

Media Law Notes

Volume 37, No. 4

Law and Policy Division, AEJMC

Convention 2009

* * * Special coverage of the 2009 AEJMC Convention. Detailed schedule begins on page 4 * * *

Head Notes

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Soon after my university gave faculty the option of adopting the plagiarism detection software program Turnitin.com several years ago, one of my media law students asked me if I thought the program infringed students' intellectual property rights.

At first, I thought it was a silly question. But now I believe plagiarism detection programs such as Turnitin do raise significant copyright issues. I choose not to require my students to submit their work via Turnitin.com because I believe they could get the wrong message. While I certainly do not condone plagiarism, I also do not

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Schedule of Law and Policy Division events for the 2009 AEJMC Convention in Boston, including:

§ Research panels
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want students to think I have no respect for their rights under the U.S. Copyright Act.

It may be true that Turnitin acquires a license from students, but I have concerns about the coercion or duress involved in Turnitin's mandatory "clickwrap" agreement. While theoretically students can decline to accept the terms, doing so prevents them from using Turnitin at all and could lead to a failing grade.

In a copyright infringement lawsuit filed by four Fairfax County, Virginia, high school students against Turnitin, the U.S. District Court for the Eastern District of Virginia in 2008 upheld the validity of the "clickwrap" agreement and said students could not modify the agreement with disclaimers dictating the terms of use of their copyright-protected works (*A.V. v. iParadigms, LLC*, 544 F.Supp.2d 473 (E.D. Va. 2008)).

The U.S. Court of Appeals, however, declined to pass judgment on the "clickwrap" agreement (*A.V. v. iParadigms, LLC*, __ F.3d __, 2009 WL 1015145 (4th Cir. Apr. 16, 2009)). Instead, the Fourth Circuit held that Turnitin engaged in fair use of students' works, even though

(Continued on page 2)

Panel Preview: More panels of interest

FCC v. Fox and First Amendment Education

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In the last issue of Media Law Notes, Jane Kirtley profiled the first-rate panel she's assembled for "The Legacy of *Department of Justice v. Reporters Committee*." I want to draw attention here to two additional Law and Policy Division panels I hope you'll plan to attend in Boston.

On Thursday, Aug. 6 from 3:15-4:45, an exceptional lineup will discuss broadcast indecency regulation on the panel "The Impact of *FCC v. Fox*." A divided Supreme Court, of course, ruled last term that the FCC's ban on fleeting expletives was neither arbitrary nor capricious. We're honored and thrilled that this panel will feature two of the central players involved in the litigation.

Gregory Garre, the former Solicitor General of the United States who

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Head Notes Cont'd...

Turnitin used entire works in a commercial setting. Interestingly, one of the arguments Turnitin successfully made to the Fourth Circuit was that the works were used anonymously; in other contexts, lack of attribution might cut against fair use, but here the Fourth Circuit saw it as a factor favoring fair use.

In fact, the Fourth Circuit's view of fair use in the Turnitin case is very broad. I am fine with a broad view of fair use because I think it facilitates free expression and cultural progress. But I hope the Fourth Circuit's broad view of fair use gets applied in the same way to individual users as it did to a corporation making money from academia's fears and misunderstandings about plagiarism.

Plagiarism is neither a crime nor a tort. It is an ethical concept but some characterize it as breach of a contract between students and universities, or employees and their employers. Contemporary application of plagiarism may be too broad; in his *Little Book of Plagiarism*, Judge Richard Posner contends plagiarism requires not only unacknowledged borrowing but also fraud and detrimental reliance.

Turnitin may provide a valuable service for those who choose to use it, but the company's website (plagiarism.org) betrays misunderstanding of copyright's basic principles. Plagiarism.org, for example, wrongly suggests plagiarism is a crime and also mischaracterizes the idea-expression dichotomy by saying ideas are subject to copyright protection. The site defines fair use extremely narrowly; in fact, the plagiarism.org definition of fair use

probably would not have allowed Turnitin to make use of students' works in the lawsuit heard by the Eastern District of Virginia.

Plagiarism and copyright law have an interesting history. Plagiarism has been traced to Roman times, but copyright law is only 300 years old. Historically plagiarism was less concerned with economics than reputation. With the advent of the printing industry, though, copyright law began enforcing exclusive rights of authors. Today, copyright law in much of the world (with the notable exception of the United States) includes a general right of paternity or attribution that functions much like plagiarism.

Perhaps we have come full circle. The "free culture" movement advocates radical changes in current copyright law, and one possibility suggested recently in *Columbia Journalism Review* would alter copyright law to focus on attribution instead of economics. In the age of the Internet, perhaps strong copyright protection no longer serves the entire public's needs because it cuts off access to too many works for even legal uses.

If the United States were to couple its healthy fair use doctrine with a European-style right of attribution, perhaps the rationale behind overzealous protection of the economic interests of corporations through copyright law would fall. In that case, Turnitin would be free to keep making use of students' works. But those same students would be free to make broader use, with attribution, of copyright-protected literature, music and movies than they are now able to do.

That's something I think my media law student from a few years ago—the one who recognized Turnitin's possible copyright infringement—would be pleased with. Now, I agree with her.

Panel Preview Cont'd...

argued the case on behalf of the FCC, will discuss, among other things, how he approached oral argument and his reflections on the Court's decision. Gregory served as the 44th Solicitor General of the United States. And before that, his distinguished career included stints as deputy solicitor general, head of the Supreme Court and appellate practice group for the law firm Hogan & Hartson LLP, and clerk for Chief Justice William Rehnquist. He has argued more than 25 cases before the Supreme Court.

Susan Weiner will then discuss the implications of the case for broadcasters. Susan is the executive vice president and deputy general counsel for NBC Universal, one of the respondents in the case. She is in charge of litigation and dispute resolution for the corporation, including NBC, its owned and operated stations and its networks. Her work includes involvement in all levels of litigation across a range of areas, such as defamation, reporter's privilege, employment, intellectual property, and challenges to FCC regulations.

The panel will feature two accomplished scholars as well. **Ed Carter**, the head of the Law and Policy Division, will extend arguments he and a colleague made in a recent article about the constitutionality of profanity regulation. There, he examined the place of profanity in the law – in history and in the present – and concluded that the regulation of

(Continued on page 3)

Panel Previews Cont'd...

profanity on broadcast TV is likely to be constitutional when profanity is used gratuitously in entertainment contexts. And **Amy Kristin Sanders**, an assistant professor at the University of Minnesota, will use a combination of legal precedent and social science research in exploring whether profanity should be treated in the same manner as visual indecency.

Then on Friday, Aug. 7 from 3:30-5 an expert panel will take on First Amendment education. As we know, general knowledge and appreciation of the First Amendment is dismal. In a recent "State of the First Amendment" survey of more than 1,000 adults, 40% could not name any of the freedoms protected by the First Amendment – the highest number in the survey's 11-year history. And a separate survey of high school students revealed that nearly half of those who responded believed that newspapers *should not* be allowed to print freely without government approval. At this PF&R session, titled "Instilling Appreciation for the First Amendment, on our Campuses and Beyond," five panelists will address what journalism and mass communication educators can do and should be doing to build awareness of the First Amendment and ensure its protections are valued.

Each of the panelists brings a unique experience involving First Amendment education to the conversation. **Sandi Chance**, the executive director of the Brechner Center for Freedom of Information at the University of Florida, will showcase the work of the Liberty Tree Initiative, with which she's involved; she

also sponsored a First Amendment Free Food Festival at Florida this spring (eat a free lunch – but only if you symbolically sign away your First Amendment rights), and she'll bring video to share. Assistant professor **David Bulla** co-chaired Iowa State's terrific First Amendment Day this year, which included a freedom march and a series of panel discussions with journalists and other First Amendment advocates. **Cynthia Mitchell**, an associate professor at Central Washington, will highlight the year-long First Amendment festival she organized on her campus that drew nearly 5,000 people to eighteen events and workshops. And **Mark Goodman**, the Knight Chair of Scholastic Journalism at Kent State, will share the lessons he's learned in a career devoted to First Amendment advocacy, including more than two decades as the executive director of the Student Press Law Center.

Finally, the panel will also proudly feature **Gene Policinski**, the vice president and executive director of the First Amendment Center. The Center, of course, serves as a forum for the study and exploration of free-speech issues and works to preserve and protect First Amendment freedoms through information and education.

I'm moderating both of these panels, and I'll be sure to leave time for audience members to raise their own questions and ideas for discussion. I look forward to seeing you there.

2009 AEJMC Convention in Boston

August 4th-8th

Beginning on the next page, you'll find a complete schedule of the cosponsored panels, the research panels, and the main panels sponsored by the AEJMC Law and Policy Division at the 2009 Convention

AEJMC Law and Policy Division Schedule, 2009

Wed., August 5th

8:15 am to 9:45 am / 027

Law and Policy Division

Refereed Paper Research Session:
The Visible Hand: Failings and Opportunities in Government Regulation of Advertising, Broadcast and Newspaper Survival

Moderating/Presiding:
Courtney Barclay, Syracuse

“Bursting the Bubble: Complaints About Soap Operas to the Federal Communications Commission, 2004-2008”
Marsha Ducey, College at Brockport (SUNY)

“Audience Measurement, the Diversity Principle, and the First Amendment Right to Construct the Audience”
Philip Napoli, Fordham

“Truth Be Told: An Analysis of FDA Interpretation of “True Statement” Regulations for DTC Advertising”
Sheetal Chhotu-Patel, North Carolina at Chapel Hill

“Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States”
Rob Frieden, Pennsylvania State

“Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy & First Amendment Analysis”
Clay Calvert, Florida

Discussant:
Benjamin Bates, Tennessee, Knoxville

* Third Place Faculty Award

10 am to 11:30 am / 043

Scholastic Journalism and Law and Policy Divisions

PF&R Panel Session:
Life After 40 Years of Tinker

Moderating/Presiding:
Candace Perkins Bowen, Kent State

Panelists:
Mark Goodman, Kent State
Linda Puntney, Kansas State
John Bowen, Kent State
Dan Kozlowski, St. Louis

1:30 pm to 3 pm / 068

Co-sponsored Panel:
History and Law and Policy Divisions
PF&R Panel Session:
Threats to the First Amendment and Freedom of Information and Communication, 2009

Moderating/Presiding:
Roger P. Mellen, New Mexico State

Panelists:
Freedom of Information
Shannon Martin, Indiana Supreme Court
John Watson, American Cyber-Law
Ashley Packard, Houston-Clear Lake
History of First Amendment
Roger P. Mellen, New Mexico State

5 pm to 6:30 pm / 095

Civic & Citizen Journalism Interest Group and **Law and Policy Division**

Research Panel Session:
Journalist and Law Enforcement: Rights versus Security

Moderating/Presiding:
Nikhil Moro, North Texas

Panelists:
Michael D. Murra, Missouri-St. Louis
David Cuillier, Arizona
Burton St. John, Old Dominion
Kyle Archer, Macalester

Thursday, August 6th

11:45 am to 1:15 pm / 134

Law and Policy Division

Refereed Paper Research Session:
The Wild World Web: Sorting Through Privacy, Confidentiality, Libel, and Other Legal Quagmires of the Internet

Moderating/Presiding:
Nikhil Moro, North Texas

“We’re All Publishers Now: A New Look at Publishing in the Digital Age”
Rich Powell, Indiana

“Sex, Lies and the Internet”
Robert Richards, Pennsylvania State

“Sexual Speech on Internet Blogs and the Privacy Tort of Disclosure of Private Information”
Kearston Wesner, Florida

“We All Need Somebody To Lean On(Line): Can Promises of Confidentiality Protect Digital Self-Disclosure?”
Woodrow Hartzog, North Carolina at Chapel Hill
* Third-Place Student Paper

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AEJMC Law and Policy Division Schedule, 2009

Cont'd from page 4...

"Bloggers as Limited-Purpose Public Figures: New Standards for a New Media Platform"

Amy Kristin Sanders and Sarah Arendt, Minnesota

Discussant:

W. Wat Hopkins, Virginia Tech

3:15 pm to 4:45 pm / 153

Law and Policy and Media Ethics Divisions

PF&R Panel Session:

The Impact of *FCC v. Fox*

Moderating/Presiding:

Dan Kozlowski, St. Louis

Panelists:

Gregory Garre, former U.S.

Solicitor General, United States

Ed Carter, Brigham Young

Amy Kristin Sanders, Minnesota

Friday, August 7th

7 am to 8 am / 217

Law and Policy Division

Business Session:

Executive Committee Meeting

Moderating/Presiding:

Edward Carter, Brigham Young

8:15 am to 9:45 am / 230

Law and Policy and History Divisions

PF&R Panel Session:

20 Years of "Personal Privacy": The Legacy of Department of Justice v. Reporters Committee

Moderating/Presiding:

Jane E. Kirtley, Minnesota

Panelists:

Bill Loving, California Poly State, San Luis Obispo

Daniel J. Metcalfe, Washington College of Law, American

David A. Schulz, Levine Sullivan Koch & Schulz, L.L.P., New York

12:15 pm to 1:30 pm / 243

Association for Education in Journalism and Mass Communication

Refereed Paper Research Session:

Scholar-to-Scholar

Law and Policy Division

28. "American Exceptionalism, The French Exception, and Harmonization of International Intellectual Property Law"

Leo Eko, Iowa

29. "Using Social Frameworks:

Incorporating Word-picture Juxtaposition Research into Libel Law"

Tom Grimes, Texas State; **Robert Drechsel**, Wisconsin-Madison, and **Amy Reynolds**, Indiana

30. "Still Have a Ticket to Ride

(Along): An Examination of Media Joint Activities with Law Enforcement"

Jasmine McNealy, Florida

31. "The Right to Know, "Special Privileges" and Institutional

Constraints: A Comparison of Access Cases"

Derigan Silver, Denver

32. "Do We Still Need Dignity: Hate and Dignity in the United States and Germany"

Michael D. Todd, Pennsylvania State

33. "Information-Privacy Rights in International Human Rights Law"
Cheryl Ann Bishop, Quinnipiac

34. "Gate Keeping the Gatekeepers: International Community and Freedom of Information in Kosovo"
Lindita Camaj, Indiana

Discussant:

Paul Siegel, Hartford

3:30 pm to 5 pm / 266

Law and Policy and Scholastic Journalism Divisions

PF&R Panel Session:

Instilling Appreciation for the First Amendment, On Our Campuses and Beyond

Moderating/Presiding:

Dan Kozlowski, St. Louis

Panelists:

Sandra Chance, Florida

David Bulla, Iowa State

Mark Goodman, Kent State

Cynthia Mitchell, Central Washington

Gene Policinski, executive director, First Amendment Center,

Nashville, TN

5:15 pm to 6:45 pm / 281

Law and Policy Division

Refereed Paper Research Session:

Muzzled in America: Declining First Amendment Rights for Free Speech and Information Gathering

Moderating/Presiding:

Erik F. Ugland, Marquette

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AEJMC Law and Policy Division Schedule, 2009

Cont'd from page 5...

“The Greatest First Amendment Victory Harry A. Blackmun Ever Lost: How the U.S. Supreme Court Decided *Gannett Co. Inc. v. DePasquale*”

John Bender, Nebraska-Lincoln

“Tinker’s Midlife Crisis at 40: Tattered and Transgressed But Still Standing”

Clay Calvert, Florida

“Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases”

Clay Calvert, Florida, and **Matthew Bunker**, Alabama

“Defining Matters of Public Concern Through State Court Decisions on Statutory Anti-SLAPP Motions”

Autumn Shafer,
North Carolina at Chapel Hill

“The Declining First Amendment Rights of Government News Sources”*

Robert Drechsel, Wisconsin-Madison

Discussant:

Mark Goodman, Kent State

* First Place Faculty Paper

7 pm to 8:30 pm / 294

Law and Policy Division

Business Session:

Members’ Meeting

Moderating/Presiding:

Ed Carter, Brigham Young

Saturday, August 8th

8:15 am to 9:45 am / 311

Law and Policy Division

Refereed Paper Research Session:

Reporter’s Privilege: Defining Who Should be Protected and Examining New Ways of Keeping Journalists Out of Jail

Moderating/Presiding:

Michele Kimball, South Alabama

“Statutory Shield Laws in Constitutional Orbits: Rise of the ‘Covered Person’ Issue”*

Dean Smith,
North Carolina at Chapel Hill

“*Garland v. Torre* and the Birth of Reporter’s Privilege”**

Stephen Bates, Nevada-Las Vegas

“Defining Journalists: The Application of the Definition of ‘Journalist’ to Bloggers”

Shin Haeng Lee, Indiana

“Challenging Civil Contempt: An Alternate Approach to Keep Journalists Out of Jail”

Daxton Stewart, Texas Christian

Discussant:

Anthony Fargo, Indiana

* Top Student Paper

** Second-place Faculty Paper

10 am to 11:30 am / 326

Law and Policy Division

Refereed Paper Research Session:
Solutions for Secrecy: Judicial and Statutory Avenues for Fostering Freedom of Information

Moderating/Presiding:

Jeannine Relly, Arizona

“Access to Information as a Right: South Korea’s 20-Year Experience”

Kyu Ho Youm, Oregon

“False Sense of Security: The impact of FERPA’s Campus Crime Provision on the Release of Student Records Related to Campus Safety”*

Jennifer Harlow,
North Carolina at Chapel Hill

“Punishment for Shade: An Analysis of Penalties and Remedies for Violations of Open Meetings Laws Across the Country”

Adrianna C. Rodriguez and
Laurence B. Alexander, Florida

“Power, National Security and Transparency: Judicial Decision Making and Social Architecture Theory in the Federal Courts”

Derigan Silver, Denver

“Clearing Up the FOIA Transparency Question: How Congress Can Break the Coming Deadlock”

Benjamin Cramer, **Michael D. Todd**,
and **Martin E. Halstak**,
Pennsylvania State

Discussant:

Charles Davis, Missouri-Columbia

* Second-Place Student Paper

Editor’s Note: On the next page, you’ll find a couple of additional pieces of information on featured Law and Policy Division Panels. For even more information, please refer to the “Panel Previews.”

Additional Notes on Law and Policy Division Panels:

On the PF&R Panel Session:

Life After 40 Years of Tinker

From moderator **Candace Perkins Bowen**, Kent State:
When the Supreme Court decided in favor of the students in the 1969 Tinker v. Des Moines Board of Education case, no one knew the impact this would have on First Amendment rights of high school journalists. Now, 40 years later, other cases have come along, but does the Tinker case still stand? How much do courts and, more important, schools understand what the case means now?

On the Research Panel Session:

Journalist and Law Enforcement:

Rights versus Security

From **Mary Beth Callie**, Regis University:

This research panel will discuss how the tension between law enforcement authorities and the press has significant

concerns for the development of both the practical and theoretical development of citizen-focused journalism in the United States.

On the PF&R Panel Session:

Threats to the First Amendment and Freedom of Information and Communication, 2009

From Moderator **Roger Mellen**, New Mexico State:

A panel to examine the latest threats to First Amendment free speech and free press protections, and related developments in journalism and mass communications.

CALL FOR PAPERS

Global Media Journal -- Canadian Edition

Volume 3, Issue 1 (2010)

International Perspectives on Network Neutrality

Guest Editors:

Dr. Jeffrey Layne Blevins, Iowa State University Dr. Leslie Regan Shade, Concordia University

The idea of “network neutrality” has become one of the most prominent policy concerns for lawmakers, telecommunications industries, media reformers, and communication scholars. In short, neutrality is the idea that Internet service providers should afford equal interconnection among content providers and users of the network, so that those who control access to the network do not censor lawful content or enact discriminatory routing of content. The outcome of this debate has significant implications for the participatory-democratic nature of the Internet, the free flow of information and speech, user’s privacy rights, Internet governance, efficacy of independent media, and political participation, as well the continued vitality of libraries and educational systems. Given these stakes, network neutrality may well be the telecommunication policy issue of the 21st Century.

In North America, battles over network neutrality have already emerged in Canada and the United States. While mobilization for network neutrality has been slower in Canada than in the United States, in the last year alone activism has taken many forms, including online and offline actions and politicizing a range of citizens and policy-makers. Canada’s media regulator, the Canadian Radio-television Telecommunications Commission (CRTC), has issued a call for network neutrality and is holding a public hearing on issues related to traffic management in July 2009. Proponents of network neutrality in the United States scored their biggest victory to date when President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009, which included language supporting neutrality principles as part its Broadband Technology Opportunities Program. Nevertheless, any subsequent legislation seeking comprehensive enforcement of network neutrality will surely face intense opposition.

(Continued on page 8)

Paper Call Cont'd...

This issue will spotlight international perspectives on network neutrality that encompass such themes as empire, network economics, technological innovation, telecommunication regulation and corporate control. Any analytical approach is welcome, including comparative studies, telecommunication policy analysis, media studies, ethical examination, political economic critique, as well as others. Potential topics could include, but are not limited to the following:

- public awareness and activism about net neutrality
- ethical perspectives on network neutrality
- neutrality as a telecommunication policy norm
- network neutrality and Internet governance
- the relationship of network neutrality to other areas of communication law
- consumer disenfranchisement/power without network neutrality
- media ownership and network neutrality
- industry trends that may undermine, or support neutrality
- technologies that may undermine or support network neutrality
- examination of the relationships between competing broadband networks
- media discourses on network neutrality
- network neutrality and impact on library and education sector
- network neutrality and impact on independent media sector

The Global Media Journal -- Canadian Edition (<http://www.gmj.uottawa.ca/>) welcomes high-quality, original submissions on related topics to the above theme. Submissions are expected to develop communication and media theories, report empirical and analytical research, present critical discourses, apply theories to case studies, and set out innovative research methodologies. The Journal is bilingual (English and French) open-access online academic refereed publication that aims to advance research and understanding of communication and media in Canada and around the globe.

Deadline: March 15th, 2010

Submissions: Papers (5,000 to 7,500 words), review articles of more than one book (2,500 to 3,000 words), and book reviews (1,000 to 1,200 words).

Method: All manuscripts must be submitted electronically as Word Document attachments, directly to Dr. Jeffrey Layne Blevins (blevins@iastate.edu) or Dr. Leslie Regan Shade (lshade@alcor.concordia.ca).

Guidelines: Available at: http://www.gmj.uottawa.ca/for-authors_e.html

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