42.2
Winter 2014

# Media Law Notes

## AEJMC Law & Policy Division

## Head Notes: Thoughts from Division Head

**Derigan Silver**
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Welcome to another excellent addition of Media Law Notes. Thanks to our fantastic Newsletter Chair/Clerk, Courtney Barclay (Syracuse), there is a great deal of terrific information in this edition of our Division's newsletter.

This edition of MLN contains the preliminary schedule for the 2014 AEJMC Conference to be held in Montreal, Quebec, August 6-9. While we do not have panel members finalized, I hope this schedule will help you begin to make travel arrangements. Thanks to Vice Head Chip Stewart (Texas Christian) for his hard work putting these panels together and finding co-sponsors. In addition to our conference panels, the Division will be hosting an extensive day of pre-conference events. Chief among these will be a series of panels commemorating the 50th anniversary of the landmark decision, *New York Times v. Sullivan*. Highlighting this panel, will be Professor Steven Wermeil of American University's Washington College of Law.

As many of you know, Professor Wermiel is co-author of Justice Brennan: Liberal Champion, considered by many (including me) to be the definitive Brennan biography. Wermiel's next book, The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan, will be published next month. I am very excited to hear Professor Wermiel's insights into both Justice Brennan and *Sullivan*. You can learn more about Professor Wermiel here (http://www.wcl.american.edu/faculty/wermiel/). A hearty thank you to Joe Russomanno (Arizona State) who was able to secure the participation of Prof. Wermiel.

In addition to this panel, Wat Hopkins (Virginia Tech) and Kyu Youm (Oregon) have also organized panels on the trial court proceedings and historical aspects of *Sullivan* and the international reach and future of the case, respectively. I can't thank Joe, Wat, and Kyu enough for their work on these panels.

On top of these pre-conference events, in the wake of recent events, Jasmine McNealy (Kentucky), our PFR chair, has arranged for a panel on social media and academic freedom. I hope you will join us the day before the official conference begins. Please remember that you will need a passport to attend the conference if you are traveling from the United States or abroad.

Also in this edition, there is a great article by Ashley Messenger, Senior Associate General Counsel at NPR. In addition to my duties as the Head of the AEJMC Law and Policy Division, I serve on the AEJMC Strategic Plan Implementation Committee. We recently finished up our first five-year Strategic Plan and conducted a survey of the AEJMC membership to determine what issues the Committee should take on over the next five years. One of the chief concerns amongst the membership was the lack of connections between the academy and the professions. To that end, I invited Ashley to write an article on the top five issues she encounters as she works with NPR's journalists and producers. Although Media Law is frequently termed a "conceptual" course, like our colleagues who teach newswriting and reporting, we have professional counterparts (practicing media lawyers) and a duty to prepare our

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## In This Issue



## FERPA Fixes: Student Privacy Rights

**Khaliah Barnes**
Director, Student Privacy Project
Electronic Privacy Information Center

Amid current education reform debates–from Common Core Standards to school privatization–student privacy is sure to be a key policy issue in 2014. Central to student privacy is the Family Educational Rights and Privacy Act ("FERPA"), a federal law that protects student records from unauthorized disclosure. FERPA applies to schools, universities, school districts, and state education departments that receive federal funds from the Education Department. FERPA grants students the right to: (1) inspect and review their education records; (2) correct and delete inaccurate or misleading records; and (3) prevent schools from disclosing education records, subject to a few exceptions. Recently, the Education

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## Call for Papers: Communication Law and Technology: The Next 20 Years

New technologies and new media have brought seismic change to communication. The global shift to digital media has strained centuries-old laws in ways that few could have predicted in 1985 when the first .com Web site was registered. Few people would have realized then that within twenty years or so legal scholars would be debating how precedents crated in the 1970s and 80s would apply to the dissemination of secret documents by Wikileaks, or that the four traditional privacy torts might be called obsolete in the world of social media, or that there would be drone journalism.

Communication Law and Policy, the research journal of the Law and Policy Division of the Association for Education in Journalism and Mass Communication, is publishing a special issue examining the evolution and direction of communication law and policy in the Twenty-First Century. The journal invites scholars on Internet law, media law, broadcast law, philosophy, policy and economics to consider what the next two decades might bring for communication law and policy. Papers may address any issue—legal or cultural—related to the future of communication law and policy. Papers may be evaluative, normative or prophetic—that is, papers may focus on the current status and make normative suggestions about legal and policy choices or may focus on the future of the intersection of communication law and technology, so long as they addresses where communication law is or should be headed over the next twenty years. Possible topics include social media, behavioral advertising, online speech, AI, privacy and communication technology, terms of service, the future of journalism and the law, and the future of copyright.

Authors whose papers are accepted to the journal through the peer-review process will be invited to a special symposium for the 2014 AEJMC Conference in Montreal, Canada. Accepted authors will be responsible for their own travel to the symposium.

There are no length requirements. Footnote style must follow The Bluebook: A uniform System of Citation (18th ed.). The first page of each manuscript should contain the article's title, but no authorship information. An accompanying cover page should contain the title and the name, address, e-mail address and phone number of each author. Manuscripts should be accompanied by an abstract of approximately 125 words and should be submitted to W. Wat Hopkins at whopkins@vt.edu.

The deadline for receipt is March 1, 2014.

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students for the challenges they will face post-graduation. I think you will find this article helpful as you think about current topics to cover in your courses. Hopefully for a future newsletter I will be able to recruit a practicing lawyer who works with public relations and/or advertising professionals to write about the top five issues facing those professions. If you have a contact, please email me at Derigan.Silver@du.edu.

In addition to Ashley's article, Courtney solicited an article on student data privacy and recent changes in the Family Educational Rights and Privacy Act from Khaliah Barnes from EPIC. The article discusses Department of Education rules, EPIC's recent FTC complaint, and an upcoming legislative proposal to strengthen privacy protections for students.

Also in this edition, you will find the results from the paper competition of the Southeast Colloquium. As always, we had a fantastic competition this year. Our Southeast Chair, Michael Martinez (Tennessee) provides you with more details in an article accompanying the results. Congratulations to the authors and a big thank you to everyone who served as a judge for the competition.

# Five Realities Every Journalism Student Needs to Know

**Ashley Messenger**
Senior Associate
General Counsel, NPR

Teaching media law obviously requires teaching the law. We talk about cases and legal principles and multi-factored tests; but it's not enough to talk about theory and doctrine. We must also convey some of the practical realities that future journalists will face. There are the top five realities related to media law that I think journalists need to know.

### 1. Know the difference between a fact and an opinion.

Facts and opinions lie on a continuum encompassing characterization, spin, and expression. It's not always easy to determine what is "fact" and what is "opinion," and even the Supreme Court has called the distinction "murky."

Nevertheless, it is crucial for reporters to understand why the distinction is so murky for both legal and ethical reasons. Libel law, for example, relies in part on whether a statement is a "factual assertion," meaning whether the statement can reasonably be interpreted as purporting to state a fact. And while many people assume that opinions are totally protected, that is not necessarily true. Opinions are protected only if they are phrased in such a way that no underlying or unstated false facts are implied. In Milkovich v. Lorain Journal, the Supreme Court ruled that a newspaper columnist who said that "Milkovich lied" could be liable for libel. The columnist claimed he was expressing his opinion, but the Court ruled that it could be interpreted as stating facts.

From an ethical perspective, journalists are often accused of bias, but using clear language that doesn't overly characterize events can alleviate those ethical concerns. Reporters should try to avoid loaded language and think carefully about whether the words they choose imply a particular perspective towards the facts.

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*FERPA, continued from page 1.*

Department issued regulations that significantly weaken FERPA and student privacy protections. These regulations permit private contractors, vendors, and government agencies to access sensitive student information without student consent. In the wake of the new FERPA rules, there have been numerous initiatives to fix FERPA and restore student privacy.

Almost immediately after the 2011 FERPA changes went into effect, my organization, the Electronic Privacy Information Center ("EPIC") filed a lawsuit against the Education Department. We argued that the Education Department's 2011 regulations violated FERPA and that the federal agency exceeded its authority by proposing rules contrary to Congress's intent to protect student privacy. Four members of our Advisory Board joined us in our lawsuit. In 2013, the Court dismissed our case on procedural grounds. However, the Court never reached the merits regarding whether the Education Department's regulations are lawful. So, the question about whether the agency rule changes were consistent with the intent of the privacy law is still unanswered.

In addition to challenging the FERPA changes, privacy advocates have also opposed the commercialization of student records. Last year, EPIC filed an extensive complaint with the Federal Trade Commission, alleging that the business practices of Scholarships.com were unfair and deceptive. The company encourages students to divulge sensitive medical, sexual, political, and religious information to obtain financial aid information. We allege that the company fails to adequately disclose that it gives sensitive student consumer information to its business affiliate for general marketing purposes. And at the time of our complaint, the website for Scholarships.com was unencrypted. Simply put, the company collected extremely sensitive information that it did not adequately safeguard. Following our complaint, Scholarships.com encrypted its website.

Others are also getting involved. Common Sense Media has recommended that private companies adhere to the following principles when developing education technology:

"Students' personal information shall be used solely for educational purposes;

Students' personal information or online activity shall not be used to target advertising to students or families; [and]

Schools and education technology providers shall adopt appropriate data security, retention, and destruction policies."

Fordham Law School's Center on Law and Information Policy recently issued a report finding that almost all K-12 districts use cloud-computing services to perform a variety of school functions. Alarmingly, Fordham's study also found that the majority of district contracts with vendors do not prohibit private vendors from selling student information. Fordham recommends that schools prohibit or limit vendors from selling student information without parental consent.

While parents, students, and privacy advocates have pushed for stronger student privacy protections, ultimately Congress will have to act to fix FERPA and restore student control over education records. At the beginning of this year, Senator Ed Markey, a longtime champion of privacy rights, announced his plans to introduce legislation to protect student data. The Senator's legislation would establish that:

- Student data should never be used for commercial purposes – to market products to kids;
- Parents should have the right to access the personal information about their children, and amend that information if it's incorrect, that is held by private companies as they would if the data was held by the school itself;
- There must be safeguards put in place to safeguard sensitive student data that is transferred to and then held by private companies;
- Private companies must delete the information that they no longer need to enhance educational quality for students.

The Senator's legislation is a much-needed first step in protecting education records. But it could go further. Currently, FERPA does not have a private right of action, thus leaving students and parents with little recourse when private companies abuse student data. Stronger legislation would create civil remedies against companies that violate the law. Moreover, learning is a life-long endeavor that increasingly happens online.

Students should not have to check their privacy rights at the K-12 brick and mortar door. Effective student privacy legislation should apply to all students, regardless of age, and regardless of whether they attend school in the virtual or real world.

## Call for Applications: Editor, Communications Law & Policy

The Publications Policy Committee of the AEJMC Law & Policy Division is seeking applications for the position of editor of Communication Law and Policy, the quarterly, peer-reviewed law journal published by the division. The position is for a three-year term and will begin January 1, 2015.

The editor of the journal is responsible for the prompt processing of all manuscripts submitted to the journal, coordinating four issues per year, handling all correspondence relative to the publication, preparing an annual report, and presenting the report to the division each year at the AEJMC annual conference. The editor should be able to write and edit clearly, to communicate effectively with authors, and to have an understanding of and appreciation for a broad range of research methods used in legal scholarship. The editor should also have a strong publication record in law or policy.

The editor receives an annual honorarium, but must demonstrate that the academic unit where the journal will be housed will support the journal with specific consideration as to postage, photocopying and other technical support, as well as some provisions for an editorial assistant.

A letter of application, a complete curriculum vita, a letter of support from a unit head, and a list of five references with contact information should be mailed to Prof. Derigan Silver, Department of Media, Film and Journalism Studies, University of Denver, 2490 S. Gaylord St., Denver CO 80208-5000. Inquiries may be made by email to Prof. Silver at derigan.silver@du.edu. Application materials must arrive by March 1, 2014.

The current editor of the journal will be applying for re-appointment.

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Thus, while there are "hard facts" (such as the fact that Richmond is the capitol of Virginia) and value judgments that are always considered "opinion" (such as a stance on whether broccoli is delicious), much of what is described in news reports falls in the murky ground in between those ends of the continuum. Reporters should be careful not to mistake opinions for facts.

### 2. Avoid (or be smart with) digital technology to protect your sources.

Technology has made it easy to find and communicate with almost anyone. We text, email, and make social media connections. These things are easy to use, but also easy to record and trace. Any communication with a source using digital technology is totally and completely insecure. Journalists must be aware that they way the communicate with sources can compromise them. If you have a source that must remain confidential, put down the smartphone and go meet them in person–or use some other low-tech method of communication. It doesn't make much sense to promise confidentiality to a source and then leave them open to exposure by using communication methods that can be traced or hacked easily.

### 3. Be cautious about using online tools because you might be giving away too many rights.

The internet is awesome! There are lots of fun tools that you can use to create apps, post or manipulate photos, make gifs or videos, and tell stories in new ways or distribute to new audiences. The potential problem is that all these tools and sites have "terms of use" that may operate as a contract, and these terms sometimes require you to grant broad rights to them, compromising your own ability to control and exploit your work. Pinterest, for example, made headlines a couple years ago for its overzealous terms of service, but the well-deserved scrutiny that was brought to their terms came only after the site had acquired millions of users and widespread notoriety. In the meantime, users may have unwittingly subjected themselves to liability (for using material to which they did not have rights) or compromised their own rights in their work posted to the site. Because sites often rely on a broad copyright license as part of their business model, it is important to have a lawyer review terms of service on any online tool you want to use to ensure you aren't compromising your own interests.

### 4. The scope of the right to take photos or record video is still ambiguous, so tread carefully.

The Supreme Court has never ruled that there is an affirmative First Amendment right to take photos or video in public places. To be fair, they have never said there isn't such a right. But the exact scope of any such right has never been defined, and federal circuit courts are split on whether such a right exists at all. For example, in Glik v. Cunniffe, the First Circuit found that there was a First Amendment right to take video of police officers arresting someone. However, in Kelly v. Borough of Carlisle, the Third Circuit ruled that a police officer was entitled to qualified immunity on a First Amendment claim because there is no clearly established right to make a video of officers during a traffic stop. Although there is some very good case law supporting such a right, and one may believe there should be such a right, the law is not perfectly clear. In some jurisdictions, those who take photos or videos, even in public places, run the risk of being arrested if they fail to comply with police orders or for violating state wiretap laws. Until the courts make clear that there is an affirmative First Amendment right to record and what the scope of that right is, journalists should not be overconfident in their rights.

### 5. Freedom isn't free, and there is no First Amendment Fairy.

I wish there were a First Amendment Fairy who could remedy impingements on freedom with a flick of her wand–but there isn't. If the government prosecutes you for speech, you have to affirmatively raise the First Amendment as a defense (and you don't always prevail). Or, if you think a government action will restrict you, you must spend the money to affirmatively sue the government and assert your First Amendment rights, with no guarantee that a court will agree and grant you relief. In other words, it can be very expensive to protect your First Amendment rights. News organizations have long been willing to spend money to vigorously defend these interests, but with budgets shrinking, companies may choose to be more cautious and pick their fights more carefully. Also, speech-related lawsuits are being brought more often against ordinary people using social media or the internet, and they may not have the money or inclination to fight impositions on their rights. Thus, there is a risk that there will be more adverse rulings, not because any legal principle has changed, but simply because those being sued aren't adequately represented. Those who care about First Amendment rights must be more vigilant to ensure that those rights are not trampled by those taking advantage of practical and economic pressures.

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Ashley Messenger is Senior Associate General Counsel at NPR. She has taught First Amendment Law at University of Michigan Law School and Media Law at American University School of Communication. Her book, A Practical Guide to Media Law, will be available in February 2014 through Pearson.

## Awarding Free Speech

**Roy Gutterman**
Associate Professor
Director, Tully Center for Free Speech
Syracuse University

While covering the eviction of ordinary people from property being seized by an Azerbaijani state-run oil company, security forces converged on journalist Idrak Abbasov and beat him so severely he was hospitalized with two broken ribs, a concussion, severe damage to one eye and damage to his internal organs.

Nobody was prosecuted, and the Azerbaijani government, which supports both the oil company and police, denied any connection. But Abbasov continued to work, eventually working on stories from the hospital.

This was the latest attack he faced. He had been beaten before while on the job, had his car vandalized, his home nearly destroyed and his family harassed while sustaining repeated attempts to silence him through

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# Call For Papers: 2014 AEJMC Conference

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2014 AEJMC Conference in Montreal, Canada. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, FCC issues, intellectual property, obscenity, freedom of information, and a myriad of other media law and policy topics. Papers outside the scope of communications law and policy will be rejected.

The Division welcomes a variety of theoretical orientations and any method appropriate to the research question. A panel of judges will blind-referee all submissions, and selection will be based strictly on merit. Authors need not be AEJMC or Law and Policy Division members, but they must attend the conference to present accepted papers.

Paper authors should submit via the online submission process as described in the AEJMC Uniform Paper Call. Papers must be uploaded to the server no later than 11:59 p.m. (Central Daylight Time) on Tuesday, April 1.

Law and Policy Division papers must be no longer than 50-double-spaced pages with one-inch margins and 12-point font, including cover page, appendices, tables, footnotes and/or endnotes, and end-of-paper reference list, if applicable. (Footnotes and/or endnotes and reference list may be single-spaced.) Papers that exceed 50 total pages or are not double-spaced will be automatically rejected without review. Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities, including APA, Chicago, or MLA styles.

Papers that include author-identifying information within the text, in headers, or within the embedded electronic file properties will be automatically rejected (review the instructions on the AEJMC website for stripping identifying information from the electronic file properties). Authors are solely responsible for checking the final uploaded version of their paper for any and all author identifying information. Submitting before the conference deadline will allow you to fully check your submissions as they are entered into the system so that a resubmission prior to the deadline is possible if necessary.

There is no limit on the number of submissions authors may make to the Division. Any paper previously published or presented at a conference except the AEJMC Southeast Colloquium or the AEJMC Midwinter Conference is not eligible.

In 2014, the Division will again award the Top Debut Faculty Paper. The top paper accepted by a faculty member who has never had a paper accepted by the Division will be awarded a prize of $150 and will receive free conference registration. For papers with multiple authors, multiple faculty and/or faculty and student, to be eligible none of the authors of the paper may have previously had a paper accepted by the Division at the national conference. In addition, only the faculty author presenting the paper will be eligible for free conference registration.

Student authors should clearly indicate their student status on the cover page. Student-only submissions will be considered for the $100 Whitney and Shirley Mundt Award, given to the top student paper. Co-authored papers are eligible for the competition so long as all authors are students. The Law and Policy Division will also cover conference registration fees for the top three student paper presenters. In the case of co-authored student papers, only the student author presenting the paper will be eligible for free conference registration.

If you have questions, please contact Dan Kozlowski, Law and Policy Division Research Chair, Saint Louis University, Department of Communication, 3733 West Pine Blvd., Xavier Hall 300, St. Louis, MO 63108. Phone: (314) 977-3734; email: dkozlows@slu.edu.

## 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.

*Free Speech, continued from page 5.*

threats, harassment and even bribery.

Such is the life of an independent journalist in Azerbaijan. In October, Abbasov spent five days in Syracuse, New York, as the recipient of this year's Tully Center for Free Speech Free Speech Award, given annually by the Newhouse School at Syracuse University to a journalist who has faced significant threats to the craft of journalism in the previous year.

Abbasov emerged from a slate 11 journalists from around the world who faced similar threats, not only to their livelihood, but also their lives. He is the seventh recipient since the center established the award in 2008. Previous winners hailed from Morocco, Zimbabwe, Mexico, Pakistan and Bahrain and shared similar experiences – kidnappings, imprisonment, beatings, torture, repeated threats and harassment.

Videos posted online show Abbasov being surrounded by menacing security forces, leaving him in unconscious crumbled mass on the ground. Video taken at the hospital, where family members and friends stood guard, show his injuries.

Abbasov explained the videos to an audience at Syracuse during his visit. He also spoke to journalism and political science classes, sharing his stories, working as an independent journalist in an oil-rich former Soviet republic where the results of presidential elections are announced the day before voting even begins. Azerbaijan still criminalizes libel and independent journalists easily find themselves in hot water.

Abbasov told stories of a journalist friend who had been killed in 2011 and of another who was recently released after more than four years in jail on trumped up charges. Other journalists have been beaten and foreign journalists have been assaulted and kicked out of the country.

Independent press rights and human rights groups regard Azerbaijan as a dangerous place for journalists.

The 37-year-old husband, and father of three, says he has no plans to quit journalism, or to step back from telling stories about corruption, pollution or politics. He even marveled at American press law, First Amendment protections and openness of our government institutions, especially courts.

Abbasov's remains dedicated to providing Azerbaijanis with independent news, not provided by state-run media. He continues and will continue.

The Tully Center has begun the process of choosing the next Free Speech Award recipient. Unfortunately, there will be no shortage of potential nominees.

# Legal Annotated Bibliography

**David Wolfgang**
Doctoral Student
University of Missouri

## LIBEL

Chow, K. (2013). "Handle with Care: The Evolving Actual Malice Standard and Why Journalists Should Think Twice Before Relying on Internet Sources." 3 New York University Journal of Intellectual Property & Entertainment Law 53.

The actual malice standard for defamation is deeply engrained in judicial opinions dating back to the 1960s, with subsequent case law fine-tuning its requirements. As new forms of media and speech have arisen, commentators have increasingly questioned whether the structures for finding defamation should change. The Internet has spurred a disconcerting practice of irresponsible journalism, but when established defamation law is applied, writers are largely protected from being found guilty of actual malice. When use of Internet sources erodes the accuracy of reporting, journalists relying on them risk becoming the target of defamation suits.

In light of incidents, it is worth considering whether additional duties should be imposed on reporters to make it more difficult to republish untrustworthy material found on the Internet without conducting adequate fact-checking. Currently, there is no duty to investigate. Still, perhaps there should be an intermediate duty of care that is higher than the current duty of not being reckless while not as strict as requiring investigation. Courts should consider using the established dubious nature of Internet sources to justify requiring increased vigilance for reporters relying on them. Some courts have said that a journalist's reliance on such untrustworthy sources may support finding of actual malice, while St. Amant v. Thompson states, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

A judicial revision of the actual malice standard would be a forceful way to crack down on irresponsible journalism stemming from the use of Internet sources, and would likely meet strong resistance due to traditional First Amendment values. Nevertheless, judicial enactment of less dramatic changes might be feasible. Such changes could ensure recognition of the need for greater responsibility when dealing with Internet sources.

## COPYRIGHT

McIntyre, S. (2013). "Private Rights and Public Wrongs: Fair Use as a Remedy for Private Censorship." 48 Gonzaga Law Review 61.

Copyright law seeks to promote the public welfare by incentivizing the creation and publication of art, literature, and other original works of authorship. The law bestows exclusive economic rights in expression, which allow copyright holders to exploit the commercial value of their creations in the marketplace. However, the "fair use" doctrine has traditionally permitted unauthorized and uncompensated uses of copyrighted material for socially beneficial purposes.

Under current jurisprudence, the fair use analysis is dominated by concerns about market harm. This approach makes sense when, as in most infringement cases, a copyright holder sues to protect the commercial value of a work that has been or will soon be published. But when the plaintiff's motive is to censor his or her work from the public eye altogether, without regard for its commercial value, copyright enforcement is far less compelling. In these "private censorship" cases, the

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## AEJMC 2014 Conference Schedule: Law & Policy Division

Tuesday, Aug. 5 (Preconference sessions)

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| 9 a.m. - 12 p.m.: | Academic Freedom and Social Media |
| 1 – 5:30 p.m.: | New York Times v. Sullivan at 50 |

Wednesday, Aug. 6

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| 8:15 – 9:45 a.m.: | Refereed Research Session |
| 11:45 a.m. – 1:15 p.m.: | Federal Shield Law: A Wolf in Sheep's Clothing? (PF&R panel co-sponsored with News & Online Division) |
| 3:15 – 4:45 p.m.: | New York Times v. Sullivan: Civil Rights History and Media Law, 50 Years Later (PF&R panel co-sponsored with History Division) |

Thursday, Aug. 7

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| 8:15 – 9:45 a.m.: | Press Councils: Keeping Press Honest or Undermining Freedom (PF&R panel co-sponsored with Ethics Division) |
| 11:45 a.m. – 1:15 p.m.: | Acts of Journalism and Acts of Congress: Media Policy and Participatory Journalism (PF&R panel co-sponsored with Participatory Journalism Interest Group) |
| 5 – 6:30 p.m.: | O'Bannon v. NCAA and the Right of Publicity (research panel co-sponsored with Sports Communication Interest Group) |

Friday, Aug. 8

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| 7 – 8 a.m.: | Executive Committee meeting |
| 8:15 – 9: 45 a.m.: | Refereed Research Session |
| 3:30 – 5 p.m.: | Refereed Research Session |
| 5:15 – 6:45 p.m.: | Revenge Porn, Voyeurism, Consent, and Anonymity (research panel co-sponsored with Commission on the Status of Women) |
| 7 – 8:30 p.m.: | Members Meeting |
| 8:45 p.m.: | Off-site social |

Saturday, Aug. 9

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| 11 a.m. – 12:30 p.m.: | Refereed Research Session |
| 12:45 – 2:15 p.m.: | Refereed Research Session |

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market-oriented fair use analysis routinely overprotects copyrights and produces outcomes that conflict with copyright law's constitutionally mandated purposes.

Comprehensive reformation of the doctrine is not necessary. What is required is simply a modest reinterpretation of fair use, in light of copyright's underlying purposes, in cases in which an author attempts to block access to an unpublished work for noneconomic reasons. This analysis must take account of not only the litigants' interests, but also the public's interest in gaining access to the work in question. In weighing these interests, courts should be guided by the degree to which a finding of fair use would serve copyright's constitutional objectives.

### HATE SPEECH

Levinson, R. B. (2103). "Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided Snyder." 46 Suffolk University Law Review 45.

The Supreme Court in Snyder extolled the protected status of hate speech as essential to First Amendment values, even when targeting a private funeral where it caused significant emotional harm to grieving family members. The Court in essence ruled that hate speech, no matter how offensive and intentionally hurtful, is protected if it addresses a matter of public concern in a public place.

This article proposes a more nuanced approach to resolving such cases. In several recent decisions, Justice Breyer has expounded his view that, when addressing difficult First Amendment questions, the Court should engage in a "proportionate" balancing test, looking to the amount of harm the speech inflicts and weighing this against the extent of the burden that the regulation imposes on freedom of speech. In his separate concurrence in Snyder, he rejected the majority's myopic focus on the public concern content of the Westboro Church's speech. Rather, he emphasized that a careful analysis of the facts is required where First Amendment values and state-protected interests "seriously conflict." He joined the majority only because the picketing occurred in a lawful place in compliance with all police direction, and the placards could not be seen from the funeral ceremony.

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*Bibliography, continued from page 7.*

Although disagreeing with how Justice Breyer struck the balance in Snyder, this article proposes that Justice Breyer's careful, contextual balancing test should be applied in determining when the need to protect targeted hate speech is outweighed by the impact such speech has on competing constitutional and societal values. It proposes that private individuals who are subjected to targeted hate speech should be permitted to recover damages for IIED, even when the speech addresses a matter of public concern.

### FREE SPEECH

Smolla, R. A. (2013). "Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez." 76 Albany Law Review 499.

In United States v. Alvarez, the Supreme Court struck down the Stolen Valor Act of 2005, in a splintered decision with no five-Justice majority. The failure of five Justices to agree on a single rationale, rather than the merits of the case itself, is the principal focus of this article. Setting the formulaic world of legal doctrine aside, Alvarez offers a good rough and ready guide to three very different judicial sensibilities regarding the preferred position of freedom of speech in the constitutional hierarchy. Visible in the spread of the three opinions in Alvarez are (1) the view, represented by Justice Kennedy's plurality opinion, that freedom of speech occupies an exalted position, rarely trumped by other societal values, (2) the view, represented by Justice Breyer's concurrence, that freedom of speech deserves some elevated stature in the constitutional scheme, but not a stature so elevated that it cannot be overtaken by well-crafted laws vindicating other significant society values, and (3) the view, represented by Justice Alito's dissent, that speech may be divided into that speech which serves some plausible positive purpose, which is deserving of constitutional protection, and that speech which advances no legitimate end worth crediting, yet is highly offensive to good order and morality, which is not deserving of any protection.

Under an application of strict scrutiny analysis, in sum, both sides could marshal reasonably strong arguments. Had all the Justices joined issue under this one standard, however, the stability and predictability of free speech conflict resolution would have been enhanced, as the stability and predictability of the law is always enhanced when the Justices do not talk past one another, and agree on a single test and a common vocabulary, even though they may divide on the application of law to fact.

### STUDENT SPEECH

Sun, J. C., Hutchens, N. H., & Breslin, J. D. (2013). "A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test." 16 University of Pennsylvania Journal of Constitutional Law 49.

Even as student speech and expression have become increasingly characterized by an online dimension, colleges and the courts are struggling to "catch up" in terms of the legally permissible limits over student online speech and expression, both in and out of formal curricular settings. A legal stumbling block encountered in online speech cases, taking place in higher education contexts, involves the judiciary's previous overreliance on legal standards largely derived from the elementary and secondary education setting in determining college students' speech rights.

In relation to independent student speech taking place in a formal class context, the legitimate pedagogical standards from Hazelwood are not wholly unsuitable to apply to college student speech. While at times giving perfunctory acknowledgement to the need to tailor these standards to college student speech, courts in fact often fail to clarify the specific types of criteria that they should take into account regarding the concept of legitimate pedagogical concerns justifying speech restrictions on college students. In relation to independent student speech taking place outside a formal instructional setting, curricular concerns can and do exist, such as the enforcement of professionalism standards, where institutional authority should extend to the speech based on academic grounds.

The authors argue that regulation of independent student speech outside of a class setting should require an appropriate

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## Call for Reviewers: 2014 AEJMC Conference

The Law and Policy Division needs your help in reviewing papers for the 2014 AEJMC Conference in Montreal. To ensure that only the highest quality papers are presented at the upcoming conference and to keep the number of papers per reviewer at a manageable level, we need about 75 to 80 reviewers.

Reviews will occur between April 1 and May 1, 2014. Ideally, we will have enough reviewers volunteer so that each reviewer will handle three papers – but this depends on how many volunteers we have.

If you would be willing to serve as a reviewer, please contact Dan Kozlowski, Law and Policy Division Research Chair, via email at dkozlows@slu.edu or by phone at (314) 977-3734.

Please note that graduate students may not review papers, and you may not both review for and submit a paper to the Law and Policy Division. If you aren't sure if you will submit a paper, please volunteer to review and we can take you off the list when the time comes. If you submit a paper to other AEJMC divisions, you are still eligible to judge for Law and Policy.

To help best match reviewers to paper topics, please specify in your email or voice mail message your legal interests and methodological specialty (e.g., libel, freedom of information, broadcast regulation, survey research). Also, if you would like to serve as a discussant or moderator for the conference, let me know.

Thank you for your help to make the conference a success!

# 2014 Southeast Colloquium Law Division Accepted Papers

*Michael Martinez, Southeast Colloquium Chair*

The Law and Policy Division received again received excellent submissions for the Southeast Colloquium paper competition. The colloquium will be held March 20-22, 2014, at the University of Florida in Gainesville, Florida. Twelve papers were accepted for presentation, discussing a range of issues including libel, copyright, and privacy torts. These papers address current challenges in these areas of law, such as revenge porn, appropriation on social media, and government collection of metadata. Below is a list of the papers accepted for presentation.

Gruesome Images, Shocking Speech & Harm to Minors: Judicial Pushback Against the First Amendment After Brown v. Entertainment Merchants Association?
Emma Morehart and Minch Minchin, University of Florida

Bag Men and the Ghost of Richard Jewell: Some Legal and Ethical Lessons About Implied Defamation, Headlines and Reporting on Breaking Criminal Activity from Barhoum v. NYP Holdings
Sarah Papadelias, Linda Riedemann and Daniel Axelrod, University of Florida

Revenge Porn and the First Amendment: Legislative Responses to an Online Weapon of Emotional and Reputational Destruction
Clay Calvert, University of Florida

Unhappy Birthday? The Perplexing Landscape of Fair Use Doctrine as Transformative Use Turns Twenty
Matthew D. Bunker and Clay Calvert, University of Alabama and University of Florida

Plausible Pleading of Fault in Libel Law: Fulfilling the Promise of Sullivan on Its Golden Anniversary
Clay Calvert, Emma Morehart and Sarah Papadelias, University of Florida

Practitioners as Publishers: Examining Public Relations Practitioners' Claims for Legal Protections Traditionally Associated with the Institutional Press
Jared Schroeder and Adam Saffer, Augustana College and University of Oklahoma

Privacy Exceptionalism and Confidentiality vs. the Public Interest in Uncovering Universal Service Fraud
Benjamin W. Cramer, The Pennsylvania State University

Faking Out the First Amendment? The Legislative Assault on Phony Facebook Profiles, Altered Images & Student Speech
Linda Riedemann, University of Florida

Rube Goldberg-Like Contrivances and Broadcasting: The Litigation Challenging Aereo and FilmOn
Kevin Delaney, University of North Carolina at Chapel Hill

Reevaluating the Right of Publicity: NCAA Athletes and A Covert Threat to the First Amendment
Alex Vlisides, University of Minnesota

The Element that Ate the Tort: Newsworthiness and Public Disclosure of Private Facts
Liz Woolery, University of North Carolina at Chapel Hill

I Know Whom You Called Last Summer: Government Collection of Telephony Metadata and the Freedom of Association
Natasha Duarte, University of North Carolina at Chapel Hill

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curricular nexus (i.e., an underlying logic or rationale fitting for higher education students versus elementary or secondary ones) before a school can take action against a student on academic grounds. A standard that permits a program to take action on academic grounds for out-of-class student speech with an appropriate curricular nexus, such as legitimate and documented professionalism standards, provides a way to balance legitimate institutional concerns related to curricular authority with important interests related to safeguarding students' First Amendment rights.

## BROADCAST REGULATION

Arbuckle, M. R. (2014). "Political Broadcasting Fairness in the Twenty-First Century: Putting Candidates and the Public on Equal First Amendment Footing." 36 Hastings Communications and Entertainment Law Journal 27.

There is a fundamental inconsistency in the current political fairness and access rules for U.S. broadcasting. While political candidates enjoy a long-standing right of access to broadcast stations to express their views and attack and answer attacks from opponents, stations have no obligation to be fair to noncandidate citizens who may be personally attacked, nor to make any good-faith effort to present opposing views on controversial public issues. However, this has not always been the case. Under the Fairness Doctrine, in place from 1949 to 1987, broadcasters were expected to present controversial issues of public importance and provide reasonable opportunity for opposing views.

During the 2012 elections, television and radio audiences found themselves awash in the usual advertisements from political candidates and their supporters. This time campaign spending was higher than ever before. The total cost of the 2012 election season - including federal, state and local elections - was widely reported to be six billion dollars. In the post-Citizens United world, political broadcast advertising will likely continue to increase. While campaign spending is at record levels, broadcast political advertising is not a new phenomenon.

At a time when social/political protesters - the Occupy and Tea Party movements for example - are influencing public opinion, debate and policy, it is important to examine the rationale for, and origin of, broadcast political fairness and access rules. Ultimately this article argues that broadcast fairness rules should apply equally to candidates and members of the public. The rationale for fairness cannot apply to one group and not the other. If the spectrum scarcity and public interest rationale for candidate rules still exist, then that rationale also supports the need for general fairness rules - perhaps even a resurrected twenty-first century Fairness Doctrine.

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