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Spring 2014

Media Law Notes

AEJMC Law & Policy Division

Head Notes: Thoughts from Division Head

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The slogan for the 2014 AEJMC conference is "Rejoignez-nous à Montréal." My French is a little rusty, but I think this translates as "Love the law in Montreal." But I could be wrong.

The Law and Policy Division's unofficial slogan, however, should be "Come early and stay late." As is evident from this year's schedule (included in this edition of Media Law Notes), our officers and members have done an excellent job putting together great panels that will begin early on Tuesday, August 5 and last until the final days of the conference. An incredibly diverse set of topics–the evolution of communication law and technology over the next twenty years, social media and academic freedom, New York Times v. Sullivan at 50, NCAA athletes and the right of publicity, a federal shield law, and revenge porn–will all be covered during the pre-conference and conference.

We will be kicking things off in a big way on Tuesday during our pre-conference sessions with speakers such as Rodney Smolla, and Lee Levine, and Steve Wermiel, the co-authors of The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan. I highly encourage all division members to come to our pre-conference events and stay in Montreal as late as you can–at the very least you should stay until our division's off-site social.

If you are still unconvinced, in this issue Jasmine McNealy (Kentucky), our PF&R chair, writes about the top-notch pre-conference panels she has organized on Social Media and Academic Freedom. Her article will surely convince you to arrive in Montreal Monday evening in order to catch the early panels Tuesday.

In addition to this year's schedule for the annual convention and Jasmine's article, this edition of Media Law Notes also contains an article from former AEJMC President and Law and Policy Division Head, Kyu Youm (Oregon) on twenty landmark First Amendment cases. Kyu consulted nearly 80 American and international experts to compile his list. Many division members will also be interested in an article on the Hobby Lobby case from Katie Blevins (Trinity University). Finally, now that the paper competition is complete, members will be interested in turning their attention to the division's teaching competition call. Please note that this year we are encouraging members who have submitted in years past, but who have not won to resubmit their proposals.

Thanks to our Clerk/Newsletter Chair, Courtney Barclay (Syracuse), for her hard work putting together another great edition of Media Law Notes. I think you will enjoy it.

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The Top 20 Landmark First Amendment Cases

Kyu Ho Youm
University of Oregon

Few of us will have trouble naming 20 First Amendment cases of the U.S. Supreme Court. But many of us will find it challenging to list the top twenty landmark cases on freedom of speech and the press, for the listing will depend on how to define "landmark." Further, which of the hundreds, if not thousands, of freedom of expression cases will make the top twenty? More importantly, what's the value of the list for media law teacher-scholars?

Defining "landmark" should be easier than identifying the landmark cases.

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Call for Submissions: Teaching Ideas Competition

The call for submissions for the Sixth Annual Teaching Ideas Competition of the Law and Policy Division is now open. The division broadly seeks ideas for innovation in teaching communication law and policy. For instance, submissions could focus on a creative approach to studying a case or cases; new ideas for incorporating social media or multimedia experiences into courses; effective in-class small group or large group activities, assignments that help students synthesize key lessons; a group project that encourages collaborative learning; a lesson plan or syllabus that reveals an innovative approach for a topics seminar or skills course; an idea for experiential or service learning; or any other area of teaching and learning that you want to share to help others improve their courses.

Winning submissions will receive certificates and cash prizes: $100 for first place; $75 for second place; and $50 for third place. Winners also will be recognized during the AEJMC Law and Policy Division business meeting in Montreal and their ideas will be show¬cased on the division website and in Media Law Notes.

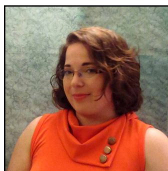
All submissions must be received by May 1, 2014. Submissions should be sent as an email attachment in Word compatible document format to Teaching Committee Chair Jason Martin at jmart181@depaul.edu. Please use "Teaching Ideas Competition" in the subject line of your submission.

Please include your name, affiliation, contact information, and the title of your teaching idea at the top of your submission. Describe your teaching idea in one to two pages (single-spaced) in this format: introduction to your idea; your rationale for the idea; explanation of how you implement the idea; and student learning outcomes. Include any appropriate hyperlinks at the bottom of your submission and include any relevant attachments to the email.

A panel of judges will blind review each submission based on the idea's creativity, innovation, practicality, and overall value to students. Submissions will be acknowledged via email but not returned.

Submitters need not be Division members. Both faculty and graduate students are welcome to submit. Previous entrants who were not awarded are welcome to revise and resubmit ideas from previous years. Winners will be notified by June 1, 2014. For any questions, please contact Jason Martin at jmart181@depaul.edu.

Hobby Lobby and the Affordable Care Act: Implication for Information



Katie Blevins
Trinty University

As of this writing, the Supreme Court decision is still pending for *Sebelius v. Hobby Lobby*. This case involves two corporate entities, Hobby Lobby and Conestoga Wood, who are arguing it is a violation of the Religious Freedom Restoration Act of 1993 (RFRA) and the First Amendment to require for-profit corporations to provide financial support for contraceptives under a federally mandated health plan when the corporate owners have a religious objection (contraceptives in this context have been defined as emergency contraceptives and IUDs).

The federal appeals courts have been split on whether corporations are required to provide contraceptive coverage-- two courts have upheld the contraception coverage rule while three have struck it down-- leaving the Supreme Court with the important task of providing guidance on this issue. To date, at least 47 other cases have been filed on behalf of for-profit corporations challenging the mandate.

There are conflicting factors at play. First is the possibility of expanding corporate personhood, recently affirmed in *Citizens United v. FEC*, where the religious preferences of an owner are not only extended to the rest of the corporation, but protected under the First Amendment. The RFRA, which shields individuals from any kind of substantial burden in the exercise of their religion, is important here. The RFRA reinstates a strict scrutiny standard when the Free Exercise Clause is called into question for federal legislation.

Second, this case draws on a type of legislation known as "refusal clauses." These refusal or conscience clauses were first implemented in reaction to *Roe v. Wade* in 1973. Under these refusal clauses, health care providers (ex: doctors, nurses, pharmacists) can refuse to provide health services that violate an individual's religious or moral views. Some clauses require healthcare providers to supply alternative providers for treatment, others do not. Reproductive services, particularly services centered on women such as contraceptives and abortion, tend to be the focus.

These clauses are mostly state laws which make it illegal to withhold funding or employment to health professionals who deny services based on religious or moral objections. Some of these clauses are broader, though, and fold an information component into the clause. Under these broader clauses, healthcare providers are able to not only deny medical care, but are also able to deny related healthcare information. For example, a girl might come to a hospital following a sexual assault. If the nurse providing care has a personal moral objection against Plan B, instead of making the option available, she may be legally protected to withhold the full range of contraceptive options available to the patient.

In the *Sebelius* case, the predominant issue is the payment for employees' insurance. In the original iteration of this case, Hobby Lobby v. U.S. (2012) in the District Court of Oklahoma, one of the

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Top 20 Cases, continued from page 1.

Landmark cases are those that "hav[e] either defined new principles discovered in the Constitution or … significantly elaborated established ones" (Richard A. Leiter & Roy M. Mersky, Landmark Supreme Court Cases: The Most Influential Decisions of the Supreme Court of the Untied States, at xx (2nd ed. 2012)). Plus, they "have defined for society the moment and the future in a profound fashion" (Donald E. Lively, Landmark Supreme Court Cases: A Reference Guide, at vii (1999)).

What did I do in ascertaining the top twenty landmark First Amendment cases? The definitional framework noted above has informed my selection of the cases. After checking all the major sources on the landmark Supreme Court cases, University of Oregon law reference librarian Stephanie Midkiff and her colleagues identified 18 print and online resources and two annotated versions of the U.S. Constitution. My research assistant, James Carskadon, and I examined the resources and a dozen constitutional and media law books.

In mid-February, I made a tentative list of more than twenty landmark cases. Nearly eighty American and international jurists, journalism and legal scholars, and journalists reviewed my working list. A noted media law scholar in the Midwest. I've incorporated the comments from my consultants into my final list (see below).

I posted my Top 20 List to Facebook on March 8—on the eve of the 50th anniversary of the *New York Times v. Sullivan* case. Some might quibble with cases that did not make the cut. It is unavoidable, since the list resulted from my editorial decisions, although I tried to make it "more than an interesting parlor game" (Frank B. Cross & James F. Spriggs II, "The Most Important (and Best) Supreme Court Opinions and Justices," 60 Emory Law Journal 409 (2010)).

Any practical or perceived significance of my list for media law scholars and the Law & Policy Division? Personally, I find the list useful in prioritizing the cases that deserve special attention in teaching and researching communication law. It also helps me articulate cogently what defines the U.S. Supreme Court on free speech and free press.

Few peer organizations have prepared lists of landmark First Amendment cases. The websites of the International Communication Association's Communication Law and Policy Division and of the National Communication Association's Freedom of Expression and Communication and Law divisions show little information about landmark cases as such. The American Bar Association's Forum on Communications Law and the Association of American Law Schools' Section on Mass Communication Law are no different.

By contrast, the American Academy of Psychiatry and the Law (AAPL) includes "Landmark Cases" in its resources (http://www.aapl.org/landmark_list.htm), though its list of landmark cases needs updating. Regardless, AAPL "selects Landmark Cases which it thinks especially important and significant for forensic psychiatry." AAPL should be instructive to the Law & Policy Division. I hope Law & Policy will compile a go-to list of First Amendment landmark cases for its members.

My list may be just "for a fun discussion over wine," according to my media law friend Tori Smith Ekstrand at UNC-Chapel Hill. However, one of my Yale Law School friends emailed me in late March: "Where is the list going to be presented? You could always add it to the Wikipedia article on the First Amendment (generally I think scholars should play a big role editing Wikipedia)."

Now I am giving careful consideration to the Wikipedia idea. Not necessarily because my list will contribute a lot to unending First Amendment debates in the global 21st century, but because it will be edited by those who marvel at why "no nation conducts its politics more freely, and no nation has more freedom of expression [than the United States]" (Freedom of Expression in the Supreme Court: The Defining Cases, at xxvi (Terry Eastland ed., 2000)).

Top 20 List of Landmark First Amendment Cases

- Bartnicki v. Vopper, 532 U.S. 514 (2001)
- Brandenburg v. Ohio, 395 U.S. 444 (1969)
- Branzburg v. Hayes, 408 U.S. 665 (1972)
- Buckley v. Valeo, 424 U.S. 1 (1978)
- Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)
- Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)
- Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1980)
- Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
- Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
- Miller v. California, 413 U.S. 15 (1973)
- Near v. Minnesota, 283 U.S. 697 (1931)
- Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)
- New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
- New York Times Co. v. United States, 403 U.S. 713 (1971)
- R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
- Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)
- Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
- Snyder v. Phelps, 562 U.S. ___ , 131 S. Ct. 1207 (2011)
- Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)
- Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994).

Hobby Lobby, continued from page 2.

additional contentions made by Hobby Lobby was that in addition to "abortion-causing drugs," the contraceptive mandate also required employers to pay for access to "related education and counseling." Education and counseling were not defined explicitly, but would arguably have extended to healthcare appointments where contraceptives are commonly discussed. This would have stretched the burden of individual employees to not just financially provide for their own contraceptive options, but also visits with health care professionals.

Regarding the long-term impact, this decision has potential consequences beyond the issue of employer-funded contraceptives. Obviously, the continuing status of a corporation as a "person"--with the accompanying constitutional rights--presents legal and ethical concerns that will change the landscape. In terms of the more narrow treatment of information, I believe the issue of a person's right to know will gain prominence over time.

Although a right to information was not considered at issue in *Sebelius*, information remains inextricably linked to refusal clauses and accompanying legislation. It is a profoundly concerning concept that one individual or corporation's religious freedom could trump an employee's access to information in a way that might seriously impact reproductive health and family planning. Although there is no constitutionally recognized right to know, the Supreme Court has written in support of a corollary right in the Free Speech clause. In *Virginia State Pharmacy Board v. Virginia Citizens' Consumer Council* (1976) the Court stated that "Freedom of speech presupposes a willing speaker. But where a speaker exists [...] the protection afforded is to the communication, to its source and to its recipients both." Refusal clauses and corporate rights challenge access to information, even as information emerges as an increasingly valuable, if ill protected, component of our lives.

PF&R Pre-conference Montreal: Social Media and Academic Freedom

Jasmine McNealy
PF&R Chair
University of Kentucky

Although academic freedom has seemingly always been an important topic of discussion, recent events concerning the rights of scholars, and students, to speak freely have brought considerable attention to the topic. For instance, in the fall of 2013, a tenure professor at the University of Kansas was placed on leave for a tweet directed at the NRA. Earlier that summer, a tenured professor at the University of New Mexico and then visiting professor at NYU, faced public backlash for his tweet concerning obese graduate applicants. In both cases, and others like them, university faculty and staff faced backlash and punishment, both public and professional, for information published on social media.

Further, many universities not have social media policies that are supposed to act as, at least, a guide to how employees are to conduct themselves online. The Kansas Board of Regents, for example, adopted rules regarding the "proper use" of social media for faculty and other employees. The policies allow for the dismissal of university employees for improper use of social media.

Our division will be hosting a pre-conference panel discussion about issues related to the policies adopted by the Kansas Board of Regents and other universities, and on the broader topic of academic freedom and social media. The discussion will consists of both legal and ethical issues panels with scholars and practitioners from the U.S. and Canada joining in the discussion.

The preconference begins at 9:30am August 5, 2014. The first panel, focusing on legal issues, will discuss university policies related to social media use for faculty and staff, as well as the legal challenges to such regulations. The second panel will discuss the ethics of using social media as an academic, i.e. issues of "friending" students, commenting/writing about work conditions and administration, engaging in what could be considered inflammatory public debates and conversations, etc.

Join us for what is sure to be an interesting discussion!

Legal Annotated Bibliography

David Wolfgang
Doctoral Student
University of Missouri

HATE SPEECH

Tourkochoriti, I. (2014). "Should Hate Speech be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe and the United States." 45 Columbia Human Rights Law Review 552.

In 2011, the French Government proposed legislation that would criminalize the denial of the Armenian Genocide. The French Constitutional Council invalidated the proposal on rule of law grounds and did not seriously address the free speech concerns underlying the case. The proposal and the invalidation once again raised the question of the limits of protection of hate speech and of political tolerance in a democratic society: should the state intervene in order to protect its citizens from offensive speech or from the danger of arriving at erroneous opinions? This paper presents a non-exclusive survey of the laws governing hate speech and addresses the philosophical justifications behind those laws.

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This article evaluates, through philosophical justifications, the legal responses to different manifestations of hate speech: group defamation, bans of political parties, and criminalization of the contestation of historic events. While most analysts take an "all or nothing" approach to these issues, believing that all manifestations should be limited if a legal system limits any hate speech, the analysis shows that philosophical reasons grounded in liberalism justify distinguishing between the different types of hate speech and addresses each in turn.

Ultimately, this article argues that bans of political parties can be justified neither on the basis of principle nor on the basis of their consequences. Similarly, the criminalization of the contestation of historical facts implies serious limitations to academic freedom. This article makes the argument that the subjectivity of the historian in reconstructing or re-enacting historical fact is a constitutive element of historical research and thus, the debate on historical facts and their evaluation should be left to the absolute discretion of the community of historians.

INTERNET FREEDOM

Nunziato, D.C. (2014). "The Beginning of the End of Internet Freedom." 45 Georgetown Journal of International Law 383.

Although the Internet was initially viewed as a medium for expression in which censorship would be impossible to implement, recent developments suggest exactly the opposite. Countries around the world--democracies as well as dictatorships--have implemented nationwide filtering systems that are changing the shape of Internet freedom. In addition to usual suspects like China, liberal democracies such as the United Kingdom and Australia have taken steps to implement nationwide Internet filtering regimes. While such Internet filtering regimes may have laudable goals--like preventing children from accessing harmful content and preventing access to illegal child pornography--they inevitably lead to overblocking of harmless Internet content and present grave dangers of censorship.

International protections for freedom of expression, as well as the United States' protections for First Amendment freedoms, provide not only substantive but also procedural protections for speech. These procedural protections are especially important for countries to observe in the context of nationwide Internet filtering regimes, which embody systems of prior restraint. Prior restraints on speech historically have been viewed with great suspicion by courts and any system of prior restraint bears a strong presumption of unconstitutionality. To mitigate the dangers of censorship inherent in systems of prior restraint such as those embodied in nationwide filtering systems, this article argues that any country adopting such a system should provide the requisite procedural safeguards identified in international and U.S. law, including (1) by providing affected Internet users with the ability to challenge the decision to filter before an independent judicial body, (2) by providing meaningful notice to affected Internet users that content was filtered, and (3) by clearly, precisely, and narrowly defining the categories of speech subject to filtering.

FREE SPEECH

Markham, C.J. (2014). "Punishing the Publishing of Classified Materials: The Espionage Act and Wikileaks." 23 The Boston University Public Interest Law Journal 1.

Bradley Manning's recent conviction for crimes related to his leaking of classified documents to Wikileaks has reignited a debate over whether Wikileaks founder Julian Assange could be the government's next target. Indeed, as recently as March 30, 2013 a Department of Justice spokesperson confirmed that an investigation into WikiLeaks' employees remains ongoing.

That Manning is confined to a prison cell while Julian Assange has not even been charged with a crime raises an obvious, yet complicated, question - why should Manning receive such a harsh punishment for leaking classified information to several WikiLeaks employees while WikiLeaks employees are subject to no punishment for exposing that same information to the entire world? This question is of particular importance because the issue of news organizations publishing classified information potentially harmful to United States national security does not appear to be going away. The recent revelations by Edward Snowden and the Guardian regarding classified National Security Agency information-gathering programs underscores this fact. As does WikiLeaks' own response to the news of Manning's conviction, which defiantly claimed that there will be "a thousand more Bradley Mannings" leaking increasingly more classified information.

So, if Manning has been convicted under the Espionage Act, does that mean WikiLeaks employees could be subject to the same fate? Despite the fact that a government investigation into WikiLeaks is going on its third year, discussions surrounding the potential use of the Espionage Act to prosecute media members like Julian Assange have been muddled at best. This article argues that, specifically, neither government officials nor academics have carefully addressed: (1) the sections of the Espionage Act that prohibit the publishing of classified materials and (2) the First Amendment implications of using the Espionage Act to punish such activities. This article addresses both these issues using the potential prosecution of Julian Assange as a case study. In doing so, it concludes that the First Amendment allows the government to prosecute those who publish classified materials under the Espionage Act in certain narrow circumstances. However, in the case of Assange, more information is needed than is publicly known regarding both his state of mind in publishing the classified documents as well as the nature of those documents before determining whether Assange may be held criminally liable under the Espionage Act.

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AEJMC 2014 Conference Schedule: Law & Policy Division

Tuesday, Aug. 5 (Preconference sessions)

8:00AM-9:15 AM Communication Law and Policy Special Edition: Communication Law and Technology: The Next Twenty Years

Panelists: TBA

Moderator: W. Wat Hopkins, Editor, Communication Law and Policy

9:30 AM-12:45 PM Legal & Ethical Issues in Academic Freedom and Social Media (cosponsored with Political Communication)

Legal Issues (9:30 AM to 11:00 AM)

Panelists: James Turk, Ryerson; Former Executive Director, Canadian Association University Teachers
Amy Kristen Sanders, Northwestern-Qatar
Daxton "Chip" Stewart, Texas Christian
Karim Renno, partner, Irving Mitchell Kalichman

Moderator: Jasmine McNealy, Kentucky

Ethical Issues (11:15 AM to 12:45 PM)

Panelists: Matt Duffy, Berry College
Shaheen Shariff, McGill; Principal Investigator and Director, Define the Line
Erin Coyle, Louisiana State
Brendon S. Gillon, McGill; Chair, McGill Association of University Teachers Committee on Academic Freedom

Moderator: Jasmine McNealy, Kentucky

1:00 PM-5:15 PM New York Times v. Sullivan, the 50th Anniversary

Actual Malice: Foundations and Future (1:00 PM-2:15 PM)

Panelists: Lee Levine, Levine Sullivan Koch & Schultz
Melvin Urofsky, Virginia Commonwealth
Rodney Smolla, Duke University

Moderator: W. Wat Hopkins, Virginia Tech

The Global Impact of New York Times v. Sullivan (2:30 PM-3:45 PM)

Panelists: Paul Schabas, attorney, Blake, Cassels & Graydon
Robert Balin, attorney, Davis Wright Tremaine
Leonard Ferreira, Florida International
Doreen Weisenhaus, Hong Kong

Moderator: Kyu Ho Youm, Oregon

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AEJMC 2014 Conference Schedule: Law & Policy Division, cont.

Tuesday, Aug. 5 (Preconference sessions), cont.

1:00 PM-5:15 PM — New York Times v. Sullivan, the 50th Anniversary

The Ruling and the Man Who Made It: A Conversation with Brennan Biographer Stephen Wermiel (4:00 PM-5:15 PM)

Panelists: Steve Wermiel, American University Washington College of Law, co-author, "The Progeny"

Moderator: Joseph Russomanno, Arizona State

Wednesday, Aug. 6

8:15 AM – 9:45 AM — Refereed Research Session

11:45 AM-1:15 PM — Federal Shield Law: A Wolf in Sheep's Clothing? (Cosponsored with Newspaper & Online News Division)

Panelists: Lucy Dalglish, Maryland
Jane Kirtley, Minnesota
Toni Locy, Washington and Lee

Moderator: Joseph Russomanno, Arizona State

3:15 PM-4:45 PM — New York Times v. Sullivan: Civil Rights History and Media Law, 50 Years Later (Cosponsored with History Division)

Panelists: Doug Cumming, Washington and Lee
Ashley Messenger, counsel, NPR
Melvin Urofsky, Virginia Commonwealth
Stephen Wermiel, American University Washington College of Law

Moderator: Aimee Edmondson, Ohio

Thursday, Aug. 7

8:15 AM – 9:45 AM — Press Councils: Keeping the Press Honest or Undermining Press Freedom (Cosponsored with Ethics)

Panelists: Paul Schabas, Blake, Cassels, & Graydon, University of Toronto Faculty of Law
David Pritchard, Wisconsin
Marc-Francois Bernier, Ottawa
Lisa Taylor, Ryerson
Bill Babcock, Southern Illinois

Moderator: Romayne Smith-Fullerton, Western Ontario

11:45 AM–1:15 PM — Acts of Journalism And Acts of Congress: Media Policy and Participatory Journalism (Cosponsored with PJIG)

Panelists: Lisa Lynch, Concordia
Madeleine Bair, Witness.org
Morgan Weiland, Stanford
Trevor Timm, Freedom of the Press Foundation

Moderator: Josh Stearns, Free Press

AEJMC 2014 Conference Schedule: Law & Policy Division, cont.

<u>Thursday, Aug. 7, cont.</u>

5:00 PM-6:30 PM	The NCAA and Publicity Rights for Athletes (Cosponsored with Sports Comm)	
	Panelists:	John Affleck, Penn State
		Kathy Olson, Lehigh
		Michael Hoefges, North Carolina
		Welch Suggs, Georgia
	Moderator:	Jason Genovese, Bloomsburg

<u>Friday, August 8</u>

7:00 AM-8:00 AM	Executive Committee Meeting	
8:15 AM – 9:45 AM	Refereed Research Session	
3:30 PM – 5:00 PM	Refereed Research Session	
5:15 PM - 6:45 PM	Revenge Porn, Voyeurism, Consent, and Anonymity: Implications for Feminism and Digital Media Law (Cosponsored with CSW)	
	Panelists:	Mary Anne Franks, University of Miami School of Law
		Woody Hartzog, Cumberland School of Law (Samford)
		Jason Martin, DePaul
		Brenda Weber, Indiana
	Moderator:	Spring-Serenity Duvall, South Carolina - Aiken
7:00 PM – 8:30 PM	Members Meeting	
9:00 PM	Off-site Social	

<u>Saturday, August 9</u>

11:00 AM - 12:30 PM	Refereed Research Session
12:45 PM - 2:15 PM	Refereed Research Session

Bibliography, continued from page 5.

PUBLIC FORUM

Grimmelmann, J. (2014). "Speech Engines." 98 Minnesota Law Review 868.

There is growing concern over search engine regulation and the role of the search engine as a disseminator of information. Does a search engine, like Google, act simply as a purveyor of information options, akin to a conduit, or does a search engine act like an editor of potential information options.

If we are determined to put search users first, the law can do two things for them. It can promote access to search by enabling users to draw on the aid of search engines, and it can promote loyalty in search by preventing search engines from misleading users. Access responds to the conduit theory: the search engine owes nothing to websites struggling to be heard; what matters is the user's ability to select among websites, which necessarily includes ignoring most of them most of the time. And loyalty responds to the editor theory: a search result is not a product the user consumes for its own sake; it is useful only as a way to find the websites whose speech the user really values.

On the advisor theory, however, matters are more nuanced. From users' point of view, website quality is subjective; no two users will have quite the same preferences. If we care about access, then no website ever has a right to insist on top placement; if it did, it would override the preferences of users who are looking for something else. But if we care about loyalty, then search engines are not yet off the hook. On the conduit and editor theories, the search engine's motives should be irrelevant: both theories focus on conduct, one to condemn, the other to justify. But on the advisor theory, motive is crucial, because it is the intent to harm users that makes the ranking disloyal and thus actionable.

This Article presents, defends, and applies the advisor theory of search. It provides a basic background on how search engines work, describes the different theories – including the editor

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Bibliography, continued from page 8.

and conduit theories – and introduces the advisor theory as a plausible solution, and finally applies the advisor theory to the search bias issue at the heart of FTC investigations.

COPYRIGHT

Kaminski, M. (2014). "Copyright Crime and Punishment: The First Amendment's Proportionality Problem." 73 Maryland Law Review 587.

The Supreme Court's increasing use of a categorical approach to the First Amendment has created a growing divide between the U.S. approach to reconciling copyright and free expression and the proportionality analysis adopted by most of the rest of the world. This article compares the proportionality analysis that most of the world's constitutional courts use when reviewing laws implicating fundamental rights with the Supreme Court's tiered framework of review in First Amendment doctrine. This article also discusses how U.S. tiered review has functionally placed copyright law outside of First Amendment analysis, while international courts and other institutions have acknowledged that copyright laws can affect and impinge on free speech rights.

There has been insufficient judicial oversight of copyright law in the United States to prevent its expansion, especially in the criminal realm. As a consequence of ever-increasing penalties and expansive criminal enforcement mechanisms, the U.S. copyright regime now raises substantial speech concerns. The regime can be overbroad, can result in collateral censorship, can give rise to chilling effects, and can allow for prior restraints on speech.

The United States' current efforts to export criminal copyright enforcement, along with a presumptively categorical approach to reconciling copyright and speech, conflict with public intuitions about free speech held by people around the world. This article argues that instead, courts should take the opposite route and reintegrate elements of proportionality analysis into First Amendment jurisprudence. Doing so would provide a more complete and nuanced understanding of freedom of expression and return the United States to its position as the most speech-protective country in the world.

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