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Winter 2019
Media Law
AEJMC Law & Policy Division

Threats to Libel Law Remind us of the Importance of our Work

Head Notes

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Welcome to the Winter edition of Media Law Notes. Thanks to Caitlin Carlson, our Newsletter Chair/ Clerk, for putting together this month's excellent issue.

On February 19, Justice Clarence Thomas called in his *McKee v. Cosby* concurrence for SCOTUS to "reconsider" *New York Times v. Sullivan*, the landmark libel ruling that safeguards press freedom by applying the actual malice standard to public officials in defamation lawsuits. In *McKee*, SCOTUS refused to review an appellate determination that Kathrine McKee is a public figure for the purpose of her defamation suit against Bill Cosby.

Justice Thomas's statements come on the heels of multiple assertions by President Trump that draconian libel laws make it nigh impossible for public officials to prevail in libel lawsuits. Over the past two years, Trump has made promises to "open up our libel laws," which he deems a "sham and a disgrace."

Predictably, the response has been divided. Many scholars, journalists, and professional groups condemned these statements, but some claim this will rein in media abuse. Notably, Cass Sunstein discussed how *Sullivan* effectively

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The Ontology of Fair Use

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The epic legal battle between Google and Oracle is knocking on the SCOTUS's door – again. On January 24, 2019, Google filed its petition for writ of certiorari to the Supreme Court. Oracle sued Google, alleging that Google's Android mobile operating system infringed Oracle's computer code. After a 25-day trial, the jury returned a verdict in favor of Google, finding that Google's use of Oracle's software was fair use. But the Federal Circuit disagreed. Viewing the jury verdict "as advisory only," the

Federal Circuit independently weighed the fair use factors and "conclude[d] that allowing Google to commercially exploit Oracle's work will not advance the purposes of copyright in this case."

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deprives public figures like Kathrine McKee of a remedy.

Abandoning *Sullivan* would leave the press vulnerable to censorship by public officials. In an era where the press has been labeled as the "Enemy of the People," it is imperative to defend vigilantly these attempts to encroach on press freedom.

The work of organizations like AEJMC is increasingly important. AEJMC connects scholars and practitioners, spurring stimulating discourse and facilitating creative research endeavors. This issue of Media Law Notes is packed with information about how you can become more involved with AEJMC, including details about the Southeast Colloquium and the 2019 Annual Conference, two opportunities to come together for edifying conversation.

The Southeast Colloquium takes place on March 7-9 at the University of South Carolina, in conjunction with the Media & Civil Rights Symposium. Details for the conference can be found on pages 15-17 of this issue. Thanks to Mike Martinez for his incredible work handling all aspects of Southeast Colloquium planning.

Our annual conference is on August 7-10 at the Sheraton Centre in Toronto. We wanted to get the schedule in your hands now, though we are still finalizing many details. Thanks to our Vice Head, Roy Gutterman, for his hard work collaborating with other divisions to plan our conference panels. Once our panelists are confirmed, we will update you with that information. Pre-conference sessions are slated for the afternoon of Tuesday, August 6. We will will share details about these sessions as they come available.

The division has also received and is beginning the process of reviewing nominations for the fifth annual Stonecipher Award, which recognizes the top work in legal scholarship concerning freedom of speech, freedom of the press, and communication law and policy. This award, established in memory of Dr. Harry W. Stonecipher by Kyu Ho Youm and Doug Anderson, was presented last year to Morgan Weiland of Stanford Law for her brilliant article, "Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition." Thanks again to Dean Smith for his work in soliciting nominations and coordinating the review process. We are excited about presenting the award this year at our annual division meeting in Toronto.

Finally, we continue to prioritize graduate student outreach. Thanks to our graduate student liaison, Kyla Garrett Wagner, and our social media administrator, Kristen Patrow, for their hard work.

And thanks to you for making the division successful. If you would like to discuss becoming more involved in the division, or if you have questions or suggestions, please email me at kearston.wesner@quinnipiac.edu.

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Is fair use a fact question for the jury or a legal question for the court? On appeal, are fair use decisions reviewed deferentially or de novo? This case raises important and timely questions about how to conceptualize and operationalize fair use.

The ontological nature of copyright fair use is often misunderstood. Professor Paul Goldstein put it colorfully: "Fair use is the great white whale of American copyright law. Enthralling, enigmatic, protean, it endlessly fascinates us even as it defeats our every attempt to subdue it." I contend that fair use is best understood as an affirmative statutory right that also serves as a speech-protective safeguard. Fair use is an affirmative right; it is not an affirmative defense. Fair use is a purposive, non-infringing use; it is not an exception simply to be tolerated.

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ." Copyright, as the Court noted in *Harper & Row*, is an instrument for achieving a utilitarian goal of promoting the "harvest of knowledge." Whether a use is fair or not is assessed by considering four statutory factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the

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copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The statute expressly provides that fair use "is not an infringement of copyright."

Conceptually, whether fair use is denominated simply a defense or rather an affirmative defense affects who has the burden of proving fair use and which party should prevail if the evidence is in equipoise. As a matter of statutory construction, fair use is a right and a definitional limit on a copyright holder's statutory right. Section 108 acknowledges the "*right* of fair use as provided by section 107." A copyright holder's Section 106 rights are "subject to" Section 107 fair use. And Section 107 states fair use "is not an infringement." As a definitional limit on a copyright holder's statutory right, fair use cannot logically be denoted an affirmative defense. It is a legal (not equitable) defense, not an *affirmative* defense. If fair use "is not an infringement," then the copyright holder has not met its prima facie case of infringement without negating fair use. Fair use should not be a user's burden to prove, rather it should be the copyright holder's burden.

The fair use analysis balances two statutory rights: the author's limited right to exclude and the user's affirmative right to fair use. The fair use analysis is not a natural right balanced against a begrudgingly abided use, rather the analysis balances two statutory rights that are mutually necessary to achieve the constitutional mandate to promote progress. And more than simply a statutory right, fair use is also entrusted with a speech-protective function. In *Golan* and *Eldred*, the Supreme Court emphasized that fair use, along with the idea/expression dichotomy, are "built-in First Amendment accommodations."

We should not lose sight of the mutuality of the push and pull forces of the author and the user. Fair use is as old as copyright. The objectives of fair use are the objectives of copyright. To achieve its constitutionally prescribed objectives, copyright needs fair use. Fair use is not an infringing act to be merely tolerated or excused, but rather it is part and parcel of the very purpose of copyright, namely promoting the progress of learning. The copyright schema cannot have one without the other; the two forces are the yin and yang of the copyright bargain.

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Southeast Colloquium 2019: Law & Policy Programming

LAW & POLICY RESEARCH SESSION
FRIDAY, March 8, 9:00 a.m. – 10:15 a.m. | Reese Phifer Hall Room 104-B

Give Me a ©: Refashioning the Supreme Court's Decision in Star v. Varsity into a More Complete Copyright Protection for Fashion Designers
Jared Schroeder | Southern Methodist University
Camille Kraeplin | Southern Methodist University
Anna Grace Carey | Southern Methodist University
Lauren Hawkins | Southern Methodist University
Kylie Madry | Southern Methodist University

It's Bigger than Hip-Hop: Sampling and the Emergence of the Market Enhancement Model in Fair Use Case Law
Brooks Fuller | Louisiana State University
Jesse Abdenour | University of Oregon

The Ghost in the Machine: Legal Personhood and Copyright Eligibility for Artificial Intelligence
Mariam Turner | University of North Carolina at Chapel Hill

New Life for False Light: Finding a Remedy for Highly Offensive Individualized Predictions in the Age of Big Data
Andrew Pritchard | Iowa State University

Moderator: Robert Andrew Dunn | East Tennessee State University
Discussant: Clay Calvert | University of Florida

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The Journal of Media Law: Ten Years of Notable Law & Policy Research

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Freedom of speech and the press is increasingly international and comparative. Publications that rivet our attention to these US-centric freedoms more often include an international perspective. Consider, for example, The Free Speech Century and Troubling Transparency. These notable books center on Americans' experience with freedom of expression since 1919 and with the U.S. Freedom of Information Act (FOIA) since 1966. But they each devote an international and comparative section: "The International Implications of the First Amendment" in *The Free Speech Century* and "Comparative Perspectives" in *Troubling Transparency*. These works contextualize U.S. law globally because their editors discerningly appreciate, in the words of U.S. Supreme Court Justice Stephen Breyer in *The Court and the World*, "the new challenges of an ever more interdependent world."

These days, members of the AEJMC Law and Policy Division explore global free-speech issues more searchingly. The International Covenant on Civil and Political Rights and the EU General Data Protection Regulation have been analyzed for Communication Law & Policy and Journalism & Mass Communication Quarterly. This is a welcome change in communication law research in the United States. In the mid-1980s, one of my conference papers was curtly rejected simply because its foreign law topic would not interest AEJMC members.

Furthermore, the profiles of non-U.S. journals like The Journal of Media Law[1] and Communications Law in England and Media & Arts Law Review in Australia will likely rise globally in the near future. Although there is currently a dearth of U.S. authors in such international journals, several American First Amendment scholars serve on the editorial boards of these UK and Australian journals.

1 Full Disclosure: I have been an editorial committee member of the JML since 2010.

JML: U.K. Media Law Scholars' Vision

This year marks the tenth anniversary of JML. It was founded in 2009 by three leading English media law scholars, including Eric Barendt (University College London), author of Freedom of Speech, one of the best books on comparative free speech.

In their founding journal Editorial, Barendt and his coeditors, Thomas Gibbons (University of Manchester) and Rachel Craufurd Smith (University of Edinburgh), stated: Although some issues of JML will be "on topics of particular importance" to England or Europe, JML, "a new, distinctive platform" for chronicling and analyzing major media law developments, aims to discuss these developments globally.

JML's intended readers—and therefore contributors—are diverse. Barendt, Gibbons, and Craufurd Smith noted that JML would publish articles of interest to media law practitioners as well as to media law academics.

JML: Traditional and "New Media" Law Contents

JML is inclusive in that it is open to traditional topics and also to "new media" law issues. Among the topics covered by JML are:

- children's privacy rights
- right to information
- right to pseudonymity
- social media and privacy
- reputation as honor
- data protection and professional journalism
- intermediary liability
- independence of public service broadcasting
- media freedom
- newspaper copyright
- antiterror laws and the news media
- commercial influences on program content
- protection of minors against harmful content
- online copyright infringement
- journalistic privilege

JML publishes three categories of content. Its two main categories are "Comment and Analysis" and "Articles." In addition, JML reviews books, although not regularly.

What distinguishes comment/analysis from articles? Articles, as Gibbons points out, critically analyze a media law topic or issue in depth and consider relevant literature, legal doctrines, and regulatory policies. In addition, articles "should demonstrate a high standard of research rigour and provide insights that make a major contribution to the field" because of their "originality and significance."[2]

In contrast, comment/analysis is narrower in scope and less in depth. Gibbons limits this category to "recent significant developments" in media case law, regulatory policies, and official reports. But comment/analysis submissions must be "rigorously researched" and "offer original insights"; JML will not accept "a purely descriptive report."[3]

To date, JML has published more than 190 content pieces, including 82 articles, 63 comments/analyses, and 42 book reviews. One of the earliest articles was Barendt's "Balancing Freedom of Expression and Privacy," which concerned the European Court of Human Rights. Among the

2 Email from Thomas Gibbons to Kyu Ho Youm (Feb. 7, 2019, 02:21 AM PST) (on file with author).
3 Id.

informative case comments/analyses were those on the European Court of Justice's "right to be forgotten" decision and the ECtHR's "right of reply" ruling. The most recent book reviews include Jan Oster's European and International Media Law (2017) and David Rolph's *Defamation Law* (2015)—thoughtfully critiqued by Craufurd Smith and Barendt, respectively.

JML: Focusing on Global Inclusion

JML has not been as global as originally envisioned, but that situation will be changing. U.K. law has garnered the lion's share of attention. More than 50 percent of the past JML articles related to England; EU and comparative laws were less frequently addressed. Nearly three-quarters of the JML authors were from the U.K.[4] Only one dealt with American media law primarily, and two JML authors were based in the United States.

Anthony Fargo (Indiana University-Bloomington), a Law and Policy Division member, has published in JML about U.S. law on anonymous speakers on news websites. In early 2019, he observed: "JML flies under the radar of most U.S. media law authors."[5] This is surprising, given that Law and Policy Division members should have taken note of JML as their worthy publication outlet sooner.

Regardless, I was elated at the August 2018 email from Gibbons hoping that his journal will "attract submissions from a wider range of jurisdictions."[6] And I was equally delighted to learn in January 2019 that Jacob Rowbottom (University College Oxford) would take a position as a new coeditor while Barendt, a founding JML coeditor, would remain as the journal's consultant editor.

Fargo commended Barendt for "encourag[ing] other American scholars to consider publishing in the journal, particularly if the topics they are writing about have an international connection." And in the Internet era, Fargo added, "most media law issues potentially have such a connection." [7]

JML: Publishing High-Quality Research

Throughout the years, the JML editors have been remarkable in publishing high-quality research articles, case comments/analyses, and book reviews. Glance through the published JML authors, and you'll find out: I am not engaging in rhetorical hyperbole!

JML has established itself as a first-rate scholarly journal within a short period of time. Just ten years ago, the inaugural issue was published. And now, at JML's tenth anniversary, JML's growth as an agenda-setting presence in media law publications and its undoubted future influence on global media law are truly something to celebrate.

Youm is professor and Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication. He wishes to thank research fellow Justin Francese for his able assistance with researching the Journal of Media Law.

4 When it comes to multiple authors, the authorial country is limited to the first author.

5 Email from Anthony L. Fargo to Kyu Ho Youm (Jan. 23, 2019, 11:36 AM PST) (on file with author).

6 Email from Thomas Gibbons to Kyu Ho Youm (Aug. 29, 2018, 1:59 PM PDT) (on file with author).

7 Email from Anthony L. Fargo to Kyu Ho Youm (Feb. 17, 2019, 06:30 AM PST) (on file with author).

LAW DIVISION AEJMC PF&R PANELS: TENTATIVE SCHEDULE

Law and Gaming: Issues in News Tech
Wednesday, August 7, 11:45 a.m. to 1:15 p.m. Co-sponsoring with Electronic News.

From Emma Goldman to the Marketplace of Ideas: Marking the 100th Anniversary of Free Speech at the Supreme Court
Wednesday, August 7, 3:15 p.m. to 4:45 p.m. Co-sponsoring with History Division.

International: Law, Policy and International reporting: Issues of Jurisdiction
Thursday, August 8, 1:30 p.m. to 3 p.m. Co-sponsored with International

Information vs. Disinformation: Who's in Control?
Thursday, August 8, 11:45 a.m. to 1:15 p.m.

The Work Ahead: Law and Media Management in the Age of #Metoo
Friday, August 9, 1:15 p.m. to 2:45 p.m. Co-sponsoring with Media Management Division.

Going On the Record About Being Off the Record - The Debate: Confidential Sources vs. the Ethics of Anonymity
Co-sponsored with Media Ethics Division, Friday, August 9, 3 p.m. to 4:30 p.m.

Off the Beaten Path: Hidden Gems for Media Law Developments

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I got into media law for two reasons that I know many of you share: first, I believe wholeheartedly in the freedoms embodied in those 45 words, and second, I love the fact that it's always changing. That second reason comes with its own challenges. As I write this, media law teachers and scholars are mulling over Justice Clarence Thomas' announcement that he'd like to "reconsider" the libel standard established in New York Times v. Sullivan over 50 years ago. And that's just one (albeit, pretty major) recent development.

Our challenge as media law teachers isn't struggling to make the content fresh; that happens organically. But it may be how to find the material to help us do that for our classes. Big news, like Thomas' bombshell, is easy to get. Everybody covers the Supreme Court. It's the lower court decisions with the occasional juicy opinions, the administrative law developments, the wacky bills sometimes announced by state legislators – that's the fun material to talk about in class, the "you can't make this stuff up" content. Here are my current go-to places for those teachable legal developments:

Constitutional Law Prof Blog. It's got a great First Amendment section, which is why I initially subscribed, but those scholars also discuss other con law issues, like the suit against the president's national emergency declaration. Subscribe and be delighted – these bloggers are unsung heroes. And they announce conferences and calls for papers.

Proskauer on Advertising Law. This law firm has a specialty practice in false advertising and trademark. The posts here feature not only Supreme Court cases but also those from state and appellate courts. Bonus: these bloggers love clever titles. A recent example: "Kimberly-Clark Unable to Flush Wet Wipes Case."

CommLawBlog. The blog of law firm Fletcher, Heald & Hildreth, it covers a range of communications law topics. Most of what it's been lately is FCC developments. So, for example, the FCC's regular review of ownership rules is announced, as well as texting regulations. Interested in TCPA? CommLawBlog's got it.

New Media and Technology Blog, Proskauer. The good folks at Proskauer also have a blog discussing these areas. I find the posts on data gathering, aggregation, and dissemination to be particularly interesting, but there are also posts on the development of facial recognition, license agreements, and intellectual property. The sheer breadth of this site makes it a great one-stop shop.

Foundation for Individual Rights in Education (FIRE). Students love to talk about themselves and others like them, and FIRE tracks developments in speech and press rights on college campuses. Like our beloved Student Press Law Center, FIRE focuses on student rights but also includes faculty speech rights. FIRE also releases an annual "worst of the worst" list of campuses restricting freedom of expression. (Disclosure: KU made the list this year for a flag censorship debacle last summer. At least it's good discussion fodder.)

I hope that these sites help make prepping a future class meeting easier for you by providing a few more places to look for less-known but still awesome legal developments. L&P could host a page on our website with these and other helpful teaching links. Send your favorites to me at gbelmas@ku.edu, and I'll start compiling.

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Fakes or Mistakes?

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Sometimes a story is too good to be true. In today's hyper-partisan media environment, where "fake news" has become a default criticism to stories you do not like, this can be a troubling and disturbing standard.

A BuzzFeed article in January may be one of those stories. BuzzFeed reported that President Donald Trump told former lawyer Michael Cohen to lie to Congress. Questions soon arose about its accuracy. BuzzFeed reiterated the article was accurate. However, an unusual public statement by Special Counsel Robert Mueller stated there were inaccuracies in the piece.

This is not the first time a publication may have gotten something wrong, and it certainly will not be the last time. Doing journalism is not always clean and easy. Reporting, especially when some sources are not coming forward or are recalcitrant or have their own agendas, does not make it easy.

Journalists sometimes make mistakes. Any respectable news outlet will do its best to get things right the first time around. But these organizations will also be responsible and fix those mistakes when they do happen. This used to mean waiting a day or two in the news cycle to publish corrections or clarifications on a designated page in the paper, or making a brief announcement on the air to correct the record.

In today's digital age, corrections, additions, clarifications or updates can correct the record almost immediately. And the interactivity of digital news, where readers can post comments or communicate more directly with writers and editors through social media or other platforms, puts readers, viewers and followers even closer to the reporters than ever before.

Today's journalists might not have the layers of copy editors they once had. But now they have legions of potential editors and fact-checkers who are ready, willing and capable of pointing out every inaccuracy, misstatement or mistake.

BuzzFeed, which in recent years has ventured beyond listicles and trivialities to cover substantial political and investigative issues, is standing behind its story and its confidential sources. The authors referred to two sources who were close enough to the information to have the data. BuzzFeed should maintain those confidences. But it raises concerns if those stories are eventually proven wrong.

In recent weeks, other news outlets have faced questions and criticism after publishing a story that may sound too good to be true.

In December, a story in Germany's pre-eminent newsmagazine, Der Spiegel, was exposed as containing numerous falsities after one of its star reporters wrote a profile of the town of Fergus Falls, Minnesota.

The reporter fabricated a host of phony details, characterizing the small town as a racist, pro-Trump bastion. Among the most egregious falsities was that the town had some anti-immigrant militiamen and a sign at the town line that said, "Mexicans Keep Out." The descriptions were so outrageous, they would be difficult to believe. Yet they were in print.

According to post-scandal reports, some townsfolk laughed it off; others publicly challenged Der Spiegel to set the record straight, which it did. The newsmagazine sent another reporter to the town to do a real profile and correct the erroneous impressions left by the first article. Also, the newsmagazine planned to file a criminal complaint against the reporter, which is apparently a viable option under German law.

While these mistakes damage the media's credibility, it's important to remember that they are outliers. Most of the reporting derided by the Trump White House as "fake news" has been borne out by the facts.

When the media is wrong, civil laws allow individuals and, in some cases, businesses to protect their reputations. Laws of defamation and, in some states, invasion of privacy serve as a check on irresponsible or harmfully false published statements.

The media are largely unregulated, as it should be under the First Amendment. However, news organizations often set their own newsgathering, editing and fact-checking standards.

The vast majority of journalists across media adhere to these standards. And readers and viewers rely on that so they can trust the news. When mistakes happen -- whether they are inadvertent mistakes, calculated for political purposes or fabricated for some unfathomable reason -- it reinforces the dog whistles of "fake news" and erodes the credibility of the institution. Eventually, the truth will surface and set the record straight.

Roy S. Gutterman is an associate professor of communications law and journalism and director of the Tully Center for Free Speech at the Newhouse School at Syracuse University. A version of this article ran in Syracuse.com/ The Post Standard

Law and Policy Division
Call for Papers
Toronto, Canada 2019

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2019 AEJMC Conference in Toronto, Canada. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, FCC issues, intellectual property, obscenity, freedom of information, and other relevant 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. Bluebook citation format is preferred, but 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**. Before submitting your paper, please make certain that all author-identifying information has been removed and that all instructions have been followed per the AEJMC uniform paper call. Take every precaution to ensure that your self-citations do not in any way reveal your identity. 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.

Instructions/Logistics

All research papers must be uploaded through an online server to the group appropriate to the paper's topic via a link on the AEJMC website: **www.AEJMC.org**. The following uniform call will apply to ALL AEJMC paper competitions. Additional information specific to an individual group's call is avail able at the end of the uniform call information.

1. Submit the paper via the AEJMC website link (www.aejmc.org) to the AEJMC group appropriate to the paper's topic. Format should be Word, WordPerfect, or a PDF. **PDF format is strongly encouraged.**

2. The paper must be uploaded to the server no later than 11:59 P.M. (Central Daylight Time) Monday, April 1, 2019

3. Also upload a paper abstract of no more than 75 words.

4. Completely fill out the online submission form with author(s) name, affiliation, mailing address, telephone number, and email address. The title should be printed on the first page of the text and on running heads on each page of text, as well as on the title page. **Do NOT include author's name on running heads or title page.**

5. Papers uploaded with author's identifying information WILL NOT BE CONSIDERED FOR REVIEW AND WILL AUTOMATICALLY BE DISQUALIFIED FROM THE COMPETITION. ALL AEJMC DIVISIONS, INTEREST GROUPS AND COMMISSION PAPER SUBMISSIONS WILL ABIDE BY THIS RULE WITHOUT EXCEPTION. We encourage everyone to submit at least a day before the conference deadline so that there is time to do a final check of the documents for self-identifying information, and time for resubmission prior to the deadline if necessary.

We are also in need of reviewers. If you are not writing a paper, please contact Nina Brown (information below) if you are willing to serve the division as a reviewer.

If you have questions, please contact Nina Brown, Law and Policy Division Research Chair, Syracuse University, Phone: (315) 443-9330; email: nmibrown@syr.edu

AEJMC Law & Policy Division Call for Submissions: Teaching Ideas Competition

The Law & Policy Division seeks submissions for the tenth annual Teaching Ideas Competition. The division wants to hear your ideas for innovation in teaching communication law and policy. Submissions can focus on creative approaches for studying a case or cases; new ideas for incorporating emerging issues and technologies into courses; effective in-class group activities or assignments that help students synthesize key lessons; group projects that encourage collaborative learning; lesson plans or syllabi that reveal innovative approaches for a seminar or skills courses; ideas for experiential or service learning; or ideas from any other area of teaching and learning that will help others improve their courses.

Winning submissions will receive certificates and cash prizes: $100 for first place, $75 for second place, and $50 for third place. Winners will be invited to present their ideas as part of a pre-conference session and will be recognized during the Law & Policy Division's business meeting in Toronto. Winning ideas will also be showcased on the division website and in Media Law Notes.

All submissions must be received by May 6, 2019. Submissions must be sent as an email attachment (preferably a Word or PDF document) to Teaching Chair Jared Schroeder at jcschroeder@smu.edu. Please use "Teaching Ideas Competition" in the subject line.

Please provide two documents in the email.

- In the first, include your name, affiliation, contact information, and the title of your idea.

- In the second, describe your teaching idea in 1-2 pages (single-spaced) in this format: introduction of your idea, your rationale for it, an explanation of how you implement the idea, and student learning outcomes. Include any related links at the bottom of the submission. Please attach any relevant attachments to the submission email. This is the document that will be sent to the judges.

A panel of judges will blind review each submission based on the idea's creativity, innovation, practicality, and overall value to students. Submissions will be acknowledged via email but not returned.

Submitters need not be Law & Policy Division members. Both faculty and graduate students are welcome to submit. Those who placed in the top three last year are not eligible to compete this year. Past entrants who were not awarded may revise and resubmit ideas from previous years.

Winners will be notified by mid June. If you have questions, please contact Jared Schroeder at jcschroeder@smu.edu.

Call for reviewers
2019 AEJMC Conference

The Law and Policy Division needs your help reviewing papers for the 2019 AEJMC Conference in Toronto. If you aren't submitting a paper, please consider being a reviewer! We need close to 80 reviewers to keep the number of papers per reviewer at a manageable level. Ideally, we will have enough reviewers volunteer so that each reviewer will handle three papers. Reviews will occur between April 1 and May 1, 2019.

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 volunteer, please contact Nina Brown, Research Chair, at nmibrown@syr.edu. To help best match reviewers to topics, please specify in the email 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!

Law & Policy Division Officers

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Stuart Anello, Musical Innovation's Sworn Enemy: The Infringer, 36 Cardozo Arts & Ent. L.J. 797 (2018)

In this article, Yeshiva University student, Stuart Anello, proposes a new take on current copyright protections for musical creators. Section 8, Clause 8 of Article I in the United States Constitution secures "for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Anello argues that this right has been denied to many musical artists in light of the evolving digital age. He asserts that "increasing the threshold by which an infringement may be successful" will lead overall to greater efforts to maintain originality and higher quality works. A lower standard for establishing infringement, Anello claims, "will force music creators to evaluate their works…in a manner more conducive to the progress of the art."

Anello begins with a comprehensive timeline of the development of musical copyright law in the courts. He highlights two approaches from the Second and Ninth Circuits respectively. Following the 1946 *Arnstein v. Porter* decision, Anello notes the Second Circuit's development of a two-pronged approach: whether "(a) the defendant had copied the work; and (b) the copying went so far as to constitute improper appropriation." Anello explains that access and similarity are important factors for the first prong. In the second prong, the factfinder listens to the music and decides if the later work is similar enough to constitute infringement. Courts require a "substantial similarity," meaning they decide whether the average listener is likely to recognize the connection between the original work and the new composition.

Following the case of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, "the Ninth Circuit uses an (a) extrinsic test, in which expert testimony and dissection are relevant, followed by an (b) intrinsic test, in which the opinion of the lay listeners is the only relevant factor." Anello describes the extrinsic test as a gatekeeper only allowing cases in which the works share production similarities beyond that of overall sound. These include such elements as "melody, harmony, rhythm, pitch, tempo, phrasing, structure, [and] chord progressions." The intrinsic test is based upon the same "substantial similarity" requirement as the Second Circuit approach. Anello points out, however, the immense difficulty courts face in determining substantial similarity between two works. He warns that many issues arise, including poor detection due to amateur ears, problems distinguishing between original features and those within the public domain, and allowing the mechanical alterations to mask the infringed "genius" of the original work.

As accessibility and ease of sharing continues to improve, Anello warns "aspiring creator[s] must realize their responsibility to monitor themselves when sending new works into the cast streams of the marketplace." He urges for an update of current copyright infringement standards among the courts to protect original artists and encourage innovation in the music industry. Anello suggests that, due to the reach of the Internet, the requirement of access should be automatically assumed in every circumstance regardless of evidence. He asserts that compositions as well as their sound recordings and unique expression should be considered one tangible form of an original work as opposed to two separate components. Further, he recommends that unique production techniques employed in a song's creation fall under the category of objective similarities so as not to be missed by untrained ears. Anello hopes the courts will consider *remixing* their current approaches and he predicts that a stricter standard will improve the marketplace while promoting and protecting original musical works.

Alfred R. Cowger, Jr., Liability Considerations When Autonomous Vehicles Choose The Accident Victim, 19 J. High Tech. L. 1 (2018)

"Go-Go Gadgetmobile!" You may be familiar with this phrase if you have ever enjoyed the children's show, *Inspector Gadget*. It is an animated television series following a quirky cyborg police inspector on his numerous criminal investigations. As part-man/part-machine, Inspector Gadget always has a trick up his sleeve—*quite literally*—popping out gadgets ranging anywhere from a heli-

copter hat to extendable and retractable robotic arms. Perhaps one of his most versatile gadgets is the Gadgetmobile. Throughout the many series spin-offs, his trusty transportation has taken on dynamic styles, been equipped for crime fighting, and, in some of the latest renditions of the show, now has its own personality, operates autonomously, and can even talk! Although the Gadgetmobile was no more than a futuristic fiction at the time of the television series' creation in the 80s, such a vehicle may not be so far-fetched. Today, semiautonomous vehicles—using sensors to navigate on behalf of their occupants—are already operating on public roads.

In his recent article, attorney Alfred R. Cowger, Jr. predicts the complicated liability issues sure to follow the imminent rise of autonomous vehicles. He addresses the conundrum of where to place the blame when your vehicle makes the *choice* of what (or who) to hit in an unavoidable collision. Cowger, Jr. applies current product liability standards and suggests alternative approaches to compensate for this quickly evolving and risky technology. The types of autonomous vehicles we will soon see in operation won't *think* in the same sense that the anthropomorphic Gadgetmobile does, however, Cowger, Jr. explains that they will calculate responses to situations on the road via an internal computer's algorithm and "will also have the capacity to 'learn' from other vehicles" through data exchange. These systems will be programmed to make their own decisions and, therefore, manufacturers will be unable to predict what responses these vehicles will choose in any situation. Difficult decisions will inevitably emerge, and vehicles will have to make split second choices with no *right* answer. Cowger, Jr. compares this to the age-old ethical trolley dilemma—do you choose to let a speeding trolley hit five patrons or do you choose to pull a lever to divert the trolley to another track on which only one patron will be hit?

In a similar manner, Cowger, Jr. poses the present question: who should be liable when autonomous vehicle decisions result in harm? If neither the occupant nor the manufacturer (assuming the vehicle operated as intended and not based upon a mechanical manufacturing or design defect) had any control over the vehicle's choice of victim in an unavoidable collision, present tort law standards, he argues, will not apply. Given their removal from the vehicle's algorithmic choices, Cowger, Jr. also points out that any blame placed upon manufacturers would essentially discourage the production of such vehicles, resulting in the societal loss of an immensely beneficial technology. He reminds his readers that autonomous vehicles are intended to significantly lessen the amount of harm on the road overall and statistics will surely improve despite occasional victims. If we decide the technology is worth the risk, Cowger, Jr. suggests some alternative standards to determine liability.

In his opinion, the common torts standards today won't cut it. Cowger, Jr. asserts that there must be a balance and proposes that "[t]he legal system will have to move beyond current legal theories in order to ensure that victims of autonomous vehicles are compensated, while at the same time protecting the autonomous vehicle industry, which will be a clear benefit to society, from debilitating absolute liability." He suggests there be no finding of fault or responsibility in such cases. Instead, "the insurance sector should pay the victim the compensation [that a court determines] he or she deserves, and the autonomous vehicle itself should be the source of insurance to pay those damages." He explains that insurance could be tied to the vehicle itself and laws could require each vehicle be insured. This cost could fall upon the individual owners, as it does now, or even the manufacturers, perhaps to offer as benefits in sales promotions. Cowger, Jr. envisions that such regulation could help the autonomous vehicle market thrive and eventually reach optimal efficiency.

Megan Deitz, A Crime Remembered: The Possible Impact of The "Right To Be Forgotten" In The United States For Crime Victims, Criminal Defendants, And The Convicted, 9 Ala. C.R. & C.L. L. Rev. 197 (2018)

For those who have used social media since its humble beginnings, there may be an accumulation of embarrassing videos, unflattering photos, or an occasional lamentable past post floating around in the dark recesses of the Internet that most would prefer not to resurface. Content of this nature on social media likely involved some form of consent at some time—albeit, regrettable in hindsight. However, many people with data online face much graver repercussions than a few humiliating snapshots. In her article, University of Alabama student, Megan Deitz, explores the benefits of a new fundamental right created by the European Union (E.U.) granting their citizens a "Right to be Forgotten" (RTBF). This legislation requires the removal of unwanted search results online. Deitz focuses on the positive impact this sort of legislation could have

"in the United States, [if a RTBF were to be] specifically tailored to victims of crimes, former defendants, and certain convicted individuals mentioned in web searches and social media."

Deitz describes that, in the eight months following the creation of the RTBF, "Google [was] flooded with other two hundred thousand removal requests from users in the E.U." Most users sought relief from recurring embarrassing results upon searching their names online. Deitz envisions, however, that such a right could profoundly benefit past criminals and others directly affected by crime in the United States by offering a smoother "reintegrat[ion] into society." Often the Internet can make it almost impossible to escape one's checkered past. Deitz explains how "[a] single browser search can lead the curious to mug shots, revenge porn, prior convictions, and newspaper events" that invade any potential progress toward a fresh start. No matter the efforts to clean up one's act, a few search terms can quickly unearth decades of dirty laundry.

According to Deitz, strict adherence to the First Amendment is the largest roadblock to allowing a RTBF in the United States. Expanding privacy online risks suppressing freedom of speech and, thus, has not been entertained by the United States government. Deitz claims, however, that one's right to privacy should be equally protected, "particularly when dealing with victims of heinous crimes or individuals whose crimes are expunged." The E.U.'s RTBF requires that content "controllers" (such as Google) bear the responsibility of ensuring that personal data online is lawfully processed, collected for legitimate purposes, relevant and not excessive, up to date, and accessible for no longer than necessary. Upon request, Google is required to remove data that is deemed to be "inadequate, irrelevant…or excessive." Any denial of a request must be proven to be "necessary to protect the public interest regarding public heath, historical or scientific purposes, or legal obligations to retain the data."

Deitz contrasts the E.U.'s RTBF with the privacy policies of the United States. Here in America, "[a]ny restriction imposed on the expression of free speech must qualify as a 'compelling government interest' and be narrowly tailored [and the least restrictive] to carry out that interest." Many worry that allowing removal of online content would hinder the freedom of speech. Despite these First Amendment fears, Deitz claims that a specially "tailored RTBF in the United States through data controllers" could offer a happy medium between privacy rights and freedom of speech. Under the United States Constitution, the federal government is not permitted to limit free speech. Deitz points out, however, that this prohibition does not extend to private actors. Following Google's efforts in the E.U., Deitz suggests private companies take up internal reviews of content in the United States. Private internal review does not mean these companies gain imminent control over online information. Deitz attests that in the E.U. data removed under the RTBF is never fully deleted. Access is only made exceedingly difficult to "all but the extremely persistent." She also offers the alternative of "deranking" results via filtering algorithms. Deitz explains that many social media companies already utilize similar efforts to weed out unwanted information on their outlets. Users agree to these limitations on their speech when they click acceptance of the sites' Terms and Conditions agreements.

Deitz does not purport that the United States should implement an unrestricted RTBF. She acknowledges that community interests are very important factors to consider. Public safety is certainly a concern and, depending on the nature of past actions, some information may be necessary to keep public (i.e. location of sex offenders). For criminal victims, however, a specifically tailored RTBF could make some extremely uncomfortable memories easier to live with. Deitz asserts that a handful of states, for example, allow publishers to keep non-consensual (non-child) pornography online as a form of free speech despite victim requests for removal. In another example, Deitz points out that families of murder victims must deal with the constant availability of forensic photographs of their loved ones online.

For former criminal defendants, Deitz explains that "the presence of information on the internet and social media regarding criminal activity affects the… ability to rehabilitate through employment or educational opportunities due to prejudice and bias." Content depicting a past criminal record can sometimes be harder to expunge than the record itself. Sites publishing mug shots, for example, often require payment for removal—if they even humor a request—and this still doesn't take care of the numerous locations on which a picture could have been shared or re-posted. Deitz also notes that "many background check websites do not update information regularly to reflect expunged records" leading to inaccurate results that are not easy to contest. Those who have been convicted will likely be offered less privacy than victims or past defendants,

however, Deitz suggests that a modified RTBF should at least provide some options for those with expunged non-violent misdemeanors. Deitz does not support full privacy for presently convicted criminals. She clarifies that a tailored RTBF "should only be enjoyed by individuals who were acquitted, received forgiveness from the courts to aid in their reentry into society, or committed minor misdemeanor offenses that were not a threat to public safety." A darkened past should not prevent a brighter future.

Southeast Colloquium 2019: Law & Policy Programming, cont.

LAW & POLICY RESEARCH SESSION

FRIDAY, March 8, 10:45 a.m. – Noon | Reese Phifer Hall Room 343

Counterspeech, Time, and the First Amendment
Victoria Smith Ekstrand | University of North Carolina at Chapel Hill

Algorithms, the First Amendment, and Discrimination: The Case for Extending Civil Rights Laws to Computer-Mediated Commercial Transactions
Stephen Kilar | Arizona State University

Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court's 2017 Free-Speech Rulings
Clay Calvert | University of Florida

"Walk" This Way, Talk This Way: How Do We Know When the Government is Speaking After *Walker v. Sons of the Confederacy*?
Kristen Patrow | University of North Carolina at Chapel Hill

Moderator: Dianne Bragg | University of Alabama
Discussant: Jared Schroeder | Southern Methodist University

LAW & POLICY DIVISION PANEL DISCUSSION

FRIDAY, March 8, 2:30 p.m. – 3:45 p.m. | Reese Phifer Hall Room 104-B

"Globalizing U.S. Media Law Teaching: Challenges and Opportunities in the 21st Century"

Panelists Edward Carter | Brigham Young University
Victoria Smith Ekstrand | University of North Carolina- Chapel Hill
Anthony Fargo | Indiana University- Bloomington
Amy Kristin Sanders | Northwestern University at Qatar

Moderator: Kyu Ho Youm | University of Oregon

RESEARCH IN PROGRESS ROUNDTABLE
SATURDAY, March 9, 9:00 a.m. – 10:15 a.m. | Hotel Capstone, Gayle and Bagby Rooms

TABLE #2 Law and Policy Division

The FCC, Sponsorship ID and the Curious Case of WLS
Chris Terry | University of Minnesota

VidAngel and the Metaphysics of Copyright Law
Ed Carter | Brigham Young University
Patrick Perkins | Brigham Young University

Truthful Information, Interested Parties? Justice Thomas' Notions of Speech Regulation
Genelle Belmas | University of Kansas Harrison Rosenthal | University of Kansas

Getting Unblocked: Is the Designated Public Forum Doctrine Enough?
Stephen Kilar | Arizona State University

The Video Privacy Protection Act of 1988 and its Impacts on Modern "Video Tape Service Providers"
Keith Saint | University of Florida

Moderator/Discussant: Brooks Fuller | Louisiana State University

LAW & POLICY DIVISION PANEL DISCUSSION
SATURDAY, 10:45 a.m. – Noon | Hotel Capstone, Bagby Room

Lost in Translation: The Disturbing Decision to Limit Access to Audio Court Files for Podcasters
Kelli S. Boling | University of South Carolina

Is Facebook the New Phone Company? Common Carrier Law Provides a Transnational Foundation for Limiting the Power of Online Media Platforms
Andrew Pritchard | Iowa State University

No Means No: An Argument for the Expansion of Shield Laws to Cases of Nonconsensual Pornography
Austin Vining | University of Florida

Clickwrap Agreements and the Psychology of Assent
Daniel Haun | University of South Carolina

Moderator: Cynthia Peacock | University of Alabama
Discussant: Victoria Smith Ekstrand | University of North Carolina at Chapel Hill