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SCHOOL OF JOURNALISM
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3rd Circuit Strikes Down FCC's Super Bowl Fine As 'Arbitrary and Capricious'

On July 21, 2008, the 3rd Circuit U.S. Court of Appeals in Philadelphia overturned the Federal Communications Commission (FCC)'s imposition of a record-setting fine against CBS Corp. for its broadcast of the infamous 2004 Super Bowl Halftime Show "wardrobe malfunction."

At the end of a performance of his song "Rock Your Body" with singer Janet Jackson, Justin Timberlake tore at a piece of Jackson's bustier, exposing her right breast for nine sixteenths of one second, according to the court opinion. The incident sparked a scandal. Both performers apologized for what they called an accident, and CBS issued a public apology and claimed it had no prior knowledge of the stunt.

According to the ruling in *CBS v. FCC*, No. 06-3575 (3d Cir. 2008), the FCC asserted it received "an unprecedented number" of complaints following the broadcast, leading it to investigate the incident and eventually issue a notice of apparent liability, fining 20 CBS broadcast stations the maximum $27,000 each, for a total fine of $550,000, which, according to *The New York Times* on July 22, is the highest fine the FCC has ever levied against a television network.

In overturning the fine, the three-judge panel of the appeals court ruled that the FCC had "arbitrarily and capriciously departed from prior policy" that said "fleeting" broadcast of indecent material was not subject to punishment. The court also ruled that the FCC cannot impose liability against CBS for the acts of Timberlake or Jackson, who it said were "independent contractors," because the FCC could not show that CBS knew in advance that the performers had planned the stunt.

The court vacated the FCC decision, and remanded the case to the district court, a disposition with which Judge Marjorie Rendell dissented. Rendell argued that although she agreed with the majority's finding that the rule change was "arbitrary and capricious" and should be vacated, she said "nothing is to be gained" by remanding the case.

In accordance with the Administrative Procedure Act, 5 U.S.C. § 706, under which the FCC operates, administrative agencies are free to revise rules and policies at their discretion and without judicial interference, as long as the changes are not found to be "arbitrary and capricious."

The majority opinion by Judge Anthony Scirica examined an extensive history of what he called "a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency," dating back to the landmark case *FCC v. Pacifica*, 438 U.S. 726 (1978), a case which arose from a daytime radio broadcast of late comedian George Carlin's "filthy words" monologue. According to the court opinion in *CBS*, in the span of nearly three decades since the *Pacifica* ruling, the FCC declined to find broadcast programming indecent unless it amounted to material so pervasive as to amount to "shock treatment" for the audience. Indecent material, which the FCC can define and regulate, is legally distinct from obscenity, which receives no First Amendment protection.

In March 2004 the FCC became more aggressive in its punishment of the broadcast of fleeting expletives when it ruled in *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) that NBC could be held liable for its live broadcast of the 2003 Golden Globe Awards at which U2 singer Bono blurted out an expletive during an acceptance speech. The commission also said Fox television could be held liable for expletives uttered by presenters and award recipients during the 2002 and 2003 live broadcasts of the Billboard Music Awards. Because the instances all occurred before the FCC announced its new policy in the *Golden Globes* decision, however, it did not fine the networks.

In June 2007, the 2nd Circuit U.S. Court of Appeals struck down the *Golden Globes* decision, finding the FCC's policy change on fleeting expletives "arbitrary and capricious." (See "Second Circuit Strikes Down FCC's 'Fleeting Expletives' Rule as 'Arbitrary and Capricious'" in the Summer 2007 Silha *Bulletin*.) The U.S. Supreme Court has granted *certiorari* in that case. 2007 Silha Lecturer Attorney Robert Corn-Revere served as lead counsel for CBS in both the 2nd Circuit and 3rd Circuit cases. (See "Attorney, FCC Expert Robert Corn-Revere to Deliver 2007 Silha Lecture on Regulating Television Violence" in the Summer 2007 Issue of the Silha *Bulletin*.)

Although the Super Bowl broadcast occurred more than a month prior to the *Golden Globes* ruling and policy change, the FCC argued that NBC should have been aware of the policy change based on a sentence in a 2001 policy statement which said "[E]ven relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." The 3rd Circuit majority disagreed, saying, "when read in its original context rather than as an isolated statement, this sentence does not support the Commission's assertion."

Super Bowl Fine, *continued on page 2*

FCC News

Senate Votes to Block FCC's Cross-Ownership Rule Change

The U.S. Senate passed a bill May 15, 2008 that would overturn rules adopted in December 2007 by the Federal Communications Commission (FCC) to loosen media cross-ownership restrictions.

The rule the bill disapproved, FCC 07-216, made it easier for a single company to own both a newspaper and a broadcast outlet in large cities. According to the FCC, the rule would have "the primary effect of presuming that certain limited combinations of newspaper and broadcast facilities in the largest markets are in the public interest." (See "FCC Changes Cross-Ownership Rules amid Intense Criticism" in the Winter 2008 issue of the Silha *Bulletin*.)

The bill, S. J. Res. 28, was initially introduced by Sen. Byron Dorgan (D-N.D.) and had 27 co-sponsors. It passed on a voice vote, and no voting records were kept.

Dorgan said the December 2007 FCC action opened a "gaping loophole for more mergers of newspapers and television stations across the country," according to a May 16 Associated Press (AP) story.

The bill will require the approval of both houses of Congress and President Bush in order to nullify the FCC's new rules. Under the congressional disapproval procedures delineated in 5 U.S.C. § 802, Congress has the authority to overturn agency rules within 60 session days of receipt of a report from the agency to both houses of Congress containing the rule and a general statement regarding its content or publication of the rule in the *Federal Register*. The new cross-ownership rules were published in the *Federal Register* on February 21, according to a March 5 *Broadcasting & Cable* story.

The House version of the bill, H. J. Res. 79, last saw activity when it was referred to the Subcommittee on Telecommunications and the Internet on March 13. The House resolution is sponsored by Rep. Jay Inslee (D-Wash.) and has 31 co-sponsors.

If the measure were to pass the House, the Bush administration has indicated that a veto is likely, according to a May 19 story in *U.S. News and World Report*. Commerce Secretary Carlos Gutierrez said he was "disappointed with the Senate's action," and would recommend that the president veto the bill, according to a May 16 AP story. "The FCC's approach modernizes a 30-year-old rule in a way that improves the financial viability of the newspaper industry, which faces an increasingly competitive media market," Gutierrez said.

Commerce Committee Chairman Daniel Inouye (D-Hawaii) gave his reasoning for opposing the FCC's new measure in the same AP story.

"In recent years, we have seen an increase in coarse and violent programming, coupled with a decrease in local news and hard-hitting journalism," Inouye said. "To say these trends are not in the best interest of the American people, and especially our youngest citizens, is clearly an understatement."

> "In recent years, we have seen an increase in coarse and violent programming, coupled with a decrease in local news and hard-hitting journalism. To say these trends are not in the best interest of the American people, and especially our youngest citizens, is clearly an understatement."
>
> – Daniel Inouye (D-Hawaii) Chairman Senate Commerce Committee

Advocacy groups say they fear the cross-ownership loosening will spread beyond the top 20 markets and that companies such as Tribune, Media General, and Gannett will buy competitors in smaller cities, according to a story published May 16 in *The Seattle Times*. The groups said they fear this would leave too much control over local news and information in the hands of too few owners.

"The consolidation of TV, radio and newspaper ownership that has occurred already limits the scope of the marketplace of ideas and hinders vigorous public debate, thereby posing a great threat to the First Amendment rights of all Americans," said Caroline Fredrickson, director of the ACLU's Washington legislative office, in an April 28 story in *Television Week*.

On October 23, 2008, the Silha Center for the Study of Media Ethics and Law will present a special Fall Forum addressing media cross-ownership. For more information on the event, see "Silha Fall Forum will Address FCC Cross-Ownership Rules" on page 35 of this issue of the Silha *Bulletin*.

– Jacob Parsley
Silha Research Assistant

Super Bowl Fine, *continued from page 1*

The FCC also argued that since the finding of liability and fine in the Super Bowl case applied to video images, and not fleeting expletives, it did not represent a policy change. Because the previous rulings had only addressed spoken expletives, the FCC argued, there was in fact no policy in place that excepted fleeting images from liability. The court again disagreed, saying "[E]ven if we accept the FCC's interpretation of *Golden Globes* and read it as only addressing fleeting expletives, the Commission's view of the scope of its fleeting materials policy prior to *Golden Globes* is unsustainable … [because] the Commission – before *Golden Globes* – had not distinguished between categories of broadcast material such as images and words." The court pointed out that the FCC has addressed complaints about nudity before, such as after a 2000 broadcast of the film "Schindler's List," but has not considered them factually or legally different from complaints about spoken expletives.

The court also rejected the FCC's argument that CBS should be found liable for the actions of Timberlake and Jackson under a theory of *respondeat superior*, a doctrine under which an employer can be held liable for employees' actions within the scope of employment, instead finding that the performers were independent contractors, not employees. The Court said "The First Amendment precludes the FCC from sanctioning CBS for the indecent expressive conduct of its independent contractors" without providing proof that CBS knew that Timberlake would tear away Jackson's bustier.

– Patrick File
Silha Fellow and *Bulletin* Editor

Subpoenas and Journalist's Privilege

Washington Times Reporter Gertz Not Forced to Testify

A federal judge who had subpoenaed a *Washington Times* reporter as part of an investigation into a leak of grand jury testimony opted not to force him to reveal his confidential sources on July 24, 2008, but the reporter now faces a subpoena from a federal grand jury.

On May 1, 2008, Judge Cormac Carney of the U.S. District Court for the Central District of California ordered *Washington Times* national security reporter Bill Gertz to appear in court and requested e-mails, files and other correspondence relating to his reporting on a Chinese spy ring in California. In a May 16, 2006 *Washington Times* story, Gertz quoted unnamed U.S. government sources as saying that senior Justice Department officials had approved an indictment against Chi Mak, an engineer who worked for an American defense contractor, charging him with conspiracy and unlawful export of defense articles. Carney sentenced Mak to 24 years in prison in March 2007 for being an unregistered foreign agent who conspired to export sensitive details about American military technology to the People's Republic of China.

According to a May 31 story in *The Washington Times*, after defense lawyers alleged that the Justice Department had illegally leaked information to Gertz for his story, Carney ordered a wide-ranging criminal investigation to determine who leaked the information to Gertz in possible violation of Federal Rule of Criminal Procedure 6(e), which bars federal officials from disclosing information about grand jury proceedings, and 18 U.S.C. § 793, which prohibits unlawful communication of classified information.

In his May 1 order, Carney concluded that the investigation had not revealed the sources of the leak and ordered the subpoena to require Gertz "to testify regarding the identity of the source that provided him with the grand jury information," according to the May 31 *Washington Times* story.

The Washington Post reported July 18 that after Gertz filed a motion to quash the subpoena, Carney said he still expected Gertz to appear and be "prepared to testify regarding the newsworthiness of this case and, more particularly, the reasons why maintaining the confidentiality of his sources is critical to his ability to engage in investigative reporting."

According to *The New York Sun* on July 25, the July 24 hearing was held despite objections from the Justice Department, which, after leading the investigation into the leaks, requested more time to pursue it.

The Sun reported on July 22 that Department of Justice officials had originally agreed to participate in Gertz's questioning at the hearing, but senior officials backed away from that promise and asked Carney for more time to take the issue to U.S. Attorney General Michael Mukasey.

Under the Attorney General guidelines at 28 C.F.R. § 50.10, federal grand jury subpoenas seeking confidential information from journalists require the explicit approval of the Attorney General, something prosecutors indicated they were seeking in recent court filings, according to *The Sun* on July 24. The story stated that Mukasey apparently authorized a subpoena for Gertz in the days leading up to the hearing.

After Carney denied the request to stay the proceedings during the July 24 hearing, and the federal prosecutor said the investigation raised "serious separation-of-powers" issues, the judge expressed exasperation, *The Sun* reported. Carney pointed out that prosecutors had earlier received approval to question Gertz, but then later retreated from that position on the advice of senior officials.

"I asked you to the prom and you said you'd go. Then you left me at the dance," the judge said, according to *The Sun*.

At the outset of the hearing, Carney announced that he had been notified by a Department of Justice official that the agency planned to subpoena Gertz to testify before a federal grand jury about the leaks, according to a July 25 story in the *Los Angeles Times*.

When Gertz was asked in the hearing whether he would name his sources, he replied, "No, sir." In response to other questions, Gertz cited his Fifth Amendment right against self-incrimination in light of the threatened subpoena from the Justice Department, the *LA Times* reported.

In his ruling on the hearing, Carney said freedom of the press is an important fundamental right and acknowledged a reporter's need to protect sources. He said Gertz performed a valuable public service through his reporting of the Chi Mak case. The judge said the public's interest in unfettered reporting outweighed the interest in forcing the journalist to identify the leakers, at least in the current proceeding, *The Sun* reported in its July 24 story.

Nevertheless, the judge said that he had a duty to subpoena Gertz to testify because Justice Department officials concluded that someone illegally had leaked secret grand jury information to him.

"Someone was talking to him. It was a serious matter," Carney said, according to the July 25 *Los Angeles Times* story.

The July 24 story in *The Sun* reported that Gertz declined to take questions after the hearing, instead reading a prepared statement.

"Today's hearing shows that First Amendment press freedoms are under assault. Confidential sources are the lifeblood of a free press, independent of government control. Without them, most government failures and abuses of past decades would have gone unreported and uncorrected," Gertz said, according to *The Sun*. "The identity of these confidential news sources must be protected if our press freedoms, fundamental to the effective

***Washington Times* Reporter**, *continued on page 5*

"Today's hearing shows that First Amendment press freedoms are under assault. Confidential sources are the lifeblood of a free press, independent of government control. Without them, most government failures and abuses of past decades would have gone unreported and uncorrected."

– Bill Gertz
Reporter
Washington Times

Subpoenas and Journalist's Privilege

Hatfill Suit Settled, Reporter Locy's Fate Still Unclear

A settlement in Steven Hatfill's Privacy Act suit against the government means former *USA Today* reporter Toni Locy may no longer be subject to a civil contempt order that included fines of up to $5,000 per day.

Hatfill, a former Army scientist and one-time "person of interest" in the government's investigation of the deadly anthrax mailings of 2001, alleged in his suit that federal government officials illegally disclosed disparaging details about him in "a coordinated smear campaign" during the investigation, in violation of the Privacy Act, 5 U.S.C. § 552a (2006). On June 27, 2008 the government settled the suit for about $5.8 million, according to a Department of Justice press release.

> "I hope this means that this ordeal is over and that I can get on with my life."
>
> – Toni Locy
> Former reporter
> *USA Today*

In order to uncover the government sources who leaked the information about the investigation, Hatfill subpoenaed six reporters over the course of the litigation. Eventually, Hatfill focused on former *USA Today* reporter Toni Locy who was eventually held in contempt by U.S. District Court Judge Reggie Walton. (See "Reporters Ordered to Testify and Reveal Government Sources in Hatfill Case," in the Fall 2007 issue of the Silha *Bulletin* and "Reporters Fight Federal Subpoenas" in the Winter 2008 issue.)

The Reporters Committee for Freedom of the Press speculated that the settlement could mean that the contempt order against Locy is now unnecessary, according to a June 27 press release. *The Washington Post* reported in a June 28 story that attorneys for Hatfill have notified the court that they no longer need Locy's testimony, which "may or may not make the appeal moot."

According to a June 28 *New York Times* story, Locy was relieved by the settlement but said that it was too soon to celebrate. "I hope this means that this ordeal is over and that I can get on with my life," said Locy, who will begin teaching legal reporting at Washington and Lee University in the fall.

Judge Walton held Locy in contempt on Feb. 20, 2008, and on March 8 issued an order dismissing Locy's motion to stay enforcement of the contempt order pending appeal and requiring that Locy pay the escalating fines herself. On March 11, hours before the first fine was due to be assessed, the U.S. Court of Appeals for the D.C. Circuit granted emergency relief and stayed Walton's order, pending an appeal. The court heard oral arguments on May 9, but the suit was settled before the court announced its ruling.

In a brief submitted to the court before the May 9 hearing, Locy's attorneys argued that the district court order was overbroad and that the court should recognize a common law reporter's privilege.

"Forced disclosure of Locy's confidential sources about her anthrax reporting will frustrate the public's interest in the free flow of information necessary to inform it about critical current events," the brief stated. "It would also frustrate the press's important watchdog role, and preclude journalists such as Locy from relying on confidential sources to report, as Locy did, that not all investigators believed Hatfill to be involved in the anthrax attacks."

A May 9 *USA Today* story suggested that after hearing oral arguments, the court might side with Locy. According to the story, Judge Brett Kavanaugh said Locy had a strong case because 49 states have recognized a reporter's privilege to guard sources' identities in order to obtain information that serves the public.

"This privilege is supposed to yield only in the exceptional case," Judge Douglas Ginsburg told a Hatfill attorney after asking him to explain why he needed Locy's testimony.

Ginsburg questioned whether Hatfill really needed the information since his attorneys had asked for a trial date anyway. "You said you've got enough to go to trial. You think you can win," Ginsburg told Hatfill's lawyer. "Why is more evidence critical to the case? That seems to be a contradiction."

The Reporters Committee reported on June 30 that after the settlement was announced, Walton had informed Locy in a written notice that if she asks the D.C. Circuit to remand the appeal of her contempt citation, he will vacate the order. It suggested that the appellate court is almost certain to do so because appellate courts are reluctant to decide cases where the issues are moot.

According to a June 28 story in *The New York Times*, Hatfill's attorneys said in a statement that both the press and the government were responsible for mistreating Hatfill. "We can only hope that the individuals and institutions involved are sufficiently chastened by this episode to deter similar destruction of private citizens in the future – and that we will all read anonymously sourced news reports with a great deal more skepticism."

In the June 27 press release, Reporters Committee Executive Director Lucy Dalglish said that it is noteworthy that, unlike a similar settlement in the Wen Ho Lee Privacy Act case in 2006, *USA Today* was not "cornered into participating in the financial settlement" – the government is paying Hatfill the entire $5.8 million. Lee's case, which also included subpoenas for journalists' sources, was settled in 2006, just before the U.S. Supreme Court denied *certiorari* in the case. The government and five media organizations involved paid Lee $1.65 million. (See "Settlement Reached in Wen Ho Lee Privacy Case" in the Spring 2006 issue of the Silha Bulletin.)

Meanwhile, Hatfill's separate defamation and intentional infliction of emotional distress suit against *The New York Times* and columnist Nicholas Kristof was unanimously dismissed by the 4th Circuit U.S. Court of Appeals on July 14.

According to the opinion in *Hatfill v. The New York Times Co.*, 532 F.3d 312 (4th Cir. 2008), Kristof's columns criticized the FBI's investigation of the attacks as "lackadaisical" and "lethargic," as well as "threaten[ing] America's national security." Over a

Hatfill, *continued on page 5*

***Washington Times* Reporter**, *continued from page 3*

functioning of our democratic system, are to endure. Efforts by government to compel reporters to disclose news sources must be resisted."

Rick Pullen, dean of the College of Communications at California State University, Fullerton, said in the July 25 *Los Angeles Times* story that he was perplexed by Carney asking Gertz to appear in court.

"Asking why it's important to keep sources confidential is kind of absurd. It's not rocket science why a reporter is reluctant to reveal information about his reporting," Pullen said. "It's also strange that he was going to ask him why he thought this information was important and worth reporting."

It is likely that prosecutors will grant immunity to Gertz, making it impossible for him to rely on the Fifth Amendment to avoid testifying under the new subpoena, according to the July 24 *Sun* story. If efforts to quash the subpoena fail, he could face civil or criminal contempt charges for refusing to identify his sources.

– Jacob Parsley
Silha Research Assistant

Hatfill, *continued from page 4*

series of articles, Kristof began presenting evidence that pointed to Hatfill as a suspect. Kristof demanded that the FBI either exculpate Hatfill or arrest him to "end this unseemly limbo."

Hatfill's suit alleged that Kristof's columns were defamatory and that they effectively accused him of the crimes "in the mind of a reasonable reader." The District Court granted summary judgment against Hatfill and the Court of Appeals affirmed, holding that "Hatfill voluntarily thrust himself into the controversy surrounding the threat of bioterrorism and the nation's lack of preparedness for a bioterrorism attack."

The 4th Circuit agreed with the district court that Hatfill was a "limited-purpose public figure" and therefore, in order to establish a defamation claim, was required to show actual malice, a fault standard for libel established in *New York Times v. Sullivan*, 376 U.S. 254 (1964) that requires a plaintiff to show that the allegedly defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." The court also concluded that Hatfill did not present enough evidence to prove intentional infliction of emotional distress.

– Jacob Parsley
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Subpoenas and Journalist's Privilege

Hawaii Enacts 36th State Shield Law

Hawaii's governor signed a bill into law on July 2, 2008 that prevents government officials from forcing journalists to divulge anonymous sources except under certain circumstances.

The bill, HB 2557, passed both houses of the Hawaii legislature with unanimous support in April. The shield law took effect immediately, and will expire on June 30, 2011, when legislators can revisit it.

The new law revises Chapter 621, Hawaii Revised Statutes to state that a journalist "shall not be required by a legislative, executive, or judicial officer or body, or any other authority having the power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise," sources, information that might lead to identifying a source, or any other unpublished information.

The law covers any "journalist or newscaster" that is or ever was "employed by or otherwise professionally associated with" any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network;" or any "digital version" of a newspaper or magazine.

The law's protections also apparently include some bloggers, or any other individual who "has regularly and materially participated in the reporting or publishing of news or information of substantial public interest … similar or identical to that of a journalist or newscaster."

The statute lists several exceptions. It does not apply in cases where "probable cause exists to believe that the person claiming the privilege has committed, is committing, or is about to commit a crime" or if the journalist "has observed the alleged commission of a crime."

The law also excludes situations where "there is substantial evidence that the source or information sought to be disclosed is material to the investigation, prosecution, or defense of a felony, or to a civil action for defamation" and "reasonable alternative sources" for the information have been exhausted, the information is deemed "noncumulative" – meaning it does not duplicate information already disclosed – and is considered necessary to the legal proceeding.

Additional exemptions exist when "the information sought to be disclosed is critical to prevent serious harm to life or public safety," or when the source consents to the disclosure of the information.

The law makes Hawaii the 36th state, as well as the District of Columbia, to enact a shield law protecting journalists.

According to the Honolulu *Star Bulletin* on July 3, state Rep. Blake Oshiro (D-Aiea), one of the bill's sponsors, said "The media play an important role in terms of keeping government as well as big businesses and corporations honest. Otherwise, the fear is that decisions get made in back rooms without any real light of truth being shined on them."

The law underwent several changes before it was passed. According to a January 31 Associated Press (AP) story, one proposed measure would have shielded anyone who "complied with and met applicable standards of journalism ethics." According to the AP on February 27, the proposed ethics provision was based on the Society of Professional Journalists' (SPJ) code of ethics. However, the House Judiciary Committee amended the bill to exclude the provision after the SPJ protested the use of its standard of conduct to define who qualifies for a legal privilege. (See "Reporter Shield Law Update" in the Winter 2008 issue of the Silha *Bulletin*.)

The *Honolulu Advertiser* reported that when drafts of the shield bill were initially circulated in August 2007, one sponsor, Rep. Gene Ward (R-Kalama Valley) said he became interested in a shield law after the subpoena of Malia Zimmerman, reporter and editor for the Web site Hawaii Reporter. Zimmerman was subpoenaed by James Pflueger, the owner of a dam that collapsed in March 2006, killing seven people when a 20-foot high wall of water washed down a valley. Pflueger, who was building his defense against lawsuits from the victims' families, subpoenaed the notes and records from Zimmerman's investigative reporting following the dam collapse, the AP reported February 1. The subpoena against Zimmerman is currently "dormant," according to her attorney, Jeff Portnoy. Although it has not been officially quashed or dropped, Portnoy said, there have been no recent attempts to attain documents or depose her. "I think Zimmerman will be absolutely protected in the civil case under the new law," Portnoy said, although he added that if a criminal grand jury were convened, she might still be forced to testify.

Although a July 3 AP story says that no Hawaii journalists have ever been jailed for refusing to name a source, the Hawaii Supreme Court ruled in 1961 that reporters had no First Amendment right to withhold confidential information in court.

The case, *Appeal of Goodfader*, 367 P.2d 472 (Haw. 1961), held that "The freedom of press guarantee of the First Amendment to the Federal Constitution is not in itself sufficient to protect a newspaper reporter from being required in a judicial proceeding to divulge his confidential source of news."

– Jacob Parsley
Silha Research Assistant

The law's protections will presumably include some bloggers, or any other individual who "has regularly and materially participated in the reporting or publishing of news or information of substantial public interest … similar or identical to that of a journalist or newscaster" as long as the protected information is "of substantial public interest."

Subpoenas and Journalist's Privilege

Judge Quashes Subpoenas to 15 Pennsylvania Reporters

On July 17, 2008, a Pennsylvania judge threw out subpoenas issued to 15 journalists summoned to testify at a closed hearing to investigate alleged leaks in the grand jury probe of a casino owner.

Dauphin County Judge Todd Hoover quashed the subpoenas in a July 17 order, according to a July 18 Associated Press (AP) story. "Upon review of the record before the Court, the Court grants the motions to quash subpoenas of all media witnesses seeking their appearance before the supervising judge," the one-sentence order said, according to a July 18 story in *The Times Tribune* of Scranton, Pa. Judge Hoover reportedly gave no explanation of why the subpoenas were quashed.

The subpoenas had been served by attorneys for casino owner Louis DeNaples, who was charged earlier in 2008 with four counts of perjury for lying to investigators about his relationships with gang figures, according to a July 2 AP story.

Attorneys for DeNaples and a codefendant allege that secrecy rules were violated, and as proof they offered "scores" of newspaper stories about the cases citing unnamed sources who spoke about grand jury matters on condition of anonymity, according to a July 1 story in *The Philadelphia Inquirer*.

DeNaples' legal team served subpoenas on reporters for the AP, *The* (Allentown, Pa.) *Morning Call*, *The Philadelphia Inquirer*, the Philadelphia *Daily News*, *The* (Wilkes-Barre, Pa.) *Citizens' Voice*, and the Harrisburg, Pa.-based Web site Roxbury News. The subpoenas sought the reporters' testimony as well as documents related to the probe, such as notes, calendars, e-mail messages, and telephone records. According to *The Inquirer* on June 24, lawyers for *The Inquirer* and the *Daily News* filed a brief with the court that called the subpoenas "a transparent attempt to intimidate the press."

On June 26, Hoover quashed parts of the subpoenas concerning the documents that the journalists were directed to provide, but did not immediately address the portions seeking their testimony.

According to the July 2 AP story, James Roxbury, operator of Roxbury News, testified before the judge on July 1, before the subpoenas had been quashed, but would not comment afterward. Roxbury's lawyer would not disclose what Roxbury was asked or discuss his testimony, but said that Roxbury cooperated without compromising his rights under either the U.S. Constitution or Pennsylvania's shield law.

Pennsylvania's reporter shield law, 42 Pa.C.S. § 5942, states that no journalist "shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit."

A July 2 *Inquirer* story reported that one of the attorneys representing Joseph Sica, a friend of DeNaples who was also charged with perjury, also sought to acquire the cell phone numbers of "eight or nine" reporters involved in the case.

According to the story, the attorney, Sal Cognetti Jr., called the office of state Sen. Robert Mellow (D-Peckville) seeking the phone numbers.

The Inquirer reported that lawyers in the case speculated that if the DeNaples legal team were able to obtain phone records from police or prosecutors, they could search those calls for the reporters' cell-phone numbers and identify who might have leaked information.

According to *The Inquirer*, Scott K. Baker, general counsel for Philadelphia Newspapers L.L.C., which owns both *The Inquirer* and the *Daily News*, said "attempts to obtain our reporters' cell-phone numbers [was] further evidence of the DeNaples and Sica defense team's intent to harass members of the media."

According to *The Inquirer*, Mellow has been a longtime supporter of DeNaples; and DeNaples, his relatives, and companies have given $300,000 since 2001 to Senate Democrats and a Mellow political action committee.

As for the involvement of Mellow's staff, *The Inquirer* reported that Baker wrote in an e-mail that, "To say the least, this would not seem to be an appropriate use of our taxpayer dollars." According to a July 2 AP story, Mellow defended giving the information to Cognetti. "A constituent asked openly for something. There is nothing backhanded, no sleight of hand, nothing deceiving about it," Mellow said.

The July 2 *Inquirer* story also said that someone identifying himself as "Randy Carruthers of the *Pittsburgh Post-Gazette*" called *Daily News* reporter Chris Brennan and Matt Birkbeck from *The Morning Call*, two reporters who were under subpoena, trying to confirm their cell-phone numbers. *Daily News* editor Ardith Hilliard said the caller hung up when Birkbeck started asking questions, according to the *Inquirer*. *Post-Gazette* editor David M. Shribman said there is no "Randy Carruthers" on his staff, calling the impersonation "repugnant."

According to the July 18 *Inquirer* story, Baker said he was pleased with Hoover's final decision to quash the subpoenas. "We believed all along that the purpose of these subpoenas was to harass members of the media and to chill the press from further reporting on the DeNaples proceedings," he said. "Fortunately the judge saw that as well and ruled in our favor."

The July 18 story in *The Inquirer* said that lawyers for DeNaples could not be reached for comment on whether he would appeal the judge's ruling, but that Christopher Casey, a lawyer for the newspapers, said he believed an appeal was likely.

– Jacob Parsley
Silha Research Assistant

"We believed all along that the purpose of these subpoenas was to harass members of the media and to chill the press from further reporting on the DeNaples proceedings. Fortunately the judge saw that as well and ruled in our favor."

– Scott K. Baker
General Counsel
Philadelphia
Newspapers L.L.C.

Subpoenas and Journalist's Privilege

UK Journalist Complies with 'Production Order'

A British freelance journalist's fight to prevent police from seizing his notes about a terrorism suspect ended when the High Court ordered him to hand over copies of his notes, audio tapes, and computer records on June 26.

According to a June 26 story on the Web site of the *Press Gazette*, a British media trade magazine, a three-judge panel sitting on the Queen's Bench Division of Britain's High Court, an intermediate appellate court, gave journalist Shiv Malik seven days to hand over all his material relating to interviews he had conducted with terrorism suspect Hassan Butt. Malik surrendered the material on June 30, according to a July 2 *Press Gazette* story.

In an earlier ruling on June 19, *Malik v. Manchester Crown Court et al.*, [2008] EWHC 1362 (Admin), All ER (D) 245 (Jun), (Approved judgment), the High Court had ruled that the original order sought by Greater Manchester Police, which included all the source material for Malik's forthcoming book, "Leaving al-Qaeda: Inside The Mind Of A British Jihadist," was too broad.

The June 26 ruling stated the final guidelines for the material Malik was required to produce, allowing Malik to turn in photocopies instead of his original notes and to blank out information that would identify confidential sources other than Butt, according to the June 26 *Press Gazette* story.

Malik's book is principally focused on the life of Butt, who became well known after the Sept. 11, 2001 attacks as a mouthpiece for the al-Muhajiroun movement, a group that was subsequently banned by the British Terrorism Act 2006 for the "glorification of terrorism." He claimed various connections to the Taliban, but now says he has renounced radical Islam, and claims many of his earlier boasts were exaggerated, The Associated Press (AP) reported June 26.

Pursuant to Schedule 5 of Britain's Terrorism Act 2000, production orders for the purposes of terrorist investigations are allowed as long as the material is likely to be of substantial value and there are "reasonable grounds for believing that it is in the public interest that the material should be produced."

On March 31, Manchester Crown Court ordered that Malik turn over "all images associated with the publication, whether intended for use or otherwise; audio and video recordings, digital and analogue; [and] notes made regardless of format and source material."

Malik then sought an order quashing the decision to grant the order and the order itself. The High Court issued its initial decision narrowing the scope of the police order on June 19, and followed with the June 26 statement of guidelines for the material Malik was required to produce.

According to the AP on June 26, Manchester police are seeking similar orders against the British Broadcasting Corp. (BBC), London's *The Sunday Times* newspaper, and CBS News, whose "60 Minutes" program featured Butt last year. All are fighting the orders in court.

> "Parliament has decided that the public interest in the security of the state must be taken into account. A balance has to be struck between the protection of the confidential material of journalists and the interest of us all in facilitating effective terrorist investigations."
>
> – Justice John Anthony Dyson
> British High Court
> Queen's Bench Division

The High Court's June 19 ruling recognized "a potential clash between the interests of the state in ensuring that the police are able to conduct terrorist investigations as effectively as possible and the rights of a journalist to protect his or her confidential sources." Justice John Anthony Dyson wrote, "Important though these rights of a journalist unquestionably are, they are not absolute. Parliament has decided that the public interest in the security of the state must be taken into account. A balance has to be struck between the protection of the confidential material of journalists and the interest of us all in facilitating effective terrorist investigations."

The judges were critical of Malik's decision to appeal, stating that he should have attempted to negotiate the order with police instead of keeping the matter in court. They required him to pay for the Manchester police's court fees in addition to turning over his material.

The judges ordered Malik to make an initial payment of 15,000 pounds (nearly $30,000) toward the police department's legal costs, according to a June 26 AP story.

According to the June 26 *Press Gazette* story, Dyson said "The real thrust of these proceedings was a frontal assault on the order itself … In short it is our view that these proceedings should not have been brought."

Malik declared the June 19 ruling which limited the initial order "a victory for common sense," according to a June 19 story in *The Guardian* of London.

In a June 19 *Press Gazette* story, Malik said "In an age of terrorism and counter terrorism and wide-ranging, dragnet legislation, the courts have taken it upon themselves to limit the powers handed down by Government to the police. They have denied the police the right to go on unlimited fishing expeditions,"

National Union of Journalists General Secretary Jeremy Dear also expressed approval of the June 19 decision. "Today's judgment was not just a victory for Malik but also a victory for all those who believe in the importance of investigative journalism," Dear said in the *Press Gazette* story. "The ruling sends a clear signal to the police that they can't see journalists as simply another tool of intelligence gathering."

Following the June 26 ruling, however, Justice Dyson said that "despite what he has declared in public, [Malik] has achieved very little," according to a June 26 Bloomberg News story.

Greater Manchester Police Detective Chief Superintendent Tony Porter called the June 26 ruling a "vindication" of the police's actions in investigating terrorism, according to a June 27 *Guardian* story.

"We've always recognized the value of

UK Journalist, *continued on page 11*

Subpoenas and Journalist's Privilege

Secrecy, Subpoena in R. Kelly Trial

The child pornography trial of R&B star R. Kelly drew media attention not just for its high profile subject and the salacious nature of the charges, but because it involved issues that are high on the list of media law concerns: trial secrecy and the subpoena of a journalist.

On June 13, 2008, a Chicago jury acquitted Kelly on all 14 counts of child pornography. According to The Associated Press (AP), the verdict came six years after Kelly was first charged with videotaping himself having sex with a girl that prosecutors argued was as young as 13 at the time.

During the weeks prior to the trial, media organizations fought to open pretrial records and proceedings after Cook County Judge Vincent Gaughan held a series of closed discussions with attorneys, placed court filings under seal, and placed a gag order on lawyers and others involved in the case.

According to the *Chicago Tribune*; the *Tribune*, Chicago *Sun-Times*, AP, and Chicago Public Radio filed an emergency motion April 24 to immediately open pretrial records and proceedings. Gaughan denied the emergency motion, scheduling a May 8 hearing instead, and eventually denied access to the sealed records and transcripts until after the trial's conclusion in a May 16 order.

In the May 8 hearing, attorneys for both the prosecution and defense argued that opening pretrial records and transcripts to the public would jeopardize a fair trial. According to the AP, Kelly defense attorney Marc Martin warned that opening all records and transcripts would prompt sensational media reports, making it harder to select a jury and then for jurors to remain impartial during the trial. Assistant Illinois state's attorney Mary Boland agreed, saying "Trials should be tried in the courtroom not in the newsroom."

The media organizations' attorney, Damon Dunn, argued the highly personal nature of the information likely to be revealed in the records did not justify the "secrecy draped over the case," the AP reported. "Embarrassment is not a reason to close proceedings," Dunn said.

Gaughan's May 16 decision echoed the concerns of prosecutors and defense attorneys. "Of paramount concern is that the defendant gets a fair trial," Gaughan wrote, according to the *Sun-Times*. "The torrent of media interest in this case has prompted entry of the order which prevents the serious and imminent threat that this case would be tried in the media."

Media organizations also complained on the first day of jury selection, May 10, after they were mistakenly excluded from an introductory hearing and statements from the judge, prosecutors, defense attorneys and Kelly himself, as well as Gaughan's reading of the indictment against Kelly, the *Chicago Tribune* reported.

According to the *Tribune*, when a media representative passed a note to the judge requesting that the hearing be stopped and the media be admitted into the courtroom, Gaughan's response was "no, not right now."

Gaughan later said he did not know the media had been excluded, the *Tribune* reported, and law-enforcement officials providing security acknowledged the mistake, saying the confusion was a result of "first-day jitters."

Another concern for media commentators arose over the subpoena of *Sun-Times* reporter and music critic Jim DeRogatis. According to a May 31 *Sun-Times* story, DeRogatis broke the story of the existence of the Kelly sex tape in 2002 after he had received it anonymously in his mailbox, later passing the tape on to police.

Kelly's defense attorneys called DeRogatis to testify about the tape, but DeRogatis appealed, arguing that compelling his testimony violated his right to a reporter's privilege under the First Amendment and the Illinois reporter privilege statute, or "shield law," 35 Ill. Comp. Stat. Ann. 5/8-901 *et seq*.

Judge Gaughan ruled May 30 that DeRogatis could not invoke the privilege because it only protects reporters from testifying and revealing their sources. He also ruled that DeRogatis must turn over any notes he took during interviews related to the tape.

However, Gaughan ruled June 4 that DeRogatis would not be required to testify because he was protected against testifying about his receipt and handling of the tape by his Fifth Amendment right against self-incrimination, according to the Reporters Committee for Freedom of the Press (RCFP). The defense argued that DeRogatis himself might have committed a crime by copying a tape that depicts child pornography. However, Gaughan's June 4 ruling reaffirmed his decision that DeRogatis hand over his notes, the RCFP reported.

There was some confusion surrounding the status of the subpoena and its appeal. DeRogatis had been expected to appear to testify on June 3, but he did not show up. According to the RCFP, *Sun-Times* attorney Dunn argued that DeRogatis never received the subpoena, and also said the judge could not hold the reporter in contempt for failure to appear, because DeRogatis was in the process of appealing the subpoena. However, Gaughan said Dunn improperly filed his notice of appeal with the trial court instead of the appellate court, and that the appeal therefore could not be considered pending.

DeRogatis appeared in court the following day, where Gaughan ruled he was not required to testify under the Fifth Amendment, and he was not held in contempt.

According to the *Sun-Times*, commentators said the court's narrow interpretation of the Illinois reporter privilege and its protection for reporters' sources threatened to "chill" future reporting.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota told the *Sun-Times* "The message that this sends journalists who cover these sorts of stories is that they do so at their own risk."

– Patrick File
Silha Fellow and *Bulletin* Editor

> "The message that this sends journalists who cover these sorts of stories is that they do so at their own risk."
>
> – Jane Kirtley
> Silha Center Director and professor of media ethics and law
> University of Minnesota

Supreme Court Rulings

Supreme Court Strikes Down 'Millionaire's Amendment' to Campaign Finance Law

For the second time in two terms, a 5 to 4 decision by the U.S. Supreme Court has struck down a provision of the Bipartisan Campaign Reform Act of 2002, better known as the McCain-Feingold Act, because it violated the First Amendment.

The Court's decision in *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008), decided June 26, 2008, struck down a provision of the law known as the "Millionaire's Amendment," at 2 U.S.C. § 441a–1(a), which requires candidates for the U.S. House of Representatives who substantially finance their own campaigns to disclose more information about their spending, while raising limits placed on how much money their opponents can accept.

The majority opinion by Justice Samuel A. Alito Jr. said that the law impermissibly burdened candidates' First Amendment right to spend their own money for campaigning and advertising, and that the law's attempt to "level electoral opportunities" among candidates has "ominous implications" for American voters' abilities to freely evaluate and compare those running for office. Alito was joined by Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas. Justices David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer joined in a dissent by Justice John Paul Stevens, who called the Millionaire's Amendment "modest, sensible, and plainly constitutional."

"[The Court has] never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other … this scheme impermissibly burdens [Davis'] First Amendment right to spend his own money for campaign speech."

– Justice Samuel Alito
U.S. Supreme Court

Federal law sets out various rules for candidates for federal office to receive campaign money at 2 U.S.C. § 441a *et seq.* The law limits candidates to taking no more than $2,300 from any one individual donor during a 2-year election cycle, and candidates cannot take money from anyone who has contributed an overall total of more than $42,700 to political campaigns during the election cycle. The law also places limits on how much money a candidate may accept from the general funds of national or state political parties. The limit is $40,900 for House seats in states with more than one seat.

Under § 319(a) of 2 U.S.C. §441a–1(a), the Millionaire's Amendment, when one candidate spends more than $350,000 in personal money to support his or her campaign, the limits placed on the amount of money the opposing candidate can accept are raised. The limit on individual donations triple, to $6,900; the candidate may accept money from donors who have already met the $42,700 overall limit; and there is no limit on how much the candidate can accept from the general funds of national or state political parties.

Under § 319(b) of the act, upon entering the race, candidates who intend to exceed the $350,000 personal funds amount must inform the Federal Election Commission (FEC) and all other candidates for the seat how much more than $350,000 he or she plans to spend, file another notification within 24 hours of actually passing the $350,000 mark, and file additional notifications with each expenditure of $10,000 of personal funds after the first two notifications are made. The second notification and those declaring expenditures of $10,000 must provide the date and amount of each expenditure. By contrast, non-self-financing candidates need only declare no intention of spending personal funds at the outset of the race.

Jack Davis, a twice-unsuccessful congressional candidate from New York who spent $3.5 million of his own money on campaigns in 2004 and 2006, challenged the Millionaire's Amendment in *Davis v. Federal Election Commission*, arguing that the law unconstitutionally awarded Davis' opponents when he simply spent his own money on his campaign, effectively enabling them to raise more money to finance speech that counteracted and diminished the effectiveness of Davis' speech.

The Court first addressed the FEC's challenges to Davis' standing to sue and its argument that, since the election has already been decided, the issue was moot. In a section of the majority opinion with which all nine justices joined, the court ruled that Davis had sufficiently shown that the "threatened injury" to his campaign via the disclosure and funding rules of § 319(a) and (b) were "real, immediate, and direct," even though his opponent never actually made use of the higher contribution limits of § 319(a), and thus he had standing for the appeal.

On the issue of mootness, the Court said the *Davis* case "closely resembele[d]" its 2007 case *Federal Election Commission v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652 (2007) where the court ruled that case was not moot, even though the election at issue was over, because of the short duration of the controversy and the likelihood that a similar situation would arise in the future. It therefore found *Davis*' case was not moot. (For more on the *FEC v. Wisconsin Right to Life* case, see "In *FEC v. Wisconsin Right to Life*, Court Upholds As-Applied Challenge to McCain-Feingold Act" in the Summer 2007 Silha *Bulletin*.)

On the merits, Justice Alito's majority opinion said the Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech."

The Court relied largely on reasoning it applied to its 1976 decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which it struck down the Federal Election Campaign Act of 1971's limits on the campaign expenditures of candidates, citizens, and associations. There the court ruled that the limits were unconstitutional because they placed substantial and direct restrictions on the ability to engage in political expression that was protected by the First Amendment.

Millionaire's Amendment, *continued on page 11*

Millionaire's Amendment, *continued from page 10*

Distinguishing the *Davis* case from *Buckley*, Alito wrote "while [the McCain-Feingold Act] does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right … [requiring] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations."

The Court said the FEC failed to show that "level[ing] electoral opportunities" amounted to "a compelling state interest" which justified the burden § 319(a) places on candidates' speech.

"Different candidates have different strengths," Alito wrote. "Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives … and it is a dangerous business for Congress to use the election laws to influence the voters' choices."

The court ruled that because it found the limits provided for in § 319(a) unconstitutional, § 319(b)'s disclosure requirements, which are meant to implement the limits, must also be found unconstitutional.

In dissenting, Stevens wrote that Davis' argument that the Millionaire's Amendment punishes candidates who choose to self-fund by offering advantages to their opponents and limiting their ability to speak and participate was "unpersuasive," and in fact, "[t]he Millionaire's Amendment quiets no speech at all."

"Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles," Stevens wrote. "If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired. And the self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by this provision."

Stevens also disagreed with the majority's reliance on *Buckley* to conclude that "'governmental interest in eliminating corruption or the perception of corruption' is the sole governmental interest sufficient to support campaign finance regulations," a suggestion he said was "simply wrong."

To the contrary, Stevens wrote that the Court had "long recognized" a strong governmental interest in "reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results," citing several cases, including *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

According to a June 30 First Amendment Center report, experts in election law and the First Amendment say the ruling could have broad effects on other restrictions on campaign spending. Rick Hasen, an election law expert at Loyola Law School in Los Angeles, said, "corporate and union spending limits are clearly on borrowed time."

The report said that according to University of Chicago law professor Geoffrey Stone, the decision demonstrates that the Court now has a solid majority of five justices – Scalia, Thomas, Kennedy, Alito and Chief Justice Roberts – who are hostile to campaign-finance reform on First Amendment grounds. The shift is attributable to the arrival in 2006 of Alito as the successor to Justice Sandra Day O'Connor, who generally supported campaign-finance laws, the report said.

The First Amendment Center report is available online at http://www.firstamendmentcenter.org/analysis.aspx?id=20238. The First Amendment Center is a nonprofit organization focused on education and information about First Amendment issues based at Vanderbilt University in Nashville, Tenn. and Arlington, Va.

– Patrick File
Silha Fellow and *Bulletin* Editor

UK Journalist, *continued from page 8*

investigative journalism. But in this particular case we think that Shiv Malik took the wrong stance," Porter said in the July 2 *Press Gazette* story. "Our focus is on the material. That's in the spirit of the most recent High Court proceedings. We've never suggested that investigative journalists need to be fearful, they've got a job to do."

In a June 2 article in British magazine *New Statesman*, Brian Cathcart, a journalism professor at Kingston University in London, cautioned against rulings forcing journalists to give up confidential information, especially in the context of terrorism investigations.

"The message of this will be clear: anybody who has real information about the terrorism milieu will know that talking to a reporter is no different from talking directly to the police, with all that that implies," Cathcart wrote.

"Reporters, and thus newspapers and broadcasters, will be unable to gather first-hand information about one of the most important stories of our time. Because people who know things won't talk to them, reporters will be reduced to talking to people who don't really know things, and we will all plunge back into the ignorance from which Malik and company have been trying to rescue us."

Cathcart concluded, "Actually, we will continue to have one source of information: the government and its instruments in the police and the security services. Everything we are told about the terror threat will come from them. And they, of course, will tell us no more and no less than we must know if we are to be persuaded to support them in whatever assault on civil liberties they want to perpetrate next."

– Jacob Parsley
Silha Research Assistant

Supreme Court Rulings

Court Unanimously Rejects Limits on Duplicate FOIA Suits

A unanimous U.S. Supreme Court ruled June 12, 2008 that the government may not reject Freedom of Information Act (FOIA) requests for federal agency documents on the ground that another party has already unsuccessfully sued for the same documents.

The opinion in *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008), written by Justice Ruth Bader Ginsburg, rejected the lower court's holding that the second party to sue for the same documents under the federal FOIA could be denied the documents based on a theory called "virtual representation," which states that nonparties to a lawsuit can be bound by that lawsuit's result if they bring a second lawsuit that states a similar claim.

> The D.C. Circuit's broad theory of preclusion went against the high court's emphasis of "the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party."
>
> – Justice Ruth Bader Ginsburg
> U.S. Supreme Court

The Supreme Court's central holding was that the lower court's application of virtual representation in two similar but not legally connected FOIA claims could not overcome "the deep-rooted historic tradition that everyone should have his day in court."

The case arose after two antique aircraft enthusiasts had sought the same Federal Aviation Administration (FAA) documents related to an antique F-45 airplane manufactured by the Fairchild Engine and Airplane Corporation. Greg Herrick, who was restoring an F-45 he owned, had been denied the documents by the FAA after the Fairchild company had objected to their release based on the trade secret excemption to the FOIA at 5 U.S.C. § 552(b)(4). A federal district court in Wyoming and later the 10th Circuit U.S. Court of Appeals upheld the FAA's decision to withhold the documents.

Brent Taylor, a fellow antique airplane enthusiast and friend of Herrick's, filed a FOIA request for the same documents shortly after Herrick's request was denied. After the FAA failed to respond to his request, Taylor filed suit in U.S. District Court in the District of Columbia. The D.C. District Court granted the FAA summary judgment in May 2005 based on the virtual representation theory of claim preclusion, and the D.C. Circuit Court affirmed in June 2007.

The D.C. Circuit announced a five-factor test for virtual representation. It said the first two prongs of the test, a showing that the two parties had an "identity of interests" in their lawsuits and that the first litigant had "adequately represented" the second litigant, were necessary for a finding of virtual representation, but not in themselves sufficient. Additionally, the court ruled, one of three other factors must be shown: a "close relationship" between the two litigants, "substantial participation" by the first litigant in the case of the second litigant, and "tactical maneuvering" by the second litigant to avoid their claim being precluded by the decision in the first suit.

According to the Supreme Court opinion, the D.C. Circuit found an identity of interests between the Herrick and Taylor lawsuits because they both wanted the same result – the release of the FAA documents – and adequate representation because they had both hired the same attorney. The appeals court also found a close relationship between the two litigants because they were friends and had planned to work on Herrick's F-45 together, and therefore granted summary judgment to the FAA on the basis of virtual representation in *Taylor v. Blakey*, 490 F.3d 965 (D.C. Cir. 2007).

Ginsburg wrote that the D.C. Circuit's reasoning in the Taylor case adopted a broad theory of preclusion that went against the high court's emphasis of "the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." The opinion said the D.C. Circuit's "amorphous" balancing test was at odds with the "constrained approach" advanced by the high court and "would likely create more headaches than it relieves."

The Supreme Court also rejected the FAA's argument that nonparty preclusion should apply more broadly to "public-law" litigation, such as a FOIA request, than in "private-law" controversies. Ginsburg observed that, while the FOIA is a law that serves the public interest generally, it instructs agencies receiving FOIA requests to make the information available not to the public, but rather to the individual making the request. "A successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large," the Court said.

The Court remanded the case to determine whether Taylor had in fact acted as Herrick's agent, but said the burden should lie with the government to prove the relationship, and "a mere whiff of 'tactical maneuvering' will not suffice."

– Patrick File
Silha Fellow and *Bulletin* Editor

Election 2008

Protest Groups Fight to be Heard at National Party Conventions

In the lead-up to the 2008 Republican National Convention (RNC) in St. Paul, Minn. and the Democratic National Convention (DNC) in Denver, groups planning to demonstrate at the events were unsuccessful in their lawsuits challenging parade routes and public demonstration zones that they argued unfairly restricted their rights to be seen and heard.

On July 16, Judge Joan N. Ericksen of the U.S. District Court for the District of Minnesota denied a motion for preliminary injunction filed by a coalition of organizations planning an anti-war march in St. Paul for the first day of the RNC, September 1. The groups challenged a permit granted by the city of St. Paul that designated the march's route and time. The injunction asked the court to reject the city's plan and substitute one proposed by the coalition.

According to the ruling in *The Coalition to March on the RNC and Stop the War v. The City of St. Paul*, Civil No. 08-835, (D. Minn. 2008), the coalition contended that the permit granted by the city, which allows a march between the hours of noon and 4 p.m. on September 1 along a designated route that begins at the Minnesota State Capitol, approaches the Xcel Energy Center, where the convention will be held, and returns on the same route, was a violation of the group's First Amendment rights.

The city of St. Paul issued the permit on May 14, denying the coalition's application for a march that started at 2 p.m. and had an unspecified finish time, estimated the number of participants at 30,000 to 50,000, and proposed a route that began and finished at the capitol, circling the Xcel Energy Center. According to the ruling, the city justified its denial of the coalition's proposed route and time by citing the convention's special security concerns and the need for "safe and orderly movement of pedestrian and vehicular traffic in the area."

Ericksen wrote that "[c]ompared to the access afforded marchers to the sites of the recent national conventions of the Democratic and Republican parties, the coalition appears to have unprecedented access to the convention site." Ericksen noted that a court declined to alter a parade route for the 2004 DNC in Boston that kept protesters "attenuated" from the convention site. "With regard to the other Republican and Democratic national conventions in 2000 and 2004, the Court is not aware of any march that passed within sight and sound of the conventions' sites. Instead, the marches terminated at rally sites that were much farther from the conventions' sites than the mere 84 feet that separate the closest point of the permit's route from one of the entrances to the Xcel Energy Center."

But the ruling was deliberate in stating that security measures used for previous conventions should not be interpreted as a "baseline" for future conventions. "Were it otherwise, a sort of 'security creep' would come, by increments, to overwhelm the First Amendment," Ericksen wrote.

Ericksen's ruling said that the permit the city issued met the constitutional requirements set out in the U.S. Supreme Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) that government regulations on the time, place, and manner of expression in "quintessential public forums" such as public streets be "content neutral, … narrowly tailored to serve significant government interests, and [leave] open ample alternatives for communication of the coalition's message."

The court disagreed with the coalition's argument that delays in the issuance of the permit, along with a limited explanation of the city's denial of its application, constituted a non-content neutral application of the regulation. "There is no evidence that [the city] disfavored or sought to stifle the Coalition's message by acting on its application approximately 3.5 months before its planned march," Ericksen wrote. She said the city's May 14 letter listing security and logistical reasons for denying the coalition's application was sufficient explanation.

In addressing whether the permit was narrowly tailored, Ericksen's order focused on the city's need for security and order, and extensively discussed the details of the routes proposed by the coalition and the city.

"The concentration of high-ranking government officials and a substantial number of people presents daunting security challenges. Threats to the convention that the Secret Service must consider include terrorist attacks, lone gunmen, fire, chemical or biological attacks, detonation of explosive devices, and suicide bombers. In addition, many groups have endorsed a call to shut down the RNC by blockading the convention site, immobilizing delegates' transportation, and blocking bridges that connect St. Paul and Minneapolis," Ericksen wrote. "[The city] plainly has a substantial interest in securing the area immediately surrounding the convention site."

The ruling said that the coalition's proposed route as well as an alternative route it had proposed both effectively encircled the Xcel Center, which could prevent delegates and emergency vehicles from traveling to and from the building. "By preventing encirclement of the convention site, the denial of the Coalition's application minimizes the potential for a blockade," Ericksen wrote.

As to the coalition's contention that the permit does not leave open ample alternatives to convey its message, Ericksen pointed out that in addition to the march passing 84 feet from one of the Xcel Center's main entrances and its glass façade, the route also passes by two of the convention's three designated media workspaces.

The court also said the city has planned a four acre "public viewing area" near the convention site which will be open to the public during the convention and "appears to compare favorably to those employed during recent political conventions," especially a so-called "free speech zone" established for the 2004 DNC positioned under a railroad bridge with concrete barriers and fencing that a federal district

Protest Groups, *continued on page 14*

"Compared to the access afforded marchers to the sites of the recent national conventions of the Democratic and Republican parties, the coalition [of protesters] appears to have unprecedented access to the [St. Paul] convention site."

– Judge Joan N. Ericksen
U.S. District Court for the District of Minnesota

Protest Groups, *continued from page 13*

court in Massachusetts characterized as "an offense to the spirit of the First Amendment" and "a grim, mean, and oppressive space" that gave the impression of an "internment camp" in *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61 (D. Mass. 2004).

According to the Minneapolis *Star Tribune* on July 16, St. Paul police hailed the decision. Police department spokesman Tom Walsh said the ruling was "an affirmation of what we have been saying all along, which is that the city has been making every effort to provide both a safe and secure event for everyone as well accommodate expression of First Amendment rights."

But Jessica Sundin, a spokeswoman for the protest coalition expressed concerns that the time frame the city has allowed for the march might be insufficient to complete it.

"I think there's a chance of a confrontation with police when it's 2 or 3 o'clock and there are still tens of thousands of people trying to get to the Xcel," she said.

According to the *Star Tribune*, Sundin said the group might appeal the decision to the 8th Circuit U.S. Court of Appeals.

The September 1 anti-war march is not the only protest planned during the St. Paul RNC, however, nor is it the only march route that prompted a lawsuit in federal court.

According to the *Star Tribune* on June 25, the city of St. Paul issued a permit to The Poor People's Economic Human Rights Campaign to march September 2 to the Xcel Center from nearby Mears Park, before continuing on to the State Capitol. The march is scheduled from 4 p.m. to 7 p.m. and will progress side-by-side with vehicle traffic on the designated streets, the *Star Tribune* reported.

On June 26, the group, which says its goal is to ensure that everyone has access to health care, housing and living-wage jobs, said it was not satisfied with the route, which is different from one it had applied for.

According to the *Star Tribune* on June 26, Cheri Honkala, national organizer for the organization, said it would continue with a lawsuit it filed against the city in U.S. District Court for the District of Minnesota complaining that the permit process was taking too long and violated the group's First Amendment rights. Honkala also said the group did not plan to follow the designated march route.

In Denver, the American Civil Liberties Union (ACLU) and a coalition of protest groups sued the city, challenging designated parade routes and arguing that the location of a so-called "demonstration zone" is too far from the site of the convention for protesters to be seen or heard by delegates and attendees. On August 6, U.S. District Judge Marcia S. Krieger ruled in *American Civil Liberties Union of Colorado, et al. v. City and County of Denver*, No. 08-cv-00910-MSK-KMT (D. Colo. 2008) that the restrictions "do not unconstitutionally impair the Plaintiffs' First Amendment rights."

Krieger's ruling relied on the three-part analysis set out in *Ward* along with many of the same cases as the Minnesota District Court in its ruling in *The Coalition* case. Krieger ruled that the Denver restrictions, which include a fenced and barricaded demonstration zone about 700 feet from the Pepsi Center arena, where the DNC will be held August 25 – 28, as well as designated parade routes, which protesters argued did not come close enough to the arena, were content neutral, narrowly tailored to serve significant government interests, and left open ample alternatives for protesters to communicate their message.

The ACLU first sued the U.S. Secret Service and Denver city officials in U.S. District Court in Colorado in early May over access to information about the location of the demonstration zone and what materials officials planned to use to keep protesters in, the Reporters Committee for Freedom of the Press reported on June 12. The report said that government authorities argued the details should not be made public for fear of threatening national security. After officials released the planned location of the demonstration zone, the ACLU amended its lawsuit, saying, "No human voice, or any other sound … can ever hope to reach a person at the entrance [to the Pepsi Center]," the Denver *Rocky Mountain News* reported.

The same U.S. District Court in Denver planned to conduct a separate trial on August 12, 2008, to address First Amendment issues relating to security arrangements at Invesco Field at Mile High, where the convention's last night of events will be held, including the acceptance speech of presumptive nominee Sen. Barack Obama (D-Ill.).

– Patrick File
Silha Fellow and *Bulletin* Editor

Minnesota Supreme Court Holds Hearing on Cameras in Courts

No Decision Yet; 16 of 19 Committee Members Disfavor Cameras

The Minnesota Supreme Court heard arguments July 1, 2008 from an advisory committee and a number of proponents and detractors of a proposed change in the state's rules that would make it possible for news media cameras to gain access to the state's district courtrooms.

Currently, Minnesota General Rules of Practice for the District Courts Rule 4 specifies that "no pictures or voice recordings, except the recording made as the official court record, shall be taken in any courtroom … during a trial or hearing of any case or special proceeding incident to a trial or hearing." Minnesota Code of Judicial Conduct Canon 3(A)(11) states that "A judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom … [unless] the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction." The restrictive rules function as a complete bar to video and audio recording of trials.

The Minnesota rules have been in place since 1983. A previous attempt to change the rules to eliminate the single-party veto power for audio and video coverage of trial courts failed in 1989 in *In re Modification of Canon 3A(7) of Minnesota Code of Judicial Conduct*, 441 N.W.2d 452 (Minn. 1989). The current proposed rule change was requested in March 2007 by several media organizations. (See "Minnesota Considers Cameras in Trial Courtrooms" in the Fall 2007 issue of the Silha *Bulletin* and "Minnesota Advisory Committee Resists Cameras in Courts" in the Winter 2008 issue of the Silha *Bulletin*). The court has not indicated when it will issue its final decision on the proposal.

A 16-member majority of the advisory committee, made up of 19 Minnesota judges and attorneys, submitted a written recommendation to the court that "the current rules not be substantially changed, other than to consolidate them into a single rule provision." The recommendation report said that the committee had examined other state rules, and conceded that in states with more liberal regulations "the committee did not hear about any of the problems feared by the opponents in Minnesota, such as victim and witness reticence, disruption of the pretrial process, or grandstanding by lawyers." The report concluded, however, that cameras offered no benefit to the court's mission of administering justice, and that "ultimately, the committee found that there was insufficient evidence to support relaxation of the current rules."

A three-judge minority said that opponents of the rule change lacked empirical evidence to back their claims that cameras would be disruptive, and pointed out that judges and prosecutors from states that allow cameras had given positive feedback.

At the July 1 hearing, Judge Mel Dickstein of the Hennepin County District Court presented the majority position, stating that "Cameras in the courtroom typically result in 30-second sound bites on the evening news, and then only in the most sensational or emotional cases or those involving people who are well known."

In response to a question from Supreme Court Justice Lorie Gildea about the presumption of openness in all judicial proceedings, Dickstein replied that the courts are and always will be open to reporters and the general public, but that introducing a camera might make people reluctant to even enter a courtroom. "Opening the courtroom to cameras would have exactly the opposite impact; not to open it further, but to close it to some of the most vulnerable in our community, people like children," Dickstein said.

As part of her tearful testimony, majority-position supporter Lolita Ulloa, managing attorney of the Hennepin County Attorney's Office Victim Services unit and member of the Minnesota Judicial Branch's Racial Fairness Committee, said she was grateful to the court for not following the majority of other state court systems. "This is not a community education project … this is about ratings." Ulloa said. "I was a victim. If I had known that cameras would be allowed in the courtroom, I would not have reported my sexual assault. You would have silenced me … even if someone had told me that cameras were not allowed in sexual assault cases, it would have been enough of a concern for me and my reputation not to come forward."

Thomas Frost, executive director of Cornerhouse, a child abuse advocacy group, said that even if cameras were prohibited in certain types of trials, allowing cameras in any cases would still result in some reluctance to testify. When questioned by Supreme Court Justice Paul Anderson whether an absolute bar against recording the testimony of children would help, Frost replied that it would not. "Children are not always rational," Frost said. "The children seeing televised trials may conclude, 'this is what happens when crimes are reported …' if we put the possibility in their mind that they may appear on television, we are putting one more barrier in front of them disclosing, and if it happens just once as a result of the cameras in the courtroom changing the rules, if it happens just once that an offender is not reported on and the offender repeatedly abuses that child, I don't think that the risk is worth it."

Judge Steven Cahill of Clay County represented the three-member minority's view at the hearing. "The people who have spoken and taken a position against the relaxation rule … are just supposing that there's going to be a bad experience." Cahill said. "There is no empirical evidence or evidence brought to us from any other state or jurisdiction where cameras have been used where there has been a bad experience."

In their written report, the minority cited the lack of reported problems in other states as a principle

Cameras, *continued on page 16*

"The committee did not hear about any of the problems feared by the opponents [of cameras in courts] in Minnesota, such as victim and witness reticence, disruption of the pretrial process, or grandstanding by lawyers. [But] ultimately, the committee found that there was insufficient evidence to support relaxation of the current rules."

– Minnesota Supreme Court Advisory Committee majority opinion

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reason for relaxing current Minnesota standards. "No prosecutor or prosecutor's association, no public defender or criminal defense lawyer or association of them, no victim's rights advocate or victim's rights advocates group, no civil litigation attorneys or associations of them from any state which permits cameras in their courtrooms appeared before the committee to lend credence to the concerns expressed by Minnesota prosecutors, criminal defense lawyers, civil litigators or victim's rights advocates," the minority report stated. Currently 35 states allow cameras in state trial proceedings, including every state that borders Minnesota.

The minority proposed a rule that "prohibits camera coverage in every conceivable case where privacy is a concern," such as family law or sexual abuse cases. The minority's proposal would remove the veto power of the parties and grant the trial judge discretion to prohibit camera coverage in part or entirely for "good cause," on a case-by-case basis.

The speaker given the most time at the July 1 hearing was retired Florida Supreme Court Chief Justice Arthur England. England discussed Florida's decision in 1977 to launch a limited one-year open access period for Florida courts subject only to equipment standards and "reasonable orders and direction of the presiding judge." England said that the experiment was a great success and that subsequent surveys of all court participants indicated that "nothing bad happened during that year" due to the presence of cameras in the courtrooms. Florida courts have allowed cameras ever since.

Another judge that spoke about the benefits of an open court system was Iowa District Court Judge Patrick Grady. A former public defender and guardian *ad litem* for children required to testify in adult court, Grady said fears that cameras would prevent crime victims from coming forward were largely misplaced. "If your victim advocates are being honest, they'll tell you that the major concern of those who report crimes … is the issue of the perpetrator being in court, not a camera being in court," Grady said.

Judge Michael Kirk, from Minnesota's 7th Judicial District Court in Moorhead, Minn., spoke about living across the river from Fargo, N.D., where cameras are allowed in district courts. Kirk contended that blocking cameras from the courts actually increases sensational coverage. He said that, based on his own observations, North Dakota television coverage often features courtroom footage with audio commentary, whereas Minnesota reporting regularly consists of "undignified comments" made outside the courthouse.

"There might be a report that would cover a Minnesota case, and what I might see in that report is a number of people on the steps of the courthouse; family members or perhaps friends of the victim or defendant, choosing to use words that maybe aren't the best for the proceedings and displaying hostility that doesn't advance the interests of justice in any way," Kirk said. "The courtroom provides control and dignity that isn't found on the courthouse steps."

Rick Kupchella, a reporter for Twin Cities television station KARE-11 who represented the Society of Professional Journalists, said gaining access to a courtroom in a system where any party involved can veto the presence of a camera is difficult. "We're stuck in an outmoded, fear-based, irrational system that seriously limits public access to a primary branch of government," Kupchella said. "That is not a formula to achieve the end of access."

Opponents of the change, such as James Backstrom, the president of the Minnesota County Attorneys Association, repeatedly said that even without any evidence of a chilling effect, the stakes were too high.

"I don't think we should take the risk, that we should jeopardize one case where someone has been victimized in a criminal way," Backstrom said. "It's traumatic enough as it is, and I don't believe we should make it more difficult for them by putting a camera in the courtroom … the people who are pushing this issue are the media, and they're doing it for purposes of profit, not for purposes of public awareness."

Not all victims' advocacy groups are opposed to the changes. Marna Anderson, the executive director of WATCH, a group that monitors the way courts handle cases involving violence against women, wrote an editorial that appeared in the October 18, 2007 Minneapolis *Star Tribune* defending the use of cameras. "Public access to the courts through recordings can demystify the justice system and promote greater understanding of its complexities, while fostering greater accountability and trust," Anderson wrote.

Thomas Plunkett, a member of the Minnesota Association of Criminal Defense Lawyers, said that cameras would detract from the public's perception of the justice system. He described a series of courtroom news reports he discovered online that involved lecturing judges, drunken lawyers, and courtroom brawls. "I found nothing that was positive," Plunkett said. "All those videos took away from the solemnity of the proceedings."

Minnesota courts might benefit from some extra oversight, according to "The Future of Cameras in the Courts: Florida Sunshine or Judge Judy," at 8 Pgh. J. Tech. L. & Pol'y 4 (2007), an article by Elizabeth Stawicki, former legal affairs correspondent at Minnesota Public Radio.

Stawicki referred to an experiment in which a Minnesota district court hired a consultant to analyze its judges' behavior in hopes of improving the fairness of the justice system. The consultant noted that judges often did not speak directly to litigants, spent an inordinate amount of time pouring and mixing coffee, and some even put their feet up on their desks. According to the article, "They had not realized how they appeared until they saw it on videotape for themselves."

– Jacob Parsley
Silha Research Assistant

International

Media, Free Press Advocates Say Beijing Games Organizers Backed Away From Promises

China Pressured to Lift Blocks on Media Center Internet Service

Journalists and free press advocates criticized organizers of the 2008 Beijing Olympics when it became apparent a few days before the games were set to begin that some Web sites were blocked on the Internet service provided to members of the media. Organizers later allowed better access.

On July 28, *The Wall Street Journal* reported that more than a dozen Web sites were inaccessible via Internet connections provided at the Olympics Main Press Center, including those for Amnesty International, as well as the Web sites of accredited media organizations Apple Daily – Hong Kong's second-largest circulation newspaper – and the British Broadcasting Corp. (BBC)'s Chinese language service. *The Guardian* of London reported July 30 that any Web site with the word Tibet in the site's URL address was also blocked.

The Guardian reported that Kevan Gosper, Chairman of the International Olympic Committee (IOC)'s Press Commission, said the only uncensored Web sites that journalists at the event would have access to were those related to "Olympic competitions." *The Guardian* said this contradicted China's promise to grant the international media "complete freedom to report" at the games.

The Guardian reported that in April, Gosper said the IOC received assurances from Chinese officials that web censorship would be lifted for journalists during the games. On July 30 Gosper said the IOC had only negotiated free access to sites about the games.

"My preoccupation and responsibility is to ensure that the games competitions are reported openly to the world," Gosper said. "The regulatory changes we negotiated with [the Beijing Olympic Games organizing committee], and which required Chinese legislative changes were to do with reporting on the games. This didn't necessarily extend to free access and reporting on everything that relates to China."

But by August 2, the restrictions had been lifted on some Web sites and the IOC had released statements that countered Gosper's earlier remarks.

The New York Times reported August 2 that IOC officials said they had urged the Beijing organizing committee to lift the restrictions in a meeting on July 31, and an IOC spokeswoman said the IOC has always been adamant about unfettered Internet access for the 20,000 foreign journalists covering the games, blaming Gosper's earlier comments to the contrary on a misunderstanding. According to *The Times*, by August 1, journalists could access the previously blocked sites of Amnesty International, Human Rights Watch, Radio Free Asia, and the BBC's Chinese language service, as well as sites that discussed Taiwanese independence, jailed Chinese dissidents, and the 1989 crackdown on protesters in Tiananmen Square. Meanwhile, other sites, particularly those that mention banned spiritual movement Falun Gong, remained off limits. Although journalists will have relatively free access to the Internet, it is still tightly controlled for the rest of the country.

The Sydney Morning Herald reported that the problem became apparent when a *Wall Street Journal* reporter showed his laptop to Olympic organizing committee Media Director Sun Weijia at a July 28 press conference at the Media Center, demonstrating that some Web sites were blocked. *The Sydney Morning Herald* also reported that reporters claimed Internet speeds were "10 times slower than at the Sydney Olympic Games eight years ago."

The Sydney Morning Herald reported that Sun initially argued that the Internet service had no problems, but after "a large gathering of Western media" expressed the same complaint, he allowed: "I will look into it and get back to you."

China enacted temporary regulations in effect Jan. 1, 2007 through Oct. 17, 2008, promising foreign reporters unrestricted travel in China and uncensored Internet access, and stating that accredited foreign journalists may interview any consenting Chinese organization or citizen. Human rights groups like the Committee to Protect Journalists, Amnesty International, Human Rights Watch, and Reporters sans Frontieres (Reporters Without Borders or RSF) have criticized the Chinese Government for not adhering to the new regulations. (See "China: Prelude to Olympics and Crisis in Tibet Elicit Criticism and Nationalism" in the Spring 2008 Silha *Bulletin* and "China Failing to Deliver on Pre-Olympics Press Freedom Promises According to NGOs' Reports" in the Fall 2007 issue.)

According to *The Australian* on August 1, Gosper, who is also a former Australian Olympian, said high-level IOC officials had struck a secret deal with Chinese Olympic organizing officials to reverse course and censor the Internet for journalists, contrary to continuing public announcements that China would not do so. "It has dented my reputation quite seriously," Gosper said. "People take me at my word, so I expect the information I am giving to be consistent."

> "The regulatory changes we negotiated with [the Beijing Olympic Games organizing committee], and which required Chinese legislative changes were to do with reporting on the games. This didn't necessarily extend to free access and reporting on everything that relates to China."
>
> – Kevan Gosper
> International Olympic Committee
> Press Commission Chairman

Reporters "Manhandled" by Beijing Police

On July 25, reporters were "pushed, jostled and manhandled" by Beijing police while covering a chaotic scene as tens of thousands of sports fans broke down barriers and fought to grab the last batch of Olympic tickets, according to Hong Kong newspaper the *South China Morning Post*.

The *Morning Post* reported that scuffles broke out as police tried to contain reporters and photographers in official media zones. One television reporter was pushed to the ground and shoved in the throat, the *Morning Post* reported, and photographers were pulled from stools and ladders they were standing on to shoot the scene.

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International

Roundup: Russian Media Feel Pressure from Kremlin

Claims of increasing media censorship in Russia have focused on the impromptu closing of a newspaper that often lampooned political leadership, the June 2008 "extremism" conviction of two journalists, and accusations of a television talk show "blacklist" – all of which were said to be politically motivated.

English-language Paper Closes after Government Scrutiny

An "unplanned audit" of the Moscow office of the bi-weekly English-language alternative newspaper *The eXile* by government media regulators on June 5, 2008 led the paper's investors to withdraw their financial support, forcing it to shut down, according to the Committee to Protect Journalists (CPJ) and the paper's editor.

According to a June 22 column by *eXile* editor-in-chief Mark Ames in London's *Mail on Sunday*, four officials from the Federal Service for Mass Media, Telecommunications, and the Protection of Cultural Heritage met Ames and other members of the staff at the *eXile* office at a prearranged time and questioned them for three hours before leaving with several issues of the paper to translate and analyze for violations of Russian laws that prohibit inciting ethnic hatred, pornography, promoting drug use, and "extremism."

Ames wrote that many of the officials' questions focused on radical writer-politician Edward Limonov, who along with chess champion Garry Kasparov leads a political opposition movement called Other Russia and who writes a regular column for the *eXile*. Topics of Limonov's columns have ranged from intense criticism of former Russian President and now Prime Minister Vladimir Putin, to one advising foreigners on how to survive a Stalinist takeover, Ames wrote.

According to a June 18 story in *The Wall Street Journal*, Evgeny Strelnik, an official at the media regulator that investigated the paper, called the audit a "routine check."

"There were a few violations, and we've issued a warning," Strelnik said, stressing that the government had not shut down the paper, which would have required a court case.

However, Ames called the audit "highly unusual."

"Not only has no Western journalist, to my knowledge, been subject to a government audit of his articles to check for violations but, as one nongovernmental organization (NGO), the Glasnost Defense Fund told me, in their experience working with the Russian media, there has never been a single Moscow-based newspaper subjected to an 'unplanned audit,'" Ames wrote in his June 22 column.

> "Not only has no Western journalist, to my knowledge, been subject to a government audit of his articles to check for violations but ... there has never been a single Moscow-based newspaper subjected to an 'unplanned audit.'"
>
> – Mark Ames
> Editor-in-Chief
> *eXile*

According to *The Wall Street Journal*, Ames founded *eXile* in 1997, amid the tumult of the post-Soviet Yeltsin era. Although the paper has never had a particularly broad circulation, it sparked lively political debate among Russia experts in the West, thanks in part to Limonov's regular columns. The paper criticized Western academics and journalists, accusing them of understating the misery caused by free-market reforms of the 1990s. Meanwhile, its entertainment section, aimed at foreign businessmen, included club reviews advising which bars were frequented by violent thugs and which were popular with adventurous Russian women, *The Wall Street Journal* reported. Ames and other *eXile* writers also gained notoriety for pranks played on government officials and foreign correspondents.

"[*EXile*] combined vicious satire, investigative journalism, no-holds-barred media criticism and an irreverent, frequently sexist take on the seamy nature of expatriot [sic] life in Moscow, where foreigners often embrace a lifestyle of extreme hedonism," Ames wrote in his June 22 column.

CPJ condemned the Russian government's actions. "Russian authorities are using politicized inspections and broadly worded extremism legislation to silence critical journalists and media outlets," said CPJ Europe and Central Asia Program Coordinator Nina Ognianova, in a CPJ "News Alert" available online at http://www.cpj.org/news/2008/europe/russ19jun08na.html. "In the case of The eXile, the state's targeted harassment has had a chilling effect on the investors. We call on Russian authorities to withdraw all claims against the paper and to allow its staffers to continue their work."

According to an editorial message posted July 14 on the paper's web site at http://www.exile.ru/articles/detail.php?ARTICLE_ID=19294&IBLOCK_ID=35, *The eXile* does not have plans to continue publishing in print, but will continue to publish online, "safely stored on new servers in an undisclosed Putin-proof location" at www.exiledonline.com.

Two Journalists Convicted of 'Extremism,' Banned from Working as Journalists

Two journalists in the Bashkortostan Republic were also charged with "extremism." In addition to having their newspaper shut down, they were given two-year suspended prison sentences, and banned from practicing journalism for one year after their June 25, 2008 conviction in a regional district court, CPJ reported.

According to the July 2 CPJ report, Viktor Shmakov, editor-in-chief, and Airat Dilmukhametov, a contributing writer for the independent newspaper *Provintsialnye Vesti* (Provincial News), were convicted in the Kirov District Court in the regional capital of Ufa for violating the Constitution of the Russian Federation, violating media regulations, and breaking laws against printing extremist material, following a criminal investigation which began in 2006 after a special edition of *Provintsialnye Vesti* included two articles by Dilmukhametov that accused regional authorities of corruption and called for the resignation of the president of Bashkortostan.

CPJ reported that a June 25 press release from Bashkortostan prosecutors said that a "complex psychological-linguistic analysis of the texts determined that they contained public appeals for

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According to the *Morning Post*, one of its photographers was detained for six hours. Official news service Xinhua reported that the photographer had allegedly broken through a temporary barricade, disobeyed police orders, and kicked an officer in the groin.

The *Financial Times* of London reported that video of the mishap was played on Hong Kong television stations, a public relations embarrassment for Chinese Olympic officials.

Hong Kong journalist groups decried the event. According to the *Morning Post*, The Hong Kong Journalists Association said it was shocked by the violent interference with journalists' reporting activities, and The Hong Kong News Executives' Association "strongly condemned" the police action.

Vincent Brossel, spokesman for international press freedom group Reporters sans Frontieres (RSF or Reporters without Borders) said "Seeing a journalist being punched while doing his job is quite scary and shows the organizers are not prepared, and we can expect more clashes," according to a July 26 story from the *Morning Post*.

Broadcast Access Questions Come Down to the Wire

According to The Associated Press (AP) on July 23, many of the details for how, where, and when broadcasters could do their work covering the Beijing Olympics were still being resolved at the last minute.

The AP reported that both rights-holding broadcasters, like NBC, who have paid for coverage of the Olympic venues, as well as non-rights holders who can cover athletes and stories away from the venues but not inside them, have faced red tape, intimidation, and restrictions on coverage, making it difficult to predict whether they will be able to cover unexpected events away from the venues, like protests.

The New York Times reported July 24 that authorities announced that they would set aside space in three city parks as protest zones, but demonstrators would still need to first obtain permits from the local police and abide by Chinese laws that usually make it nearly impossible to legally picket over politically charged issues.

One broadcaster, who the AP said asked not to be identified for fear of having permits rescinded, said broadcasters have to tell authorities "everywhere we want to be in August, and what time. … We have to provide a list of the guests who will be interviewed and the content of the interview."

The AP reported broadcasters have been promised six hours of limited live coverage daily from Tiananmen Square, though interviews are banned. Helicopter shots of the start of the marathon in Tiananmen Square have also been banned. Chinese organizers have also promised free movement of satellite trucks around the city, the AP reported. However, Sandy MacIntyre, director of news for the Associated Press Television Network, said he received a notice from Chinese authorities saying the broadcaster would have to give 24- or 72-hour notice to move a satellite truck around Beijing, according to the July 23 AP story.

"There shouldn't be any notice at all needed to go live," MacIntyre told the AP, adding, "All of these rules should never have come down to the wire like this.

– Patrick File
Silha Fellow and *Bulletin* Editor

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extremist activity and calls for civil disobedience to legal authorities, which incited citizens to violently change the constitutional regime, breach the Russian Federation's integrity, and violently acquire powers of the president of Bashkortostan."

Shmakov told CPJ that local prosecutors also asked the Kirov District Court to close *Provintsialnye Vesti* in early June 2008, claiming the newspaper violated media rules by allegedly committing technical violations, such as failing to send free copies to state agencies and not publishing on a regular basis and violated anti-extremism legislation by publishing extremist materials.

CPJ Program Coordinator Ognianova said the organization was "disturbed" by the ruling, calling it "part of a trend among Russian authorities to use sweeping 'extremism' legislation to chill critical coverage."

CPJ said the verdict should be overturned. Shmakov said he plans to appeal.

New York Times *Story Focuses on Claims that Dissent is Stifled on Television*

The New York Times reported June 11, 2008 that an informal "stop list," initially born during the campaign that placed Vladimir Putin protégé Dmitri A. Medvedev in the presidency and Putin's party in a parliament majority by a landslide margin, has all but expunged political dissent from Russian television.

According to the *The New York Times*, senior government officials deny the existence of any stop list. Journalists said that although they do not believe the Kremlin keeps an official master stop list, networks keep their own list of government critics who they do not invite on air or whose critical political opinions they limit or suppress, based on an understanding of the Kremlin's likes and dislikes for particular people and sentiments.

Vladimir V. Pozner, host of political talk show "Times" on top national network Channel One and president of the Russian Academy of Television, told *The New York Times* the pressure to conform to Kremlin tastes had intensified, not easing even after the campaign.

"The elections have led to almost a paranoia on the part of the Kremlin administration about who is on television," Pozner said.

The *New York Times* story pointed to a number of specific incidences in 2007 and 2008, such as when political analyst and Putin critic Mikhail G. Delyagin was digitally erased from a talk show in fall 2007 after

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International

Charges Filed in Politkovskaya Murder, Killer Still at Large

Russian authorities have brought charges against several men in connection with the October 2006 murder of revered journalist Anna Politkovskaya, while her killer is said to be hiding in Western Europe and an investigation into the organization of the suspected contract killing is ongoing.

The Washington Post reported June 19, 2008 that prosecutors with a committee investigating the murder charged Sergei Khadzhikurbanov, a former police officer, and two brothers from Chechnya, Dzhabrail Makhmudov and Ibragim Makhmudov, with involvement in the crime, but gave no details as to their alleged roles. The three men have been in custody since they were among 10 people arrested in August 2007 as part of the investigation. (See "Russia: Politkovskaya Investigation Continues; Reporter Detained for Alleged Extortion" in the Fall 2007 issue of the Silha *Bulletin*.)

The Washington Post reported that charges for extortion and abuse of office brought against Pavel Ryaguzov, an officer in the domestic security agency FSB who officials had previously said provided Politkovskaya's address to the killers, were related to a "separate crime."

Politkovskaya was shot and killed in the lobby of her Moscow apartment building on Oct. 7, 2006. *The Washington Post* reported that Politkovskaya was shot in the head and chest and that a pistol and spent bullet casings were found on the floor at her feet. The circumstances of her death led many to speculate that the killing was in retaliation for her outspoken criticism of government officials and policies targeting Chechnya, the topic for much of the reporting for which she was renowned. *The Washington Post* characterized the shooting as an "apparent contract killing," the killer having left the murder weapon at the feet of the victim as an assassin's mark. (See "Famed Russian Reporter Murdered in Contract Killing" in the Fall 2006 issue of the Silha *Bulletin*.)

On July 1, 2008, The Associated Press (AP) reported that Alexander Bastrykin, head of the prosecutors' investigative committee, announced at a July 1 press conference that Politkovskaya's accused killer, Rustam Makhmudov, the eldest of the Makhmudov brothers, had fled to a Western European country. Bastrykin did not name the country or say how he knew the information be true, the AP story said.

According to *The Washington Post*, Rustam Makhmudov was charged in absentia in May, and had been identified as the killer in news reports as early as March.

According to a June 18 report from the Committee to Protect Journalists (CPJ), Sergei Sokolov, deputy editor of *Novaya Gazeta*, Politkovskaya's former employer, said although the charges conclude a preliminary investigation into the journalist's killers, separate probes into Rustam Makhmudov and the masterminds of the crime are ongoing.

> "We think the investigation is on the right track. However, a crime cannot be considered solved with the immediate killer still at large, on the run, and … outside the country. Neither can it be considered solved when the mastermind has not been identified."
>
> – Dmitry Muratov
> Editor-in-Chief
> *Novaya Gazeta*

CPJ reported that *Novaya Gazeta* Editor-in-Chief Dmitry Muratov said in a radio interview that the case is far from closed. "We think the investigation is on the right track. However, a crime cannot be considered solved with the immediate killer still at large, on the run, and … outside the country," Muratov said. "Neither can it be considered solved when the mastermind has not been identified."

Novaya Gazeta has also been critical of the government investigation into the killing. CPJ reported Sokolov said that deliberate leaks of confidential information in the press and other forms of sabotage of the investigation have seriously jeopardized the pursuit of justice, allowing Rustam Makhmudov to avoid custody, for example.

CPJ reported June 18 that Russia is the third deadliest country in the world for journalists. Since 2000, 14 journalists have been murdered, and in only one case have the killers been convicted.

– Patrick File
Silha Fellow and *Bulletin* Editor

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criticizing the administration, and when rock band Televizor had its booking on a St. Petersburg television station canceled in April 2008 after its members publicly took part in an demonstration supporting the Other Russia political opposition.

The story said that former political allies of Putin as well as those opposed to him, such as Kasparov, leader of the Other Russia coalition, and members of the nation's liberal parties, have all "disappeared from view."

Kasparov, who made an unsuccessful run for president in 2008, encouraged world news industry leaders at the World Newspaper Congress in Göteborg, Sweden to challenge the Kremlin on press freedom, the Associated Press (AP) reported on June 4.

Government officials and others, however, have countered that people hostile to the Kremlin do not appear on TV simply because their views are not newsworthy, *The New York Times* reported.

The story said that when Vladimir R. Solovyov, a political talk show host whose show had more recently stopped featuring members of opposition parties, was asked why they no longer appeared on the show, Solovyov responded, "No one supports them. They have nothing to say."

Valery Y. Komissarov, a former host on a state channel who is now a governing party leader in parliament, said "These are people who are not interesting for society, who are not interesting for journalists. But they want publicity and perhaps they want to explain away their lack of creative and political success by the fact that they are persecuted, that they are included on the so-called stop list."

– Patrick File
Silha Fellow and *Bulletin* Editor

New Media

5th Circuit Holds MySpace Not Responsible for User Misuse

Social Networking Web Site Sued over Sexual Assaults, Suicides

The 5th Circuit U.S. Court of Appeals ruled May 16, 2008 that a federal law shielded the Web site MySpace from liability for the sexual assault of a Texas girl who met the man who assaulted her via the popular social networking site.

According to the 5th Circuit's opinion in *Doe v. MySpace*, 528 F.3d 413 (5th Circ. 2008) then 13-year-old "Julie Doe" lied about her age when registering for a MySpace account in summer 2005, saying she was 18, which enabled her to circumvent safety features the Web site has in place to protect underage users. MySpace requires users to be at least 14, and has automatic privacy settings for 14 and 15-year-old users which makes their full MySpace profile viewable only to users who are in their selected group of "friends."

Nineteen-year-old Pete Solis contacted Doe via MySpace, the two exchanged personal information including their phone numbers, and when the two later met in person, Solis sexually assaulted Doe, the court opinion said. According to the *Hays Free Press* of Hays County, Texas, Solis was sentenced April 18, 2008 to 90 days in jail and a seven-year probation, during which time he must register as a sex offender.

Doe and her mother sued MySpace and its parent company News Corporation for $30 million in Texas state court in June 2006 for negligence, gross negligence, fraud, and misrepresentation, claiming that the Web site ignored concerns about sexual predators and, despite MySpace's claims that the Web site was safe for underage users, it in fact "had no meaningful security measures or policies in place to effectively safeguard young underage MySpace users from being contacted by dangerous adult MySpace users." After some jurisdictional wrangling, the suit was heard in federal district court for the District of Western Texas, which granted MySpace's motion to dismiss on Feb. 13, 2007.

The 5th Circuit affirmed the district court's ruling that MySpace is protected by the "Good Samaritan" provision of the federal Communications Decency Act (CDA), 47 U.S.C. § 230, a law which, according to the 5th Circuit's opinion "provided broad immunity … to Web-based service providers for all claims stemming from their publication of information created by third parties." Section 230(c)(1) of the CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

According to the 5th Circuit opinion, the plaintiffs argued that § 230(c)(1) was inapplicable in their case because their claims were based on MySpace's lack of safety and security measures, and thus "d[id] not implicate MySpace as a 'publisher' protected by the act."

The Circuit court agreed with the reasoning of the lower court, which called Doe's argument that the CDA should not apply "disingenuous," because the basis for the argument was that if Doe and Solis had not been allowed to communicate and exchange personal information via MySpace, the sexual assault would never have occurred.

"No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities," Judge Sam Sparks wrote for the district court in *Doe v. MySpace, Inc.*, 474 F.Supp. 2d 843 (W.D. Tex. 2007).

The plaintiffs also argued that because MySpace "facilitates its members' creation of personal profiles and chooses the information they will share with the public through an online questionnaire," it does not qualify for immunity under the CDA because it is partially responsible for creating its users' content.

In April 2008, the 9th Circuit cited similar reasoning when it denied immunity under the CDA to Roommates.com, a Web site that allows users to search for roommates while indicating preferences based on gender, sexual orientation, and familial status. According to the 9th Circuit in *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), Roommates.com had become an information content provider and thus responsible in part for creating discriminatory information on its Web site by actively soliciting specific types of discriminatory information in a questionnaire. (See "Federal Court Decisions Add Uncertainty to Internet Law" in the Spring 2008 issue of the Silha *Bulletin* for more on that decision.)

Ultimately, the 5th Circuit said that the plaintiffs were barred from making the argument that MySpace removed itself from CDA immunity by facilitating Julie Doe's creation of her profile because they had not raised that argument in the lower court. However, the court said that the record did not support the Does' claim because Julie Doe had admitted that she lied about her age when creating her MySpace profile and because she was personally responsible for exchanging personal information with Solis.

> "[The Communications Decency Act] provided broad immunity … to Web-based service providers for all claims stemming from their publication of information created by third parties."
>
> – 5th Circuit U.S. Court of Appeals *Doe v. MySpace*, 528 F.3d 413 (5th Circ. 2008)

Teen Suicides Draw Lawsuits for MySpace, Scrutiny for Online Harassment

MySpace has also been targeted with lawsuits and scrutiny following teen suicides in California and Missouri.

On December 12, 2007, *The Dallas Morning News* reported on a lawsuit filed by the family of a 14-year-old Southern California girl who committed suicide after being sexually assaulted by a Texas man.

The Dallas Morning News reported that the lawsuit, filed in Texas, said online conversations between the 30-year-old man and the girl led to a face-to-face meeting and the sexual assault near her home in California.

According to the lawsuit, the man ended the relationship several months later, causing the girl to

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fall into "a deep depression as a result of the failed, despicable relationship fostered over MySpace." The girl killed herself in July 2006, *The Dallas Morning News* reported.

According *The Dallas Morning News*, the man later pleaded guilty to traveling across state lines to have sex with a minor and was sentenced to nine years in federal prison. The lawsuit filed by the girl's family, which claims that MySpace does not do enough to ensure the safety of underage users, seeks reimbursement for the parents' medical and psychological counseling expenses, as well as punitive damages for mental anguish and emotional distress, *The Dallas Morning News* reported.

Missouri Suicide Leads to Federal Indictment in California

The high-profile suicide of a 13-year-old girl in Missouri led state lawmakers there to update laws against harassment, while the mother accused of taunting the girl, a neighbor, was indicted by a federal grand jury in California.

According to the indictment, which was issued in the U.S. District Court for the Central District of California on May 15, 2008, Lori Drew of O'Fallon, Mo., along with "co-conspirators," created a MySpace account under the fictitious identity Josh Evans in fall 2006, which Drew used to contact, flirt with, and later reject and insult a young girl, identified in the indictment as M.T.M.

According to New York Times on May 16, 2008, M.T.M. was identified by her mother as Megan Meier, a former friend of Drew's daughter who hanged herself in her home in October 2006. According to the indictment, after a few weeks of chatting, "Josh" announced in mid-October that he was moving away and told Meier that the world would be a better place without her in it.

The federal indictment, filed in California because MySpace is based in Hollywood, charges Drew with one count of conspiracy and three counts of accessing a computer without authorization and via interstate commerce to obtain information to inflict emotional distress. The indictment relies in part on 18 U.S.C. § 1030, a federal law against "fraud and related activity in connection with computers" which, according to the *Los Angeles Times* on May 16, is a federal statute "commonly used to go after computer hackers or crooked government employees."

According to *The New York Times*, some experts were skeptical about whether the federal law could be used under the circumstances of Drew's indictment.

Nancy Willard, executive director of the Center for Safe and Responsible Internet Use and Rebecca Lonergan, a law professor at the University of Southern California and a former federal prosecutor, both expressed doubts. "… I am not sure this statute technically covers the essence of the harm," Lonergan said.

The Washington Post reported July 23 that in a motion to dismiss Drew filed with the U.S. District Court, she argued that if she is guilty as charged for violating the MySpace policy for "the wayward or misuse of a social network website," then so are millions of Internet users every day.

The Associated Press (AP) reported May 19, 2008 that authorities in Missouri did not file charges against Drew following the suicide because there was no applicable state law.

On May 16, however, the Missouri State legislature passed a bill that updated a state law criminalizing harassment by removing a requirement that the communication be written or over the telephone.

The AP reported May 19 that under the bill, repeat offenders and anyone who is at least 21 years old could be charged with a felony and face up to four years in prison if they harass a minor. Other instances of harassment would remain a misdemeanor with penalties of up to a year in jail.

The bill also requires school officials to tell police about harassment and stalking on school grounds. And it expands state laws against stalking to cover "credible threats" not only against the victim, but also against family and household members and animals.

The AP reported that stalking is currently a misdemeanor in Missouri, but the bill would let someone be charged with a felony and face up to four years in prison for stalking more than once, making "credible threats," violating a court protection order, or violating probation or parole by stalking.

According to the AP, Missouri Gov. Matt Blunt praised lawmakers' efforts in a statement, saying "Social networking sites and technology have opened a new door for criminals and bullies to prey on their victims. These protections ensure that our laws now have the protections and penalties needed to safeguard Missourians from Internet harassment."

– Patrick File
Silha Fellow and *Bulletin* Editor

Copyright

Campuses See Upswing in Copyright Infringement Notices

Colleges and universities reported a surge in copyright infringement notices from the Recording Industry Association of America (RIAA) in spring 2008 amid increasing criticism of the association's methods of attacking online piracy. Meanwhile, Congress reauthorized a law that will require colleges and universities to take action to prevent students from engaging in illegal file sharing and punish those who do.

According to an April 30, 2008 story in *The Chronicle of Higher Education*, colleges and universities around the country reported a substantial increase in the number of complaint notices they received from the RIAA claiming that specific songs were being illegally traded by a computer user on campus networks.

The Chronicle reported that information security officials at the University of Cincinnati said their office usually receives 25 to 30 notices per year from the RIAA, but that they had received 13 in the two weeks preceding April 30 alone. The George Washington University saw the number of notices it received climb from an average of 10 per week to 123, *The Chronicle* reported. According to technology news Web site Ars Technica, St. Cloud State University Information Technology Security Coordinator Darrin Printy said in an April 30 story, "Normally, we only get about a dozen per year; now we are getting about four to six notices a week."

Ars Technica reported in a Feb. 27, 2008 story that the RIAA launched a campaign to crack down on campus file sharing in February 2007. *The Chronicle* described in a May 23, 2008 story how the RIAA hired a company called Media Sentry to search the Internet, using popular file sharing programs such as LimeWire, for computers on college networks that are sharing specific songs that appear on a list provided by the RIAA. When Media Sentry finds a computer sharing one of the listed songs, it sends a letter to the college or university, which includes the name of the file and the date and time when Media Sentry investigators saw it available online, requesting that the song be removed from the network.

These letters, or "take down notices," are based on the Digital Millennium Copyright Act's (DMCA) requirement at 17 U.S.C. § 512(c)(1) that a party claiming that an Internet service provider is illegally allowing access to copyrighted material notify the service provider and allow it to "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing."

According to Ars Technica, the group also sends "prelitigation settlement letters" to colleges and universities, addressed to the user of a specific Internet protocol (IP) address. If school information technology workers identify the network user to whom the IP address was assigned at the time the song was shared and pass along the letter, the user has the opportunity to settle with the RIAA for $3,000. If the user does not respond or the school fails to forward the letter, the RIAA files a "John Doe" lawsuit and asks a federal judge to issue an *ex parte* subpoena for the identity of the user using the IP address.

According to Ars Technica, as of the Feb. 27, 2008 story, the RIAA had sent out 5,404 letters to over 160 colleges and universities, and over 2,300 of those resulted in the targeted students settling with the RIAA.

Universities have had a variety of reactions to the RIAA's stepped-up campaign against campus network file sharing. The Associated Press (AP) reported on May 30, 2008 that the University of Florida and Ohio University have banned peer-to-peer file sharing. According to Ars Technica, Ohio University became the first university to ban all peer-to-peer file sharing on its campus network after it topped a list of the RIAA's "top 25 music-pirating schools" in February 2007.

According to University of Minnesota policy, residential students who violate copyright law can have their access to the campus Internet service disabled for two weeks for a first offense. For a second offense, or when a student receives an infringement notice, a student's access is disabled indefinitely and he or she is "referred to Student Judicial Affairs Office for possible disciplinary action." The policy is available online at http://www.resnet.umn.edu/policies/policieslist.shtml#copy.

The Missouri University of Science and Technology took a unique approach to limiting illegal file sharing, according to the AP on May 30, 2008. Students there must score perfectly on a random six-question quiz on digital copyright in order to earn six hours of access to the university's peer-to-peer file-sharing network. The AP reported that the university said notices from the RIAA have dropped from 200 in 2006-2007 to eight in the 2007-2008 academic year.

According to the AP, RIAA spokesman Jonathan Lamy called such measures "a step in the right direction."

"What we've found to be the most effective is a comprehensive approach that employs a combination of tools: innovative educational programs, legal ways to enjoy music and technological tools that prevent the misuse of campus networks in the first place," Lamy said.

However, some universities have challenged the RIAA's notices and settlement demands. In October 2007, the University of Oregon and the Oregon state attorney general filed a motion to quash an RIAA subpoena for the identities of 17 network users.

A judge has yet to rule on the Oregon case, *Arista v. Does 1-17*, Case No. 6:07-CV-6197-HO (D. Ore. 2008), but in two other cases in 2007, *Capitol v. Does 1-16*, 2007 WL 1893603 (D. N.M. 2007) and *Interscope v. Does 1-7*, 494 F.Supp. 2d 388 (E. D. Va. 2007), federal judges denied the RIAA's *ex parte* subpoenas to universities for the identities of file sharing network users.

In *Capitol v. Does 1-16*, federal district judge Lorenzo Garcia wrote that the plaintiff record label overstated the irreparable harm that they sought to prevent through *ex parte* subpoenas. "While the Court does not dispute that infringement of a copyright results in harm, it requires a Coleridgian 'suspension

Copyright Crackdown, *continued on page 24*

> "Normally, we only get about a dozen [infringement notices] per year; now we are getting about four to six … a week."
>
> – Darrin Printy Information Technology Security Coordinator St. Cloud State University

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of disbelief' to accept that the harm is irreparable, especially when monetary damages can cure any alleged violation," Garcia wrote.

Moreover, Garcia wrote that the targets of the subpoenas, subscribers to the University of New Mexico network, should be "given a reasonable opportunity to intervene in order to stop the disclosure of sensitive information" such as "name, address, social security numbers, credit card information, purchase histories, as well as road map [sic] of the subscribers' Internet activities." The *Capitol v. Does 1-16* ruling is available online at http://www.ilrweb.com/viewILRPDF.asp?filename=capitol_does1-16_070524OrderDenyExParteApplication .

In *Interscope v. Does 1-7*, a federal judge in the Eastern District of Virginia denied the plaintiff record label's motion for an *ex parte* subpoena of seven unknown users of the College of William and Mary's computer network. Judge Walter D. Kelley, Jr. wrote that the federal law on which Interscope based its motion to serve the subpoenas, the Cable Communications Policy Act of 1984 (CCPA), 47 U.S.C. § 551(c)(2)(B), did not support the motion.

Judge Kelley wrote that because the CCPA only authorizes disclosure of information by cable operators to government entities pursuant to court orders, it does not apply to this situation. The College of William and Mary does not qualify as a cable operator nor is the plaintiff, Interscope records, a government entity, Kelley wrote.

In addition to the possible legal flaws at least two federal judges have found in the RIAA's methods for targeting potential copyright infringers, one academic study, released June 5, 2008 and discussed in a *New York Times* story the same day, showed that the association's technical methods might also be flawed.

According to *The New York Times*, researchers from the University of Washington who were using software to monitor file-sharing networks found that even though they did not download any files, they received more than 400 take-down requests accusing them of participating in illegal downloads. Some of the takedown requests accused printers or network routers of illegal downloads.

The researchers concluded that the RIAA, as well as the Motion Picture Association of America (MPAA) and Entertainment Software Association (ESA), are looking only at IP addresses of participants on these peer-to-peer networks, and not what files are actually downloaded or uploaded, when they determine who to send take down notices or prelitigation letters.

One researcher, assistant professor of Computer Science and Engineering Tadayoshi Kohno said, "Ultimately, we think that our results should provide a wake-up call for more openness on the parts of content enforcers."

Nevertheless, a bill passed by Congress on July 31 makes a comprehensive approach to copyright monitoring on the part of colleges and universities mandatory.

The College Opportunity and Affordability Act of 2008, H.R. 4137, a law first established in 1965 and last overhauled in 1998 and generally aimed at governing higher education programs, includes a provision at § 488(a)(1)(P) et seq. that would require colleges and universities to annually inform students about copyright infringement and have policies in place to detect, prevent, and punish copyright infringement via campus networks, or risk losing eligibility for some federal student aid.

When the bill was introduced in November 2007, a press release from the MPAA praised it, saying that colleges and universities would benefit from the legislation. "Illegal downloading … can also be harmful to universities as it puts their systems at risk for security purposes, takes up bandwidth, and slows systems that are designed for research and other educational purposes," said MPAA Chairman and CEO Dan Glickman.

But universities and their advocates roundly criticized the bill. Matt Owens, assistant director of federal relations at the Association of American Universities told *The New York Times* for a Nov. 13, 2007 story that the copyright enforcement provision of H.R. 4137 "makes no sense."

Owens said, "You have the federal government requiring a nonprofit educational institution to develop plans to help a for-profit industry to earn more revenue from their students."

In a March 16, 2008 *Los Angeles Times* story, Steve Worona, director of policy and networking for Educause, a nonprofit organization focused on information technology in higher education pointed out that "more than 80 percent of students live off campus and use commercial networks," not campus networks.

In a letter to George Miller (D-Calif.), chairman of the House Committee on Education and Labor, and sponsor of H.R. 4137, officials from the University of Maryland, Stanford University, The Pennsylvania State University, and Yale echoed concerns about singling out universities "which industry leaders admit are responsible for only a small fraction of illegal file sharing" and ignoring "other internet service providers whose networks are associated with most of the problem." The letter, as well as the November 9, 2007 MPAA press release, can be found via links in a New York Times story available online at http://bits.blogs.nytimes.com/2007/11/13/bill-would-make-colleges-copyright-cops/?ex=1195621200&en=27d611a019a1b75a&ei=5070&emc=eta1.

According to *The Chronicle of Higher Education* on May 23, 2008, recording and movie industry lobbyists have met with some success in urging state lawmakers to pass laws requiring colleges and universities to implement policies similar to those in H.R. 4137. A Tennessee law that requires private and public colleges and universities in the state to develop and "reasonably implement" policies to deter students from online copyright infringement, State Senate Bill 3974, went into effect in May 2008.

The Chronicle reported that state lawmakers in Illinois are considering HB 4380, a bill that would require any public college that has received 10 or more copyright infringement notices to install anti-piracy software, a provision that universities in Tennessee successfully fought to have removed from that state's similar bill before it was passed.

– Patrick File
Silha Fellow and *Bulletin* Editor

Copyright

AP Challenges Web Sites over Fair Use, Limits Still Unclear

The Associated Press' (AP) most recent attempt to protect its news content from online copyright infringement created an uproar in the blogosphere.

On June 10, 2008, the AP issued seven "take down requests" to Rogers Cadenhead, publisher of a Web site called Drudge Retort, targeting user-submitted posts which included AP content. The AP has since rescinded the requests and taken no further legal action, announcing instead a plan to create a clearer policy for the use of its content by Internet users.

Take down requests are issued pursuant to guidelines set out in 17 U.S.C. § 512(c)(1) of the Digital Millennium Copyright Act of 1998 (DMCA). The DMCA protects online service providers from liability for copyright infringement by Web site and blog content creators, and outlines the procedure by which an entity can ask that a Web site remove content it believes infringes on its copyright. Before entities can file lawsuits for copyright infringement, the DMCA requires them to send notices to service providers or content creators requesting that they remove content believed to be violating copyright.

The Drudge Retort, a parody of the conservative blog the Drudge Report, is a "social news site" like Digg, Redditt, or Mixx, which allows "its users to contribute blog entries, comments, and links to interesting news articles," according to David Ardia of the Citizen Media Law Project (CMLP), a research center affiliated with Harvard Law School's Berkman Center for Internet and Society. The Drudge Retort reports that it has 8,500 members. Ardia's CMLP blog post on the issue is available at http://www.citmedialaw.org/blog/2008/associated-press-sends-dmca-takedown-drudge-retort-backpedals-and-now-seeks-define-fair-us. (Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, is a member of the CMLP board of advisors.)

According to Cadenhead, who wrote about the AP's take down notices in a post on his personal blog at http://www.cadenhead.org/workbench/ap-dmca-summary, six of the take down requests the AP sent were aimed at "user submitted blog posts" and one was for a user's comment on another user's post. The posts and comment included excerpts of AP articles. The excerpts in question ranged in length from 33 to 79 words, Cadenhead wrote, and none included the full text of the articles. The posts included links to the original articles, and some included commentary on the articles.

Cadenhead listed the contested posts on his personal blog, showing the excerpts, their lengths, and the AP and user written headlines. Cadenhead told *The New York Times* for a June 17 story that he thought the issue extends beyond his own site. "There are millions of people sharing links to news articles on blogs, message boards and sites like Digg. If the AP has concerns that go all the way down to one or two sentences of quoting, they need to tell people what they think is legal and where the boundaries are." Ardia, writing for the CMLP, also criticized the AP's move, writing that "the posts AP is complaining about … invariably include links to the original articles and serve to drive traffic to the site hosting the original AP story."

Ardia also suggested that the contested excerpts of AP articles might constitute "fair use" under federal copyright law. According to 17 U.S.C. §107, the use of another's copyrighted work in news reporting or commentary on news reporting is generally considered fair use and does not infringe copyright. Under the U.S. Supreme Court's decision in *Harper and Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), courts considering "fair use" claims must take into account the purpose of the use of copyrighted material, the nature of the copyrighted material, the "amount and substantiality of the portion used," and the effect the use has on the market. Ardia said that if the AP had filed a lawsuit alleging copyright infringement, the Drudge Retort could have successfully used fair use doctrine as a defense.

Previous AP lawsuits against two other Web sites that compile and distribute news content, but are not user-driven, are still pending. On Oct. 9, 2007, the AP filed suit against Moreover Technologies and its parent company, Verisign, according to an October 10 story posted on the Web site PCWorld. PCWorld reported that Moreover Technologies offers news aggregation services aimed at enterprises, individuals and application developers that include AP content. According to an October 9 AP story, the suit claims Moreover improperly displays AP's headlines and portions of stories as part of its free, ad-supported services and reproduces full articles and photos through subscription services. The lawsuit, filed in United States District Court for the Southern District of New York, alleges copyright infringement, citing 17 U.S.C. § 101 and 501.

On Jan. 14, 2008, the AP sued the Web site All Headline News of AHN Media Corp., again claiming copyright infringement under 17 U.S.C § 101. According to *Editor & Publisher*, the AP "claims that AHN Media Corp. … copies AP stories from Web sites that legitimately carry them and redistributes them on its Web site and as a service it sells to other news outlets, competing for the AP's customers." The case is also being considered in the Southern District of New York.

A June 19, 2008 video news segment posted on the Web site Media Channel reported that the AP had attempted to impose fees on bloggers linking to its content. On April 14, 2008, a company called iCopyright announced in a corporate press release that it had been chosen by the AP to manage the fees it would charge Internet users to link to its content online. The press release is available at http://info.icopyright.com/news_041408_ap.asp.

Media Channel reported that bloggers were "ticked off" about the fee system, and had set up a website in protest of the AP's actions at www.unassociatedpress.net, organizing a boycott against

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"There are millions of people sharing links to news articles on blogs, message boards and sites like Digg. If the AP has concerns that go all the way down to one or two sentences of quoting, they need to tell people what they think is legal and where the boundaries are."

– Rogers Cadenhead
Publisher
Drudge Retort

Copyright

Update: TorrentSpy Ordered to Pay Over $110 million in Damages to MPAA

A May 5, 2008 ruling by Judge Florence-Marie Cooper of the U.S. District Court of the Central District of California placed a permanent injunction on file sharing Web site TorrentSpy, and awarded the plaintiff motion picture studios statutory damages of $110,970,000 – or $30,000 each for 3,699 infringements – plus court costs.

In December 2007, Cooper granted the plaintiffs' motion for terminating sanctions, an order she said was appropriate only in "extraordinary circumstances," because she said that TorrentSpy had destroyed evidence during the discovery phase of the trial, including deleting and modifying user forum posts on their Web site and concealing the Internet protocol addresses of users, preventing the plaintiffs from determining whether the defendants had uploaded copyrighted movies.

As a result, the court concluded the lawsuit and entered a default judgment in favor of the plaintiffs, which included Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Paramount Pictures Corp., Tristar Pictures, Inc., Twentieth Century Fox Film Corp., Warner Bros. Entertainment, Inc., Universal City Studios LLLP and Universal City Studios Productions LLLP. (For more on the December 2007 ruling see "Studios Win Copyright Judgment against File Sharing Web Site" in the Winter 2008 Silha *Bulletin*.)

Cooper's May 5 order effectively halts TorrentSpy's operation as a site for sharing copyrighted films and television shows. The defendants are banned from "directly, indirectly, contributorily, or vicariously infringing in any manner any [c]opyrighted [w]orks" owned by the plaintiffs. The order specifically prohibits TorrentSpy from "reproducing, distributing, publicly performing, or displaying any of the defendants' copyrighted work, or from "encouraging, promoting, soliciting, or inducing, or knowingly materially contributing to, enabling, facilitating, or assisting, any person or entity, via any computer server, computer program, website, or online system, network or service, including … any peer-to-peer or file-trading network …" in sharing the plaintiffs' copyrighted work.

The Associated Press reported May 8, 2008 that lawyers for TorrentSpy's operators, Valence Media LLC, filed a document in court following the May 5 ruling saying the company had sought bankruptcy protection in a British court and requesting that the judgment be stayed. A message at www.torrentspy.com said the Web site "permanently closed down worldwide on March 24, 2008" because "the legal climate in the USA for copyright … is simply too hostile."

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– Patrick File
Silha Fellow and *Bulletin* Editor

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the news service. The Media Channel report quoted Ardia as saying that "the AP's effort to impose these forced licensing fees is going to result in bloggers simply not using AP content."

The New York Times reported that on June 14, the AP rescinded its take down requests to the Drudge Retort, and announced it would "attempt to define clear standards as to how much of its articles and broadcasts bloggers and Web sites can excerpt without infringing on The AP's copyright." AP Vice President and Strategy Director Jim Kennedy was quoted in *The Times* story as saying of the take down requests, "We don't want to cast a pall over the blogosphere by being heavy-handed, so we have to figure out a better and more positive way to do this."

– Sara Cannon
Silha Center Staff

Silha Center Resources
for Research on Media Ethics and Law
are available on our web site,
at www.silha.umn.edu/resources

Student Media

2nd Circuit Rules School Can Punish Teen for Online Criticism of Administrators

A federal appeals court ruled May 29, 2008 that school officials did not violate a Burlington, Conn. high school student's First Amendment rights in denying her the position of class secretary after a she posted a personal blog entry calling school administrators "douchebags" and encouraging readers to voice their displeasure with them.

The ruling by the 2nd Circuit U.S. Court of Appeals in *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008), upheld a lower court's denial of a motion for a preliminary injunction that would have reinstated the Lewis Mills High School senior, Avery Doninger, as class secretary, a privilege that included an opportunity to speak at her June 2008 graduation. The court ruled that because Doninger's "vulgar and misleading" April 2007 blog post about a controversy involving a student council activity "created a foreseeable risk of substantial disruption" at the school, administrators did not violate her First Amendment rights by disqualifying her from running for class secretary.

According to the court opinion, Doninger's blog post followed a dispute between school administrators and student council members over the scheduling of an annual battle of the bands contest, called "Jamfest." Student council members were informed April 24, 2007 that the event, which had been planned for April 28, would have to be postponed or its location moved for a third time that school year, due to a scheduling conflict.

Several student council members, including junior class secretary Doninger, composed and sent a mass e-mail to students and their parents saying administrators had said Jamfest could not be held in the school auditorium, requesting support for holding the event as scheduled, and encouraging the e-mail recipients to contact high school principal Karissa Niehoff and then-district superintendent Paula Schwartz to voice their concerns. Niehoff confronted Doninger in the school hallway later that day, saying that she and Schwartz had received an influx of calls about Jamfest, expressing her disapproval of the students' decision to send a mass e-mail rather than voice their concerns directly to school administrators, and encouraging Doninger and others to send a corrective e-mail, because she was in fact willing to compromise with them on scheduling the event. According to the court opinion, Doninger claims Niehoff also said the event would be cancelled altogether, but Niehoff disputes this.

At home later that night, Doninger posted a message on her publicly-available blog in which she vented her frustration about the controversy, included the text of the mass e-mail sent earlier in the day, and encouraged readers to continue to contact school officials. Although the original post is no longer available online, it was excerpted in the court opinion.

"Jamfest is cancelled due to douchebags in central office," Doninger wrote. "… Paula Schwartz is getting a TON of phone calls and emails and such. [W]e have so much support and we really appriciate (sic) it. [H]owever, she got pissed off and decided to just cancel the whole thing all together. … And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more."

According to the court opinion, administrators and student council members decided on a new Jamfest date the following day, and administrators admonished student council members that they should not appeal directly to the public when they disapprove of administrators' decisions. Schwartz and Niehoff did not learn of the blog post until May 2007, according to the opinion, at which point they decided to disqualify Doninger from running for senior class secretary.

Doninger filed suit in July 2007 in state court asserting claims under 42 U.S.C. § 1983 and state law that her rights under the First Amendment and the equal protection clause of the Fourteenth Amendment were violated. The defendants later removed the case to the U.S. District Court for the District of Connecticut because the suit raised questions of federal law. The District Court denied Doninger's motion for preliminary injunction in August 2007.

In affirming the district court's ruling in May 2008, a unanimous three-judge panel of the 2nd Circuit said that Doninger's blog post "contained the sort of language that properly may be prohibited by schools" under the U.S. Supreme Court's ruling in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), where it ruled that the constitutional rights of students in public school "are not automatically coextensive with the rights of adults in other settings" and that schools have a responsibility for "teaching students the boundaries of socially appropriate behavior."

Addressing the fact that Doninger's blog post did not occur on school grounds or at a school-sponsored event, the court's opinion, written by Judge Debra Livingstone, relied on a "framework" it set forth in *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2nd Cir. 2007) "that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct would forseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus."

In *Wisniewski*, the 2nd Circuit found that school officials did not violate an eighth grader's First Amendment rights in disciplining him for creating and transmitting over the Internet a "crudely drawn icon that depicted and called for the killing of his teacher" because it was "reasonably foreseeable that the icon would come to the attention of school authorities and that it would create a risk of substantial disruption" of school activities. The "substantial disruption" standard, the 2nd Circuit said, came from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), where the U.S. Supreme Court ruled that

Student Blogger, *continued on page 28*

The court ruled that because Doninger's "vulgar and misleading" blog post about a controversy involving a student council activity "created a foreseeable risk of substantial disruption" at the school, administrators did not violate her First Amendment rights.

Student Blogger, *continued from page 27*

school administrators may only prohibit student expression that will "materially and substantially disrupt the work and discipline of the school."

The court said that not only was Doninger's blog post likely to reach campus, it was in fact intended to reach campus. As to whether it "foreseeably created a risk of substantial disruption within the school environment," the court said that the language of Doninger's blog post was "plainly offensive" and "potentially disruptive of efforts to resolve the controversy." Moreover, the court said that Doninger's blog post, which falsely said the event had been cancelled, resulted in a number of disruptions at the school, including an influx of phone calls and e-mails to administrators, students becoming "riled up" and threatening a sit-in protest, and Doninger and other student council members being called out of class to resolve the dispute.

According to the Student Press Law Center (SPLC), Avery Doninger's mother Lauren has said that in spite of the 2nd Circuit's ruling on the injunction, the family plans to proceed with a trial to allow a jury to decide whether the punishment was wrong.

SPLC Executive Director Frank LoMonte said in a May 30, 2008 story on the group's Web site that the decision teaches a terrible civics lesson.

"Avery Doninger was addressing a matter of public concern and was urging citizens to get involved in the matter and contact public officials to try to change a decision that she opposed," he said. "That is exactly the type of speech to which courts properly afford the greatest First Amendment protection, and it is disturbing that the 2nd Circuit treated an attempt to enlist the public in changing the outcome of a government decision as a 'disruption.'"

The Hartford Courant (Conn.) reported on May 30 that Doninger's attorney Jon L. Schoenhorn said the ruling could "emasculate the First Amendment rights of students," but Thomas R. Gerarde, an attorney for Schwartz and Niehoff, said the rulings by both courts "exonerated" the school district administrators.

In a situation Lauren Doninger told *The Courant* June 14 she found ironic, Niehoff was later suspended without pay for two days in early June for sharing private information about Avery Doninger via e-mail.

According to *The Courant*, Niehoff responded to a man from Wisconsin who had sent her a critical e-mail about the Doninger case. In her response, the principal cited specific examples of problems she had with Doninger over her language.

The Courant reported that Lauren Doninger obtained via a state Freedom of Information Act request a June 9 disciplinary letter sent to Niehoff by district superintendent Alan Beitman. In addition to outlining the suspension, the letter also ordered Niehoff to attend workshops or training sessions on federal student privacy law and encouraged her to write a formal apology letter to the Doningers.

Beitman said in the letter that he had "serious concerns regarding what I consider to be an uncharacteristic lapse in judgment," *The Courant* reported.

According to *The Courant*, the Wisconsin man who had sent the e-mail to Niehoff, Mike Morris, had asked, "if it has ever dawned on any of you that your retaliatory action against Avery Doninger constitutes an ironic, prima facie evidence of the truth of her characterization?"

– Patrick File
Silha Fellow and *Bulletin* Editor

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Student Media

Student Media Roundup: In California, Student Journalists and Principals Clash, Legislators Pass Media Adviser Protection Bill

Two California high school principals threatened their school newspapers after they disagreed with students' editorial choices in spring 2008. Meanwhile, the California legislature passed a bill that would provide greater protection for journalism teachers, but budget issues stalled the bill at the Governor's desk.

Flag-Burning Image Leads to Threats to Cut Student Newspaper

A controversial year-end edition of the Shasta High School *Volcano* in Redding, Calif., almost resulted in the paper's demise.

The June 3, 2008 issue of the student newspaper featured an image of a Shasta High senior burning an American flag on the cover, and an editorial inside defending flag burning as protected free speech.

Shasta High School Principal Milan Woollard told the Redding *Record Searchlight* for a June 12 story that the student publication would not be brought back next year, and that the last issue had been embarrassing. Woollard said the paper had already been on the brink of extinction due to budget cuts.

"The paper's done," Woollard told the *Record Searchlight*. "There is not going to be a school newspaper next year."

Shasta Union High School District Superintendent Mike Stuart told the *Record Searchlight* he thought the publication was "offensive" and "self-indulgent."

In the end, however, school administrators reversed their decision to drop the paper after a discussion with next year's editor-in-chief.

According to the June 12 *Record Searchlight* story, *Volcano* faculty adviser Judy Champagne said she had proofed the text for the controversial final issue, but could not recall if she saw the photograph of the burning flag. She said she felt sabotaged by the staff.

"I thought it was bad journalism," Champagne told the *Record Searchlight*.

Senior and *Volcano* editor-in-chief Connor Kennedy, who wrote the editorial, defended his work as being neither secretive nor sabotage. In an e-mail to the *Record Searchlight*, he explained that seniors at the school had just finished a government class unit on free speech that specifically examined flag burning.

"In the high school community, (which) is the intended audience for the editorial, (the issue) is relevant and timely ," Kennedy's e-mail said, according to the *Record Searchlight*.

"I know for a fact that our advisor [sic] saw both the cover and the article connected with it, as she made final edits on both," he wrote. "She did not voice any objections or concerns, and any claims that this was done without her consent are untrue."

The initial decision to discontinue the paper drew the ire of advocacy groups who said the students were within their legal rights to publish the photo and editorial.

"I don't think any newspaper should ever be discontinued as punishment for things students have written, especially when what they've written about is the defense of free speech and what they have said is absolutely correct," said Terry Francke, general counsel of nonprofit free speech and press advocacy group Californians Aware, in a June 11 Associated Press (AP) story.

However, Francke said state law does not require schools to fund student newspapers or elective journalism classes.

District Superintendent Stuart told the Student Press Law Center that he decided to continue to provide funding for the paper after he spoke with next year's editor-in-chief, Amanda Cope. Stuart said he hoped to contribute to the student's editorial decision-making by introducing the student reporters to the staff of the *Record Searchlight* and asking editors at the local paper to mentor the students.

Cope said in a June 14 *Record Searchlight* story, "It's excellent to have the paper back," adding that she assured school officials that future editions of the *Volcano* would be "legitimate and professional."

Stuart said in the June 14 *Record Searchlight* story that although the school would not seek to exercise greater editorial control over the paper, they would like to know about controversial articles in advance so that the administration is not "blindsided."

"It's OK to put controversial things in the paper," Stuart said. "Putting your opinion out there is a brave thing to do. There ought to be a lot of thought that goes into that."

"I don't think any newspaper should ever be discontinued as punishment for things students have written, especially when what they've written about is the defense of free speech and what they have said is absolutely correct."

– Terry Francke
General Counsel
Californians Aware

Principal Apologizes for Pulling Copies of School Newspaper from Racks

A high school principal eventually apologized after a controversial image prompted him to have approximately 400 copies of the school's newspaper removed from distribution racks, but hinted that school administration could play a greater role in overseeing the paper's content in the future, according to a story in the June 2 Eureka, Calif. *Times-Standard*.

The controversy arose after the April edition of the Eureka High School *Redwood Bark* included a back page art feature depicting female nudity.

Eureka High School Principal Robert Steffen said in an April 30 *Times-Standard* story that offended students had asked for permission to remove extra copies of the paper from school distribution racks, and because he feared it might create a conflict in the student body, he instructed the school's janitors to remove and recycle all undistributed copies of the 4-day-old paper.

"It wasn't censorship so much as restricted circulation," Steffen said, adding that he allowed the paper to keep the controversial drawing and accompanying story on the paper's website at www.redwoodbark.net.

The drawing, by high school student Natalie Gonzalez, was pictured alongside a profile of the aspiring artist. The story addressed Gonzalez's use of nudity in her artwork.

"Art is free, and if we want high school students to act as adults, we should treat them as adults, and expect them to take nudity in a mature way," Gonzalez said in the *Redwood Bark* story. "And, I don't ever want anyone, including myself, to be limited when it comes to art."

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Student Press Roundup, *continued from page 29*

Eureka City Schools Superintendent Gregg Haulk defended Steffen's decision in the April 30 story in the *Times-Standard*.

"He pulled it off the rack because it was becoming a disruption to our learning environment. First and foremost, we are a learning institution."

Steffen's apology came to the student body via a letter published in the *Redwood Bark*, part of which was printed in the June 2 *Times-Standard* story.

"I apologize to the *Redwood Bark* staff for not allowing the normal course of disagreement to occur through letters to the editor," Steffen wrote. "The administration will pay for the next edition of the *Redwood Bark* in a conciliatory move to build trust and demonstrate our interest in moving forward."

Steffen's letter also discussed implementing new policy measures for the student paper. "The hoped-for outcome of this controversy is that media students, administration and the school board work together for the mutual education of all concerned, and to clearly define a policy," the letter states. "As it is now, many parents and others in the school public believe that school administration and the newspaper advisor should exhibit oversight of all publication content."

Drew Ross, editor-in-chief of the *Redwood Bark*, told the *Times-Standard* that he is concerned that the administration will want to craft a detailed policy that might stifle some of the freedom the paper currently enjoys.

Redwood Bark faculty advisor Philip Middlemiss shares those concerns, according to the *Times-Standard*. "Suddenly, we've stirred the waters up and our ability to have that independence has been threatened," Middlemiss said. "That's probably the scariest part of this whole thing."

If the school does institute a policy of prior review, it could be considered retaliatory and therefore illegal, said Frank LoMonte, executive director of the Student Press Law Center, in a June 3 story on the Student Press Law Center's Web site. The story is available online at http://www.splc.org/newsflash.asp?id=1763&year=.

"If a school imposes prior review in retaliation for a specific editorial content decision that the school disagrees with, that may well violate the First Amendment," LoMonte said. "The First Amendment says a school can't take any action that would chill the legitimate expression of free-speech rights, and putting in place a new review requirement that didn't exist before would certainly cause students to censor their own speech."

Bill to Protect Journalism Teachers Passes California Legislature; Awaits Governor Approval

A bill that aims to protect journalism teachers at all levels of public education from being disciplined for protecting students' rights to free speech passed in the California Senate by a 31-2 vote on August 5 and is now awaiting the approval of Governor Arnold Schwarzenegger .

SB 1370 states "An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution." The bill passed the California State Assembly by a 67-6 vote on June 16. According to an August 6 story from the Student Press Law Center, Schwarzenegger has asked that no other bills be sent to him until the state's budget is passed. After receiving the bill, the governor will have 12 days to sign or veto it. If the bill is not given to the governor before session ends Aug. 31, he has until Sept. 30 to address it. The story is available at http://www.splc.org/newsflash.asp?id=1795. Sen. Leland Yee (D-San Francisco/San Mateo), the bill's author, said in an August 5 press release that he expects the governor to sign the bill into law, because Schwarzenegger "has consistently supported our efforts to make sure true freedom of the press is alive and well on our campuses."

Legislative proponents of the bill argued that it is necessary to fully ensure the freedom of speech that is extended to California students. Since 1992, California law has protected student publications to the fullest extent of the U.S. and California constitutions through Cal. Educ. Code § 48950.

According to an April 15 AP story about an earlier version of the bill, California Newspaper Publishers Association lawyer Jim Ewert said faculty advisers in California have recently been fired or reassigned at least 12 times because of material written by student reporters.

Opponents of the bill have argued that the measure is overly broad. The Association of the California School Administrators (ACSA) said in a statement that the bill could lead to teachers using it to get out of discipline or reprimands. "ACSA has heard of numerous situations whereby a teacher has used poor judgment under the guise of student freedom of speech," said the statement, reprinted in the bill's analysis, available online at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_1351-1400/sb_1370_cfa_20080617_141558_sen_floor.html. "The school principal must be able to utilize discretion when coming in contact with these situations. Teachers are the adults that must be held accountable for their students, even in the case of a school newspaper, yearbook, or other written materials."

The University of California wrote a letter to Sen. Yee informing him that it would not observe SB 1370 if it were passed. The letter, dated June 16, stated that existing law and school policies "already afford substantial freedom of speech protections for students and faculty."

"Although the University goes to great lengths to ensure academic and speaking freedoms, we must also have the right to take appropriate measures if a faculty member or UC employee fails to observe instruction standards or University policies that are appropriate to the academic environment," the letter stated. The university's constitutional status gives it discretion in implementing state law, said university spokesman Brad Hayward in a June 23 story on the Web site Inside Higher Ed. In this case, the bill proposes to amend § 66301 of the California Education Code, which is within Part 40 of the Education Code. Another section of Part 40, § 67400, states, "No provision of [Part 40] shall apply to the University of California except to the extent that the Regents of the University of California, by appropriate resolution, make that provision applicable." The story is at http://insidehighered.com/news/2008/06/23/press.

– Jacob Parsley
Silha Research Assistant

Libel

New York Law Protects Authors from Libel Tourists

New York Governor David Paterson signed a bill April 30, 2008 that grants statewide protection to writers and publishers convicted of libel in foreign courts.

The law, officially titled the Libel Terrorism Protection Act , effectively overruled a December 2007 New York Court of Appeals ruling that author Rachel Ehrenfeld could not enjoin enforcement of a $225,000 British libel judgment entered against her in 2004, according to a summary of the bill published by the New York State Assembly.

Ehrenfeld was sued in England by billionaire Saudi Arabian businessman Khalid bin Mahfouz for allegations made in her 2003 book "Funding Evil: How Terrorism is Financed – and How to Stop It," that accused bin Mahfouz of backing organizations with ties to terrorism. (See "New York High Court Rules in Libel Tourism Case" in the Winter 2008 Silha *Bulletin*).

British libel standards place the burden of proof on the defendant to prove that the allegedly libelous statements are actually true, rather than on the plaintiff to prove the statements' falsity. Ehrenfeld did not contest bin Mahfouz's libel claim and default judgment was entered against her.

Popularly dubbed "Rachel's Law," the New York law renders foreign judgments unenforceable in the state of New York unless the applicable foreign laws provide the same free speech protections as those guaranteed under the First Amendment. The bill received unanimous support from both the New York State Assembly and Senate.

The key provisions of the law amended New York's statute pertaining to foreign country money judgments, N.Y. C.P.L.R. 5304, to read, "A foreign country judgment is not conclusive if … the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions."

The statute also extended personal jurisdiction to any person who "obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York … for the purposes of rendering declaratory relief with respect to that person's liability for the judgment," codified at N.Y. C.P.L.R. 302. Typically, personal jurisdiction in a state court is limited to defendants whose contact with the state is sufficient to reasonably expect to be sued there.

In an official press release that accompanied the signing of the bill, Paterson said, "New Yorkers must be able to speak out on issues of public concern without living in fear that they will be sued outside the United States under legal standards inconsistent with our First Amendment rights. This legislation will help ensure the freedoms enjoyed by New York authors."

In the same press release, bill sponsor Sen. Dean Skelos (R-Rockville Centre) said, "The truth is a critically-important component of the War on Terror. American authors, like Dr. Ehrenfeld, who expose terrorist networks and their financiers, should not be subject to intimidation and lawsuits in foreign courts designed to circumvent our First Amendment rights."

A January 20 story in the *International Herald Tribune* recapped several recent episodes of "libel tourism" taking place in British courts, in addition to the case against Ehrenfeld. For example, an Icelandic investment bank has sued Danish tabloid *Ekstra Baladet* for libel in London because the publication's online edition can be accessed in England.

The story also mentioned a previous case brought by bin Mahfouz which resulted in British publisher Cambridge University Press agreeing to destroy all remaining copies of the book "Alms for Jihad: Charity and Terrorism in the Islamic World," and to write to 100 libraries around the world seeking to add an explanatory sheet to archived books.

According the *Herald Tribune*, bin Mahfouz alone has filed more than two dozen lawsuits against writers and authors, and his advisers have created a special Web site tracking the law suits and featuring apologies issued by writers and publishers. The Web site is available at http://www.binmahfouz.info/faqs_4.html.

In an April 30 *Wall Street Journal* op-ed, prominent First Amendment attorney and 2005 Silha Lecturer Floyd Abrams criticized the long shadow cast by the recent British decisions. "English libel law is increasingly being used to limit public debate about terrorism," Abrams wrote.

Abrams emphasized the need for increased statutory protection of American authors. "England should be free to choose its own libel law. But so should we. It is not too much to ask that American law should protect our people when they speak in precisely the 'uninhibited, robust and wide-open' manner that the First Amendment was drafted to protect."

Abrams noted that American and British law differ in protecting freedom of speech, citing the U.S. Supreme Court decision *Bridges v. California*, 314 U.S. 252 (1941). In *Bridges*, the court ruled in favor of two California newspapers that had printed strongly worded editorials urging specific outcomes in then-undecided court cases. The lower courts found the newspapers guilty of contempt of court, but the Supreme Court reversed.

The state had argued that the convictions should be upheld because "the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English

NY Libel Law, *continued on page 32*

"New Yorkers must be able to speak out on issues of public concern without living in fear that they will be sued outside the United States under legal standards inconsistent with our First Amendment rights."

– David Paterson
Governor of New York

NY Libel Law, *continued from page 31*

common law." Justice Hugo Black, writing for the majority, reversed, stating that, "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."

The recent upsurge in foreign libel decisions, especially in England, has other American commentators concerned. In a June 25 article in *The Chronicle of Higher Education*, Jonathan Bloom, a lawyer at the firm Weil, Gotshal & Manges in New York said that some of the damage has already been done. "I have no doubt there have been many other examples of authors who have not written books or articles or even undertaken research in this area because they didn't want to wind up on the receiving end of a lawsuit," he said. "There's no worldwide security issue that affects us more than the funding of terrorism. The fact that libel laws are being used to chill unvarnished academic writing on this subject is pretty frightening."

U.S. courts have previously ruled, in a case involving a French lawsuit against Yahoo!, that speech by U.S. companies could not be regulated by countries that have more restrictive laws on freedom of expression. (See "Recent Developments in Internet Law: Court Clears Yahoo!" in the Winter 2003 issue of the Silha *Bulletin.*)

In May, Sens. Joseph Lieberman, (I-Conn.) and Arlen Specter (R-Pa,), along with Rep. Peter King, (R-N.Y.), introduced federal legislation that would extend similar libel protections across all 50 states. Officially entitled the Free Speech Protection Act, the bill creates a federal cause of action and federal jurisdiction so that federal courts may determine whether statements are defamatory under United States law when a journalist, speaker, or academic is sued in a foreign court for speech or publication in the United States. The bill authorizes a court to issue an order barring enforcement of a foreign judgment and to award damages.

The House version of the bill, H.R. 5814, and the Senate version, S. 2977, are both presently in committee. The bill specifically provides a cause of action for "any United States person against whom a lawsuit is brought in a foreign country for defamation on the basis of the content of any writing, utterance, or other speech by that person that has been published, uttered, or otherwise disseminated in the United States … against any person who, or entity which, brought the foreign suit if the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law."

The bill also allows the court to triple any damages and award court costs, including attorney fees, to plaintiffs who recover under the statute. Under the bill, an action may be commenced any time after the filing of the defamation lawsuit in a foreign country. It extends to any lawsuit, even those commenced before the enactment of the act.

"The freedom of American journalists should not be threatened by foreign courts that do not adhere to America's principles of free speech," Lieberman said in a statement released May 7 by his office. "Discovering the truth requires full and open debate."

"Our journalists provide us with insight on issues that affect all Americans, such as war and terrorism," King said in the same statement. "We cannot allow their voices to be silenced … American authors and journalists should be able to practice their First Amendment right without the fear of a lawsuit."

– Jacob Parsley
Silha Research Assistant

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Media Ethics

Washington Post Reporter Loses Job over Blog

A *Washington Post* staff writer lost his job in April 2008 after he revealed he was also writing for an unrelated sports blog. Commentators have said the episode was the latest example of a growing problem facing mainstream media outlets regarding employee-published online content.

Michael Tunison, who worked in *The Post*'s Montgomery County bureau, had been writing several posts each week on the professional football blog Kissing Suzy Kolber since 2006 under the pseudonym "Christmas Ape." Kissing Suzy Kolber describes itself as "a humor site dedicated to the NFL." According to an April 17 post on the AOL Sports Fanhouse blog describing the events, the site is among the most popular NFL blogs on the Internet.

The blog entry in which Tunison identified himself was peppered with profanities and entitled "Drunk Blogger Staggers into the Light." In it, Tunison refers to *The Washington Post* as a "dying medium." Tunison also writes about getting drunk the day of Super Bowl XL and the post includes a picture of him with a sports mascot.

In a later post, Tunison said the reason he revealed his identity was in the interest of full disclosure, because he had started getting paid for his work at the blog. He also said that much of the blog's content involved "taking shots" at other sports writers, and he did not wish to publish those comments anonymously. The posts are available at http://kissingsuzykolber.uproxx.com/tag/xmas-ape/page/4.

In an April 17 *Editor & Publisher* story, *Washington Post* Executive Editor Leonard Downie Jr. confirmed that Tunison no longer worked at the newspaper and had left his job, but would not specify whether he resigned or was fired. The *Editor & Publisher* story can be found online at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003790987.

In portions of an e-mail reprinted in Sports Illustrated's Media Circus blog, Tunison said that he was told to resign or he would be terminated. The Media Circus story can be found online at http://sportsillustrated.cnn.com/2008/writers/richard_deitsch/04/20/column.421/index.html.

"We have standards for people's outside work," Downie told *Editor & Publisher*. "You need to clear it with your editors here before and it should not be a conflict of interest."

The April 17 *Editor & Publisher* story included an e-mail response from Tunison to Downie's comments. "There was no conflict of interest between my writing for Kissing Suzy Kolber and my work for *The Washington Post*. The blog is not a journalistic endeavor and it is not something I was paid for until I revealed my identity. It is a humor blog about the NFL, whereas my job for the paper was to cover local news in a suburban county outside Washington, D.C."

The *Editor & Publisher* story included pertinent portions of the official *Post* stylebook: "This newspaper is pledged to avoid conflict of interest or the appearance of conflict of interest, wherever and whenever possible … we work for no one except *The Washington Post* without permission from supervisors. Many outside activities and jobs are incompatible with the proper performance of work on an independent newspaper …. Our private behavior as well as our professional behavior must not bring discredit to our profession or to *The Post*."

Washington Post Ombudsman Deborah Howell wrote April 27 that "it is no surprise that Tunison is no longer around if you read the blog, which contains obscene, sexist and racist comments that won't be repeated here." Howell also discussed several angry e-mails *The Post* had received and concluded with some advice for young journalists: "Don't hide your other job. Don't embarrass the editors. And use that talent without posting a picture of yourself drunk."

Newsrooms across the country are reacting to staffers' blogging in different ways. For example, the Web site journalism.co.uk reported April 29 that the Thomson Reuters company has implemented a policy that, although allowing employees to maintain blogs, prohibits them from using blogs for internal communication or for airing differences with colleagues or the company itself. The report is available at http://blogs.journalism.co.uk/editors/2008/04/29/thomson-reuters-internal-blogging-ban-for-staff/.

Other news outlets, such as *The New York Times* and *Los Angeles Times*, have precise guidelines for personal blogging, according to a story from the June/July issue of *American Journalism Review* (AJR). The *Los Angeles Times* requires approval of a supervisor, and approval will not be granted unless the blog meets the paper's journalistic standards. *The New York Times* requires that journalists avoid writing about any topics they cover professionally.

According to an October 9, 2006 story posted on the CBS News Web site, network standards state that all personal blogs written by CBS News employees must be approved by the Senior Vice President of Standards and Special Projects or the President of CBS News.

"There has always been outside approval required for outside speeches, outside writing – books, magazines, op-eds," said Linda Mason, CBS News Senior Vice President, Standards and Special Projects. "And that's so that, again, your opinions don't reflect badly on CBS, or in any way show bias towards one side or the other. On blogs, that's a whole new thing. We can't have people having personal blogs venting their opinions." The article is available at http://www.cbsnews.com/blogs/2006/10/06/publiceye/entry2071663.shtml.

Specific policies regarding blogging are becoming more common, but it has been a slow process, according to AJR. Editors and news organizations have been dealing with blogs for about a decade, and they continue to grow as a part of how people interact with the world.

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"There was no conflict of interest between my writing for Kissing Suzy Kolber and my work for *The Washington Post*. The blog is not a journalistic endeavor and it is not something I was paid for until I revealed my identity."

– Michael Tunison
Blogger, former reporter
The Washington Post

Silha Center News

Guardian Readers' Editor Butterworth to Deliver Silha Lecture

2008 Lecture to Focus on Intersection of Law, Ethics in the Digital Age

Who is a journalist? What is "responsible journalism?" How do media law and ethics intersect? Is self-regulation effective – or even possible – in the digital age? Siobhain Butterworth, readers' editor for *The Guardian* in London, will consider these and other questions when she presents the 2008 Silha Lecture, "Raise Your Hand if You're a Journalist: Does Responsible Reporting Need a Legal Defense?" on Oct. 6, 2008, at Cowles Auditorium at the University of Minnesota in Minneapolis.

As the readers' editor, or internal ombudsman, for *The Guardian*, Butterworth investigates and responds to readers' questions and complaints about the print and online editions of the newspaper from a position of independence. She writes a weekly commentary and considers items for the daily "Corrections and Clarifications" column. Before becoming readers' editor in April 2007, Butterworth served as Legal Director for Guardian News & Media, publisher of *The Guardian* and its sister Sunday paper, *The Observer*. She qualified as a solicitor (attorney) in 1991, and was in private practice before joining Guardian News & Media in 1997.

As the readers' editor, or internal ombudsman, for *The Guardian*, Butterworth investigates and responds to readers' questions and complaints about the print and online editions of the newspaper from a position of independence.

The Guardian, founded in 1821, is an independent newspaper owned by the Scott Trust since 1936. Its guiding principle, as stated by former editor CP Scott, is: "Comment is free, but facts are sacred. The voice of opponents no less than that of friends has a right to be heard." The innovative Guardian Unlimited network of websites was launched in January 1999, and is the second-largest news destination in the United Kingdom after BBC News Online. More than four million visitors from the United States log on each month.

The Silha Lecture begins at 7:00 p.m. in the Cowles Auditorium room at the Hubert H. Humphrey Center on the West Bank Campus of the University of Minnesota in Minneapolis. The presentation will include an opportunity for audience Q&A. The event is free and open to the public. No reservations or tickets are required. Light refreshments will be served.

The Silha Center is based at the School of Journalism and Mass Communication at the University of Minnesota. Silha Center activities, including the annual Lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

For further information, please contact the Silha Center at 612-625-3421 or silha@umn.edu, or visit www.silha.umn.edu.

– Sara Cannon
Silha Center Staff

***Post* Reporter**, *continued from page 33*

"A lot of the people we're hiring today have a prior history (online), a digital footprint so to speak, and you can't erase that footprint no matter how hard you try," Anthony Moor, deputy managing editor/interactive for *The Dallas Morning News* said in the AJR story. "I think you are seeing news organizations trying to grapple with this."

Some publications, such as *The Miami Herald* and *The Washington Post* do not address personal blogging at all in their employee manuals, according to AJR. They instead rely on broad policies that cover general behavioral expectations of newsroom employees.

"Bloggers like to think of themselves as unique and special in every way, but (they) still have to conform with other policies about personal behavior reflecting on their professional work," *Washington Post* Managing Editor Philip Bennett said in AJR. "We treat personal blogs the way we treat any sort of speech outside of what people do for the Washington Post."

In an article on Cyberjournalist.net, a Web site that calls itself a "news and resource site that focuses on how the Internet, convergence and new technologies are changing the media," J.D. Lasica, an author and commentator on social media, wrote that blogs threaten the traditional newsroom structure.

Lasica wrote that mainstream media outlets fear blogs by journalists. "Blogging empowers individuals at the expense of the carefully constructed newsroom hierarchy. It busts down the bureaucracy into a level playing field, a democratic playing field where your ideas count more than your pecking order in the organization's flow chart." The article is available at http://www.cyberjournalist.net/news/000361.php.

Tom Regan, a news blogger for National Public Radio and cochairman of a 2007 panel discussion at a conference for the Online News Association, said the most prominent factor for determining where a journalist will stand on the blogging issue is age.

"The older journalists felt that it compromised your position as a reporter," Regan said, according to AJR. "Younger journalists felt it's a whole new era, we all use Facebook, we're all used to sharing everything with everyone, so why shouldn't we as journalists? It was a real big split."

– Jacob Parsley
Silha Research Assistant

Silha Center News

Drechsel Named Silha Visiting Fellow

The Silha Center for the Study of Media Ethics and Law has announced that it will welcome Silha Visiting Fellow Professor Robert Drechsel for the fall 2008 semester.

Drechsel has taught at the University of Wisconsin-Madison since 1983, serving as director of the School of Journalism and Mass Communication from 1991 to 1998. There he teaches courses in newspaper reporting and the law of mass communication, as well as graduate seminars in mass communication law and policy. Before joining the faculty at Wisconsin, Drechsel taught for four years at Colorado State University. Drechsel is an alumnus of the University of Minnesota, where he earned his bachelor's, master's, and doctorate degrees .

Drechsel said his fall fellowship will include work on a research project on local television coverage of courts with a colleague at the William Mitchell College of Law, and a large-scale, long-term study of the professionalization of media occupations and legal liability.

Drechsel's research at the University of Wisconsin has focused on tort law and constitutional law affecting mass communication, and on reporter-source interaction in state trial courts. He is the author of "News Making in the Trial Courts" (New York: Longman, 1983), and articles in a variety of legal and communication journals.

Silha Visiting Fellowships are awarded on a case-by-case basis to outstanding faculty members in the area of media ethics and law. The last visiting fellow hosted by the Silha Center was Professor Kaarle Nordenstreng, from the University of Tampere in Helsinki, Finland, who visited in the fall of 1994.

– Sara Cannon
Silha Center Staff

Silha Fall Forum will Address FCC Cross-Ownership Rules

On Thursday, Oct. 23, 2008, the Silha Center for the Study of Media Ethics and Law will present a special Fall Forum addressing media cross-ownership featuring Rosemary Harold, Deputy Chief of the Media Bureau of the Federal Communications Commission (FCC).

Congressional hearings, protest demonstrations, and more than 165,000 comments set the scene in December 2007 for the FCC's rather modest, but highly controversial, relaxation of its 32-year-old ban on joint ownership of daily newspapers and broadcast stations. In her talk, "The FCC's New Media Ownership Rules: Emotion and Reason in Rulemaking," Harold will review how the FCC balanced fears about media consolidation with facts about journalist layoffs when relaxing its joint-ownership ban, and what impact the new rules may have on the rapidly evolving media landscape.

Harold holds a master's degree from the Missouri School of Journalism, a J.D. from Georgetown University Law Center and has worked both as a journalist and as a practicing attorney. At the FCC's Media Bureau, she serves as one of the senior officials responsible for developing, recommending, and administering the policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio in the United States and its territories. The Media Bureau was established in 2002; Harold joined it in 2005.

The event, which begins at 4:30 p.m., will be held in the Murphy Hall conference center at the University of Minnesota's School of Journalism and Mass Communication. It is free and open to the public. The forum will include an opportunity for audience questions; light refreshments will be served. For further information, please contact the Silha Center at 612-625-3421 or silha@umn.edu, or visit www.silha.umn.edu.

– Sara Cannon
Silha Center Staff

The Silha Center sponsors various events and activities throughout the year.

To learn about past and upcoming events and activities, visit the Silha Center's Web site at

www.silha.umn.edu

2008 ANNUAL SILHA LECTURE

Raise Your Hand If You're a Journalist: Does Responsible Reporting Need a Legal Defense?

October 6, 2008
7:00 p.m. - 9:00 p.m.
Cowles Auditorium, Hubert H. Humphrey Center
University of Minnesota
Free and Open to the Public
No Reservations Required
www.silha.umn.edu ~ 612-625-3421

Siobhain Butterworth is the readers' editor for *The Guardian* newspaper in London. She investigates complaints – about matters such as accuracy, privacy, injury to reputation and journalistic ethics – from a position of independence within the paper. She writes a weekly column about these and other issues. She qualified as a solicitor in 1991 and was Legal Director for Guardian News & Media for more than a decade.

Featuring: Siobhain Butterworth, Readers' Editor, The Guardian

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