44.2
Winter 2016

Media Law Notes

AEJMC Law & Policy Division

Head Notes: Thoughts from Division Head

Dan Kozlowski
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"I think it's time that Missouri becomes known as a state that values free speech," Missouri state representative Elijah Haahr proclaimed recently. Amen to that, brother!

Haahr was speaking at a hearing in support of the Walter Cronkite New Voices Act, a law that would protect free speech and free press rights for high school and college student journalists here in Missouri. Spurred on by the Student Press Law Center's New Voices campaign, and on the heels of North Dakota's success in passing a similar law last year, about 20 states currently have their own campaigns ongoing. The organizer of the Missouri campaign, Robert Bergland, told the SPLC that there is a favorable environment for free speech and free press issues in the state right now after the fiasco at the University of Missouri in the fall, when educators tried to block student journalists from covering a public protest there.

To Bergland's point, another recently proposed bill in the Missouri House would require college students at public universities in the state to take a class on freedom of speech. The legislative fate of that bill is murky. But the New Voices Act has found success so far. It unanimously cleared its first committee hurdle. Fingers crossed more triumphs are ahead, for students in Missouri and for students throughout the country.

Speaking of triumphs – we have an issue full of content for you!

Congratulations to those of you who had papers accepted at the Southeast Colloquium. You can find the list of accepted papers inside. You'll also find a note from Brooks Fuller, our division's graduate student liaison. Brooks will be hosting our division's first-ever coffee hour at the Southeast Colloquium. If you're coming to LSU, be sure to stop by! Brooks' note has more details.

You'll also find the schedule of panels for the Minneapolis conference inside. Thanks to Vice Head Courtney Barclay for her work organizing our conference schedule. And thanks to those of you who are coordinating the panels.

Our preconference session in Minneapolis will take place from 1 to 5 p.m. on Wednesday, Aug. 3. We'll have three panels throughout the afternoon. One, organized by Jonathan Peters, will feature Judge Diana Murphy of the Eighth Circuit Court of Appeals. Another, organized by Jared Schroeder, will focus on teaching tips and will include some of our recent winners of our division's teaching ideas competition. The third panel, organized by Amy Kristin Sanders, will spotlight how we can/should internationalize our communication law syllabi.

The division social in Minneapolis will be Friday, Aug. 5 at 8:30 p.m. Save the date! I've already reserved an area of The Newsroom, a restaurant located near the conference hotel. I'm recruiting sponsors to help cover the costs of the social. The UNC Center for Media Law and Policy, the Silha Center for the Study of Media Ethics and Law, the Center for International Media Law and Policy at Indiana, and Clay Calvert have already pitched in. I'm looking for others to join them!

Finally, you'll find calls inside for the Stonecipher Award (nominations due to Derigan Silver by Feb. 28), our teaching ideas competition (deadline for submissions to Jonathan Peters is March 15), and our paper competition for the national conference (deadline is April 1).

Enjoy the issue!

In This Issue

Features

Calls

A Public Scholar

Jared Schroeder
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A little part of me dies when my students offer the right to bear arms as one of the five freedoms promised by the First Amendment.

The answer is a common one when I give my communication law classes a short survey at the beginning of each semester. During the past few years, the average student, at the beginning of the class, can name two or three of the rights correctly – not counting their inclusion of the right to bear arms, of course.

As faculty members, when our students don't know much about the course's content at the start of the term, we can take solace in the opportunity we will have in the coming weeks and months to teach them.

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AEJMC Southeast Colloquium, Law and Policy Coffee Hour

Brooks Fuller
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The AEJMC Law and Policy Division will host a coffee hour on Friday, March 3, from 3:15 p.m. to 4:30 p.m. in the Holliday Forum, located in the Journalism Building at the Manship School at LSU.

The coffee hour is an opportunity for young media law and interdisciplinary scholars to get to know the experienced and energetic faculty and student members in the Law and Policy Division. The division leadership hopes that events of this sort will generate buzz (pun fully intended) about the division among scholars who work in areas that might fall outside our typical footprint. Increasing opportunities to socialize and exchange ideas will especially broaden our appeal with graduate students who research a range of interesting media issues that have legal and policy implications. By expanding our interdisciplinary appeal, we will also improve the amount and quality of paper submissions to our conference panels and to our flagship journal, Communication Law and Policy.

If you will be in Baton Rouge for the Southeast Colloquium, please come and encourage your students and colleagues to do the same!

Call for Papers: 2016 AEJMC Conference — Law and Policy Division

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2016 AEJMC Conference in Minneapolis, MN. 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 Uniform Paper Call. 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 for the competition.

The Division again will award a 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 Jason Martin, Law and Policy Division Research Chair, DePaul University, College of Communication,

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Division Schedule for Minneapolis Conference

The Law & Policy division has a great program scheduled for this year's conference. Being in Minneapolis gives us the opportunity to hear from some of the key players in the Cohen v. Cowles Media case during a panel co-sponsored by the News & Online News division. Journalists, lawyers, and scholars will discuss the legacy of Cohen over the last 25 years. The Law & Policy division has partnered with the International Communications Division for two panels, including one examining international freedom of information laws in the context of the 50th anniversary of the U.S. FOIA. We have also partnered with Media Ethics, Scholastic Journalism, and Communication Technology for panels focusing on the use of drones in media, free speech at private schools and universities, and police body cameras.

Below is the schedule for these panels. Don't forget to come early so you join us for our pre-conference session focusing on teaching, including tips, creative assignments, and hot topics.

See you in Minneapolis!
Courtney Barclay, Vice Head/Program Chair

Law and Policy 2016 AEJMC Conference Schedule

Minneapolis, MN

Wednesday, August 3

1:00 – 5:00 p.m.

Pre-Conference Sessions

Thursday, August 4

1:30 – 3:00 p.m.

Winning the Fight for Free Expression at Private Schools and Universities

Organized by Erik Ugland, Marquette

Co-Sponsored with Scholastic Journalism

5:00 – 6:30 p.m.

Ethics Aloft: Drones, Sensors and the Changing Boundaries of Media

Organized by Kathleen Culver, Wisconsin

Co-Sponsored with Media Ethics

Friday, August 5

1:30 – 3:00 p.m.

Freedom of Information Act 50 Years Later: The U.S. Law Still Serving as the Touchstone?

Organized by Kyu Ho Youm

Co-Sponsored with International Communication

3:15 – 4:45 p.m.

Cohen v. Cowles Media at 25: Its Lasting Legacy

Organized by Joe Russomanno, Arizona State

Co-Sponsored with News & Online News

5:00 – 6:30 p.m.

Top Papers Research Panel

This research panel will feature the winners of the division's research paper competitions.

6:45 p.m.

Law and Policy Division Business Meeting & Social

Immediately following our business meeting, join us for an off-site social.

Saturday, August 6

3:30 – 5:00 p.m.

The Internationalization of Media Law & Policy

Organized by Erik Ugland, Marquette

Co-Sponsored with International Communication

5:15 – 6:45 p.m.

(Sun)light, Cameras, Legal Action: A Look at Developments Related to Police Body Cameras

Organized by Patrick File

Co-Sponsored with Communication Technology

Do You Have News for the Division?

If you have any news or would like to contribute to the newsletter, please contact
Kearston Wesner by email,
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During the past few months, however, I've been thinking about all the people who will never set foot in our classes, or any class that covers the basics regarding freedom of expression. How will they encounter this information about their fundamental rights?

I really started thinking about this when Tim Tai, a student and a journalist working for ESPN, was verbally and physically confronted in his efforts to document the protests on the University of Missouri campus in early November (https://youtu.be/xRlRAyulN4o). A Missouri administrator, a faculty member, and several students contested his right to stand in a public area and report on a matter of substantial public concern.

Many asked: "Shouldn't these people know about the First Amendment?" That idea ran through my mind as well, especially when I was asked a question along those lines while appearing on a Dallas television station to discuss the incident.

Many of us assume people should know about these rights that are central to our research and teaching, but how should they know? When in their lives would they pick this information up if we, those who study and teach about these rights so much, don't think to share it with them?

After all, what happened in Missouri in November happens quite often when journalists or citizen publishers document controversial events. The most commonly discussed cases are when law enforcement officers contest efforts to record their activities.

Social media and networked technology have made it possible for anyone to communicate messages to audiences, which means more and more people who have not taken communication law courses are in many ways entering a minefield of legal concerns when they publish.

Protests such as the one at Missouri also combine social media, networked technology and individuals who feel passionately about a serious public issue, but also believe they should retain their right to privacy. They don't realize that joining a protest, physically or virtually, cannot be a private act.

In light of incidents such as the one that occurred at Missouri in November, and that happen with far less fanfare across the country, I want to encourage Law Division members – us – to consider how we can take on a greater role in sharing what we know with the public.

It's certainly easy to focus on the research, teaching, and service that dominate our lives. It should not be forgotten that these aspects of our work do contribute to increasing what is known within our fields and to a portion of the public. Still, can we do more?

This year, I would like to urge division members to look for ways that they can share their knowledge within the field to the general public.

Many Law Division members are very active in sharing about First Amendment concerns, and I compiled this list of potential avenues for such efforts with their work in mind:

Write an op-ed piece for your local newspaper.

Make yourself available for interviews with local television stations (even if it is terrifying to do so).

Curate a social media or blog space that draws attention to a communication law concern and somehow draws a portion of the public into the discussion.

Contact civic and advocacy organizations about speaking with their groups regarding First Amendment rights.

Speak with high school students and high school groups about the First Amendment.

Certainly, these ideas represent only a few of the possible ways through which we can share our knowledge with the public in a way that brings more clarity and awareness to rights that are fundamental to self-government.

This list, however, hopefully helps encourage each of us to do some thinking about how we can share more regarding what we study and teach every day with those who might never have a chance to encounter these crucial ideas otherwise.

Call for Reviewers: 2016 AEJMC Conference — Law & Policy Division

The Law and Policy Division needs help reviewing papers for the 2016 AEJMC Conference. 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, 2016. Ideally, we will have enough reviewers volunteer so that each reviewer will handle three papers.

To volunteer, please contact Jason Martin, Research Chair, at jmart181@depaul.edu.

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 topics, please specify your legal interests (e.g., libel, freedom of information, broadcast regulation, survey research). Also indicate if you would like to serve as a discussant or moderator for a session.

Thank you for your help.

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New technology and defining "reasonable" privacy expectations

Jasmine McNealy
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At the time of this writing Justice Antonin Scalia had just passed away leaving a vacancy on the High Court that is sure to amp up the enmity between President Obama and members of Congress. Justice Scalia was, whether you agreed or disagreed with his constitutional interpretations, a formidable legal mind. He will be difficult to replace.

Before his death, Justice Scalia had written quite a few memorable opinions and dissents, not the least of which was his dissenting opinion in ABC, Inc. v. Aereo, in which he argued that the platform provider was passive and therefore could not be held liable for what consumers did with the content transmitted, and that a bright line rule should be used to consider conduct in contributory infringement cases.

Bright line rules were important for Justice Scalia, too, in privacy law cases. In Kyllo v. United States, for example, he delivered the 5-4 majority decision holding that the use of thermal technology on a home from a public street constituted a search within the meaning of the 4th Amendment. Similarly, in U.S. v. Jones, Scalia wrote the majority opinion holding that the placement of tracking technology on the personal vehicle of a person being investigated required a warrant.

In both cases, the majority decisions focused heavily on places – the home and the personal vehicle (property) – in which an individual could have a reasonable expectation of privacy. This reasonable expectation of privacy is of particular interest with advances in technology. With social media, drones, and increasing government surveillance, the question arises as to what information individuals can expect to remain private.

As of late, government officials have argued that individuals have no expectation of privacy related to their use of technology. A Department of Justice official recently argued that Tor users had no expectation of privacy related to their IP address. The case, U.S. v. Michaud, is that of a public school employee accused of accessing child pornography from a site that the FBI seized and began controlling. And it's not only federal government officials calling for a narrow interpretation of the reasonable expectation of privacy. The Maryland attorney general recently filed a brief claiming that cellphone users voluntarily shared information with third parties and, therefore, had no expectation of privacy in their location data.

Both of these cases demonstrate aggressive stances by government related to 4th Amendment reasonable expectations of privacy. It would be remiss, however, not to note that private corporations, too, are forcing regulators to reevaluate what information, much of which people make readily available, should be reasonably expected to remain private. In fact, the Federal Trade Commission recently held a one-day workshop, PrivacyCon, to sort through research that considers consumer/corporate information relationships (Full disclosure: I participated in PrivacyCon with a colleague). In the end, there was no clear answer as to what consumer expected or should expect to remain private. There were, however, a lot more questions.

Perhaps this demonstrates that reasonable expectations of privacy are difficult to parse, and that bright line rules will be hard to create.

This does not mean, however, that looking for reasonableness in privacy expectations is an unworthy task. It just means we need great minds to consider it.

2015 Harry W. Stonecipher Award
Call for Nominations

The Stonecipher Award Selection Committee of the AEJMC Law and Policy Division is seeking nominations for the 2015 Harry W. Stonecipher Award for Distinguished Research on Media Law and Policy. In addition to being recognized at the annual meeting of the Law and Policy Division, the winner will receive a cash prize. The award honors the legacy of Harry W. Stonecipher. Stonecipher, who died in 2004, was an acclaimed and influential First Amendment educator. He nurtured a number of media law scholars during his 15-year career at Southern Illinois University, Carbondale, beginning in 1969.

The Stonecipher Award for Distinguished Research on Media Law and Policy is open to all journalism and communication scholars within and outside AEJMC. The award will be presented to the research that most broadly covers freedom of expression as a whole. The award is not limited to research that centers on media-specific issues. In addition, the successful nomination will ideally be global in scope, rather than U.S.-centric, given that media law and policy as a research topic is inextricably intertwined with the rest of the world in the 21st century. Preference will be given to research with a strong theoretical component that demonstrates the potential to have a lasting influence on freedom of expression scholarship. Nominations may be for articles, monographs, peer-reviewed journal articles, law review articles, or other scholarly publications. Self-nominations are welcome.

In order to be considered for the award, the research must have been first published between January 1, 2015 and December 31, 2015. Nominations should be sent to Derigan.Silver@du.edu before Sunday, February 28, 2016.

2016 Southeast Colloquium Law Division Accepted Papers

The Law and Policy Division received excellent submissions for the 41st annual AEJMC Southeast Colloquium paper competition. The colloquium will be held March 3-5, 2016, at the LSU Manship School of Mass Communication in Baton Rouge, Louisiana. The accepted papers address a range of issues, from copyright to privacy. These papers address current challenges in these areas of law, including censorship on college campuses and cyberharassment.

Four "C's": Copyright, Commercial Speech, Confirmation and Censorship

Discussant: Daxton (Chip) Stewart, Texas Christian University

Copyright in Inanimate Objects, Matthew D. Bunker, University of Alabama and Clay Calvert, University of Florida (Top Faculty Paper)

One is the New Two: An Examination of FTC Substantiation Requirements for Health Claims in Food Advertising and its First Amendment Implications, Chioma Ihekweazu, University of North Carolina at Chapel Hill (Student)

Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response, A.Jay Wagner, Indiana University (Student)

Indirect Censorship of Collegiate Media: Exploring Administrative Removal of Collegiate Media Advisers as First Amendment Retaliation Against Student Journalists, Lindsie Trego, University of North Carolina at Chapel Hill (Student)

Privacy

Discussant: Erin K. Coyle, Louisiana

A Mosaic Theory of Cyberharassment: Using Privacy Principles to Clarify the Law of Digital Harms and Free Speech, P. Brooks Fuller, University of North Carolina at Chapel Hill (Top Student Paper)

An Examination of Ag-Gag and Data Trespass Statutes, Ray Whitehouse, University of North Carolina at Chapel Hill (Student)

Digital Breach: Where Privacy Ends and Data Security Begins, Angela Rulffes, Syracuse University (Student)

Student Data in Danger: What Happens When School Districts Rely on the Cloud, Chanda D. Marlowe, University of North Carolina at Chapel Hill (Student)

Privacy, Speech & Smartphones: First and Fourth Amendment Perspectives on When Students' Rights and New Communication Technologies Collide on Campus, Stephanie McNeff, University of Florida (Student)

Theory and Public Policy

Discussant: Jason Martin, DePaul University

Fissures, Fractures & Doctrinal Drifts, Clay Calvert, University of Florida and Matthew D. Bunker, University of Alabama (Faculty)

Twenty Years Later: The Application and Influence of McIntyre v. Ohio Elections Commission, Natalee Seely, University of North Carolina at Chapel Hill (Student)

Crash and Learn: The Inability of Transparency Laws to Penetrate American Monetary Policy, Benjamin W. Cramer and Martin E. Halstuk, Penn State University (Faculty)

Libel by the Numbers: The Use of Public Opinion Polls in Defamation Lawsuits, Eric P. Robinson, Louisiana State University (Student)

2016 Southeast Colloquium Law Division Program

LSU Manship School of Mass Communication – Baton Rouge, Louisiana

March 3-5, 2016

THURSDAY, MARCH 3, 2016

6 p.m. – 8 p.m. (Holliday Forum)

Opening reception

FRIDAY, MARCH 4, 2016

8 a.m. – Registration and check-in (Journalism Building)

9 a.m. – 10:15 a.m. (Curet Room, Hodges Hall)

Law and Policy Division Research Panel: Four "C's": Copyright, Commercial Speech, Confirmation and Censorship

Discussant: Daxton (Chip) Stewart, Texas Christian University

1:45 p.m. – 3 p.m. (Room 135, Journalism Building)

Law and Policy Division Research Panel: Privacy

Discussant: Erin Coyle, Louisiana State University

SATURDAY, MARCH 5, 2016

8:30 a.m. – Registration and Check-in

10:30 a.m. – 11:45 a.m. (Room 135, Journalism Building)

Law and Policy Division Research Panel: Theory and Public Policy

Discussant: Jason Martin, DePaul University

12:00 p.m. – 1:00 p.m. (Curet Room, Hodges Hall)

Southeast Colloquium Business Lunch

Awarding of Top Papers

Choosing a Site for 2017

Legal Annotated Bibliography

Minch Minchin
Doctoral Student
University of Florida

HIGH AND LOW-VALUE SPEECH

Chen, A. & Marceau, J. (2015). "High-Value Lies, Ugly Truths & the First Amendment", 68 Vand. L. Rev. 1435.

Historically, most scholars and jurists assumed that protecting lies under the First Amendment was necessary only to the extent that it shielded the search for truth. Banning falsehood, in theory, created the possibility that true expression would be chilled in the process.

The authors claim that this theory was predicated on the presumption that lies are inherently worthless and permitting lies "provides protection to the truth-speaker by also incidentally protecting the liar." This article makes the case that the seminal Supreme Court case *United States v. Alvarez*, which gutted the Stolen Valor Act's prohibition on false claims of gallantry, necessitates re-evaluating the historical presumption about lies.

The authors argue that jurists should evaluate expression not by truth but by pragmatic value. Certain "high-value" lies are worthy of protection because they advance the primary justifications for which freedom of speech exists. For example, undercover journalism is innately deceptive but yields a product that justifies the means.

Other high-value lies are undercover police activity and animal rights activists challenging ag-gag laws. Chen and Marceau argue that deceptive intelligence-gathering practices within this pragmatic framework advance each of the primary free speech theories in use today: Meiklejohnian democratic self-governance, individual autonomy or the marketplace of ideas. The authors conclude that high-value lies ought to receive the same protection as their truthful counterparts.

COMMERCIAL EXPRESSION

Rothman, J. (2015). "Commercial Speech, Commercial Use, and the Intellectual Property Quagmire", 101 Va. L. Rev. 1929

Loyola Law School professor Jennifer Rothman challenges the efficacy of the commercial speech doctrine in First Amendment jurisprudence and decries its application in the IP law context.

In *Jordan v. Jewel Food Stores*, *Sports Illustrated* offered Chicago-area supermarket Jewell free advertising space in exchange for prominently featuring a Michael Jordan commemorative issue of the magazine in its stores. But Jewell's advertisements included images of Michael Jordan, which violated the Lanham Act and precluded the ad from First Amendment protection. The advertisement was considered "commercial speech." Jordan could not, of course, have sued the magazine because, even though both Jewell and *Sports Illustrated* were commercial enterprises ostensibly making money off of the basketball star's image, one was "commercial" and one was not. Questioning both the legal and normative reasons for such a seemingly arbitrary demarcation, Rothman describes a series of hypotheticals in which commercial speech receive less legal protection, despite being "truthful, limited in scope, and . . . matter[s] of public concern."

Complicating matters, state commercial laws are harder to enforce in an increasingly Internet-driven marketplace, and circuit splits regarding the commercial speech doctrine are mounting to the point that the Supreme Court may need to intervene.

To alleviate the confusion, Rothman creates a five-part taxonomy of what "commercial" means—or ought to mean—in the IP context. The "primary justifications for distinguishing commercial from noncommercial speech, and commercial from noncommercial uses (in the 'for-profit' sense), are rooted in concerns over free speech and constitutionality, value, harm, and broader principles of fairness." To that end, she concludes that the concerns over these matters do not always provide a "convincing normative basis for distinctions rooted in commerciality and that none adequately explains the current contours of IP laws." Therefore, understanding when commerciality should and should not apply is essential to progress in the field of IP jurisprudence.

COPYRIGHT

Tehranain, J. (2015). "The New ©ensorship", 101 Iowa L. Rev. 245

In the sixteenth century, English copyright law originated as a means for the Worshipful Company of Stationers and Newspaper Makers, a guild of London book distributers, to seize and destroy any materials not duly authorized by the company and, by extension, the government. Southwestern Law School Professor John Tehranian claims that copyright has, in a sense, come full circle, and that "private litigants are increasingly exploiting the state-granted copyright monopoly to censor expressive activities by their adversaries." Copyright law, he says, is one of the last strongholds of would-be censors, who have been chased away during the last half-century from the "losing tort claims, [of] defamation, false light, invasion of privacy, and intentional infliction of emotional distress," all of which have been immunized by the First Amendment.

This article discusses how "cynical invocations" of copyright law have increased in frequency by those who wish to silence their critics' viewpoints, often over important social and political issues. He provides the following recent examples: a "creationist group using the Digital Millennium Copyright Act to force the takedown of critical materials put online by evolutionists; abortion-rights activists bringing infringement litigation to enjoin speech by pro-life forces; military personnel using copyright claims to suppress photographs documenting human-rights abuses; [and] a political commentator suing to vindicate the exclusive rights to recordings of his shows as a means of suppressing criticism of his hate-filled rant." He says such invocations are antithetical to First Amendment values, and if we do not permit them in tortious claims, why should copyright be any different?

Tehranian identifies two generally common characteristics of recent censorial copyright claims. First, plaintiffs lack legitimate economic motivations to maintain their rightful markets for the licensing of their copyrighted materials. Second, defendants' use of the materials advance the expression of basic facts or commentary on matters of public concern.

Tehranian offers three possible reforms to deal with the problem: a federal anti-SLAPP statute; reform of 512(f) of the DMCA to address the good-faith requirement; and a *N.Y. Times v. Sullivan*-style check on liability whenever a matter of public concern and a lack of legitimate economic motivations are present. Once

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these solutions start falling into place, he argues, would-be censors will have to start looking elsewhere to squelch the expression of their detractors.

SPEECH REGULATION

Wright, G. (2015). "Content-Neutral and Content-Based Regulations of Speech: A Distinction that is No Longer Worth the Fuss", 67 Fla. L. Rev. 2081

Generally, content-based laws—which are concerned with *what* is being said—are presumptively unconstitutional and subject to strict scrutiny. Content-neutral laws, on the other hand, are more interested in *how* the speech is expressed, and are subject to the more government-friendly intermediate scrutiny standard. Yet in practice, Indiana Law Professor George Wright argues that chronic inconsistencies in the distinction have turned the matter upside-down.

In particular, Wright takes aim at applying the alternative channels doctrine for content-neutral speech. This doctrine states that the bench should look more favorably upon a speaker who lacks other means to express her ideas. He contrasts that doctrine against the least-restrictive means test used in content-based cases. This doctrine asks whether the government can regulate expression in a more speech-friendly manner while achieving its compelling interest.

A large swath of speech, then, could lack alternative avenues for expression but escape the same regulatory censorship aimed at content-based expression. In sum, "even if a compellingly vital and precisely tailored content-neutral speech regulation fails, on a rigorous interpretation, to leave available ample alternative speech channels, then the hierarchy, and the meaningfulness, of the content-based/content-neutral distinction evaporates."

Further complicating the matter is that "not all speakers have similar priorities, aims, resources, time-frames, capacities and limitations," so asking a judge to ferret out whether alternative channels exist is often impracticable, especially considering that the emotive method or means used to express oneself is generally considered equally important in the analysis as what is actually said. Because of these problems, he concludes, "the clarity, coherence, and the practical significance of the content-neutral/content-based regulation distinction have eroded beyond the point of recoverability."

FREEDOM OF EXPRESSION

Bhagwat, A. (2015). "Free Speech Without Democracy", 49 U.C. Davis L. Rev. 59

The Meiklejohnian ideal of democratic self-governance is a fundamental rationale for free speech in the United States. Courts often invoke this reason when striking down expression-limiting statutes and ordinances.

Outside the United States, however, this rationale is hardly even an afterthought. While Alexander Meiklejohn was an American steeped in democratic values, autocratic governments concern themselves little with concepts of self-governance. Less obvious, U.C. Davis School of Law Professor Ashutosh Bhagwat suggests, is that many non-democratic leaders throughout the world care about free expression. The traditional Meiklejohnian theory is in a sense too narrow because speech can serve an important function in any style of government.

Glasnost-era Russia and modern-day China and Qatar are examples of regimes that provide "meaningful protections for free speech, albeit with clear limits." Here, governmental leaders have or had no interest in promoting democracy or subverting their own monopolies on control, but they may encourage limited freedom of speech for three reasons: enforcing central authority; alleviating pressures for political change; and lending legitimacy to the government by encouraging citizens to participate.

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