



46.4
Fall 2018

Media Law

AEJMC Law & Policy Division

Centering Diversity Strengthens the Study of Free Expression



Head Notes

Kearston Wesner
Quinnipiac University
Kearston.Wesner@quinnipiac.edu

The Supreme Court began its term just a few days before I started writing this article. The confirmation of Brett Kavanaugh to the Court, by one of the slimmest margins in history, was mired in controversy from start to finish. In addition to the expected partisan battle about judicial ideology and the shift to a conservative

court, the United States grappled with weighty and complicated questions about how we address sexual assault.

The contentious confirmation process cast something of a shadow over this semester. Classroom discussions have become more somber. Students have difficult questions about the sensitive topics being discussed in the media, and like so many others, I have struggled with how to support their curiosity and help them ask

those questions. We are having – or should be having – tough, but vital, conversations right now.

We can seize the opportunity to help students realize a fuller picture of our legal system by tackling these issues head-on. One way to do this is by boosting voices that historically have been muffled. We can draft syllabi to include cases that center issues of race and gender. We can shape classroom discussions by addressing historical background – *New*

Women in the Law Division (WILD)

See Head Notes, 2



Tori Smith Ekstrand
Associate Professor
UNC Chapel Hill
torismit@email.unc.edu

The women of the Law Division have been meeting informally for breakfast for the past two AEJMC national conferences. So, it wasn't surprising to find almost 15 of us up early on a Friday morning to meet again in August, this time at Washington's Busboys and Poets restaurant.

This year's gathering, though, had a decidedly different tone. Discussion moved quickly to the #MeToo movement against sexual



WILD women brunching in D.C. this summer

harassment and assault and to the ground-breaking investigative journalism that ended the careers of media giants like Harvey Weinstein, Les Moonves, Matt Lauer and Bill Cosby.

See WILD, 2

In This Issue

WILD

Women of Law Division 1-3

Podcasts

Teaching with Tech 3

Journalist Safety

Try Podcasts to engage students 4

Southeast Colloquium

Call for Reviewers 3

Call for Papers 5

Annotated Bibliography

Articles from Fall 2018 6-9

Meeting Minutes

From 2018 Business Meeting 10-12

York Times v. Sullivan, for example, should be situated as a landmark civil-rights decision.

These considerations are also central to the Law and Policy Division's efforts this year. When coordinating our panels, we are striving to include and celebrate diverse viewpoints. The articles accepted for publication in *Communication Law and Policy* reflect our focus on equity; of the scholars published in volume 23, eight were women and eleven were men. And during our annual conference in Washington, D.C., the Women in Law Division brainstormed about how to best support our diversity aims. See Tori Smith Ekstrand's column in this issue for more information about our efforts.

I am proud to head our division this year. We have a terrific leadership team: Roy Gutterman is vice head/program chair; Nina Brown is research chair; Caitlin Ring Carlson is the clerk/newsletter editor (and she designed the issue you're reading right now); Jared Schroeder is teaching chair; Jonathan Peters is PF&R chair; and Mike Martinez is serving once more as our Southeast Colloquium chair.

I am also grateful for the service of Kyla Garrett Wagner and Kristen Patrow as graduate student liaison and social media administrator, respectively. Their efforts are critical to help us realize our goal of boosting our graduate student outreach.

Additionally, I want to recognize Morgan Weiland, who received the prestigious Harry W. Stonecipher Award for Distinguished Research on Media Law and Policy during our business meeting in Washington, D.C. We are able to recognize her extraordinary scholarship through the generosity of Kyu Ho Youm. Our division has the honor of selecting the recipient of this award, and this year, Dean Smith has agreed to continue his duties as chair of the Stonecipher Award Selection Committee.

Vice head/program chair Roy Gutterman is diligently coordinating our panels for next year's conference in Toronto, scheduled for August 7-9, 2019. Our pre-conference sessions are slated for August 6. We will announce the slate of panels and panelists once they are finalized.

Also in this issue are the 2019 Southeast Colloquium calls for submissions and reviewers. The conference runs from March 7-9 at the University of South Carolina, in conjunction with the Media & Civil Rights Symposium.

In closing, if you have any suggestions or feedback, please contact me at kearston.wesner@quinnipiac.edu or (713) 443-1431. I am committed to making this an excellent year for the Law and Policy Division, and I look forward to speaking with you about your ideas.

The gathering was both sobering and affirming, as talk turned to our own experiences as women scholars in media law. For Genelle Belmas at the University of Kansas, the meeting was a truly open exchange about equality in the division.

"To have looked down that table in August and seen the faces of so many women who came before me and with me, and who are coming after me, was more heartening than I can tell you," she wrote to me in a recent e-mail.

Belmas recalled times early in her career when it was difficult to feel accepted within the division -- a feeling that drove her to participate more in other divisions and conferences.

"I'm glad that I don't have to do that anymore, and that we can create a research cohort to support each other, cite each other, find collaborators, and keep our voices as vibrant as they were that morning at breakfast," she wrote. Similar stories were shared.

When Kathy Olson of Lehigh University and I first discussed a regular meeting for women in the division, our hope was that we would not only meet more collaborators, but also create an informal mentoring network and support system, particularly for new women members of the division.

Teaching with Tech: Try Using Podcasts

WILD, continued from 2



Jared Schroeder
Assistant Professor
Southern Methodist University
jcschroeder@mail.smu.edu

One word – podcasts.

I've found that teaching communication law includes two persistent problems. First, there's just so much that needs to be covered. Trying to accomplish too much means students might not grasp foundational concepts from the course. Trying to cover too little might mean they miss out on something crucial.

The second problem exacerbates the first. Students often come into the class with very little knowledge about how government works. They can seldom name the five freedoms of the First Amendment. A little part of me dies every time they list the right to bear arms as one of those freedoms. It happens every semester.

For the past few years, I have experimented with using podcasts to address these two problems. For the most part, I think they have helped. I have recorded a set of ten podcasts and I assign them like readings. Each is about fifteen to twenty minutes long.

Each podcast is used to introduce a new topic. The first podcast always covers basic concepts – precedent, the types of law, and the types of courts. Other podcasts lay the

foundations for defamation, privacy, and copyright. The goal is to introduce content in a way that prepares students to come to class. Once in class, we build from there.

Students have told me they enjoy the podcasts because of my beautiful voice. Just kidding. No one has ever said that. They enjoy them because they can replay parts that they don't understand. They don't have to worry about interrupting me or feel nervous about asking a stupid question. The podcasts are also very purposefully done in a way that is down to earth. They are meant to be basic and understandable.

The podcasts are time-neutral for me because I benefit from the students getting started on class content without actually being in class. I usually pair the podcasts with a reading. For the defamation podcast, for example, I have them read *New York Times v. Sullivan*.

The podcasts also allow me to get the details just right. I can record and re-record until I have explained a concept in the clearest way possible. This is a benefit because in class, as difficult as it may be for people to believe, I at times fail to make sense.

The podcasts are also great for me because they are reusable.

No new members in the division should have to struggle finding that support or advice. The Law Division should feel as welcome to new scholars as other divisions within AEJMC. But accounts at the breakfast did not reflect that, at least not historically.

My personal hope is that the division will consider and adopt several goals related to supporting its women and emerging scholars, including: Encouraging more involvement and submission to the journal; participating in the national conference as presenters, moderators and discussants; and specific planning for the mentorship of new scholars in the division. We must be seen as a division that scholars want to come and present to, and that begins with a division where a new scholar will be welcomed, included, and respected.

Tori Smith Ekstrand is Associate Professor at the University of North Carolina and Co-Director of the UNC Center for Media Law and Policy.

See Podcasts, 6

Southeast Colloquium: Call for Reviewers

The Law and Policy Division has a proud tradition of hosting an engaging research paper competition at the AEJMC Southeast Colloquium each year, and we anticipate that 2019 will be no different. With our growing number of papers comes a need for an equally vigorous team of reviewers. For us to limit reviewers to three papers each, we'll need ap-

proximately 30 reviewers. If you are not submitting a paper to the colloquium this year, the division invites you to help with the competition. Reviewers will receive a package of papers in mid-December, with a mid-January deadline for returning reviews.

For more information, please contact Dr. Michael T. Martinez

by phone at (865) 974-1567 or via e-mail at mtmartinez@utk.edu.

For more information on the 2019 AEJMC Southeast Colloquium, to be held at the University of South Carolina in Columbia, S.C., see the website https://www.sc.edu/study/colleges_schools/cic/journalism_and_mass_communications/aejmc_southeast_colloquium/index.php.

Bill Would Make Violence Against Journalists A Federal Crime



Jason Shepard

Chair, Dept. of Communications
Cal State University, Fullerton
jshepard@Fullerton.edu

When California Rep. Eric Swalwell introduced the “Journalist Protection Act” in early 2018, making it a federal crime to assault journalists, critics said the bill was political pandering and unnecessary because violence against journalists in the United States is not a major problem.

Even journalism scholars questioned the need.

“Although it has some symbolic and practical value, the bill strikes me as mostly redundant, and it comes at the expense of expanded federal power,” wrote Jonathan Peters, a media law professor at the University of Georgia and free press correspondent for the Columbia Journalism Review.

A journalist’s privilege bill protecting confidential sources is a more important legislative priority, Peters argued.

But things changed after a man with a grudge against journalists opened fire in the Capital Gazette newsroom in Annapolis, Maryland on June 28, 2018, killing Gerald Fischman, 61; Rob Hiaasen, 59; John McNamara, 56; Rebecca Smith, 34; and Wendi Winters, 65.

The shooter, Jarrod Ramos, targeted employees of The Capital because of a longstanding obsession he had against the newspaper over

a story about his arrest for harassing a woman in 2011, prosecutors allege.

In the U.S., violent attacks against journalists are not unprecedented.

Journalism historian John Nerone studied such incidents for his 1994 book, *Violence Against the Press*. Nerone argued that violence against the press has spiked when norms and controls break down in public discourse.

History may show we are living in one of those periods.

Last year, more than 20 press organizations partnered to launch the [U.S. Press Freedom Tracker](#), a non-partisan website dedicated to documenting press freedom abuses. The site is run by the Freedom of the Press Foundation and the Committee to Protect Journalists.

In the first nine months of 2018, the site documented 39 physical attacks, 15 journalist subpoenas, five journalist arrests, and five journalists killed.

Worldwide, 44 journalists have been killed so far in 2018, and 61 are missing, according to the Committee to Protect Journalists. Among them include Jamal Khashoggi, the Saudi journalist and Washington Post columnist, who was allegedly killed by Saudi officials in October.

While the congressional bill’s chances of passage seem dim, recent events show why it’s needed.

The Journalist Protection Act would amend the U.S. code to make assaults against journalists a federal crime.

The bill underscores how attacks on journalists are not just attacks on individuals but also attacks on important national institutions and values. For that reason, the bill would send an important message about the role journalists and press freedom play in supporting American democracy.

“President Donald Trump’s conduct invites violence against journalists,” Rep. Swalwell said in a statement when he introduced the bill, H.R. 4935.

A companion bill was introduced in the Senate in May, S.B. 2967.

“A free, and independent press – a strong Fourth Estate – is essential to the American people and our democracy, ensuring an informed public and holding those in power accountable,” New Jersey Senator Bob Menendez, one of the bill’s sponsors, said in a statement.

Jason M. Shepard (@jasonmshepard) is Associate Professor and Chair of the Department of Communications at California State University, Fullerton. A version of this article appeared in the Fall 2018 edition of California Publisher.

44 th Annual AEJMC Southeast Colloquium Call for Papers, Panels and Research-in-Progress Abstracts

Authors are invited to submit research papers, panel proposals and/or research-in-progress abstracts in the Law & Policy Division for the [44th Annual AEJMC Southeast Colloquium](#), which will be held **March 7-9, 2019** at the University of South Carolina in Columbia, S.C. The Colloquium will take place in conjunction with the biennial [Media & Civil Rights History Symposium](#). Authors should prepare submissions as a PDF file and submit them to the following link: <http://bit.ly/sec-law>. Those who submit will receive a confirmation email stating that your submission has been received.

All submissions must be completed by **no later than 11:59 p.m. EST on Monday, December 17, 2018**. Submissions must be original and must not have been previously presented at a conference. Students and faculty should indicate their status for consideration of faculty and student top paper awards. Do not include any author identifying information on any page of the paper submission. Authors also should redact identifying information from the document properties. On the cover page of the attached paper, only the title of the paper should appear. Following the cover page, include a 250-word abstract. Length of papers should not exceed 50 pages for Law and Policy papers (30 pages including references and tables for other divisions).

The author of each accepted paper (at least one author in the case of a co-authored paper) must present the paper at the Colloquium or it will not be listed in the final program.

Acceptance and/or submission of papers to colloquium paper competitions *does not* prevent authors from submitting to AEJMC divisions for the AEJMC Annual Conference in August. Complete contact information and a complete list of (all) authors must be submitted with other material (and on deadline) or a paper will be disqualified. For online instructions on “how to submit a clean paper” for blind review, see [this link](#).

Authors of accepted papers will be notified by early February 2019. You may read more about the event at the Colloquium website at https://www.sc.edu/study/colleges_schools/cic/journalism_and_mass_communications/aejmc_southeast_colloquium/index.php.

PANEL PROPOSALS

Panel proposals using the same link by **Monday, December 17, 2018**, and should include a brief description of the panel along with proposed panelists. Proposals should not exceed three double-spaced pages.

RESEARCH-IN-PROGRESS

The Colloquium will include research-in-progress roundtables as an opportunity for researchers to share and get feedback on projects that are in some stage of development. Research-in-Progress abstracts are NOT eligible for Colloquium research awards.

Authors must submit a synopsis of the project, with research questions or hypotheses and at least one paragraph that explains what stage of development the project is in. More detailed submissions are also allowed but should not exceed ten double-spaced pages.

For more information contact Law & Policy Research chair Dr. Michael T. Martinez (mtmartinez@utk.edu).

<http://bit.ly/sec-law>

Support From Graduate Student Membership

I usually redo one or two of them each summer and maybe another one during winter break. Since they focus on foundational concepts, they are not terribly influenced by changes to technology or new court decisions. I mainly redo them when I'm tired of hearing the same terrible jokes.

The production quality on my podcasts is not high. I use the built-in mic on my laptop and Audacity, which is an open source app. I do not script the podcasts, as I have heard other academics do. While that might be the wisest way to approach podcasts, I feel like the students appreciate a more candid conversational approach. I usually make an outline of what I want to cover. I can always stop and look something up if I get stuck.

I upload the podcasts to the class's content management system when I am finished.

If you have not tried using podcasts as a tool to help your students, I encourage you to give it a try.

Jared Schroeder is Assistant Professor at Southern Methodist University.



Kyla Garrett Wagner

PhD Student
UNC Chapel Hill
kpgarret@live.unc.edu

Four years ago, I registered as a graduate student member of the AEJMC Media Law and Policy Division, and, unexpectedly, it was one of the best decisions I made as a graduate student.

Over the years, my membership earned me much more than access to the journal and a voice in the division: It led to one of the best support groups I have had as a developing academic. At this year's AEJMC National Conference, I participated in the conference's job hub, which was an overwhelming experience. But after a long day of interviews – filled with highs and lows – I was met by a group of professors from the division who invited me to dinner and

promptly took the opportunity to lift my spirits. They reassured me I would find the right position, gave me advice for my job applications, and, most importantly, got me away from thinking about the job search and back to enjoying the conference. Not a single one of those professors was a part of my program. But we had a shared connection as members of the same division, and that meant they were there to support me.

I did not realize joining the division meant I also gained a support group, but that is what I got. And every year I renew my membership, the support and mentorship I get in return grow. So, to all the graduate students even remotely interested in the law, I recommend you join the division and see where that support takes you.

#lawdawgforlife

Law & Policy Division Officers

Head

Kearston Wesner
Assistant Professor
Quinnipiac University
Kearston.Wesner@quinnipiac.edu

Clerk/Newsletter Editor

Caitlin Carlson
Assistant Professor
Seattle University
carlso42@seattleu.edu

Southeast Colloquium Chair

Michael T. Martinez
Assistant Professor
University of Tennessee
mtmartinez@utk.edu

Vice Head/Program Chair

Roy Gutterman
Associate Professor
Syracuse University
rsgutter@syracuse.edu

Teaching Chair

Jared Schroeder
Assistant Professor
Southern Methodist University
jcschroeder@mail.smu.edu

Webmaster

Genelle Belmas
Associate Professor
University of Kansas
gbelmas@ku.edu

Research/Paper Competition Chair

Nina Brown
Assistant Professor
Syracuse University
nmbrown@syr.edu

PF&R Chair

Jonathan Peters
Assistant Professor
University of Georgia
jonathan.peters@uga.edu

Graduate Student Liason

Kyla Garrett Wagner
UNC Chapel Hill
kpgarret@live.unc.edu

Graduate Student Social Media

Kristen Patrow
UNC Chapel Hill
patrowk@live.unc.edu

Annotated Bibliography: Fall 2018



Ashton Hampton
JD Candidate 2021
University of Florida
ahampton95@gmail.com

Erica Goldberg, Competing Free Speech Values in an Age of Protest, 39 Cardozo L. Rev. 2163 (2018)

In this article, University of Dayton Assistant Law Professor Erica Goldberg assesses First Amendment doctrine considering the current “age of protest” among American universities. She explores the tension between traditional policy and contemporary “free speech values,” which she defines as the ideals and rationales supporting the legal protection of speech. Many scholars and litigants have clashing views under the dichotomy of government action and inaction, however, Goldberg maintains “free speech values are served by both.” Typically, courts adhere to the state action doctrine under which protections only apply when censorship is exercised by the government, and not the suppressive efforts of private parties. Goldberg emphasizes that many attacks on free speech are not government-based. The chilling effect of protected anonymous speech online as well as the unfettered power of social media outlets to control conversations are two such examples. However, Goldberg insists adherence to formal free speech doctrine inevitably must, at times, come at the expense of free speech values to achieve greater First Amendment equality overall.

In her review of Supreme Court decisions, Goldberg illus-

trates a few conflicting interests between First Amendment doctrine and values. Goldberg addresses the controversial verdict in the 2010 case of *Citizens United v. FEC*, for example, where a 5-4 majority rejected the view that the political speech of individuals with limited resources should be held higher than the overpowering messages produced by an organization through use of substantial corporate funds. Goldberg also identifies the unrestricted freedom of newspapers and broadcasters to choose which speakers to allow on their platforms. Thus, strict adherence to doctrine can eclipse some values, such as diversity of viewpoint from certain outlets, while still protecting others, such as the freedom of the individual papers and stations to choose what information to transmit.

To resolve most of the tension between doctrine and values, Goldberg argues distinction is necessary between the two. She advocates that “a strong state action doctrine, neutral public concern tests, and great skepticism for any type of viewpoint-based discrimination by the government will ultimately strengthen First Amendment doctrine and free speech values.” Goldberg applies her suggested formal doctrine approach to the growing movement of disruptive protests. New bills now criminalize “certain methods of protesting” when what begins as *protected speech* turns into *unprotected actions*, such as the destruction of property and the creation of barricades. Goldberg stresses this distinction as key to First Amendment doctrine.

Goldberg highlights, for example, the student protests at Berkeley last year in which protestors “threw fire bombs, looted ATM machines, smashed car windows, and punched” those waiting to hear the controversial speaker. She distinguishes that “these destructive actions actually transcended speech and became unprotected conduct.” This distinction, Goldberg contends, should be the general rationale for the government in addressing free speech disputes. However, it can be difficult to traverse the fine line between seeking to protect bystanders from acts of violence, on the one hand, and potentially targeting specific viewpoints or unconstitutionally chilling speech, on the other. Goldberg clarifies that arresting protestors for performing violent acts is certainly permissible under the Constitution. Efforts such as Trump’s threat to deny federal funding to Berkeley following these events, however, may constitute unconstitutional state action. Goldberg warns we must be wary of “targeting tactics” put forth by legislators to smother known protestors. Her article promotes a strong state action doctrine to best advance “both formal and substantive First Amendment equality.”

Rebecca L. Scharf, Game of Drones: Rolling the Dice with Unmanned Aerial Vehicles and Privacy, 2018 Utah L. Rev. 457 (2018)

University of Nevada
Associate Law Professor Rebecca L. Scharf explores the uncharted area of drone regulation, focusing on the use of drones by law

enforcement and the inevitable issues that will arise concerning individual privacy. With numerous tracking and monitoring capabilities, such as facial recognition software, high resolution cameras, GPS, thermal imaging, license plate reading, data storage, etc., drones are the perfect agents for surveillance. Scharf identifies size, cost, and safety as three irresistible advantages to drone usage by law enforcement. In fact, Scharf confirms that the Federal Bureau of Investigation (“FBI”) has already admitted to using drones for gathering “critical information” and the “Customs and Border Protection (“CBP”) has used drones for surveillance on behalf of numerous federal, state, and local agencies, including: the U.S. Immigration and Law Enforcement, the Federal Emergency Management Agency, the U.S. Secret Service, the Drug Enforcement Agency, U.S. Forest Service, [and] the U.S. Department of Energy, . . . among others.”

Considering these current drone employments, Scharf urges that we start addressing potential privacy concerns. She recaps Supreme Court decisions on Fourth Amendment claims arising from law enforcement’s use of surveillance technologies to form a basis for future drone guidelines. Following the 1967 Supreme Court decision in *United States v. Katz*, involving the wiretapping of conversations in a public telephone booth, “the ‘reasonable expectation of privacy test’ became the core of Supreme Court jurisprudence surrounding Fourth Amendment protection.” As drones become more prevalent in society, however, this test may falter. Drone-specific regulation is necessary to control the use of these extremely distinct devices. Scharf explains that “the more widely available the particular technology is, the less the privacy the individual is afforded against government use.” The Federal Aviation Administration (“FAA”) predicts “seven million drones could be purchased annually by 2020” and, although the FAA created initial drone regulations in the fall of 2016, privacy has yet to be referenced.

The Supreme Court expanded upon the *Katz* test in what are referred to as the “Aerial Surveillance Trilogy” cases: *California v. Ciraolo*, *Dow Chemical v. United States*, and *Florida v. Riley*. All three involved police use of aircraft to conduct aerial surveillance of private properties, while *Dow Chemical* and *Riley* also included the use of special cameras. The cases focused on the factors of publicly navigable airspace, the type of technology used, and the altitude above the private property, respectively. The Supreme Court

has yet to deem any aerial surveillance an unconstitutional search, however, in *Kyllo v. United States*, it determined the use of thermal imaging technology to be “presumptively unreasonable without a warrant” when police attempted to use such technology outside a home to detect the manufacturing of marijuana. The dissent condemned the majority’s reasoning “that the thermal imaging scanners were not in ‘general public use,’” worrying this will cause issues in the future as such technologies become more readily available.

Scharf proposes a three-factor test to guide courts and law enforcement in drone regulation: “(1) What type of technology is the drone employing in the search? (2) What is the extent of the surveillance? (3) How pervasive is the privacy intrusion?” Scharf further recommends, to best protect individual privacy, that “courts should apply a presumption that a warrant is necessary, absent exigent circumstances,” when police use drones to survey private dwellings. She hopes we can avoid letting drones fly by policy-makers undetected.

Al-Amyr Sumar, Prior Restraints and Digital Surveillance: The Constitutionality of Gag Orders Issued Under the Stored Communications Act, 20 Yale J.L. & Tech. 74 (2018).

Ballard Spahr LLP Associate Al-Amyr Sumar warns of the gradual dissipation of the First Amendment’s protection against prior restraints on speech in this article evaluating judicial responses to digital government surveillance. Sumar focuses particularly on litigation surrounding the constitutionality of the Stored Communications Act (SCA), which, as Sumar explains, “authorizes the government both to obtain a person’s stored internet communications from a service provider and to seek a gag order preventing the provider from even notifying the person of that fact.” Although such efforts have not been successful under the scrutiny of the courts, First Amendment doctrine prohibiting prior restraint “appears to be giving way to a more permissive set of rules.”

In his analysis, Sumar looks to cases addressing gag orders accompanying National Security Letters (NSLs), unique subpoenas typically issued by the Federal Bureau of Investigation (FBI) and used to gain access to personal information from communications providers. Under the SCA, the FBI can issue gag orders with the NLS subpoenas, forcing recipients to keep the correspondence under wraps. This issue was

considered in 2008 by the Second Circuit in *John Doe, Inc. v. Mukasey*. The court determined the NSL gag orders violated the First Amendment, however, the court struggled to link the gag orders and prior restraint doctrine, finding the strictest scrutiny reserved for prior restraints not compatible to the SCA provision. After Congress amended the SCA, the issue came up before the Ninth Circuit in 2017 and the court essentially agreed that “the NSL provisions needed only to satisfy strict scrutiny,” not the higher standard typically reserved for prior restraints inhibiting protected speech. Sumar uses the recent case of *Microsoft v. DOJ* as his main example “highlight[ing] the tension between classic prior restraint jurisprudence and government surveillance in the digital age.” Microsoft filed the suit in 2016 alleging that the government was using the SCA provisions §§ 2703 and 2705(b) to elicit Microsoft’s private information. There were apparently over “3,250 gag orders” sent to Microsoft, “two-thirds of which ha[d] no fixed end date.” Judge Robart held that the gag orders, as both “impermissible prior restraints and content-based restrictions,” violated Microsoft’s First Amendment rights. The Department of Justice, in response, “issued binding guidance limiting the availability of §2705(b) gag orders.”

Considering these cases, Sumar asserts three arguments in his article. First, it is indisputable that the SCA gag order provision is and should be treated as a prior restraint. SCA §2705(b) quite literally “forbid[s] certain communications when issued in advance of the time that such communications are to occur.” Second, regardless of lessening the level of scrutiny, the SCA gag order provision cannot satisfy even the base strict scrutiny, that is be “narrowly tailored to promote a compelling Government interest.” This, Sumar notes, is clear from the excessive number and, more specifically, the unlimited time-frame of the gag orders sent to Microsoft. Third, and finally, the government’s procedure for obtaining a gag order under the SCA is unconstitutional. He points out that recipients of such orders or NSLs have no freedom in the matter. The request demands a response, whether that be reluctant acceptance or retaliation in court. Particularly, the process under §2705(b) is “effectively ex parte” which routinely leaves the service provider limited options. Sumar concludes by offering a few potential—although admittedly unlikely—revisions for the SCA. In general, he recommends courts tread lightly in this “age of digital surveillance.”

Russ Pearlman, Recognizing Artificial Intelligence (AI) as Authors and Inventors Under U.S. Intellectual Property Law, 24 Rich. J.L. & Tech. 2 (2018).

In his article, Executive Vice President of Headstorm LLC and part-time student at Southern Methodist University Russ Pearlman proposes an innovative update to intellectual property law, specifically concerning copyrights and patents. Presently, both the U.S. Copyright Office and the U.S. Patent and Trademark Office refuse to recognize works created by Artificial Intelligence (AI) systems. Pearlman argues this selectiveness is outdated, finding it erroneously fixed to antiquated hesitations now incompatible in view of the progress and potential of modern technology. In response to common approaches that hold machines to be mere tools, Pearlman attests that AI systems “have ‘created’ numerous works including musical compositions, art, writings, recipes, and potentially patentable inventions.” Pearlman conveys that AI systems are generally recognized under three distinct types: weak AI, strong AI, and superintelligence. While superintelligence, he admits, is still far off in the future, strong AI is currently available and incorporates features such as “awareness, memory, learning, anticipation, and experience; hallmark characteristics demarking consciousness.”

Turning first to the U.S. Copyright Office, Pearlman observes a lack of “statutory backing for their policy” against non-human authorship. Despite the vagueness of the term “author” in the Copyright Acts of 1790, 1909, and, the most recent, 1976, the Copyright Office has customarily refused to recognize works not created by a “human agent.” Pearlman notes that the federal court system has held a similar viewpoint, being sure to often reference the *humanness* of authors in their decisions. AI, Pearlman argues, can produce the key aspects of “originality and creativity [that] are critical to the question of authorship.” He sees some hope in the common “work-for-hire doctrine,” when an employee creates a work in the scope of his/her position, but the employer owns the rights to the work. Under this doctrine, the owner “can be an individual or a legal person.”

Over in the U.S. Patent and Trademark Office, AI is met with equivalent disdain. Like that of “author” under copyright law, patent law fails to fully define “inventor, but [does] prominently suggest[] that human development is required.” Unlike copyright law, a legal entity cannot be an inventor. Inventors

can however, assign their patents—as personal property—to a non-human entity. Although the Patent Office rejects non-human inventors, some have managed to sneak in. Pearlman points out that foregoing full disclosure is one way to patent an invention created by AI. He notes, “[r]egardless of the actual process used to create the invention, the USPTO seems to require only that a natural person be registered for the patent, and that the patent application meets its other stringent requirements.”

To remedy the lack of AI recognition under current IP law, Pearlman suggests a two-part framework. The first condition focuses on the independence of the work and ensures that it is appropriate for protection: “An AI has created eligible subject matter if the creation is original and developed independently from mere instructions provided by a programmer.” The second condition assesses the causation that led to the work’s creation: “An AI has caused the creation of work or invention if there is ‘de minimus’ human direction and the AI’s creation process is not merely rote or mechanical.” Pearlman further addresses the proper assignment of rights for AI works. Following the current reasoning under both copyright and patent law, Pearlman recommends a similar scheme in which rights can be rightfully assigned to AI entities either through implicit agreements, such as “work-for-hire” or “employed to invent” models, or explicit licensing or contractual agreements made by natural persons.



UNIVERSITY OF
SOUTH CAROLINA
School of Journalism and
Mass Communications

is proud to host the

**2019 AEJMC
Southeast Colloquium
March 7-9, 2019**

and our biennial



media & civil rights
history symposium

Join us. More info at:
bitly.com/aejmc-southeast-colloquium

Minutes, AEJMC L+P Division Meeting

August 7, 2018

Call to order: 6:46pm (J Martin.)

Chip Stewart wearing a Medieval Times Lanyard?

Agenda:

Approval of Minutes: Accepted by acclamation.

State of the Division, Jason Martin

Thanks to officers, sponsors

Division membership:

205 members (8th largest of 18 divisions) - last year 216 -- 238 in 2016 - Chip registration broke tie with Advertising (have been 5th or 6th in recent years)

Submissions trend is down

2011 = 75

2012 = 65

2013 = 60

2014 = 56

2015 = 65

2016 = 53

2017 = 57

2018 = 38 (18 accept) 9 student submissions (1 accept), no poster session

2019 audit of LAWP

Partnerships this year: LGBTQ (C-SPAN live), EEND, INTC, PRDV, MMEE, ETHC

Budget: 2018 July \$3895.41

2017 \$4675 (\$4695)

Payments to journal, income from memberships

Does not include social donations or expenses associated with conference (plaques, awards, etc.)

1 panelist had to canceled (Amtrak), some funds to assist Stonecipher winner travel

Last year membership voted about 1/3 budget donation to SPLC, RCFP

(\$650 each, last year \$779)

Goals: Met diversity, social media, expanded/enhanced pre-conference (36, 37, 43)

Did not meet: increase membership

Stonecipher: Dean Smith

Thank you to Kyu and Doug. Award becoming important. Thanks to judges, including to increased number of judges. Wat Hopkins to join judge panel. Wider submissions, better advertising lead to a great group of papers. DS will circulate links to other paper submissions.

Winner: Morgan Wieland...first student to win award.

Presentation: Paper idea originated during Net Neutrality policy...NN/packets are an act of speech, first amendment is expanding/ first amendment expansionism.

New libertarian tradition....Supreme Court wants to vindicate rights of listeners. Listeners are consumers...quantity not quality, vindicate corporate speaker. Becomes a deregulatory weapon. Must reject this right/approach...libertarian tradition hostile to traditional approaches.

Officer Reports: Wat

Good year 42/13 (Get Info from other sheet)

High quality articles.

Seeking reviewers, need specific areas.

Ed board :Sandra Braman left board, question raised re: percentage of board members who are male

Volume 24/2 FOIA Issue is available as a book.

Q: SSSI?

Need more international ed board members to qualify.

Head: Jason Martin

Thanks to leaders and division members. Thanks to sponsors for the socials. Now a tradition.

Announce: anniversary for journal, 2020, AEJMC has funds for special issue

Head Report - CODV

AEJMC membership is up 3408 to 3470 (July)

Overall 1584 submissions, 49.5% accept, 785 accepted

Record: 1923 in SF 2015

Numbers down for a DC conference

2019 Toronto Aug. 7-10 2019 (Aug. 6 pre-conf)

Sheraton Centre Toronto

2020 SF

2021 NOLA

2022 Detroit Indy Chicago (To vote on)

This year's SE COLLO: South Carolina

Child care pilot: 100+ interested, 7 enrolled (less than expected)

Vice: Kearston Wesner

Programming: Preconference was a success. Panels were great, congrats to teaching awards

Co-panels...We won with PR. Ethics wants to do future panels.

Panel ideas welcome to Kearston and Roy

Thanks to Roy and Jason

Ideas: to increase membership on panels in Toronto

Research Chair (Roy)

Submissions down. Couldn't accept papers on 2 to 1. Looking for more submissions for next year.

Thanks to judges for work, meeting deadlines.

Papers that were accepted fit nicely, no rejections, one withdraw. Thanks to Felicia in HQ.

Awards: Debut: Roy, Western Kentucky

Top student paper: Kristen Patrow

3rd place: Erin Coyle/Witnack

2^d Place: Jared Schroder

1st Caitlin Carlson/Haley Rousselle

Teaching:

Comp: 10 entries, 3 judges. Winners present at preconference.

3rd: Ben Holden

2nd: Nina Brown

1st: Genelle Belmas

PF+R Chair (John)

Treated as a public outreach/ encouraged journalists to reach out to other L+P members on speech issues. Sponsored con-panels

Chip, Jason, Genelle handled copyright panel last minute.

Webmaster (Caitlin)

Website online.

Newsletter (Chris)

SE Colloquium (Mike)

Alabama, Kyu moderated panel, 15 submission, 6 faculty, 9 students, 6 accept, rip sessions

Top Paper: Jared Schroder (copyright)

Top Student Paper: Lost in Translation, Kelly Bolyn
SC 2019 March 7-9, coincide with history conference.

Transfer of Power

Gavel transfer

Recognition of Jason, who ordered his own plaque.

Kearston's Goals for 2018-19:

Increase membership

Need to reach grad students

Division Interest and Engagement (More with Grad student liason)

Increase support/visibility of Stone Cipher award/comp

Continue commitment to diversity

Nominations for Officer Positions:

Chris Terry is stepping out of the leadership ladder.

Research Chair: Nina Brown appointed
Clerk: Caitlin C. --- Self nominated.

Unanimous by voice vote.

PFR: Jonathan Peters willing to continue
Unanimous by voice vote.

Teaching: Jared to continue

Unanimous by voice vote.

Website: (to be appointed later)

SE Col: Mike reappointed

Student Liaison: Kyla in 2nd year

Appointments:

SE Colloquium: Mike Martinez

Student Liaison: Kyla Wagner Garrett

Social Media: Kristen Patrow will accept the position.

Vote on 2022 Location

Detroit, Indy, Chicago

Indy is cheaper for grad students, Detroit rooms are in new facility, but price is on par with Chicago. Other divisions pushing for Detroit.

Discussion:

Tony: What hotel in Indy? Main Marriot: according to Jason

Tori: Detroit is a hub city.

Midwest portion:

Move to vote:

Chicago 11

Detroit 20

Indy: 8

New Business:

Genelle: Assemble contact list of Women in Media Law, list to be started

Dean Smith: Why is newsletter still distributed on paper.

Tori: Poll students/ members about why submissions are down. Online poll? Gather data.

Explore the options/survey?

Discussion:

Eric → Percentage of division members who attend?

Mike: Follow up with Ex Members.

Diversity: Erik and Jasmine

Announcements:

IAMCR (Erik Ugland) 50 years, IAMCR...connect with international scholars, amplify voices of scholars....IMACR is wider than ICA. Abstract submission conference, coming in year in Madrid. July 7-11, preconference on law topic on July 6th.

Jasmine: ICA: Work with Poly Comm, connect AE-JMC to ICA, 2019 in Washington DC more policy. November 1st submission deadline.

Erik Easten: Journal of Media law and Ethics: Looking for manuscripts, looking for someone to take over the Journal

Division Social

Move to adjourn 8:11pm