47.3
Summer 2019

Media Law

AEJMC Law & Policy Division

Head Notes: Closing Out My Term

Head Notes

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For the past year, I have been coordinating our conference events for Toronto. These tasks have been challenging and rewarding, though imbued with sadness. The annual conference also marks the end of my term as division head.

This year, I set four goals for the division. Overall, we have realized success in achieving these goals.

(1) **Increase efforts to reach graduate students and build division interest and engagement**

Through the hard work of Kyla Garrett Wagner and Kristen Patrow, the division has redoubled its efforts to boost the visibility of graduate students on our various social media accounts. Caitlin Carlson, our newsletter clerk, has consistently featured articles geared toward graduate student issues. And each issue features the annotated bibliography, penned by law student Ashton Hampton.

(2) **Increase support for and boost visibility of the Stonecipher Awards**

The Stonecipher Award deadline was shifted to earlier in the year, which increased the time available to promote the award. Dean Smith did a stellar job coordinating the review process and securing nominated articles this year. Please check out his article in this newsletter which recognizes the Stonecipher winner, Victor Pickard.

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Vitctor Pickard receives 2019 Stonecipher Award

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Why have so many people said so much about a policy that affects so little in the realm of media law?

That is the riddle at the heart of Victor Pickard's article "The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse." It was published last year in the International Journal of Communication, and it is the winner of the 2019 Stonecipher

Victor Pickard is an Assocociate Professor at the Annenberg School for Communcation

Award for Distinguished Research in Media Law and Policy.

Pickard is an associate professor in the Annenberg School of Communication at the University of Pennsylvania and a co-director of

See STONECIPHER, 2

In This Issue

(3) **Continue commitment to inclusion and diversity in division membership and conference participants**

Division leadership has made a concerted effort to prioritize diversity in both division membership and conference participants. Our newsletter has featured columns that highlight diversity in the classroom and international issues. We have made significant progress in diversifying our panels. We have a lot more work to do as regards membership, which feeds into our fourth goal…

(4) **Increase division membership**

The division continues its efforts to increase membership, generally. The numbers have remained static, which reflects a general trend across AEJMC divisions. However, we have been engaging in outreach efforts that will, hopefully, boost numbers. Additionally, Tori Smith Ekstrand and Kyla Garrett Wagner created a survey to assess the state of the division. Thanks to those of you who have taken the survey. We are using this data to drive our planning for next year.

This year, I have the task of bringing the division through our assessment, which takes place every five years. On August 7, I will meet with the AEJMC Assessment Committee to discuss the division's activities over the past five years and the future trajectory of the division. The latter portion of the conversation will be guided by both the survey results and the goals set by next year's vice-head, Roy Gutterman.

For 2019-2020, Roy has set the following goals, in addition to the standing goals of boosting membership and diversity:

(1) Increase scholarly collaborative efforts among AEJMC divisions
(2) Increase collaboration outside AEJMC with professional organizations
(3) Boost visibility of division newsletter and social media presence
(4) Continue commitment to positioning division as a prominent voice for First Amendment rights

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With continued support from division membership, I am confident that Roy will be able to achieve these goals next year. This year, I have received encouraging feedback from division members who are enthusiastic about the direction of our division. I am excited to discuss our plans at the business meeting and social with you all.

The business meeting will be held on **Thursday, August 8, from 6:45-8:15 p.m.** in Sheraton Hall E. Come early for our Top Paper Panel, from **5:00-6:30 p.m.** in the same room.

Immediately after the business meeting, please join us for the division social, which we are co-sponsoring with the International Communication and Newspaper and Online News Divisions. The social will be held from **8:30-10 p.m.** at Assembly Chef's Hall (111 Richmond Street W), approximately 200 meters from the hotel. (For you Imperial System aficionados, that's approximately 656 feet, or a 4-minute leisurely walk).

And please, check out the list of donors in this issue. Their contributions are critical to the success of the division.

Once again, thank you for allowing me to head the division this past year. Your commitment to the division's success has been inspiring, and I am honored to pass the gavel to Roy next year.

STONECIPHER, continued from 1

the Media, Inequality, and Change Center, which is a collaboration of the Annenberg school and the School of Communication and Information at Rutgers University. He also is the author of the book "America's Battle for Media Democracy" (Cambridge).

While last year's winning article by Morgan Weiland explored the tendency of hyper-libertarian rhetoric to swamp Supreme Court decision-making in the realm of commercial speech, here Pickard explores the triumph of a negative-rights approach to freedom of speech and press in the policy-making realm. The now-defunct Fairness Doctrine might be most associated in people's minds with contemporary accusations that it was "a liberal attempt to silence right-wing voices," Pickard writes, but he shows the rule's roots to be long and ill-remembered — partly by grounding them in the urgent media reform movement of the 1930s (think Hitler and fascism) and partly by anchoring them to Supreme Court rhetoric in such cases as *Associated Press v. United States* (1945).

"[T]he Fairness Doctrine's often-romanticized legacy should be reconsidered in light of its postwar origins," Pickard writes, because as originally conceived, it "represents an exemplar of positive freedom enshrined in media policy."

In tracking the evolution of debate over 50 intervening years, Pickard concludes that opponents have gone beyond what theorists would call "regulatory capture" to achieve a kind of "discursive capture" — that is, controlling even the way

STONECIPHER, Continued from 2

we *talk* about proposed government interventions in the media. In the captured marketplace of ideas that Pickard perceives, self-regulation is the only regulation allowed.

"Although officially killing the Fairness Doctrine was ostensibly an attempt to remove 'unnecessary regulations,' it validates the contention that government has no legitimate role in regulating media markets and protecting positive freedoms," Pickard writes. "Before allowing this normative foundation to further crystallize, American society should have a public conversation about the kind of media system a democracy requires."

Judges agreed that Pickard's article explores a topic of enduring importance and, as one judge put it, must be included in any thoroughgoing research in this area in the future. The article is "compelling in light of today's political landscape," as one judge said, and, according to another, "will help set the stage for policymaking to come."

Judges for this year's award were Dean Smith, chair, High Point University; Katie Blevins, University of Idaho; Lucy Dalglish, University of Maryland; Tori Ekstrand, UNC Chapel Hill; Emily Erickson, Cal State Fullerton; Patrick File, University of Nevada, Reno; Michael Hoefges, UNC Chapel Hill; W. Wat Hopkins, Virginia Tech; Jasmine McNealy, University of Florida.

Professors Kyu Ho Youm and Doug Anderson founded the Stonecipher Award five years ago to honor their friend and colleague Harry W. Stonecipher, who mentored many notable scholars in his 15 years at Southern Illinois University, Carbondale, starting in 1969. The award is accompanied by a cash prize and is open to scholars within and without the AEJMC.

Pickard is online at victorpickard.com. You can find his winning article at this link: https://www.miccenter.org/wp-content/uploads/2018/09/Fairness-Doctrine.pdf.

Special Mention: It is unusual for the judges, voting blind, to select nearly unanimously the same nominee for runner-up, but that was the case this year with Stephen Bates' article "Is This the Best Philosophy Can Do?" Henry R. Luce and A Free and Responsible Press, 95 Journalism & Mass Comm. Q. 811 (2018). Judges praised Bates' deep-digging primary-source research and fastidious writing.

Finalists: Lyombe Eko, *Diverse Legal Interpretations of Freedom of Expression and Blasphemy*, Oxford Research Encyclopedia of Communication, Feb. 2018; Eric B. Easton, *Lawyer for the Masses: The Role of Gilbert Row in* Masses Publishing Co. v. Patten, 50 Ariz. St. L.J. 747 (2018); Jason M. Shepard & Kathleen B. Culver, *Culture War on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 San Diego L. Rev. 87 (2018); Lisa Taylor & David Pritchard, *The Process Is the Punishment: Criminal Libel and Political Speech in Canada*, 23 Comm. L. & Pol'y 243 (2018).

AEJMC 2019 National Conference in Toronto: PF&R Panels

Law & Gaming Issues in Tech
Wed., Aug. 7 11:45 a.m. - 1:15 p.m.

Co-Sponsoring Division: Electronic News

Panelists:
Lyombde Eko, Texas Tech
Jayson Hilchie, President & CEO , Entertainment Software Association of Canada
Clay Calvert, Florida

Moderator: Shaina Holmes, Syracuse

From Emma Goldman to the Marketplace of Ideas: Marking the 100th Anniversary of Free Speech at the Supreme Court
Wed., Aug. 7 3:15 p.m. - 4:45 p.m.

Co-Sponsoring Division: History Division

Panelists:
Brooke Kroeger, NYU
Jared Schroeder, Southern Methodist
Jeff Smith,Wisconson-Milwaukee
Erika Pribanic-Smith, University of Texas, Arlington

Moderator: Aimee Edmonson, Ohio

Information vs. Disinformation: Who's in Control?
Thurs., Aug. 8 11:45 a.m. - 1:15 p.m

Sponsoring Division: Law & Policy

Panelists:
John Fraser president and CEO, National News Media Council, Toronto
Dianne Garyantes, Rowan University

Moderator: Chip Stewart, Texas Christian

The Work Ahead: Law and Media Management in the Age of #Metoo
Fri., Aug. 9 1:15 p.m. - 2:45 p.m.

Co-Sponsoring Division: Media Management

Panelists:
Anne Kingston, senior writer, Maclean's
Ginger Blackstone, Harding University
Arien Rozelle. St. John Fischer

Moderator: Tori Smith Ekstrand, UNC

Law, Policy and International Reporting: Issues of Jurisdiction
Thurs., Aug. 8 1:30 p.m. - 3:00 p.m.

Co-sponsoring Division: International

Panelists:
Kyu Ho Youm, University of Oregon
Ed Carter, Brigham Young
Ryder Gilliland, DMG Advocates, Toronto
Iris Fischer, Blake, Cassels & Graydon LLP, Toronto

Moderator: Roy Gutterman, Syracuse

Going On the Record About Being Off the Record: The Debate: Confidential Sources vs. The Ethics of Anonymity
Fri., Aug. 9 3:00 p.m. - 4:45 p.m.

Co-Sponsoring Division: Media Ethics

Panelists:
Lee Wilkins, Missouri
Tom Devine, Government Accountability Project
Genelle Belmas, Kansas
Fred Vultee, Wayne State and Missouri

Moderator: Kathy R. Fitzpatrick, American University

Mark Your Calendar: Important Dates for AEJMC 2019

Tues., Aug 6, 1:00 - 5:00 p.m. Law & Policy Pre-Conference

Thursday, Aug. 8, 6:00 - 8:00 p.m. Top Paper Session & Business Meeting

Thursday, Aug. 8, 8:00 p.m. Division Social @ Assembly Chef's Hall

Friday, Aug. 9, 8:00 a.m. WILD (Women in Law Division) Breakfast @ Location TBD

Advocating for Media Law & Policy Education

Erik Ugland
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All of us in academia are hyper-specialists, so we're prone to a little egocentrism when defending our turf with university peers and administrators. It's a tendency we should normally guard against. But right now, for all of us in this division, it's the perfect time to quash our inhibitions and unleash our inner advocate. The subjects we teach and study are so vital to the empowerment and self-fulfillment of individuals in the digital age, and are so central to the principal debates that are shaping the structure and character of our societies, that it just won't do anymore to keep them sequestered in j-schools and comm departments.

This is a critical moment to not only protect our courses in our departmental curricula but also to push these subjects, or versions of them, into university curricula as well. There is no reason why universities should not view media law and policy as natural components of a modern university education.

There are several reasons for this, which I addressed more fully in Communication Law & Policy ("Expanding Media Law and Policy Education: Confronting Power, Defining Freedom, Awakening Participation"). The most obvious is that everyone is now a mass communicator and without some foundational constitutional and media law knowledge, people expose themselves to legal risk and coercion. They also limit their speech possibilities by not understanding the ways in which the First Amendment (access, newsgathering) and other sources of law (FOIA) can enable them to be influential citizen-communicators.

Another reason is that there are widening disparities in public opinion about the meaning and social function of freedom of speech and press. We are at the start of a uniquely disruptive period in First Amendment history, with critical choices to be made about micro-level issues — like how best to conceive of, and potentially bracket, hate speech, commercial speech, fake news, etc. — and about which macro-level framework to embrace as well. Should we double-down on the libertarian/neoliberal model reflected in current U.S. law and policy, drift toward the authoritarian approaches that are proliferating around the world, or embrace a more socially focused and pluralistic version like those that still endure in parts of Europe? None of these is predestined for us, and all citizens need to be equipped to help drive and respond to movement on these issues.

The third reason to expand media law and policy eduction is that the most consequential social and policy issues of our time involve media and expression (net neutrality, surveillance, AI, big data, platform regulation, online privacy, media access), and our response to these issues will largely dictate the balance of social power in the coming decades. We need a generation of engaged citizens who can be leaders on these subjects. We can help prepare them through targeted course work and by creating opportunities for them to develop their ideas and contribute to public debate while still in school — all of which, not incidentally, would support the broader project of resuscitating young citizens' political efficacy and engagement.

There are different ways to achieve the goal of expanding media law and policy education, several of which are outlined in the CLP article, and some of which are already being put in place by our division colleagues. The form that these initiatives take is less important than the broader aims, for which all us can and should serve as unabashed evangelists.

Erik Ugland is an Associate Professor at Marquette University. His article, "Expanding Media Law and Policy Education: Confronting Power, Defining Freedom, Awakening Participation" appears in Vol. 24, Issue 2 of Communication Law & Policy.

AEJMC 2019 Research Sessions

Research Session 1 - Hate, threats, and incitement: the balance between speech and risks to public safety, Thursday, August 8, 8:15-9:45am

Discussant: Kalen Churcher (Wilkes Univesity)
Moderator: Cayce Myers (Virginia Tech)

The Understanding of Absolute Right to Freedom of Expression Concerning Hate Speech in the Case of the Charlottesville Incident, Qinqin Wang (Louisiana State University), Roxanne Watson (University of South Florida)
Exploring Legal Solutions to Address the Problem of Hate Speech in the United States, Caitlin Carlson (Seattle University)
The Trouble With "True Threats," Eric Robinson (University of South Carolina), Morgan Hill (University of South Carolina), *2nd Place Faculty Paper

Research Session 2 - Top Papers Panel, Thursday August 8, 5:00-6:30pm

Discussant: Chip Stewart (Texas Christian University)
Moderator: Tori Ekstrand (University of North Carolina)

Troll Storms and Tort Liability for Speech Urging Action by Others, Clay Calvert (University of Florida) *
1st Place Faculty Paper
TL;DR and TC;DU: An Assessment of the Length and Complexity of Social Media Policies, Jonathan Obar (York University) **1st Place Debut Faculty Paper
Algorithms, Machine Learning, and Speech: The Future of the First Amendment in a Digital World, Sarah Wiley (University of Minnesota) ** 1st Place Student Paper

Research Session 3 - Threats to expression: compelled speech, forum pressures, and tribalism, Friday August 9, 8:15-9:45am

Discussant: Mike Martinez (University of Tennessee)
Moderator: Dayo Abah (Washington & Lee University)

Wither Zauderer, Blossom Heightened Scrutiny?, Clay Calvert (University of Florida)
Forum Delegation: The Birth and Transposition of a New Approach to Public Forum Doctrine, Brett Johnson (University of Missouri), Shane Epping (University of Missouri)
Past Imperfect: Packingham, Public Forums, and Tensions Between Media Law's Present and Internet Regulation's Future, Anthony Fargo (Indiana University)
The Tribal University: Factions, iGen and the Threat to Free Speech on Campus, Joseph Russomanno (Arizona State University) *3rd Place Faculty Paper

Research Session 4 – Reputation on trial: modern journalism law concerns, Friday August 9, 11:30-1:00pm

Discussant: Nancy Whitmore (Butler University)
Moderator: Amy Kristin Sanders (University of Texas)

"I also consider myself a First Amendment lawyer," Jonathan Peters (University of Georgia)
Neutral Reportage "Missing In Action" In U.S. Law But Expanding In Foreign Law As A Libel Defense, Kyu Ho Youm (University of Oregon)
Media Mea Culpas and Journalistic Transparency: When News Outlets Publicly Investigate Their Reportage, Clay Calvert (University of Florida)

SESSIONS, continued on 7

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Research Session 5 – Hands Off: Challenges in Gathering Information, Saturday August 10, 12:45-2:15pm

Discussant: Jane Kirtley (University of Minnesota)
Moderator: Eric Easton (Baltimore School of Law)

Privacy Exceptionalism Unless It's Unexceptional: How the American Government Misuses the Spirit of Privacy in Two Different Ways to Justify both Nondisclosure and Surveillance, Ben Cramer, (Pennsylvania State University)
A Structural Imperative: Freedom of Information, the First Amendment and the Societal Function of Expression, A. Jay Wagner, (Marquette University)
Lost in translation: The disturbing decision to limit access to audio court files for podcasters, Kelli Bolling, (University of South Carolina) ***3rd Place Student Paper

Research Session 6 – Poster session, Thursday August 8, 1:30-3:00pm

Discussant: Jack Breslin (Iona College)

'Funding Secured:' A Forty Million Dollar Tweet that Highlights First Amendment Issues Associated with Regulating Speech on Social Media, Sam Cohn (Syracuse University College of Law) ***2nd Place Student Paper
Boycotts, Blacklists, and De-Platforming: The ACLU Wrestles with Private Censorship, Stephen Bates (University of Nevada, Las Vegas)
Deciding Fair Use, Amanda Reid (University of North Carolina)

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AEJMC 2019 Preconference Schedule

1 to 5 p.m. / PC007 Kenora – (Second Floor)
Law and Policy Division

Preconference Workshop Session: Emerging Issues in Media Law

Part I (1 p.m. to 2:15 p.m.) **Moderating, Defending and Reporting on Global Freedom of Press and Access to Information**

Moderating/Presiding
Roy S. Gutterman, Syracuse

Panelists
Phil Tunley, Canadian Journalists for Free Expression
Iain MacKinnon, Linden & Associates

Part II (2:15 p.m. to 3:30 p.m.): **U.S. and Canadian Communication Law: Challenges and Opportunities in the Global Century**

Moderating/Presiding
Jon Peters, Georgia

Panelists
Kyu Ho Youm, Oregon
Amy Kristin Sanders, Texas at Austin
Edward Carter, Brigham Young
Iris Fischer, Blake, Cassels & Graydon, LLP, Toronto
Ryder Gilliland, DMG Advocates LLP, Toronto

Part III (3:45 p.m. to 5 p.m.): **LAWP Teaching Award Winners**

Moderating/Presiding
Jared Schroeder, Southern Methodist

Panelists
First Place
Daxton "Chip" Stewart, Texas Christian and Jonathan Groves, Drury
Second Place
Brett Johnson, Missouri
Third Place
Stacie Jankowski, Northern Kentucky
Honorable Mention
Jason Martin, DePaul

Annotated Bibliography: Summer 2019

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Stacy Norris, *"…And the Eye in the Sky is Watching Us All"—The Privacy Concerns of Emerging Technological Advances in Casino Player Tracking*, 9 UNLV Gaming L.J. 269 (2019)

We may not all have the best of luck at casinos. One wrong roll of the dice or a bad hand can lead to some pretty hefty losses. Yet, the constant risk of losing is all part of the thrill and patrons may find that the higher the stakes, the sweeter the taste of victory. Most gamblers are fully aware of the potential financial consequences involved. However, due to recent technological advancements, players may be losing a lot more than they bargained for. In her note in the University of Nevada, Las Vegas Gaming Law Journal, student Stacy Norris explores new developments in the use of biometrics in casino surveillance systems and assesses the impact such tracking could have on player privacy.

Apparently, the practice of "player tracking" is nothing new. Casinos have been monitoring players—in one form or another—for decades. The methods, Norris points out, have evolved over time. On the simpler side, casinos offer patrons reward cards that, once activated following a quick scan of the user's driver's license, allow the holder to swipe at machines and tables throughout the casino to earn points. Some casinos incorporate this technology into their guests' hotel room key cards for convenience. While players accrue points per play, casinos accumulate information, like what games they play, how long they play, how much they bet, and how much they win. This level of data collection seems harmless. However, reward cards are the least of our worries. Norris warns that "[t]echnological advancements in video surveillance, biometrics, and other varying means to identify and track people have reached an almost Orwellian level of intrusiveness."

Facial recognition technology has been prevalent in casinos since the early 2000s and today patrons may even be individually identifiable on surveillance cameras despite external apparel like hats, glasses, and scarves. Perhaps the most daunting development to date is the use of biometrics, which "refers to the method of identifying persons through scanning a part of the human body possessing unique characteristics." Norris explains that such characteristics can include an individual's face, irises, fingerprints, speech, heartbeat, and even the way in which they walk or carry themselves. Ten years ago, a patent was issued for a biometric gaming device capable of scanning user fingerprints and facial features. More recently, within the past three years a patent was issued for a stress-detecting gaming system. The patent depicts a slot machine capable of collecting and analyzing a user's emotional demeanor over time. Scanners on the machine can read a player's biometric data via "infrared cameras, pupil scanners, body movement scanners, body temperature sensors, blood pressure sensors, [and] pulse sensors" to measure whether and to what extent a player is stressed, excited, depressed, bored, or intoxicated.

Norris illustrates that the use of biometric data collection by casinos could have both a positive and negative impact on players. On the one hand, this technology could help casinos better identify frequent customers and offer them a more personal and customized experience. Fingerprint or facial scanning machines could also simplify the process of transferring credits or calculating winnings. A quick glance at a scanner at the cash-out cage would certainly be more convenient than keeping track of multiple reward cards or lugging around a handful of chips. Biometric devices could also be programmed to recognize signs of problem gambling to combat the addictive nature of casino games. A system could shut down, for example, upon registering a specific fingerprint or could prompt a user to take a break when excessive levels of stress are identified. On the other hand, however, this sort of technology could be abused. Systems may be programmed to encourage compulsive players. Casinos are businesses after all. To increase their profits, they may tweak the odds of payouts. Based on biometric readings of levels of stress or excitement, casinos could tune machines to discourage low rollers or to egg on higher bets through strategic manipulation of players' perceptions of their odds. Continued data collection also makes casino databases more enticing to hackers and will inevitably

lead to a greater risk of liability should the systems be compromised.

Although the United States Supreme Court fluctuates on its assertion of privacy as a constitutional right, Norris inquires whether biometric data collection violates the Fourth and Fifth Amendments. Norris also points out that the question of whether a casino is a state actor is also likely to muddy the waters. If a casino is deemed *not* to be a state actor, Norris offers as another "possibility that covert, undisclosed monitoring via surveillance and biometrics could constitute intrusion on seclusion" under tort law. Proving that a patron not only had a reasonable expectation of privacy but also an expectation of seclusion on the public floor of a casino, however, is sure to serve as a formidable roadblock. Courts have typically limited these expectations to areas within the walls of one's own home. Albeit, arguments can still be made that individuals expect that the type of personal information collected by biometric devices remain private and secluded. Many patents for gaming machines incorporating biometric technology have been filed within in the last decade. For casino patrons, the cards may already be stacked against them in terms of maintaining privacy over their personal information on the floor.

Matthew Bunker, Ph.D., *Reality Bites: The Limits of Intellectual Property Protection for Reality Television Shows*, 26 UCLA Ent. L. Rev. 1 (2019)

From classics, like *The Dating Game* and *Candid Camera*, to contemporary shows, like *The Bachelor* and *Big Brother*, proto-reality and reality television has experienced a steady progression of popularity over the past sixty years. Audiences are continuously captivated by the excitement and impulsive feel of unscripted programming. When producers ditch the script, they not only make content more unpredictable and relatable, but can also often cut the cost of production by approximately 75% compared to their scripted and dramatized counterparts. However, due to the format of reality TV shows, creators have a hard time protecting their content from competitors. In his recent article, University of Alabama Journalism Professor Dr. Matthew Bunker examines the current intellectual property protection available for reality TV programming.

Dr. Bunker lays out a general history of the rise of reality television and explores past litigation concerning alleged content and formatting appropriation. He highlights the immense advantage typically granted to defendants in copyright infringement cases. Dr. Bunker notes that plaintiffs tend to fail in two key aspects: (1) distinguishing between an idea and an expression, and (2) passing the doctrine of *scenes a faire*. As to the first speedbump, Dr. Bunker explains that mere ideas are not protectable under copyright law. For example, the concept of a plot about two people falling love, splitting up, and then reuniting is a mere idea that can be reproduced in an infinite number of styles without constituting infringement. However, an expression, which incorporates more specific details, takes an idea and transforms it into a unique and copyrightable work. In the prior example, such details could include the character development, dialogue between the couple, the specific events that transpire throughout their rollercoaster romance, the setting of the show, etc. The second speedbump plaintiffs face, *scenes a faire* "(literally scenes that must be done) [,] include stock plot elements, characters, and other literary devices that are so standard as to be almost obligatory in connection with a particular theme or setting." Dr. Bunker demonstrates, for instance, the indivisibility of common elements like trucks, drinking, and cheating partners to the country music genre.

It is not uncommon for a reality show, especially one that receives unprecedented success, to fall victim to the greedy claws of a copy-cat competitor. However, Dr. Bunker asserts, all hope is not lost. Dr. Bunker illuminates that, although ideas and *scenes a faire* are not protectable on their own, works that arrange unprotected elements in an original way can pass both tests to assert ownership. Even then, though, plaintiffs must also prove that similarities with the defendant's program are "striking." Mitigating factors may aid the plaintiff in meeting this burden, such as if the defendant had significant access to the plaintiff's work prior to the alleged appropriation. Conversely, factors such as whether the defendant's program has similar elements but also includes additional features that substantially alter the ambiance of the program could ultimately swing in the defendant's favor.

Lastly, Dr. Bunker contemplates the likelihood of a success if pursuing relief under trademark and trade dress law as opposed to copyright. A reality TV plaintiff could file a trademark claim asserting that a rival program incorporates elements so similar that it creates a significant likelihood of confusing both audiences. Additionally, trade dress claims could be filed

should a plaintiff believe a defendant program has appropriated a distinct image from their show, such as a recognizable set where the show is filmed or perhaps a specific character's iconic style or costume. Unfortunately, Dr. Bunker reveals, trademark and trade dress are "not [likely to] serve as a particularly fruitful avenue for reality TV plaintiffs" beyond claims of explicit appropriation of a program's name, logo, or slogan. Overall, Dr. Bunker recognizes that the plight of reality TV plaintiffs seeking relief for infringement is tough. However, he is hopeful that protection can be achieved when plaintiffs ensure that their infringement complaints are sufficiently genuine and specific.

Elissa Tucci, *#NOFILTER: A Critical Look at Physicians Sharing Patient Information on Social Media,* 16 Ind. Health L. Rev. 325 (2019)

In this note, Indiana University Robert H. McKinney School of Law student Elissa Tucci reveals the benefits and drawbacks of unregulated social media use by physicians. Tucci's topic was prompted by the recent publication of unsettling Snapchat images taken by nurses in a naval hospital. "One image depicted a nurse flipping her middle finger at an infant with the caption, '[h]ow I currently feel about these mini Satans.' Another post was a video of a nurse mishandling a newborn by making it appear to dance as music played in the background." Tucci warns that this sort of conduct on social media is a serious violation of both professional medical standards and rules protecting patient privacy. Unfortunately, the viral photos and video were far from isolated events. According to Tucci, numerous physicians have incorporated social media into their daily operations and the chance of misuse is high. Despite regulatory efforts, like those implemented by the Department of Health and Human Services ("HHS") and the Health Insurance Portability and Accountability Act ("HIPAA"), Tucci believes the true issue stems from the fact that few, if any, rules offer clear guidelines and detailed explanations of specific examples of proper and improper social media use.

Tucci begins by highlighting the rapid evolution and unprecedented popularity of social media and how certain applications, like Snapchat, found their way into the medical professional world. Like all professionals to some extent, physicians have had to adapt to the digital age. For many, this eventually led to the use of social media. Today, numerous physicians from a range of specialties have dedicated social media accounts specifically for the purpose of promoting their practice. Due to the multiple benefits of using social media, medical accounts are popping up every day. Snapchat, in particular, has proven to be an ideal platform specifically because of its "lax censorship community guidelines." For example, content involving nudity is permitted on Snapchat if it is depicted non-sexually. On Facebook and Instagram, however, any posts involving nudity are strictly prohibited and are subject to removal. This distinction has made Snapchat a popular platform for plastic surgeons. Through Snapchat accounts, plastic surgeons can reach an infinite number of past, present, and potential clients. This serves as an educational tool. Individuals can follow a physician's account to learn about procedures on a relaxed and user-friendly medium. It also allows physicians to put out a certain perspective of their practice and offer followers a glimpse of the practice's overall personality. Uploading daily images and videos can show a lot about a practice's standard of care. Social media accounts also allow new patients to view images of successful procedures or to connect with other patients that have undergone similar procedures to alleviate anxiety. From a business perspective, physicians that have incorporated social media accounts also generally experience a higher number of patient bookings.

Despite all the advantages of social media use in medical practice, serious concerns about the proper protection of patients and health information have also surfaced. Physicians are not always as careful as they should be when it comes to maintaining patient confidentiality. Specific guidelines have been established under HIPAA concerning consent and voluntary disclosure of protected health information. If all elements are not met, a post involving a patient on social media is invalid and the practice will face severe consequences. Tucci asserts that there are also prevalent ethical issues at hand. A post published online by a physician must "not only compl[y] with legal standards, but also meet[] general standards for ethics and professionalism within the medical community." Further, Tucci stresses the need for accurate content. Are physicians editing photographs to an extent that they are not correct representations of their actual operations? Are certain risks and precautions relevant to the depicted procedures being properly identified so as not to mislead potential patients? Physicians should also

be weary of broadcasting obscene or explicit images or videos more for the sake of entertainment than education. If physicians are not careful in their postings, they could risk not only corroding the credibility of their private practice, but also risk tarnishing the integrity of the medical community as a whole.

Recognizing the need for a more structured and specific set of guidelines, Tucci makes a few recommendations. First, she suggests that physicians be required to take an additional exam prior to practicing medicine. Just as lawyers must take the Multistate Professional Responsibility Examination ("MPRE"), Tucci recommends physicians take a similar examination to fully understand their ethical expectations and to reduce future breaches. Second, Tucci proposes specific clarifications be added to current social media guidelines, whether these additions be tacked on to the rules set forth by the American Medical Association or to the code implemented at an individual medical practice. Lastly, Tucci advocates for a heightened degree of liability for physicians that abuse social media by posting false or misleading content. In general, social media offers a vast array of features that can drastically improve communication and understanding between patients and medical professionals. By no means does Tucci encourage that physicians reduce their use of social media. Instead, she seeks to alleviate current methods of misuse through proper education and regulation in order to reinforce the public's trust in the professional medical community.

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