as "frustratingly

off-limits" in a Feb. 24, 2012 story. The government limits journalist visas and requires all foreign journalists who do enter Syria with an official visa to conduct reportage alongside a government minder, according to a Feb. 22, 2012 story in *The New York Times*. This makes it extremely difficult to observe the revolt firsthand. The majority of foreign journalists have not entered Syria on a formal visa, but either have covered the story from a distance or sneaked across the border with the help of smugglers from Turkey and Lebanon, the story said. This behavior draws the ire of Syrian authorities, who seek to control media coverage of the uprising and portray the conflict as caused entirely by an armed insurgency.

Reporting in Syria Proves Fatal for Journalists

The choice to cover events on the ground has proven fatal in several instances. On Feb. 22, 2012, four journalists were attacked in a house located in the Baba Amr district of the west-Syrian city of Homs. Referred to as the "capital of the revolution," Homs is the country's third most populous city. It has become a focal point of the uprising and has been continually under siege by the Syrian Army, which has sought to oust the opposition-led Free Syrian Army from the city since May 2011. The country's two most populous cities, Damascus and Aleppo, continue to support the Assad regime. The Feb. 22, 2012 Homs shelling took place on what was the 19th day of a bombardment believed to have claimed the lives of hundreds of trapped citizens, according to a story by the *Times*.

The February 22 attack targeted a makeshift media center used by mainstream media and citizen journalists alike. Among the victims of the attack were Marie Colvin, an American reporter working for *The Sunday Times* of London, and French photographer Rémi Ochlik. The attack aroused suspicions that Syrian security forces may have identified the location of the media center by tracing satellite signals, *The New York Times* reported.

Colvin, 56, was an award-winning, veteran war correspondent who had

covered conflicts from the Middle East to Chechnya, Zimbabwe, and Sri Lanka. Prominent figures ranging from British Prime Minister David Cameron and Rupert Murdoch, owner of *The Sunday Times*, paid tribute to Colvin and her years of experience covering conflict. Murdoch called Colvin "one of the most outstanding foreign correspondents of her generation" in a tribute published the date of her death by *The Sunday Times*. An obituary written by Roy Greenslade in *The Guardian* the same day praised her commitment "to reporting on the realities of war, especially the effects on citizens." John Witherow, *The Sunday Times'* editor, said as part of the paper's tribute to the fallen reporter that Colvin "believed profoundly that reporting could curtail the excesses of brutal regimes and make the international community take notice."

Ochlik, 28, had previously covered wars and upheaval in Haiti, Congo, and Egypt and was covering the Syrian conflict as a freelancer. At least 13 civilians were reported dead in the February 22 shelling, and three other Western journalists were wounded by the attack on the media center, among them French reporter Edith Bouvier and British photographers Paul Conroy and William Daniels.

In a statement released on February 22, press freedom advocacy organization Reporters without Borders (RSF) said that "[t]he Damascus government is persisting in its bloody policy of censorship and suppression of information." The organization characterized the censorship as a form of collective punishment, using "the most violent means to silence those journalists who witness its excesses."

Ochlik and Colvin's deaths came less than a week after that of famed war correspondent Anthony Shadid, 43, also in Syria. Working for *The New York Times*, Shadid had slipped into Syria to report on the uprising and succumbed to an apparent asthma attack on Feb. 16, 2012. Shadid was a prolific, Pulitzer-Prize winning foreign correspondent, who frequently endangered both himself and his family covering the Middle East, ac-

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cording to a *Times* obituary by Margalit Fox published the date of Shadid's death. Shadid was respected by colleagues in the profession for his devotion to reporting in sensitive situations, with David E. Hoffman writing in a *CJR* Behind the News blog post that "[h]e went to those places to make sure the voices of dispossession would be heard and the victims of war would be seen."

According to research by the Committee to Protect Journalists (CPJ), eight local and international journalists have been killed attempting to cover the events in Syria since November 2011, with at least five of the deaths raising questions of government culpability. Among the journalists killed in the line of duty are freelance cameramen Ferzat Jarban and Basil al-Sayed. Homs has proven to be among the most dangerous locales to cover, with French television reporter Gilles Jacquier and freelance reporter Mazhar Tayyara being killed shortly before the February shelling of the media center. Falling victim to the Homs shellings three days after Colvin and Ochlik was Anas al-Tarsha, a 17-year-old videographer who regularly filmed military attacks and posted the videos on YouTube and supplied footage to citizen news organizations.

The string of deaths has led some news organizations to reevaluate the risks taken by war correspondents and appreciate their contributions to journalism. Mohamed Abdel Dayem, Middle East and North Africa program director for CPJ commented in a Feb. 27, 2012 report that "At extraordinary risk, Syrians such as Anas al-Tarsha have picked up their cameras to document for the rest of the world the devastation caused by the governments ongoing attacks" in the face of government efforts to restrict access.

Speaking at a memorial service for his cousin, Ed Shadid called on news editors to increase protection for reporters working in dangerous situations. Cautioning future journalists, Shadid suggested that they "consider that the danger for journalists like Anthony and others like him is that their commitment and history of bravery could be exploited by editors and management who are under their own pressures to meet production goals and achieve awards," according to a March 3, 2012 Associated Press (AP) story.

The AP reported in the same story that editors at several newspapers have responded to the calls for increased safety in the wake of Shadid's death. Susan Chira, an assistant managing editor at the *Times*, said that journalist safety has always been a priority for the newspaper. "Everyone at *The New York Times* is thinking about anything we can do to help our journalists do their work safely," she said, acknowledging that nevertheless, "There is always more to be done."

"We've already invested a lot of time and attention to reporters' safety," and the string of deaths in Syria requires the paper to "double and triple [its] efforts."

— David Hoffman,
Contributing Editor,
The Washington Post

Shadid's former editor at *The Washington Post*, David Hoffman, expressed a similar sentiment, and said he intends to increase efforts targeted at journalist safety. Speaking to AP, Hoffman said "we've already invested a lot of time and attention to reporters' safety," and that the string of deaths in Syria requires the paper to "double and triple [its] efforts."

In a Feb. 24, 2012 editorial in *The Los Angeles Times* titled "In Praise of War Correspondents," Timothy M. Phelps pointed to a trend among newspaper editors to pull back on war correspondent coverage in the face of danger. Acknowledging the bravery of war correspondents, Phelps said that although losing courageous journalists is tragic, pulling back on media coverage of wars is equally troublesome. Although "[n]o editor wants to place a correspondent in jeopardy," Phelps wrote, "Marie [Colvin] and Anthony [Shadid] would not want their deaths to be used to justify retreating from dangerous but important journalism."

Pulitzer Prize Winning Photograph Evokes Strong Emotions

The necessity of coverage of grisly events in the Middle East was further brought into question by the Pulitzer Prize-winning photography of Massoud Hossaini. Hossaini's photograph, which

won the Pulitzer for breaking news photography, depicts an Afghan girl crying in fear following a suicide bomber's Dec. 6, 2011 attack on a shrine in Kabul. The 12-year-old girl, named Tarana Akbari according to an April 18, 2012 Huffington Post story, stands horrified with her face streaked with the blood of the bodies surrounding her. According to an April 18, 2012 Agence France-Presse (AFP) story, newspapers printed the image in various states, with *The New York Times*,

for example, publishing the unaltered photograph on its front page following the bombing, while some newspapers cropped the photograph to remove the images of blood and bodies of small children. MSNBC refused to run the photograph at all on its website at the time, but published

the photograph accompanied by a warning after it won the Pulitzer.

Though the content may be harrowing, news media ethicists are in agreement that such images are a necessary part of conveying the narratives of violence facing these countries.

Speaking to AFP for its April 18 story, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said that "it is absolutely ethical to take and publish photographs like this" because it is "part of telling the whole story." In the same AFP story, Susan Moeller, director of the International Center for Media and Public Agenda at the University of Maryland, said that these types of images should be used as a teaching opportunity and cause for conversation, because "[t]hey are not just representative of the events they depict." It is this perspective that Hossaini himself, speaking to the AFP on April 18, identified with, grateful that he "can right now reflect the pain of the Afghan people to the world, tell the world what's going on in Afghanistan.

— MIKEL J. SPORER
SILHA RESEARCH ASSISTANT

Silha Forum Explores Whether Constitutional Rights Extend to Virtual Worlds

Many people view virtual realities — games where users create computer-simulated environments that can mimic the real world — as imaginary worlds that may differ dramatically from an individual's real life.

SILHA CENTER EVENTS

For some individuals, virtual reality provides a more accurate reflection of who they think they are than real life. Should the U.S. Constitution and the protections it affords citizens be extended to virtual realities? Or is it designed to protect only the real world? At a Silha Center Spring Forum on April 4, 2012, Mary Horvath, an FBI Senior Computer Examiner joined by Dick Reeve, General Counsel/Senior Chief Deputy District Attorney for computer crimes in Denver, Colo., and Stephen Cribari, a criminal and constitutional law professor at the University of Minnesota Law School, considered these questions as well as privacy issues in the online environment.

More than 85 attendees filled the Murphy Hall Conference Center at the University of Minnesota School of Journalism and Mass Communication for the forum, "A Virtual Bill of Rights - Does the Constitution Protect Virtual Speech and Conduct?" Led by Cribari, Horvath and Reeve used a fact-pattern dealing with a hypothetical virtual world to discuss whether crimes like theft, rape, and murder that occur in a simulated environment, committed by user-controlled avatars, should be treated the same way they would be in the real world, and whether civil remedies should be available to users to pursue a libel claim for speech that occurred in the virtual world.

An avatar is a three-dimensional digital persona created by a user in an online game such as Second Life, a virtual world operated by Linden Lab, a San Francisco-based company that attracts users from across the globe. Second Life is a 3D world that allows users to interact with other users while exploring different virtual environments, listening to live music performances,

playing games, shopping in the user-generated virtual economy, among other possibilities. To engage in the virtual reality, users can create avatars that resemble their real-world selves, or they can craft alternative identities. Horvath said many participants in digital worlds live vicariously through their avatars. Cribari noted that some individuals believe that their avatar is a better reflection of who they truly are than their real-world persona.

To illustrate how a virtual crime might constitute a real-world crime, the panel

"One post on Facebook is probably on about 200 servers, even if it was deleted. The Internet loves to back stuff up."

— Mary Horvath,
FBI Senior Computer Examiner

discussed the "rape" of a female avatar. "Where does the real physical human being go for relief?" Horvath asked. Horvath and Reeve both agreed that this experience could be psychologically harmful to an individual whose reality exists more in her virtual world than the real world. The panel did not come to a consensus, but audience members suggested virtual tribunals could be the solution.

Second Life is available to users at no cost, but they have the option to pay real-world money in exchange for the ability to purchase virtual land, buy virtual materials to build a home, or participate in a virtual stock exchange, among other options. Linden Lab CEO said Second Life is "generating well in excess of \$75 million a year," according to a March 15, 2012 post on Joystiq network's blog Massively that focuses on the latest news in multiplayer online gaming. Humble took over the company in 2011, refined the product, and has seen a 40 percent increase in new users, the post said.

Although most of the conduct that occurs in virtual realities is purely part of the game, the expenditure of real-world money complicates the debate

over whether to prosecute users for the actions of their avatars. Reeve said virtual realities like Second Life have been used to launder money. "It's just a game, unless there are real-world implications," he said. Horvath added that if the conduct of an avatar mirrors a user's actions in real-life, Second Life activity could be used as evidence against the individual accused of a real-world crime. Beyond criminal activity, Reeve suggested there may be potential real-world intellectual property claims that may stem from happenings in a virtual world.

In most cases, however, the panelists concluded that most actions in virtual worlds are not subject to prosecution and avatars do not enjoy constitutional protections afforded to citizens in real-life. "Our resources do not need to be spent figuring out what's going on in the virtual world," Reeve said. The panel left the audience, which included many law and graduate students, to ponder how they might address these issues when they are in policymaking positions 10, 20, or 30 years from now.

Beyond virtual worlds, the panelists also discussed the lack of privacy that exists in a digital world. "I can pretty much get access to your entire life," Horvath said. The panelists cautioned audience members to be mindful of their actions online and their activity on social networking sites like Facebook, because they may continue to exist somewhere in perpetuity. "One post on Facebook is probably on about 200 servers, even if it was deleted," Horvath said. "The Internet loves to back stuff up." As it becomes increasingly difficult to avoid using online tools like Gmail, Google's email service, Cribari said it is important that users be educated about the policies and practices of the online services they use.

— HOLLY MILLER
SILHA BULLETIN EDITOR

Silha Spring Ethics Forum Focuses on Cameras in the Courtroom, Status of Minnesota Pilot Project

The U.S. Supreme Court has ruled that the press and the public have a First Amendment right of access to criminal trials, and that cameras do not violate the Sixth Amendment right to a fair trial.

SILHA CENTER EVENTS

As a result, many states have allowed cameras in their courtrooms, but the state of Minnesota has taken a more cautious approach. In 2011, Minnesota launched its two-year pilot project, which permits cameras in most civil proceedings, but prohibits cameras in criminal proceedings, child custody, family law and juvenile proceedings, and petitions for protective orders. The ethics of camera coverage was the topic of the Silha Center's April 12, 2012 Spring Ethics forum, "Getting the Picture: Focusing on the Ethics of Cameras in the Courtroom." The event was cosponsored by the Minnesota Pro Chapter of the Society of Professional Journalists.

The pilot program requires the media to provide written notice to the trial judge as well as to the attorneys involved at least ten days before covering a hearing or trial, as well as contacting the designated media coordinator, who will "facilitate interaction between the courts and the electronic media." To date, only a handful of proceedings in Hennepin, Ramsey and Stearns Counties has been covered by print and broadcast cameras. Appellate courts operate separately from the pilot program. To gain access to those proceedings, the media must give notice of intent to cover those proceeding to the Clerk of the Appellate Court at least 24 hours in advance. Access to appellate courts is granted on a pool basis, with only one electronic news-gathering camera allowed and two still-photographic cameras.

Journalists have argued that the use of electronic reporting tools is a logical extension of their constitutional right to attend and report on legal proceedings. Among opponents' arguments are fears that witnesses' identities may be revealed; that attorneys and judges

might engage in "grandstanding," or showing off for the cameras; and that the presence of cameras could disrupt proceedings, perhaps resulting in an unfair trial.

The Silha Center has been following Minnesota's pilot program closely since 2007. (For more on the battle over cameras in the courtroom, see "Battles to Gain Camera/Audio Access to State

"Camera coverage of court proceedings is part of the journalistic fabric of a vast number of states. There is no valid evidence that any of the ills people have speculated will occur."

— Judge Kevin Burke,
Hennepin County District Court

and Federal Courtrooms Continue" in the Fall 2011 issue of the Silha *Bulletin*; "Minnesota Senate Expands Floor Access; State Supreme Court Approves Cameras in the Winter/Spring 2011 issue; "Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings in the Fall 2010 issue; "An Exclusive Report from the Silha Center" in the Spring 2009 issue, "'FOIA and Access: Minnesota High Court Approves Cameras-in-Court Pilot Program" in the Winter 2009 issue; "Minnesota Supreme Court Holds Hearing on Cameras in Courts: Minnesota Supreme Court Holds Hearing on Cameras in Courts in the Summer 2008 issue; "Minnesota Advisory Committee Resists Cameras in Courts" in the Winter 2008 issue, and "Court Access: Federal Law Would Allow Cameras in U.S. Courts," in the Fall 2007 issue.)

Panelists included Hal Davis, the team leader for public safety for the St. Paul *Pioneer Press*; Joan Gilbertson, a senior news producer at WCCO-TV in Minneapolis; Gary Hill, former National Ethics Committee Chair for SPJ; Caroline Palmer, staff attorney at Minnesota Coalition Against Sexual Assault (MNCASA); and Abby Simons, a Minneapolis *Star Tribune* reporter who

covers Hennepin County District Court. Professor Jane E. Kirtley, Silha Professor of Media Ethics and Law and director of the Silha Center, moderated.

Hill began the event by showing a collection of video clips of television news coverage from the 2005 Chai Vang murder trial in Wisconsin, where cameras in criminal cases are commonplace. Vang, a Hmong

immigrant, shot and killed six Caucasian hunters who had wandered onto his property. Although the crime was allegedly rooted in racial prejudice, Hill described how electronic coverage of the proceedings helped accurately portray the demeanor of the defendant, witnesses

and victims, and helped defuse the highly volatile situation in the community. Simons agreed, saying that trying to use adjectives in written reports to describe the expressions of the defendant and the witnesses during the trial can carry nuances that may be misleading. Writing that a defendant was "agitated" could lead readers to assume there was a degree of guilt, for example. Presenting the image without a value judgment attached to it allows viewers to decide for themselves, she said.

But such coverage can be distorted by editing, Davis claimed, giving emphasis to some parts of a trial while glossing over others. Print media often follow the "inverted pyramid" style of presenting facts, where the most important information comes first. In contrast, video coverage of an event often presents information in a linear, "as it happened" timeline. Using the inverted pyramid style to edit video could be misleading, Davis warned.

Palmer said that as a victim's advocate, her concern is that a potential witness or victim in a sexual assault case who viewed video coverage of a civil case might not realize that cases such as theirs would not require them to appear

before a camera under Minnesota's pilot program. Not understanding that, they might avoid reporting the assault. Simons responded by asking whether the potential harm to a victim would outweigh the benefits of public access to such proceedings.

Although Palmer raised concerns about victims of sexual assaults, other panelists noted that there are many ways to protect their anonymity, such as the "blue dot" that has been used to hide witnesses' faces. Gilbertson commented that local media often carry video images of proceedings in other states, so that many Minnesotans assume cameras are permitted in their own state as well, not realizing there are significant restrictions.

Kirtley pointed out that the problem of "grandstanding," where judges and attorneys might act unnaturally because of the camera's gaze, is a question of legal ethics and not the problem of the media. Hill observed that most proceedings are already videotaped to

save on the cost of using human court reporters. However, Kirtley pointed out that videotapes made under these circumstances are controlled by the courts, not the media.

Hennepin County District Judge Kevin Burke, who was scheduled to take part but was unable appear, sent a statement to be read at the event. Burke wrote that "Camera coverage of court proceedings is part of the journalist fabric of a vast number of states. ... There is no valid evidence that any of the ills people have speculated will occur." Simons agreed, noting that many proceedings she has attended have been crowded, indicating that citizens are indeed interested in knowing what is happening in the courts.

Davis reiterated, however, that the Minnesota pilot program limits coverage to civil cases. Most information about civil cases, Davis stated, is found on paper, and reporters need to know where to look for it. By contrast, most of the

action in a criminal case takes place in a courtroom. The majority of the panel agreed that electronic coverage of criminal proceedings would be important to citizens.

The panel discussion was followed by questions from the audience. One of the audience members was Minnesota House Rep. Leon Lillie (DFL-North St. Paul), who has proposed legislation promoting the use of cameras in courtrooms.

Kirtley concluded the lively discussion by noting, "Cameras are not only a right of journalists, but cameras are a right of the public."

Nearly 100 students, faculty, and members of the public attended the Ethics Forum, which was underwritten by generous grants from the late Otto Silha and his wife, Helen, SPJ, and the School of Journalism and Mass Communication. The full Ethics Forum is available to be viewed online at <http://www.silha.umn.edu/events/archive.html>.

– ELAINE HARGROVE
SILHA CENTER STAFF

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TWENTY-SEVENTH ANNUAL SILHA LECTURE

A Question of Taste: The Ethics and Craft of Restaurant Reviewing

You are invited to the 27th Annual Silha Lecture, featuring Lynne Rossetto Kasper, co-creator and host of American Public Media's national radio show, *The Splendid Table*. Joining Kasper will be Jane and Michael Stern, who are weekly guests on *The Splendid Table*. Known for their *Roadfood.com* website, the Sterns have pioneered internet food reporting and photography and written more than forty books. They are contributing editors of *Saveur* magazine and regularly write for *Parade*.



October 25, 2012 • 7:00 p.m. – 9:00 p.m.
Cowles Auditorium
University of Minnesota West Bank

Contact the Silha Center at silha@umn.edu or 612-625-3421 for additional information.