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The Student Press Law Center Report (ISSN 0160-3825), published three times each year by the Student Press Law Center, summarizes current cases and controversies involving the rights of the student press. The SPLC Report is researched, written and produced by journalism interns and SPLC staff.


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CORRECTION

In the story “Private police facing greater public scrutiny” in the Spring 2008 SPLC Report, Massachusetts state Sen. Patricia Jehlen’s name was misspelled on page 20.

The SPLC regrets the error.
Michael Beder, McCormick Tribune Foundation Publications Fellow, graduated from Northwestern University’s Medill School of Journalism in June 2007. He worked for four years at the student newspaper, The Daily Northwestern, where he served in a variety of roles, including as news editor, Forum editor and managing editor. He interned as a reporter and Web producer at the St. Louis Post-Dispatch, and he was a Dow Jones Newspaper Fund copy editing intern at the St. Paul Pioneer Press in Minnesota.

Rob Arcamona, summer 2008 Scripps Howard Foundation Journalism Intern, graduated from the Pennsylvania State University in December 2007, where he majored in journalism. Rob served as a reporter, anchor, news director and general manager of Penn State’s radio news station, ComRadio. In 2006 he served as an investigative reporting intern at WTOP Radio. He has received multiple journalism awards from the Society of Professional Journalists, the Associated Press and the William Randolph Hearst foundation. He covered college censorship and access issues for the Report.

Kelsey Beltramea, summer 2008 Scripps Howard Foundation Journalism Intern, is a junior at the University of Iowa, where she majors in journalism and political science. She has been a metro reporter for The Daily Iowan for two years, covering courts and politics. She also served as a correspondent for The Des Moines Register. She covered Internet issues, libel and privacy for the Report.

Jimmie Collins, summer 2008 College Media Advisers Journalism Intern, is a senior at the University of Texas at Austin majoring in newspaper journalism with a focus on business. She worked at the student newspaper, The Daily Texan, for more than three years. She served in many positions, including as news editor, a beat reporter and a feature writer. She also held a reporting internship with the Austin Business Journal in fall 2006. She covered high school censorship, legislation and privacy for the Report.

Journalism makes better students

The relentless news of layoffs and falling earnings at media companies may make skeptics question the value of journalism education. Two recent studies make a persuasive case for why scholastic journalism still makes a difference.

In July, the John S. and James L. Knight Foundation released a summary of findings by researchers at the University of Connecticut and the University of Maryland, who interviewed more than 100,000 high school students about their attitudes toward the First Amendment.

The authors found that understanding of, and support for, freedom of speech went up significantly with students’ use of online media, both by blogging and by reading Web-based news sources. Their findings will be published in the forthcoming book, Future of the First Amendment: The Digital Media, Civic Education and Free Expression Rights in the Nation’s High Schools.

The Knight-funded study reinforces the findings of a report released in May by the Newspaper Association of America Foundation. Indiana University researcher Jack Dvorak studied the academic achievement of more than 31,000 students nationwide.

The NAAF research found that students on the staff of high school newspapers or yearbooks performed meaningfully better than non-participants in their aggregate scores on the ACT college entrance exam, high school grade-point average, and first-year college grades. The full text of Dvorak’s report, High School Journalism Matters: Journalism Student Academic Performance in the 21st Century, is available at http://www.naafoundation.org/upload/foundation_pdf/scholatic_report.pdf.

These findings make it all the more shameful that some school administrators are working so hard to make journalism unappealing and unrewarding. As you will read in our cover story, some extremists are urging the federal courts to ignore 40 years of legal precedent and rule that students have no First Amendment right to blog about their schools, even outside of school on their own time, if they can anticipate that their comments will arouse discussion at school.

The SPLC is working to convince the courts to reject this dangerous power grab by a small minority of bad administrators who put the PR image of their schools ahead of their students’ best interests.

Instead of squelching young people’s interest in discussing the issues that affect their lives, officials should heed the findings of these authoritative studies and nurture students’ enthusiasm for reading and writing, even if that means tolerating a little dissent — which, after all, is the reason we have a First Amendment.

— Frank LoMonte, executive director

SPLC spotlights stories that make a difference

Public-records laws can open up a world of discoveries, rewarding persistent journalists like those in Marcy Burstiner’s reporting class at California’s Humboldt State University.

As a class project, Burstiner’s students took on the case of 25-year-old James Lee Peters, who hanged himself in the Humboldt County Jail while awaiting a long-delayed transfer to a state mental health facility. The students found that Peters’ predicament was frustratingly common.

The judge and prosecutor in Peters’ case bemoaned the lack of adequate mental health programs — yet no one wanted to talk on the record. So Burstiner’s students turned to the California Public Records Act: for police reports, for jail logs, and — most revealingly — for the closed investigative file of the district attorney’s review of Peters’ death.

These documents spoke for Peters, vividly, and they told an important story that exemplifies the best of student journalism.

The work of these Humboldt students, and Burstiner’s tips on using open records laws, are available on the SPLC Web site at: http://www.splc.org/newsflash.asp?id=1777. SPLC will be highlighting other such creative uses of legal tools to gather stories that make a difference. We invite your submissions. Contact us at splc@splc.org.
Yearbooks face more scrutiny

N.M. book raises ire by including lesbian couples; staff prank in Calif. leads to greater official oversight

By Jimmie Collins

A t the end of each school year, students pore over their new yearbooks, looking at every picture, picking out their friends and signing messages they hope will retain meaning for years to come. By the time the next year rolls around, that annual is all but forgotten and students are ready to move on to a new year of memory making.

But students at some high schools will return to classes this fall to find the hallways full of chatter about last year’s book — and about possible changes to the way their yearbooks are run.

After publishing pictures of two lesbian couples on the relationships page of the Plainsman, yearbook staff members at Clovis High School faced a crowd of upset community members at the last school board meeting of the year. The group said including gay couples in the book is not representative of the community. Some even threatened to stop donating to school projects.

But student editors argued that featuring the couples was a conscience decision to which they gave much consideration.

“We just wanted to show that there is a diversity, there (are) gay and lesbian couples in the school and they have a right to be in the yearbook just as much as anybody else does,” Editor in Chief Maggie Chavez told the Clovis News Journal.

The Plainsman included a photo of then-sophomores Melody Trujillo and Con tezza Bonney and a caption in which the girls talk about their relationship.

The girls said they had been dating for about two years and explained their feelings for each other.

“We were just friends at first but then we started liking each other and by ninth grade we were a couple,” Bonney told the Plainsman. “She’s crazy and outgoing, that’s what I love about her. Melody’s personality is her best quality, she doesn’t care what people think about her and she makes me feel safe and loved.”

Adviser Carol Singletary said the couples approached the staff about being included in the spread. Student editors were supportive and spoke to Singletary about the idea.

“We’re a fairly conservative community, so when the [editors] wanted to include the pictures I said it’s going to make waves,” Singletary said. Because the publication is student-run, Singletary said she and the editors discussed whether the photos would violate anything in the school policy.

“It didn’t violate anyone’s privacy,” she said. “The girls were the ones who approached my staff. They were very public about [their relationship].”

The school board at the Clovis, N. M., school decided to review the district’s publication policy and consider revising it, Superintendent Rhonda Seidenwurm said.

“Currently, our attorneys are reviewing the policy to determine whether the district — through the policy — has abdicated its responsibilities to oversee student publications as defined in the Hazelwood decision,” Seidenwurm told the Student Press Law Center in an e-mail.

In 1988, the U.S. Supreme Court ruled in Hazelwood School District v. Kuhlmeier that school officials may censor high school publications if they are not designated as public forums for student expression, and if the officials can demonstrate reasonable, educational justifications for their censorship.

The school’s current policy says students control all content — with the help of the publications adviser — as long as that content is not obscene, libelous, slanderous or defamatory and does not cause a material or substantial disruption.

That language mirrors the standard set by the Court’s 1969 decision in Tinker v. Des Moines Independent Community School District, which said administrators cannot censor student speech unless there is a reasonable forecast of “material and substantial disruption” to the school or unless the speech will invade the rights of others.

The current policy says school-sponsored publications are public forums for student speech and “material that stimulates heated discussion or debate does not constitute the type of disruption which is prohibited.”

Singletary, who resigned as yearbook adviser just before the yearbook controversy, said it looks like the policy might be revised to meet Hazelwood standards so the school would have more control over content.

“I didn’t expect that,” she said. “Not one of the things that we discussed was the fact that this would result in a change in policy. I didn’t realize it would be that big.”

But the First Amendment prohibits revoking students’ control over a publication because the school disagrees with a discretionary editorial content decision, said SPLC Executive Director Frank LoMonte.

“Court after court has said that, as long as students don’t libel someone or steal their copyrighted property or break any other
laws, students can’t be punished for expressing a point of view in student publications,” LoMonte said. “If the Clovis school board retaliates against the yearbook because of a disagreement over the tastefulness of editorial content that everyone agrees was legal, the district will be begging for a First Amendment lawsuit, and it will lose.”

Will Cockrell, a member of the Christian Citizenship Team, which first opposed the yearbook spread, helped to mobilize the community to speak out against the picture at the school board meeting, according to the Clovis News Journal.

The Christian Citizenship Team is a group at Central Baptist Church in Clovis that “monitors political actions and social actions that come to bear on society that are counter to Christian doctrine,” Cockrell told the Journal.

“We don’t think that it reflects anywhere close to the attitudes and the morals of the community,” Cockrell said. “I don’t have a child in school but I’m appalled. If I were the parents of those kids, I’d own that school. Those are minors.”

But Jessie Hardison, a yearbook staff member, said she felt like the yearbook should be inclusive of all people no matter their race, gender or sexuality.

“It’s time for Clovis to come into the 21st century and be OK with people … Something little like this goes a long way and if we keep doings things like this, it might change things,” Hardison told the Journal.

Queen Creek Unified School District in Arizona also is reviewing its policies and guidelines regarding student publications after parents complained about the yearbook in May. So far the school has asked for parent volunteers to oversee the publication.

Parents were concerned about pictures of lesbian couples, students with tattoos and piercings, and teens named “best partiers” holding red plastic cups.

The district and parents said the yearbook was “glorifying things that were inappropriate for children in high school,” according to an article in the Arizona Republic.

The district’s current publications policy says the superintendent must review all student publications before they go to print, but that did not happen this time, school board member Dale Hancock told the Republic.

At Charter Oak High School in Covina, Calif., yearbook staff members will see more teacher involvement in the editorial process rather than a policy overhaul. The school is working on refining the process that the staff members work under in order to make sure errors do not make it to publication.

The change is a response to several pages in the 2007-08 yearbook that had offensive or incorrect names.

The school is reprinting the pages with correct names after students replaced the names of nine Black Student Union members with racially offensive fake names such as “Tay Tay Shaniqua,” “Crisphy Nanos” and “Laquan White.”

Principal Kathleen Wiard said the yearbook process usually allows page designers to temporarily fill in fake names until the students are identified and changes are made before the final copies are sent to the printer. For some reason, not all the final changes were made this year, Wiard said.

The school is working on changing the proofing process to something more than an editor or adviser simply asking if changes have been made, Wiard said. The teacher or coach in charge of a given organization now will be responsible for filling in each student’s name and checking the final proofs.

“We’re doing that process now with current proofs for the replacement pages,” Wiard said. The school plans to have yearbook purchasers come in early August so they can replace the pages in the books.

The school knows which students were responsible for the BSU name changes and administrators now are trying to determine how many other students were aware of the situation and failed to report it, she said.

Along with changing the process, Wiard said the publication company the school works with is going to help educate the students on the duties that come with being part of a student publication.

“The kids are going to camps and training with [the company] to talk to them about care and ethical concerns that go with that,” Wiard said.

Wiard refused to release the names of the yearbook adviser or the students involved in

Covering sexuality — carefully

BY JIMMIE COLLINS

When student journalists write about sex it almost always raises administrative eyebrows, but when the topic turns to homosexuality, the reaction sometimes escalates from concern to alarm.

Over the years school officials have censored student speech and expression — in the student newspaper, in the yearbook or on a T-shirt — that brings up sexual orientation.

But lesbian, gay, bisexual and transgender advocacy organizations say it is vital to allow youth to have a respectful discourse about LGBT issues. Censoring based on that content is illegal and could be detrimental to students representing that part of the community, they say.

“There’s a consensus that we can sort of control what young people are talking about,” said Daryl Presgraves, a spokesman for the Gay, Lesbian and Straight Education Network. “The reality is young people are so far ahead of adults and they are talking about [gay rights].”

Censoring a story because it brings up the LGBT community makes those students feel unsafe and apart from the community, Presgraves said.

“Is it fair to say to [LGBT] students that they aren’t as good as those students who meet the approval of community guidelines?” he asked.

The GLSEN helps set up Gay-Straight Alliances at high school campuses. The network also helps schools find appropriate ways to approach issues about sexual orientation and harassment.

Presgraves said administrators often censor stories in school papers out of a general misunderstanding. When students write about harassment based on sexual orientation, for example, principals often react solely because they see something about sexuality in the article.

“Regardless of what your beliefs are, you can’t ignore that there are LGBT
In Florida at Ponce de Leon High School, students were told they could not display messages or symbols supporting gay students. Principal David Davis told students that homosexuality was a sin. He forbid known gay students from speaking to younger students and suspended 11 people for standing up for gay rights.

In May U.S. District Judge Richard Smoak ruled against Davis and the Holmes County School Board. In his written opinion, issued in July, Smoak said Davis is entitled to his opinion of homosexuality but is not permitted to stifle speech. The judge also pointed out that while rainbow symbols were forbidden at the school, students were allowed to display swastikas and the Confederate flag. This clearly is viewpoint discrimination, he said.

In New Mexico at Clovis High School, the student yearbook, The Plainsman, is facing a battle against the community and the school board after including pictures of two lesbian couples on its relationships spread.

Critics said the pictures were not representative of the community. The school board is considering changing its policy so student publications will be considered closed forums, which would give the administration more control over content.

While it is important to include LGBT students in the school community, articles in student publications have to be done for the correct reasons, said Tom Avila, deputy executive director of the National Lesbian and Gay Journalists Association. Writing a story about LGBT students just to “make a check mark in the diversity column” or to make people feel proud or empowered is a common pitfall, Avila said.

“Sometimes I think the problem is one of having reached that level in doing journalism where you’re able to direct the passion you have for the subject in the ways necessary,” Avila said.

Sometimes, because reporters are so passionate about the topic, they begin to “compartmentalize” their stories and forget to do the basic reporting work that goes into any story, Avila said. Stories about religion, immigration, LGBT or a lunch menu change should all be treated with the same basic reporting steps.

Avila suggests talking to advisers or administrators ahead of time to explain the story’s importance and get their support.

Students often think they know more about the subject than they really do, especially those who are passionate about LGBT rights, Avila said. But those students should step back and ask questions.

“This is a struggle for anyone in a minority,” he said. “We run into problems when you tell a story believing you know all the answers. Find out who might know more about the subject than you.”

Using the basic steps of journalism and taking time is essential when writing about a sensitive subject and can often make the difference between a story being censored by the administration or not, Avila said.

“I fully recognize and believe in the fact that there is additional guidance required when you’re looking at a student scholastic publication,” he said. But administrative guidance cannot imply that there is something wrong with people who are LGBT, Avila said.

“When we’re eliminating a population from the student press, we’re sending a message, and that message is that the news and media is not about the full community,” Avila said.

Check the basics

Tom Avila, of the National Lesbian and Gay Journalists Association, offers these suggestions for students reporting stories that touch on LGBT issues.

- Put your story in context beyond the school. Look into the community, state or geographic region.
- Go beyond Google. Talk to people in the community or experts at your local university or college or in an LGBT organization.
- Look at how your professional counterparts are handling LGBT stories.
- Consider subjects’ privacy rights. You might need to use an alias or no last name in sensitive stories.
- Get a “reporting buddy” who can critique your work.
- Become an expert on the information you include. Prepare to answer questions the topic is likely to raise.
- Leave yourself time to write. Don’t rush stories on sensitive subjects.

Paper nearly folded after running photo, story on flag-burning

CALIFORNIA — The superintendent of Shasta Union High School District in Redding plans to get help from the local newspaper to teach student journalists how to make calculated editorial decisions. The principal threatened to shut the paper down after The Volcano printed a photo on its cover of students burning an American flag and ran an editorial on the topic.

Superintendent Mike Stuart made his announcement in mid-June, reversing a decision by Shasta High School Principal Milan Woollard to shut down the paper. Woollard had said he would eliminate the newspaper class after the last edition of the paper printed. Woollard told the Redding Record Searchlight he found the issue embarrassing and that it cemented his decision to cut the paper.

Woollard and Stuart both later cited budget concerns as the primary reason for cutting the class. Stuart decided the following week to give Shasta High School extra funding to support a class section so the paper can continue.
Student voices find sympathetic ear

Calif. lawmaker has been driving force for free-speech protections

BY JIMMIE COLLINS

Sen. Leland Yee was one of about 3,000 protesters in the 1960s who defended a little park on the urban Berkeley campus. The park was owned by the University of California and administrators intended to replace it with a new dormitory.

Although the park suffered temporary damage after being ripped up to begin construction, it was eventually rebuilt — complete with trees, flowers and sod — and is now called The People’s Park.

Yee (D-San Francisco/San Mateo) said his passion for defending student journalists’ rights stems from his passion for redressing what he and other students felt were wrongs of the Berkeley administrators.

“I was not a journalist, but I was a protester,” he said.

His days as a protester — and the fact that he emigrated with his family from China when he was three and had to fight for his citizenship — give him a unique view of the First Amendment, Yee said.

“As an immigrant, when you come to this country, you begin to appreciate this country a lot more because the citizenship you have is not given to you,” Yee said. “You earn it. You kind of seek it out.”

The First Amendment’s protections are incredibly important and set this country apart from others, he said.

The senator went to public school in San Francisco, attended Berkeley for his undergraduate degree, San Francisco State University for his master’s degree and eventually received a Ph.D. in child psychology from the University of Hawaii.

As a longtime student, and someone who continued working with children afterward, Yee said he became passionate about educating younger generations and preserving their rights. The best way to preserve the First Amendment is to make sure students understand and appreciate it, he said.

Yee was elected to the California State Assembly six years ago with 78 percent of the vote — the largest percentage for any Democratic candidate with a Republican opponent that year, according to records from the California Secretary of State. He was the first Asian/Pacific American to be appointed speaker pro tempore — the second-highest position in the Assembly. In 2006, he became the first Chinese American elected to the state Senate. Yee helped transform California student journalism with laws that specifically protect the free-speech rights of high school and college students.

Because of his reputation, lobbyists and free-speech defenders all over the state approach Yee first when there is a student journalism issue they feel the legislature should address.

“He has such a strong commitment to advancing and protecting student speech,” said Jim Ewert, legal counsel for the California Newspaper Publishers Association, who often works with Yee on First Amendment issues. “He’s quite effective and highly respected among his colleagues. He truly understands the need for continuing to protect student speech.”

Sen. Jack Scott (D-Pasadena), who is chairman of the Senate education committee, said he has been impressed with Yee since he came to the Senate.

“I’ve found him to be knowledgeable and, on the other hand, willing to listen to the possibility of amendments to a bill that he’s authoring,” Scott said.

Yee is hard-working and held in esteem by his colleagues, which helps them recognize the merits of his bills, Scott said.

While working on a current bill that would prevent administrators from retaliating against teachers who protect student speech, Yee ran into opposition from the University of California, which argued the bill would make it difficult to discipline teachers who were not properly doing their jobs. Yee agreed to amend the bill so it would protect teachers “solely for acting to protect a pupil engaged in conduct authorized by a specified provision of state law or refusing to infringe upon conduct that is protected pursuant to state law or those constitutional provisions.”

The Association of California School Administrators worked with Yee to make that change.

Laura Preston, a lobbyist for ACSA, has worked with Yee for many years — going back to when he was on the San Francisco school board, where he spent eight years. Preston said she would rank Yee in the top 25 percent of legislators she works with.

“He’s terrific; he’s very open,” she said. “We don’t always see eye-to-eye, but one of the things I look for when working with a legislator is that they will tell me if they are with me or not.”

Yee has always been very up-front about his position when working on a bill, she said. Preston and Yee often find themselves on opposite sides of legislation, but have maintained a friendly professional relationship over the years.

It is important for legislators to avoid
LEGISLATION

Legislature passes anti-retaliation bill

BY JIMMIE COLLINS

California teachers stand to get more protection this fall under a bill meant to keep high school and college administrators from retaliating against them for protecting student free speech or expression.

The state Assembly on July 14 approved Senate Bill 1370, proposed by Sen. Leland Yee (D-San Francisco/San Mateo), with a 72-1 vote. The bill was passed in the Senate 31-2 Aug. 5 before moving on to Gov. Arnold Schwarzenegger’s desk for a signature or veto.

The bill follows up on legislation Yee authored in 2006, Assembly Bill 2581, which bars administrators from punishing students for engaging in protected speech or expression. A.B. 2581 took effect in January 2007.

The teacher protection bill bounced back and forth between the legislative houses, taking on several amendments along the way. As of Aug. 1, the bill had been amended to counter arguments that it was overly broad and to address concerns from the University of California, concerned school board members and administrators.

Originally dubbed the Journalism Teachers’ Protection Act, the Assembly stripped the bill of the moniker on June 2 to make clear that the protections extend to all faculty members, not just journalism advisers.

The bill then passed the Assembly with a 67-6 vote, but upon return to the Senate it was met with more amendments. University officials, school board members and administrators pushed for more changes, saying the bill still ran the risk of protecting teachers who simply were not doing their jobs.

From Yee, Page 7

getting personally attached to a bill by becoming emotionally involved, Preston said.

“[A.B. 2581] brought everything out into the open and said that in California, we don’t allow censorship,” said Rich Cameron, chairman of the California Journalism Education Coalition, which has recognized Yee for his service to journalism.

The bill to protect teachers came this session after it became apparent that there was still a problem with censorship.

“We had a problem that the advisers were vulnerable,” Cameron said. “Administrators decided that if you couldn’t censor the students, you turn around and put pressure on the adviser to do the censoring.”

The legislature has been responsive to the bill, Yee said, and he believes most individuals in the legislature understand the importance of free speech and free expression.

“What was rather interesting and gratifying for me, despite the fact that I am a Democrat, there was quite a bit of Republican support for these bills,” Yee said. “The First Amendment is not a liberal or conservative issue.”

Yee said that he would be prepared to support conservative speech even if it exposed a viewpoint he did not agree with, and this is a lesson school administrators need to learn.

Yee said it strikes him as odd that school administrators who teach the First Amendment and tell students they should appreciate it tend to have a low threshold for speech they are willing to accept and protect. He said these administrators have the attitude that, in an instructional environment, it is OK for teachers and administrators to violate the First Amendment in order to teach the difference between good and bad.

“You don’t set up bad examples,” he said. “You don’t trash the First Amendment in the course of trying to help teach a certain lesson. That’s like a parent trying to teach their children how to be good by committing a crime.”

an assemblyman, to sponsor Assembly Bill 2581, which amended the code to extend the extra protection to college and university students. The bill, introduced in 2006, went into effect in January 2007.

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Happy Chastain, senior legislative director for UC, sent a letter on behalf of the university to Yee June 16 while the bill was awaiting consideration on the Assembly floor. The letter warned that if the bill passed without amendments, the university would be unlikely to adopt its provisions.

UC argued in the letter that the bill was misleading because it is “not simply limited to free speech rights for Journalism teachers, as implied, but the provisions would extend to all UC faculty and staff.”

The university wrote that the bill could restrict its ability to act against teachers who fail to meet academic standards and could expose the university to unnecessary litigation. School boards and high school administrators expressed similar concerns.

“S.B. 1370 would make it very difficult to reassign a journalism teacher who is not performing in accordance with academic re-
“...They should understand where we’re coming from. We don’t want schools to come in and break the law.”

Rich Cameron
chairman, California Journalism Education Coalition
Tangled Web

Courts conflict in efforts to define schools’ power over online speech

BY KELSEY BELTRAMEA

I t had been a long day at school for Avery Doninger. Her principal, Karissa Niehoff, told her about scheduling conflicts the school was having with “Jamfest” — a battle of the bands contest Doninger worked to coordinate as junior class secretary for her Burlington, Conn., high school. Doninger believed because of those conflicts, the event would be effectively canceled.

Near tears as she left the principal’s office, Doninger said she thought about the event all afternoon during talent show auditions and all through rowing practice that evening. When she finally got home from Lewis S. Mills High School, frustrated and upset, Doninger needed to vent. But her mom was not home from work yet. So she went into her “office” — a cozy, renovated closet adorned with posters of her favorite musical artists.

Accessing her online diary, Doninger wrote on April 24, 2007, that Jamfest was going to be canceled “due to the docusho bags in central office.” She encouraged those who read her entry on livejournal.com to write or call then-Superintendent Paula Schwartz’s office about the event “to piss her off more.”

Her school — nearly three weeks after the blog entry — punished her for it. Administrators said Doninger used vulgar language to convey incorrect information because the event ultimately was not canceled, just held at a later date. They said her plea for others to call the officials to “piss” them off was inappropriate for a class officer and removed her from her post, and also prevented her from serving her senior year.

But Doninger and her mother thought the school administrators had no right to control her behavior at home. They filed a lawsuit in July 2007, charging that the school abridged Doninger’s First Amendment rights when it punished her for what she said on the Internet.

In a preliminary motion, a federal district court in Connecticut disagreed, refusing to reinstate Doninger as class secretary while court proceedings were ongoing. The court noted Doninger’s punishment was relatively minor and only affected her extracurricular role as a student leader.

The 2nd U.S. Circuit Court of Appeals followed suit in May, affirming the district court decision and ending Doninger’s effort to be reinstated as a class officer before she graduated.

All because of what she said on the Internet. And Doninger is not alone.

Conflicting precedents

Despite the explosion in the popularity of social-networking sites and blogs — and in the number of disciplinary sanctions doled out to students for online expression — the Supreme Court has yet to decide a student Internet speech case. She also is a former student Press Law Center publications fellow. “But the fact that it’s accessible to more people does not mean that it should be more limited.”

Layshock, a former student at Hickory Hill School in Hermitage, Pa., got himself in trouble on MySpace when he was a senior. He was suspended for 10 days in 2006 after a mock MySpace profile he made of his principal, Eric Trosh, came to the attention of school faculty.

Using a computer at his grandmother’s house, Layshock made a profile that said Trosh used drugs and kept a beer keg behind his desk. The profile did not threaten violence or otherwise encourage disturbance at the high school, so he sued the school, claiming the discipline was unjustified.

Layshock had better luck in court than Doninger. A federal judge declared his punishment unconstitutional in July 2007 because the profile was not created at school or at the mall, they’re putting it up on the Internet,” said Rose, who is representing student Justin Layshock in an online speech case. She also is a former Student Press Law Center publications fellow. “But the fact that it’s accessible to more people does not mean that it should be more limited.”

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Layshock had better luck in court than Doninger. A federal judge declared his punishments unconstitutional in July 2007 because the profile was not created at school or during school hours, and when students viewed it at school it did not cause a "substantial disruption.”

The U.S. Supreme Court said in a 1969 decision, Tinker v. Des Moines Independent Community School District, that students are allowed to express themselves freely unless their actions cause a "material and substantial disruption” of school operations or invade the rights of other students. Defin-
ing “substantial disruption” has become the linchpin of cases involving student speech in the four decades since the Tinker decision.

Schools “are fairly creative with coming up with different disruption rationales,” said David L. Hudson Jr., a scholar at the First Amendment Center. “They essentially come up with any kind of disruption. School board attorneys are becoming fairly familiar with arguing under the Tinker standard.”

Still, it is not clear whether the Tinker decision — originally intended to address on-campus speech — applies to online expression. Hudson anticipated the absence of a clear authority for online student speech cases would ultimately result in the Supreme Court becoming involved, perhaps in Doninger’s case.

“It is a numbers game, and there are many more decisions by both state and federal courts now across the country,” Hudson said. “Doninger provides an excellent vehicle, because of its interesting facts, heightened media coverage and the fact that it is a federal appeals court decision. Obviously, it is a long shot, but sooner or later I think it is inevitable given the muddled state of this area of the law.”

And the accessibility of the Internet in classrooms, making information all the more readily available, is effectively muddling what constitutes “disruption.”

In Layshock’s case, the school district asserted that the mock profile constituted a “substantial disruption” because the school had to shut down student access to the computer system after students’ reading other unapproved Web sites, like Layshock’s, disrupted the day-to-day operation of Hickory High School.

U.S. District Judge Terrence McVerry found otherwise.

“The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web,” McVerry wrote in the ruling favoring Layshock. “Public schools are vital institutions, but their reach is not unlimited.”

Alternate standards

Courts have ruled, though, that schools have legal arguments beyond the Tinker standard. For example, the Supreme Court has said that administrators can regulate school-sponsored speech or speech that they perceive to be a true threat.

Several students at Braden River High School in Bradenton, Fla., were disciplined in June for writing and singing controversial rap lyrics after another student downloaded the music from MySpace and played it for classmates at school. A teacher overheard the music — which described violence against school officials and the principal’s daughter — and administrators doled out punishments ranging from detention to prohibiting three of the seniors from walking across the stage at the graduation ceremony.

A middle school in Weedsport, N.Y., used this “true threat” rationale to justify punishing Aaron Wisniewski in July 2001. The eighth grader had shared an AOL Instant Messenger buddy icon with friends that showed a gun shooting at a person’s head with splattering red dots and the caption “Kill Mr. VanderMolen,” Wisniewski’s English teacher. Wisniewski sued his school district, but the 2nd U.S. Circuit Court of Appeals affirmed a lower court’s dismissal, holding that threatening out-of-school speech could be punished.

Administrators also can censor lewd or vulgar speech that occurs in certain campus settings, the Supreme Court said in 1986 in Bethel School District v. Fraser. In that case, high school senior Matthew Fraser was punished for a public address he gave at school, nominating a classmate for office, that was filled with sexual innuendos. Some schools have attempted to extend the Court’s Fraser reasoning to online speech that makes its way onto campus.

The Hermitage School District is appealing its district court loss to the 3rd U.S. Circuit Court of Appeals, arguing administrators could regulate what Layshock said because it was lewd, vulgar and plainly offensive school-related speech.

But First Amendment advocates say Fraser’s on-campus speech is a long way from Layshock’s online activity — which they say schools have no jurisdiction to regulate. The Pennsylvania Center for the First Amendment at Penn State University and the Student Press Law Center have joined Layshock’s case, filing a joint friend-of-the-court brief in support of his free-speech rights.

Frank LoMonte, executive director of the SPLC, said he did not expect a ruling in the case until 2009. And then, “it would be crazy” for courts to try to extend the Fraser case into the setting of a student’s personal Web page, he said.

“There is no way that a reasonable reader looking at a student’s Facebook or MySpace page, or a student’s off-campus news blog, could confuse those Web sites for official speech by the school,” he said. “So the rationale for lowering the censorship bar in Fraser has no relevance to off-campus, online speech.”

LoMonte added his fear is not that students will lose the right to insult the principal but that they will lose the right to publish genuine news that accurately gives a negative image of the school.

“All good journalism prompts discussion, and some of the discussion may even be legitimately critical of the principal,” he said. “It can’t be the law that off-campus speech critical of the principal, or that causes other people to think less of the principal, is outside the protection of the First Amendment.”

Attorneys for Layshock have argued the mock profile he created was not at all an at-
t empt at serious journalism, but instead was a parody — protected speech under the First Amendment. Courts have defined parody as speech so extreme that no reasonable person would think it was intended to be true.

**Beyond school discipline**

The First Amendment protects student speech only against suppression or retaliation by state officials wielding state power. School employees who believe their rights were violated by online student speech can still take legal action as private citizens — as Principal Trosch has done in suing Layshock for libel, a separate ongoing case.

Other educators targeted by online pranks have similarly begun considering private legal remedies.

After students created a fake MySpace profile for Edinburgh High School Spanish teacher Trent Shupperd, his job was on the line. He told the *Indianapolis Star* in May that administrators confronted him with an online conversation he supposedly had with a female student that contained sexual overtones. Shupperd told the local paper the school’s administrators and police determined three current students and one former student set up the profile for Shupperd.

“I am considering my options and how best to move forward,” Shupperd said in an e-mail to the SPLC in June. “All options are open, and I am seeking legal guidance and the guidance of the teacher’s union on how best to proceed.”

Anna Draker, an assistant principal at Clark High School in San Antonio, sued two students and their parents in 2006 over a MySpace page that said she was a lesbian and contained “obscene comments, pictures and graphics,” according to her lawsuit.

Draker’s attorney, Murphy Klasing, said the MySpace spoof devastated the mother of two. And that sort of material should not be protected, he said.

“If a person gets on their own MySpace page and makes fun of another individual, I think that is protected, even though it’s vulgar and might be obscene — it’s protected because it’s their opinion. And an objective viewer has perspective that this is coming from a student,” Klasing said. “But when you get on and create a fake profile in the likeness of another individual, you’re perpetrating a fraud of another person.”

Klasing said a judge threw out the initial defamation lawsuit against the students because he determined the claims were not disparaging, so Draker sued for intentional infliction of emotional distress. The judge threw out that claim as well. The case is before Texas Court of Appeals.

The Bexar County District Attorney also filed a criminal charge against one of the students involved in creating the profile. He received conditional, informal probation.

The Indiana Supreme Court in May threw out a minor delinquency petition filed against a Greencastle Middle School student, identified as “A.B.,” who had posted a vulgar tirade about her principal on a MySpace group she created. The state trial court determined the girl was “delinquent” because it said her postings would be considered criminal harassment if committed by an adult.

The state appeals court reversed that decision, concluding her postings were political speech protected by the First Amendment. The Indiana Supreme Court also ruled for the student, but ruled instead that because the principal was not among the MySpace subscribers authorized to view the group, the criticism was not directly aimed at him.

Criminal charges of identity theft can also be pursued if someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic gain.

Tim Puntarelli, dean of students at Roncalli High School in Indianapolis, had to take Facebook to court in May so that he could learn who had set up a fake profile using his name.

Jay Mercer, an attorney for the Archdiocese of Indianapolis who is representing Puntarelli, said the account user sent friend invitations that would “not be appropriate coming from a dean of students” and also sent messages wrongly indicating he intended to discipline certain students.

A district court judge ordered Facebook to turn over information identifying who created and managed the account before the social-networking site took it down on school officials’ request. Facebook and MySpace both have terms of use prohibiting users from creating a false identity or attempting to use another’s account.

No matter the legality of the expression, there is an argument that school officials do not have the power to act as parental authorities when dealing with off-campus behavior.

Avery Doninger’s mother said she “grossly resented” the school officials stepping in to punish her daughter for the blog.

“Avery’s behavior happened at home at a home computer at 9:30 at night,” Lauren Doninger said. “I am perfectly capable of disciplining my children. I did not need the school district to reach into my home and take over my responsibility.”

She also questioned whether the administrators were sending the right message about civic awareness.

“I understand Avery may have not gone about it the right way, but the intention to make noise, create public awareness, rally public support for a public issue — thank God we have students who are doing that,” Lauren Doninger said. “Passivity and apathy are so much more worrisome than kids who are learning the skills of political and social organization and demonstration.”

Along with those skills, students must also be trained about online responsibility, said Warren Watson, director of J-Ideas, a First Amendment institute at Ball State University.

“Students need to remember what they post online, unlike a generation ago when people wrote in diaries, what they do on their social networking MySpace or Facebook, is available for everyone to see,” he said. “… This concept of digital free speech is really the new battleground of the First Amendment, and we must determine where the line is drawn in cyberspace.”

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 Лаура Донингер
 Мать Авери Донингер
Order on the desktop

Computer game to draw on real cases to simulate First Amendment lawsuit

By Kelsey Beltrame

I

t retired Supreme Court Justice Sandra Day O’Connor has her way, students across the country will be donning controversial T-shirts and unrepentantly violating school dress codes — in a virtual sense, at least.

The retired justice is helping to develop a free, interactive, Web-based program called “Our Courts” for middle school students to experience civics by investigating and arguing cases — like whether T-shirts with contentious messages can be worn at school.

O’Connor is providing guidance and leadership for the two-part program she is developing with experts at Georgetown University Law Center and Arizona State University.

One component of “Our Courts,” designed by a company in New York City, can be used in classroom curricula, while the other component is a game, designed by a Madison, Wis.-based company, intended for students to play in their free time.

The game challenges students to view cases from the perspectives of several actors: the client, a juror, an attorney or the judge presiding over the case. And the first game will be focused on the First Amendment, said Abby Taylor, director of the “Our Courts” project.

“We decided it was something that was really concrete that students could wrap their minds around,” Taylor said. “We know you don’t lose your First Amendment rights at the schoolhouse door, but we still don’t really know what that means, so we’re going to have kids grapple with that and figure out what that really means to them.”

She said students will be very involved in testing content to make sure they find it accessible and engaging. They will confront a fictional situation in which a school policy prohibits virtual students from wearing T-shirts that depict band names or logos because students in the fictional school have been arguing about musical tastes. The school views these arguments as disruptive. But a student wears a prohibited logo supporting a musical group anyway and is disciplined. He challenges the discipline all the way to court.

Real life bases

The student’s hypothetical situation is similar to several cases involving real-life students testing the limits of their school dress policies in the name of free speech.

In May, the mother of a Minnesota sixth grader filed a lawsuit against the school, arguing administrators violated her son’s First Amendment rights when they ordered him to stop wearing T-shirts that bore anti-abortion messages. School officials at Hutchinson Middle School in Hutchinson, Minn., told the student he could not wear the shirts because they were inappropriate and “could be considered offensive,” according to the lawsuit.

The boy, referred to as K.B. in court documents, wore three particular T-shirts on numerous occasions in April. He was not reprimanded the first day, but on another day a teacher told him his shirts were inappropriate and “could be considered offensive,” according to the lawsuit.

He was reproached at least eight more times that month for wearing the T-shirts produced by the American Life League, a Roman Catholic group that supports anti-abortion activities. On the front, one had the words, “Abortion — Growing, Growing, Gone.” Another said, “What part of abortion don’t you understand?” The third said, “Never Known, Not Forgotten.” On the back, all three said, “47,000,000 babies aborted 1973-2008.”

K.B.’s school district has a policy that prohibits schools from abridging “the rights of students to express political, religious, philosophical, or similar opinions by wearing apparel on which messages are stated.” As long as these messages are not lewd, vulgar, obscene or profane, they are acceptable, the policy states.

More than 1,200 miles away, Paul “Pete” Palmer confronted the same difficulty when he wore his opinion on his shirt.

Palmer believes the dress code at Waxahachie Independent School District in Texas violated his First Amendment rights, because administrators used their dress code regulations to prohibit him from wearing a John Edwards 2008 T-shirt in class.

He filed a lawsuit against the school district in April. In May, the district clarified its dress policies about logos, slogans, words and symbols on clothing. Students can wear “campus principal-approved” collared shirts or spirit T-shirts with messages support-
Students unfortunately right now have such a limited knowledge of civics in general and virtually no knowledge of the judiciary except what they see on TV.”

Elizabeth Hinde
Arizona State University assistant professor of education

Several students could be punished for violating the uniform codes, which required solid khaki bottoms and solid red, white or blue shirts.

The lead plaintiff, Kimberly Jacobs, repeatedly violated Liberty High School’s uniform policy and was suspended from school five times for a total of about 25 days, according to court documents. At least once, her shirt contained a message reflecting her religious beliefs.

Judge Michael Daly Hawkins wrote in the majority opinion that Tinker did not apply in Jacobs’ case because the dress code regulations were not based on particular viewpoints or messages she and the other students were attempting to convey.

In dissent, Judge Sidney R. Thomas wrote that the majority’s decision “represents a substantial rewriting and undermining of the First Amendment protections afforded by Tinker.”

Allen Lichtenstein, who represents the students and parents, said passive expression on clothing is protected speech.

“The premise that student rights do not stop at the schoolhouse door is still good law according to the Supreme Court,” said Lichtenstein, who is the general counsel for the American Civil Liberties Union of Nevada.

He has filed a petition for reconsideration of the 9th Circuit’s ruling.

First Amendment foundations

With cases like Jacobs making their way through the legal system, it is likely that officials with O’Connor’s “Our Courts” project will have to find a way to keep the game dynamic and continue supplementing the modules as time passes, said Taylor, the project’s director.

“It’s a challenge to some extent, because you can’t just release something like this and have it be done, because the law changes all the time,” she said.

For this reason, the game will focus on historic cases like Tinker and Hazelwood School District v. Kuhlmeier, a 1988 Supreme Court decision that determined administrators could censor many school-sponsored student publications by showing administrators have a legitimate educational reason for doing so.

“We hope to give students civics in a whole new perspective,” said Elizabeth Hinde, an assistant professor of education at Arizona State University who specializes in social studies education.

She is co-chairwoman of a team of educators charged with developing the “Our Courts” curriculum. “We’re going to be teaching civics from a judicial point of view, and that’s what separates this from other civics education programs.”

Hinde worked as a teacher for roughly 18 years before becoming a professor, and she still regularly works in grade-school classrooms. She is not happy with what she has been observing.

“Students unfortunately right now have such a limited knowledge of civics in general and virtually no knowledge of the judiciary except what they see on TV,” she said.

“Our hope is that [the project] will make a difference and that students will come to know and understand this third branch of government and become more informed voters and participants in our democratic process.”

Expanding students’ knowledge of the First Amendment is an important part of that effort, said Warren Watson, director of J-Ideas, a First Amendment institute at Ball State University.

“I think that there’s nothing more important than learning about being a good citizen and being involved, and the First Amendment is really the best place to start,” he said.

A study on the “Future of the First Amendment” indicates that students do not have a solid foundation in understanding First Amendment principles, Watson said.

See ‘Our Courts’, Page 17
Old issues, new questions

BY KELSEY BELTRAME

It is a routine practice for people looking for internships and jobs. One letter after another, they carefully type their names into Google and hit “Enter” to delve up their pasts. High school sprinting records. Scholarship announcements. And a mention in the university police blotter for underage drinking?

Widespread use of search engines and Web archival systems have upped the ante for journalism; because of the Web, records no longer simply appear in print one day and disappear to microfilm the next. The long-term accessibility of electronic publishing and rapid response abilities of online posters often put journalists in ethical quandaries, balancing a desire to preserve the historical record while simultaneously minimizing harm and avoiding liability.

Correcting Web content

“We get a lot of people that Google their name, and they find some quote they gave us in 1997 and they think it makes them look bad,” said Albert Sun, Web editor in chief at The Daily Pennsylvanian. “But we tell them we just can’t [delete archived information]. You want your newspapers to be a good record of what’s happened in the past, but you have to balance that with people’s expectations that things they’ve done in the past will stay in the past.”

The Daily Pennsylvanian alters content in a story only when the material is proven to have a factual misrepresentation. In addition to running a correction in the print version of the newspaper, the staff puts an asterisk in front of the corrected Web story, indicating the date the article was corrected, and sometimes includes a description of the correction at the bottom of the article, Sun said.

An unscientific poll on the College Media Advisers Web site found about 41 percent of the nearly 50 respondents handle requests to delete, change or update items on publication Web sites by allowing the student editors to decide on a case-by-case basis. Almost 44 percent of more than 80 people who responded to a separate survey question said their outlets have specific, clearly written policies that govern Web corrections, updates and deletions.

Though The Daily Pennsylvanian has no formal policy of its own, staffers try to follow the example set by professional media outlets. Most papers retain all stories exactly as they appear in the final print edition and append any corrections in a separate box. But the immediacy with which content can be altered and the triviality of the error must also factor into staffers’ decisions to make corrections, some argue.

“If something was wrong online for five minutes, you might be doing more harm than good if you say this was wrong before,” said Eric K. Meyer, an associate professor of journalism at the University of Illinois at Urbana-Champaign. “That’s one of the very complicating factors in online corrections.”

Adam Goldstein, attorney advocate for the Student Press Law Center, advised that publications alter articles only with a written agreement releasing them from liability.

“If someone wants the original text corrected, they should be willing to sign a release that agrees they won’t sue the newspaper over the corrected version,” he said. “Otherwise, corrections should appear at the bottom of the page, but never in the text itself, because changing the original text may create a new window for lawsuits.”

Each state has a statute of limitations for libel, beginning when a statement is first published. Though the laws vary from state to state, they usually require that libel lawsuits be filed within one to two years, no matter the medium. When an article is altered, it could be construed as republishing, essentially restarting the clock.

When archives go online

As publishers increasingly migrate to the Internet — making years of archived material newly accessible on the Web — it is not clear when that clock begins ticking.

Since December 2004, when Google co-founders Sergey Brin and Larry Page announced their “Google Books” Library Project, about 30 institutions across the country have partnered with the program to upload millions of volumes of text, which often include back issues of campus newspapers.

Other institutions have resolved to digitize on their own. For example, about 25,000 pages of the Yale Daily News dating back to 1878 now are available online thanks to the university’s Digital Production and Integration Program.

The first phase was mostly accomplished by May, when nearly 21 selected years of Yale Daily News archives were released onto the Internet, including the first year of publication and those spanning World War I and World War II. The Yale Daily News is the oldest college daily newspaper published in the United States, and 123 years of archives will be available when the digitization is complete.

But those records are not accessible directly through Google. One must first open the newspaper database to search material
from old publications.

Kevin Vanginderen, an alumnus of Cornell University, found his school’s old publications can be found simply by Googling his own name.

Vanginderen, who practices law in California, was taken aback when he found a 1983 article from the Cornell Chronicle, a non-student publication owned by the university press office, that linked him to burglary and theft charges.

Vanginderen filed a $1 million lawsuit in October that claimed the Chronicle libeled him in the article and that the recent digitization of the article constituted “republishing” — making the paper liable again for the article, though the statute of limitations for claims against the original story ran out long ago.

A federal judge dismissed Vanginderen’s claim, ruling that the article was substantially true and thus could not be libelous. But to the dismay of Cornell attorney Nelson Roth, the judge refrained from ruling on the republication issue, which Roth said held larger implications.

“If we were to redact or delete that information like [Vanginderen]’s asking us to do, we would be redacting or deleting that part of the historical record, a record that was always available on the library shelves,” Roth said.

Peter Hirtle, Cornell University Library’s intellectual property officer, said a ruling against the university in Vanginderen’s case would likely bring worldwide efforts to digitize library and commercial archives to a “screeching halt.”

If the court deemed Web uploading of the newspaper to be “republishing,” Hirtle said it would be “disastrous for projects that wanted to make material available online. … [E]very time you wanted to digitize something, you would have to make the same sort of editorial decisions that the original editors did the first time they published it.”

Hirtle said the Cornell University Library just finished digitizing 100,000 books with Microsoft and will add another 500,000 with Google. “And we are under no po-

sition to review the content of those books to see if there is anything defamatory in them,” he added.

Frederick Martz agreed. He is the special projects librarian in Yale University’s Digital Production and Integration Program.

“If you really had to fact check everything, it would simply stop the project. We simply couldn’t do that,” Martz said.

Officials at Yale are describing their project as “a faithful digital reformattting” and not “republishing,” he said.

Yale’s Usability and Assessment Librarian, Kathleen Bauer, added, “We’re taking something that’s publicly available on our library shelves right now, and in my view, we’re just making it more accessible.”

Comment boards

But unlike when articles were published and only stored away on library shelves, audiences now have the ability to offer their immediate opinions on the Internet. And those comments can be instantaneously affixed to articles with the click of a mouse.

Rusty Lewis, director of newspaper relations at the College Media Network, said his company offers two ways for the newspaper staffs it hosts to monitor their comment boards. Editors either moderate the messages as they come in, or allow them to immediately go live onto the Web site and take down those they consider to be offensive.

Of the more than 600 college newspaper Web sites the New York-based College Media Network hosts through College Publisher, roughly 60 percent of them allow the comments to go up without any moderation, Lewis said.

Charles Derry, a professor of theater arts at Wright State University in Dayton, Ohio, wished there would have been more moderation of student publication The Guardian’s message board.

Students approached him after reading a comment he allegedly authored in response to a student’s online letter to the editor. The posting called a student Derry advises in the theater arts department a fool.

“I felt as if I had been the victim of identity theft, that someone had taken my name,” Derry said. “And it was immediately clear to me that someone who did this was someone who knew I was the student’s adviser and was trying to hurt her by having her mentor humiliate her in public.”

He asked The Guardian to remove the comment, but editors refused, citing the First Amendment rights of whoever did post the comment. So he filed an official complaint requesting that the Student Media Board force The Guardian to remove the comment and also provide the true identity of the poster.

The matter was settled, however, when editors at the newspaper learned a College Media Network policy prohibited impersonation on Web sites it supports. A clause in the “Terms of Use” agreement says the Web site owner should not use or allow others to use the site in any manner that, among other things, “may or may appear to impersonate anyone else.” The editors removed the comment without disclosing the poster’s identity.

“Ultimately in our case, because of that small line in the College Publisher online policies, we were able to take care of this problem at this time,” said Ann Biswas, The Guardian’s adviser. “But it really was eye-opening that we really need to be proactive and create policies in advance of complicated First Amendment-type clashes that we might experience.”

Biswa said her students’ main concern was protecting the First
Amendment rights they believed the poster held, because they wanted to maintain an open forum. Now staffers at The Guardian are considering whether they want to have editorial oversight of the comments before they are posted, she said. Biswas noted she wished there was a better mechanism for verifying posters’ identities before allowing them to comment.

But Lewis said there is very little the server can do to verify identities of those that respond to articles online beyond requiring that users provide a working e-mail address.

In any event, neither Lewis’ company nor the publications it hosts can be held liable for comments on the Web. Section 230 of the federal Communications Decency Act shields College Media Network and publications like The Guardian from liability, because it holds that no provider or user of an interactive computer service can be treated as the publisher of any information provided by someone else.

However, someone could subpoena identifying information, like an IP address, about a suspect poster through the courts. An IP address is a numerical identification that can be traced to a specific Internet service provider.

The Ball State Daily News in Muncie, Ind., was subpoenaed in March for records after staff members published a story about a university employee’s lawsuit. The newspaper’s adviser, Vince Filak, said people posted personal attacks on the woman in response to the story on the Web, and she wanted to know who the posters were.

When she subpoenaed the Ball State Daily News for the posters’ identifying information, the paper refused to provide it.

“We really didn’t want to turn the information over just on general principle, because we didn’t want to set any kind of precedent,” said Filak.

He said he worried that a wave of others might come to the Ball State Daily News Web site to uncover posters’ identities and that there would be a chilling effect on the comment board. The newspaper obtained volunteer legal counsel through the Student Press Law Center’s Attorney Referral Network to contest the subpoena, and the matter still is pending.

Though there are legal protections for media outlets, Bob Steele, a scholar of journalism ethics and values at the Poynter Institute, said media outlets still have a responsibility to their readers to keep an eye on what others post on their message boards.

“The problem is there can be great harm to individuals if the monitors aren’t watching closely,” he said. “People can leave quite harmful remarks toward individuals or groups.”

Steele added that diatribes can quickly outweigh thoughtful dialogue. “It’s important from a quality control perspective for the operator of the site, including student newspapers, to have a meaningful monitoring function.”

Dustin Gardiner, The Daily Utah Chronicle’s editor in chief, said stories on its Web site can acquire up to a couple dozen comments if they are popular. The student-newspaper staff monitors comments after they are posted, looking for instances of libel and hate speech.

“We’ve written a lot of stories about undocumented immigration, and a lot of times you get people that post hate speech that distract from the purpose of the online forum,” he said.

Whereas newspapers can be held liable for material published online unless it infringes a copyright or constitutes child pornography, or unless newspaper staffers collaborate with the poster in creating the content. Even newspapers that choose to monitor Web comments — removing material that staffers determine is inappropriate or seems libelous — cannot be held accountable in court for “publishing” those statements.

“We don’t monitor comments because you have any legal responsibility to do it,” Gardiner said. “We do it because we think it’s the right thing to do.”

Seventy-four percent of those surveyed would prevent public school students from wearing a T-shirt with a slogan that might offend others, even though the Supreme Court has repeatedly said, even in the school setting, that mere “offensiveness” does not remove speech from the protection of the First Amendment. And 25 percent of Americans said “the First Amendment goes too far in the rights it guarantees.”

Gene Policinski, vice president and executive director of the First Amendment Center, in a statement released with the study’s findings, said the results “endorse the idea of more and better education for young people — our nation’s future leaders — about our basic freedoms.”

The “Our Courts” project aims to do just that. Hinde said “Our Courts” will embrace students’ “21st-century skills” to engage them in civics education and appeal to teachers wanting something more than just a textbook from which to teach.

“We have teachers lined up, literally, who are willing to participate and test run the program and work out early kinks,” Hinde said about Arizona educators.

The pilot project is tentatively planned to begin in Arizona, Virginia and New York City, with a prototype of the first free-speech module scheduled for release in December 2008.

Taylor said “Our Courts” hopes to have the module fully functional by spring 2009, thanks to funding from numerous charitable foundations.
Inside, American flags will drape over the walls while balloons float to the floor below. Music will keep the mood light and delegates on their feet. Outside, protesters will rattle chain-link fences and scream insults as riot police stand ready to squash violent protests.

The two scenes seem worlds apart but will happen side by side when the presidential conventions roll into Denver and Minneapolis-St. Paul in late August and early September.

“I’m actually pretty nervous,” said Anna Ewart, a reporter with The Minnesota Daily, the University of Minnesota’s student newspaper. “I don’t really know what to expect.”

The two atmospheres of the presidential conventions, the pomp of the convention itself and the grit of the protests outside, are poles apart and present student journalists with the dynamic and sometimes daunting task of trying to cover it all.

Melissa Subbotin, a spokeswoman for the Republican National Convention, which will take place from Sept. 1-4 in St. Paul, said there are enough events going on during the convention to make even a seasoned reporter’s head spin.

This may seem like a dream assignment to some reporters, but serious consequences come with the task. As one student journalist found out, one wrong move and a reporter might be forced to take notes from inside a jail cell.

New York, 2004

“Everything was going really smoothly,” said Beth Rankin, a former reporter for Kent State University’s student newspaper, The Daily Kent Stater. “We were actually surprised how few arrests there were … until August 31.”

Rankin and two other Stater journalists had come to New York City in late August 2004 to cover the Republican National Convention. They were shadowing a group of activists from Kent State who had decided to take part in the protests going on throughout the city that week.

“We went to a street rally in Union Square to meet up with our sources,” Rankin said. “There was a lot of tension and riot cops were everywhere. A group of people started marching down this one city block, and I had two seconds to decide to stay where I was or follow my sources. I followed.”

Rankin said that as she walked with protesters, constantly scribbling time-coded notes, police blocked off the protesters’ route — and then circled behind them.

“I had never seen such large riot cops before. A police officer yelled that everyone going to be arrested and we better just sit there,” Rankin said.

According to press reports compiled by the New York Civil Liberties Union, the New York City Police Department arrested 1,187 protesters on Aug. 31. Rankin, a working reporter, was among the arrested. In total, the NYPD reported 1,827 arrests in relation to the convention.

After police had cordoned off the marchers, Rankin said she went up to a police officer and tried to avoid arrest by showing her Stater press pass.

“I tried to tell him that I was a member of the press. He didn’t listen, just zip tied my arms and sat me down on the corner,” Rankin said.

Rankin and the scores of protesters she was with were hauled off to Pier 57, the NYPD’s “Post Arrest Staging Site.” The conditions at the site caused a media firestorm.

“There was this stuff on the floor, it got everywhere. It made people break out in rashes,” Rankin said. “They were like giant dog kennels. There were a few hundred people milling around. My press pass had been thrown away and all my stuff had been taken. I tried to tell them I was a reporter, but they weren’t listening.”

In October 2004, the New York Civil Liberties Union filed a lawsuit against the City of New York for police actions during the Republican convention. The NYCLU claims NYPD mass-arrest tactics resulted in the unlawful arrests of bystanders and observers. The NYCLU also claims detainees were kept in “unhealthy and perhaps dangerous” conditions. The case still is pending.

In its answer to the NYCLU’s lawsuit, the NYPD said its actions did not violate any law or provision of the Constitution.

Eventually, Rankin managed to borrow a detained demonstrator’s smuggled cell phone and called her mother, fellow reporters and editors at The Stater. At that point, Rankin had been in custody for nearly 24 hours.

“The food was half rotten and my ribs were swollen,” Rankin said. Just a few weeks before coming to New York, Rankin had...
surgery on her right ribs. “They were still technically broken,” she said.

The zip ties Rankin was cuffed with had rubbed off much of the skin on her wrists. She was moved from one holding cell to another on the pier as the day went on. Eventually, Rankin was taken from Pier 57 and brought to a police precinct.

“Each time I moved I thought I was getting out, but they just took me to a different pen. It really messed with my head,” Rankin said.

After a few more hours sitting in the precinct, Rankin was released.

“They threw me out of the back door onto the street. I had no phone, no money, nothing. I didn’t even know where I was,” Rankin said. “It was something out of a movie.”

Rankin said that from the time she was first detained until the time she was forced out of the back door of the police precinct 30 hours had passed. Thirty hours in police custody, for covering a story.

Covering it from the outside

Rankin’s experience is a dramatic example of what a student journalist covering the conventions could face. This year, in both Denver and St. Paul, protests and demonstration routes are planned throughout the cities.

Ewart, a reporter with The Minnesota Daily, said she was unaware of Rankin’s story.

“The thought of getting arrested didn’t even cross my mind. We haven’t even started planning for it,” Ewart said.

Officials at the St. Paul Police Department do not expect a repeat of the 2004 Republican convention. Peter Panos, a public information officer for the department, said if a protest were to get out of hand, reporters should get themselves out of the situation.

“Reporters are grown adults and know what they’re doing. They have to take responsibility for themselves,” Panos said. “If you get in the middle of protests, you’re not going to get special treatment.”

Jessica Sundin, a spokeswoman for a coalition of protest groups in St. Paul, said a standoff with police is possible during the Republican convention. In July, protest groups lost a lawsuit against the city that would extend the hours they were permitted to march beyond the noon to 4 p.m. window the city had allowed. In a July 16 report, Sundin told the Minneapolis Star Tribune that current protest hours aren’t long enough.

“I think there’s a chance of a confrontation with police when it’s 2 or 3 o’clock and there are still tens of thousands of people trying to get to the Xcel [Energy Center],” Sundin said.

Panos added that if journalists were to get caught up in a mass arrest, they should comply with police orders until they are able to identify themselves as part of the media.

The Reporters Committee for Freedom of the Press, a non-profit group, has set up a 24-hour hotline for journalists who get into trouble at the conventions this year and need to speak to a lawyer. Ashley Kissinger, a partner at the Washington, D.C.-based law firm Levine, Sullivan, Koch & Schultz LLP, will be assisting journalists at the Democratic convention in Denver.

Kissinger said if a journalist chooses to follow protesters into restricted areas, they are just as liable to be arrested as the protesters are.

“Reporters don’t have any rights beyond citizens to violate security rules and regulations. A reporter can’t just cross a police line,” Kissinger said. “They may find that the story is worth getting arrested, but that’s up for the reporter to decide.”

The better option, Kissinger said, is to ask a police officer if they could follow protesters. If the officer says no, “go ask another one. They may say yes,” Kissinger suggested.

Randy Furst, a reporter for the Minneapolis Star Tribune, said if he were faced with the decision, he would heed police warnings.

“Your job is to get the story, be the eyes and ears,” Furst said. “Not to make things crazier. You can’t report if you’re locked up.”

Aaron Montoya, editor in chief of the Rocky Mountain Collegian, Colorado State University’s student newspaper, said his first priority is reporters’ well-being.

“Keep safe above everything else. If you can stick around for the coverage, do that,” Montoya said. “Our advisers are telling us we should get to a high point and stay above the action.”

The St. Paul and Denver police departments will be assisted by dozens of other local and federal police agencies during the conventions. Although the St. Paul police may have a good working relationship with local media, the problem, said attorney Bill Tilton, is getting all of these agencies to work together.

In Denver, a $50 million federal grant has funded the city’s effort to keep the streets safe for the 50,000 visitors, not including protesters, that city officials expect to flood Denver in late August. The city has nearly 600 outside officers committed to assisting the Denver police during the democratic convention.

The police department for Aurora, a city just east of Denver, will send more than 300 officers to Denver for the convention, nearly half its force. Police Chief Dan Oates told the Denver Post in July that his officers were receiving crowd control training. Denver police have been tight-lipped about the actual

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Public positions offer insight into presidential candidates’ views on free expression

By ROB ARACONA

It might be impossible to predict just how the Democratic and Republican presidential candidates would act as commander in chief, but looking at what Sen. John McCain and Sen. Barack Obama have done in their careers could give potential voters a clue.

Although many campaigns focus on separating the two major presidential candidates, on some First Amendment and other press-related issues, McCain and Obama agree with each other.

In April 2006, the two candidates supported the Federal Funding Accountability and Transparency Act of 2006. The law was passed unanimously in the Senate and was signed by President Bush in September of that year.

The law called for the government to develop a Web site that would disclose grants, loans and contracts doled out by the government. The Web site, www.usaspending.gov, keeps track not only of how much money is given out by the federal government but also which companies receive it.

Both senators also supported a 2006 bill that raised the maximum fine a broadcaster could receive for airing obscene or indecent material, such as curse words. McCain cosponsored the legislation that allowed the FCC to fine broadcast outlets up to $325,000 for every violation. The Broadcast Decency Enforcement Act of 2005 passed unanimously in the Senate and was signed into law on June 15, 2006.

Sen.-Feingold

One speech-related piece of legislation that McCain, in particular, has been criticized for is his sponsorship of the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act.

McCain-Feingold amended the Federal Election Campaign Act of 1971, which among other things regulates how much candidates may spend if they decide to accept public financing for their campaigns. McCain-Feingold added new restrictions on the amounts and sources of money that campaigns, party committees and independent groups may raise and spend.

Several advocacy groups called the law a violation of the First Amendment. The U.S. Supreme Court has struck down several provisions of the law as unconstitutional. In the 2003 case McConnell v. Federal Election Commission, the Court said a provision that barred people under 18 years old from contributing to political campaigns violated their First Amendment rights.

The most high-profile challenges involve the law’s limits on how private groups and individuals may spend money during a political campaign.

In Federal Election Commission v. Wisconsin Right to Life, Inc. the U.S. Supreme Court ruled in 2007 that a portion of section 203 in McCain-Feingold violated the First Amendment as applied in certain contexts.

The provision prohibited independent groups from running advertisements that use a candidate’s name in connection with a specific issue within 30 days of a primary election and 60 days from a general election unless they do so through a registered political action committee. These PACs are subject to Federal Election Commission regulations.

This year, the Supreme Court struck down another provision of the law, known as the “millionaire’s amendment,” in Davis v. Federal Election Commission. The court said the McCain-Feingold Act illegally disadvantaged political candidates who use their own money to run for office by allowing their opponents to raise money above the usual limits.

The case reaffirms the court precedent of equating money spent in a campaign to political speech. In July, the FEC said it would stop enforcing the millionaire’s amendment to comply with the Supreme Court’s ruling.

In June, Obama decided to opt out of the public financing system McCain had attempted to regulate, choosing to fund his campaign entirely using privately raised funds, although he still is subject to contribution limits and disclosure requirements.

Obama said his decision was a way to avoid being beholden to outside groups and wealthy individuals.

“The public financing of presidential elections as it exists today is broken, and we face opponents who’ve become masters at gaming this broken system,” Obama said.

See the chart below for the candidates’ stances on other free-expression issues.

Mr. Davis

Mc Cain does not appear to have much general respect for First Amendment principles. When confronted by talk show host Don Imus about the claim that his campaign finance legislation violated the First Amendment, McCain responded by stating: “I would rather have a clean government than one where quote ‘First Amendment rights’ are being respected that has become corrupt … If I had my choice, I’d rather have the clean government.”

Access

Sen. Barack Obama
Democrat of Illinois

In June 2006 the Senate failed to recommend a 28th amendment to the U.S. Constitution by just one vote. Obama voted against the amendment that would have banned “desecration of the American flag.” Obama noted that he was in favor of legislation that would make it illegal to burn the flag, but did not think a constitutional amendment was necessary. The alternative, proposed by Sen. Richard Durbin (D-Ill), would have imposed penalties for burning the American flag as a means of intimidation or inciting violence but would not have banned flag-burning altogether. Durbin’s bill was rejected 36 to 64.

In addition to being in favor of tougher standards for broadcasters, Obama has said, as president, he would ensure that violent and potentially disturbing video games would be clearly marked. In an interview with Common Sense Media, Obama said he wants the video game industry to regulate itself, “but if the industry fails to act, then my administration would.”

As a state senator in Illinois, the Democrat co-sponsored the Verbatim Record Bill, which was signed into law in August 2003. The legislation requires government organizations to make video or audio recordings of all closed-door meetings. The bill had the strong support of the Illinois Press Association.

Sen. John McCain
Republican of Arizona

The 2006 proposed amendment was not the first time McCain had voted to outlaw flag burning. In 1999 the Republican-controlled Congress attempted, and failed, to add a similar constitutional amendment. In his support of the 1999 law, McCain said he did not believe that “guaranteeing respect for our national symbol by prohibiting acts of desecration impinges on political ‘speech’.”

During a June appearance in New Hampshire, the blog GamePolitics.com reported McCain had said he felt that parents should take the active role in regulating which video games their children play. In May 2000 the Senator sponsored the Media Violence Labeling Act, which would have mandated a labeling system for violent media. The bill has yet to be voted on. McCain’s stance differs from Obama’s in that the Republican senator puts a stronger emphasis on parental restrictions on what video games children play rather than emphasizing a stronger government role.

McCain has proven himself to be a staunch advocate of protecting children from offensive or indecent media. McCain introduced the Childnet’s Internet Protection Act in the Senate in 1999. OPA requires schools and libraries that receive certain discounted technology or federal education funds to install measures in their computers that would block Internet access to “visual depictions that are obscene, child pornography, or harmful to minors . . .” President Clinton signed the bill in December 2000.

Mr. Davis

Lawrence G. Walters
First Amendment lawyer and partner at the Florida-based firm Monell, Garcia, Walters & Money
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security plan they will use during the convention. A police spokesman told the Associated Press that they have talked with local protest groups to “clear up any misunderstandings and rumors that are out there.”

Tilton will be working for the RCFP’s hotline for journalists covering the Republican convention.

“The most awkward situation would be if a journalist were to get arrested and no one had any record of them being part of the media,” Tilton said.

Panos echoed that worry. He said there would be a “media center” in the city where journalists can register for city-issued press credentials to help identify themselves as reporters in the case of a mass arrest.

“We want to help reporters, not kick them out,” Panos said.

Kissinger suggested reporters make themselves clearly identifiable to police. She said reporters should wear hats or helmets that say “Press” and wear their credentials around their necks at all times.

“If you get caught up in a mass arrest, tell the police right then that you’re a member of the press,” Kissinger said. “Be courteous and respectful to the officers, but tell them you’re a journalist before you get arrested.”

One problem Rankin, the Kent State journalist, ran into was that she did not know what to do with her notes when she was being arrested.

“I had heard from someone that the police would take my notes,” Rankin said. “So, I started ripping pages out of my notebook and shoving them into my bra and pants. Really, anyplace I thought they wouldn’t be taken from me.”

This was not a unique situation. There have been occasions where police officers have confiscated a reporter’s notes or videotape while making an arrest. However, the Privacy Protection Act of 1980 provides strong protections for a reporter’s notes and other documents.

The law says a government agency, including police, may not “search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”

There are some exceptions to this law. But, Kissinger said, they are limited.

Police may confiscate a reporter’s equipment if the reporter is suspected of committing a crime by using that equipment. For instance, if a reporter were to start taking pictures within a courtroom that has banned all photos, that reporter’s camera could, under this act, be legally confiscated.

The law also says a reporter’s notes could be taken if “there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.”

Covering it from the inside

In addition to the protests going on in the streets, there are still the conventions themselves to cover.

“I think people forget that a lot of business actually gets done during these things,” Natalie Wyeth, a Democratic convention spokeswoman, said. “All of the caucuses meet and we select the official party platform for the upcoming election.”

Wyeth said the convention will start at 7 a.m. with prime-time programming wrapping up around 9 p.m. That’s 14 hours of meetings, speeches, rallies and discussions to cover.

Adam Nagourney, a political reporter for The New York Times, said it is impossible for one reporter to cover everything that happens at a convention.

“You’re dealing with an incredible amount of information and data. It’s hard to filter it all,” Nagourney said. “Reporters should focus on a particular story or storyline and go with that.”

Richard Valenty, a reporter for Colorado Daily, a professional newspaper focused on the University of Colorado, said he is reading everything he can in anticipation for the Democratic convention.

“I’m preparing to spend time both inside and outside on the street,” he said. “The inside stuff might be as interesting as the outside stuff. We’ll have to wait and see.”

Subbotin, a Republican convention spokesperson, said lists of each day’s events will be available online.

For the most part, political conventions are scripted events; surprises or scoops for journalists to jump on are few and far between. Nagourney said to look for the themes that will begin to present themselves as the events unfold.

“Everything big happens at night, so the deadlines are intense … intense,” Nagourney said.

To actually enter the Xcel Energy Center in St. Paul or the Pepsi Center in Denver, reporters must have filed for and received press credentials from the respective convention administrators.

Montoya said the Rocky Mountain Collegian received six press credentials to the Democratic convention with varying de-
University to pay largest-ever fine for faulty crime reporting

MICHIGAN — Eastern Michigan University in June was ordered to pay $350,000 in fines for 13 violations of the Clery Act, the largest fine ever imposed for violating the law governing disclosure of campus crime data. The fine is $7,500 less than the original amount issued by the U.S. Department of Education.

Among the violations, the department found EMU inaccurately reported the circumstances surrounding the death of student Laura Dickinson in 2006. EMU police “immediately determined the death to be suspicious in nature,” the Education Department said. But a day after Dickinson’s body was found, a university statement said there was “no reason to suspect foul play.”

The Clery Act is a federal law that requires any university taking federal money to disclose information about crime on campus, including “timely warnings” about serious ongoing threats.

The university also settled a civil lawsuit with the Dickinson family for $2.5 million.

In a press release, the university said, “We’re pleased to have arrived at an agreement with the U.S. Department of Education and we appreciate their recognition of the progress and improvements EMU has made during the past year in regards to Clery Act compliance.”

In a Dec. 14 letter to the university, the education department called EMU’s actions an “egregious violation, which endangered the entire EMU campus community.”

The controversy over EMU’s handling of the Dickinson murder led to the dismissal of former university President John Fallon and two other university officials. Fallon has filed a lawsuit against the university, claiming his rights were violated under the Michigan Whistleblowers Protection Act when he was fired.

Editor alleges student senate at U of Oregon broke sunshine law

OREGON — A University of Oregon student senate committee disregarded the state’s open meetings law, according to student government president Sam Dotters-Katz.

A May 13 meeting of the Associated Students of the University of Oregon Senate Over-Realized Committee evaluated student groups’ requests for access to the university’s over-realized fund. The fund built up $750,000 that would be doled out for the 2008-09 year.

The meeting, then-Oregon Daily Emerald Editor in Chief Laura Powers said, was in violation of Oregon’s public reports and meetings law because the public was not given 24 hours advance notice as is required by Oregon Revised Statue 192.640.

At the meeting, Powers raised an objection, but Dotters-Katz said the meeting continued because members felt no action could be taken against them so close to the end of their Senate terms.

In an e-mail to the ASUO Senate, Patrick Boye, then-chairman of the Over-Realized Committee, wrote that he did comply with public meeting laws when he contacted Emerald reporter Robert D’Andrea about the meeting.

Powers filed three grievances with the ASUO Constitution Court in relation to the May 13 meeting. The court, in a June 8 decision, dismissed Powers’ claims and stated Powers did not make “a factual showing that it was a meeting that would fall under Public Meetings Law requirements.”

Powers graduated in May and is no longer able to file complaints with the Constitution Court. She said she hopes the Emerald will refile a complaint with the court.
Privacy rules could stunt access

BY JIMMIE COLLINS

Proposed changes to the regulations governing the Family Educational Rights and Privacy Act could result in denying access to information that would be crucial to keep schools accountable, some First Amendment advocates say.

The U.S. Department of Education’s Family Policy Compliance Office currently is reviewing 121 comments made about the changes and expects to finalize the proposal sometime in December, said Jim Bradshaw, a spokesman for the Department of Education. Once finalized, the changes are expected to take effect in January 2009.

Comments from several organizations, including the Student Press Law Center, expressed concern that some language in the proposal might be overly broad and would allow schools to deny access to records that would otherwise be open under the statute.

FERPA forbids schools and colleges that receive federal funding from releasing individual students’ educational records to the public, with a few exceptions for information that has personal identifying information redacted or that does not pertain to a specific student.

The Department of Education is in charge of administering and enforcing FERPA, and periodically issues clarifying regulations that implement the statute.

Confusion on former students

U.S. Secretary of Education Margaret Spellings proposed a change to the definition of educational records clarifying that records created or received after a student leaves school — and that are not directly related to the student’s attendance — would be excluded from FERPA protections. The Department of Education wrote in the Federal Register that there has been some confusion among schools about the provision excluding alumni records from the definition of educational records.

“Some schools mistakenly interpreted this provision to mean that any record created or received after a student is no longer enrolled is not an education record under FERPA,” the department wrote.

The department provided an example of what would be considered private under the proposed changes to the regulation: a settlement agreement about events that happened when a student was enrolled.

But a settlement agreement is precisely the kind of document that might be newsworthy, the SPLC wrote in its comments. A settlement could involve sexual harassment by an instructor, an injury due to the school’s negligence or any other instance where disclosure would be necessary to hold the institution accountable, the SPLC wrote.

“By using a ‘settlement agreement’ as an example of a confidential record, the Department sends a very dangerous message to schools — a message that invariably will multiply the already alarming number of wrongful FERPA-based denials,” wrote Frank LoMonte, SPLC executive director, in comments to the department.

But some privacy advocates argue that the rule does not go far enough in protecting confidentiality. By declaring that FERPA does not cover records received after a student’s enrollment unless the document directly relates to the student’s attendance, the department is creating a new exception that is “not found in the statute, is without authority and is potentially damaging,” wrote the Center for Law and Education (CLE), a non-profit organization that provides legal assistance in low-income communities.

The Center argued in its comments that a school could continue to collect information about its former students, including negative information such as allegations of criminal activity, and that information would not be treated as a confidential educational record under the proposal.

An education record is an education record whether the person it involves is in attendance at the time or not, said Kathleen Boundy, CLE co-director.

Boundy asked that the Family Policy Compliance Office consider students who have dropped out, been expelled or who intend to re-enroll. Data the school collects on a student between attendance periods could be considered unprotected information under the proposed rule, she said.

“Although the definition of student properly includes former students, this exemption from the definition of ‘education record’ undermines the former student’s ability to exercise his rights under the statute,” Boundy wrote in an e-mail to the SPLC.

Reading minds?

While FERPA requires schools to withhold records that contain educational information about named individuals, proposed changes could effectively expand FERPA by denying information that is “linked or linkable” to a specific student, even if the information does not name or identify any student. The proposal also says schools should refuse information to a requestor if the institution believes the requestor has “direct, personal knowledge of the identity of the student to whom the educational record directly relates.”

Some fear this language adds a subjective
standard that entrusts too much discretion to school officials to make judgment calls on releasing or withholding documents.

“The Department’s proposal would require school employees to ‘read the minds’ of people requesting public documents, with the illogical result that the very same piece of paper will be an open record to one requestor and a confidential educational record to the next requestor, based on the subjective judgment of a school employee,” LoMonte said in a written statement.

Betsy Hammond, an education reporter for The Oregonian, wrote comments on behalf of the Education Writers Association saying that the proposal runs the risk of closing the doors to performance data because disclosing information by school grade levels or ethnicities could reveal information that is “linked or linkable” to a particular student.

Hammond also said that both education reporters and parents might have trouble accessing records because they are likely to know students at the school and have the ability to connect them to the records at hand.

For instance, parents of an eighth-grade student might be ineligible to receive statistics on dropout rates because they are likely to have direct knowledge of many of their children’s classmates.

“These unintended consequences of proposed changes in language regarding ‘personally identifiable information’ mean the definition must be further refined to protect the public [interest] in being able to scrutinize the performance of public schools,” Hammond wrote.

Clifford A. Ramirez, who worked in the Registrar’s Office at the University of California at Los Angeles, said that the regulations are not meant to impede or obstruct the evaluation of academic programs or the ability of citizens to hold schools accountable.

Ramirez said the school can release redacted information — such as statistics on dropout rates — but the institution may also deny access if there is suspicion of a “targeted” request.

“The institution must make a responsible judgment based upon privacy considerations, but also in regard to the safety of its students, parents and other members of the educational community,” Ramirez said in an e-mail to the SPLC.

Many people from both sides of the open-records debate contend that as long as a document does not contain personally identifiable information or that particular information has been redacted, the record should be made available regardless of any other information the requestor may have.

The statute defines personally identifiable information as a student’s name, social security number, student number, Internet identifiers, family members’ names and personal characteristics that would make the student’s identity easily traceable. Proposed changes to the Education Department regulations would add biometric identifiers — such as fingerprints — and other indirect identifiers such as the place and date of birth or mother’s maiden name.

The CLE also suggests that further clarification of the “linked or linkable” standard is necessary, saying there is no need to question the motives of those who request records if the standards for personally identifiable information remain restricted to those authorized by the statute.

Boundy said this change in the regulation is intended as further protection for students, which her organization advocates, but the standard is confusing.

“This proposed language appears to create an unenforceable standard, transferring to the holder of the records responsibility for making a subjective determination of what is in the mind of the inquirer at the time of the request,” the CLE wrote.

**Balancing rights**

Congress made changes to the FERPA statute via the USA PATRIOT ACT of 2001 and the Campus Sex Crimes Prevention Act. The Patriot Act changes allow schools to release information to the Attorney General — without consent or knowledge of the student — in connection with the investigation or prosecution of terrorism crimes. The Campus Sex Crimes Prevention Act makes an exception to FERPA allowing schools to release information about registered sex offenders who enroll at the institution. The school is instructed to make information about that student available to the campus community, campus law enforcement and local law enforcement agencies.

Although these statutory changes went into effect seven years ago, the Family Policy Compliance Office said the agency is not required to make changes to the regulations every time an amendment is made, but that the agency enforces the statutory changes and provides written guidance until the regulations are amended to catch up with the statute.

“Writing regulations is quite time-consuming and the more changes you have to make, the longer it takes to get everything through and to publication in the Federal Register,” Bradshaw said on behalf of the office. “Typically, we wait until we have several changes that need to be made before undertaking the regulatory process.”

The amendments to department regulations, proposed in March, are meant to implement those changes made to FERPA by Congress. The proposed changes also make clarifications that arose from two Supreme Court decisions and “amendments that have been identified as a result of the [Department of Education’s] experience in administering FERPA,” according to the notice of proposed rulemaking.

Changes also were made in response to the shootings at Virginia Tech. Those changes would allow campus officials to share more information about students’ mental health.

The final regulations are expected to be published in December and — unless otherwise noted — will take effect 30 days after publication in the Federal Register. A discussion of the comments received that were relevant to the proposal will be published with the final regulations, Bradshaw said.

“It is laudable that open records advocates continue to argue for vehicles to ensure the integrity of our public institutions,” said Ramirez, the former UCLA official. “Not to be forgotten in that dialogue, however, is consideration for the privacy of the citizens themselves. In other words, our Constitutional rights do not end at the First Amendment.”
Sensitive subject

Students’ oral sex quotes land Wash. high school paper in legal trouble

By Kelsey Beltramea

High school journalism depends on minors consenting to interviews. In Claremont, Calif., a high school junior told the student newspaper she supported a new law banning cell phones while driving. A freshman at a Jewish day school in Rockville, Md., discussed morality and capital punishment with her student publication. And in Palo Alto, Calif., a student newspaper quoted a high school junior on his feelings about the constitutionality of same-sex marriage.

But when a 17-year-old girl in Puyallup, Wash., told members of her student newspaper staff about her oral sex experience, and they printed her name and statement, she cried foul.

The girl is among a group of four students and their parents who have filed claims against the Puyallup School District; three reporters from Emerald Ridge High School’s student newspaper, the JagWire; and two faculty members, contending they did not have permission to print the students’ testimonials about oral sex in the paper’s February issue.

Four pages of that issue were dedicated to the topic of oral sex, with stories ranging from a description of the hormones triggered in oral stimulation to counterpoint columns in which reporters discussed whether it is immoral to engage in the behavior. The students bringing claims shared their personal oral sex experiences in pull quotes displayed prominently in the package.

For example, one 18-year-old female senior — who was also identified by name in the article — said, “I was 15. I was horny. It wasn’t really a relationship at that point.”

Each of the student plaintiffs is seeking up to $1.5 million in damages for invasion of privacy, negligence, and intentional infliction of emotional distress, among other claims. But an official lawsuit has not yet been filed. Washington state law requires petitioners seeking legal action against any local government entity to file a claim outlining their case before they actually file the lawsuit in court.

The petitioners argue they expressly requested anonymity in the newspaper and were told by newspaper staff members their names would not be printed. But JagWire staffers told the Student Press Law Center they took extra care to make sure it was OK to publish names, even returning to each source to check wording for accuracy.

This case touches on an area of the law that is surprisingly underdeveloped, said Mike Hiestand, legal consultant to the SPLC. He said courts have never addressed consent by minors in student media, although they have addressed the issue in cases involving professional media outlets. The courts have recognized that a minor’s consent generally is valid if he or she is capable of understanding the consequences, even if parental consent is not obtained or parents expressly refuse. As long as the person has the legal capacity to give consent — regardless of age — courts have considered the consent adequate.

The U.S. Supreme Court set the foundation for this standard in 1979 in Smith v. Daily Mail Publishing Co. when it ruled that journalists can print minors’ names as long as the information is “lawfully obtained” and “truthfully” reported. Daily Mail had challenged a West Virginia statute, which criminalized publishing names of any youth charged as juvenile offenders without court approval, on behalf of two newspapers that were prosecuted for printing the name of a 14-year-old student alleged to have shot and killed a 15-year-old classmate.

The courts have determined minors’ privacy rights are analogous to adults’ when the subject matter is “newsworthy” — meaning reporters do not necessarily need to get minors’ or their parents’ consent merely to report the story.

Hiestand advised that newspapers take extra care when the material is “sensitive.”

“When you have particularly private information or private stories, you need to be careful with everyone involved,” he said. The same ethical standards apply to professional and student media.

Hiestand said journalists should make sure their fellow students know they are speaking with a reporter and that the reporter is interviewing them for a story that will be published. They should remind sources that the publication may be read by students, parents, teachers and members of the community.

And when journalists are interviewing a minor, Hiestand said it is advisable to get consent in writing.

“It’s best to get these consents in writing because stories change,” he said. “They

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Public figure hurdle remains high

College officials fall short in suits challenging statements published about them

BY KELSEY BELTRAMEA

Courts in two recent cases have reaffirmed that university professors and administrators are public figures who face heavy burdens when trying to claim they were harmed by information published or circulated about them.

Courts in Minnesota and Maine threw out the officials’ lawsuits, ruling that because the plaintiffs hold public positions at their institutions, they must meet standards the law requires of public figures.

Eric Robinson, staff attorney for the Media Law Resource Center, said neither case is necessarily groundbreaking; they just underline present law.

“My impression is that public university employees have more or less typically been held to be public officials,” he said. “These cases just reinforce that.”

‘Breathing space for error’

In Minnesota, the state’s appeals court ruled in January that Richard D. Lewis could not win his libel and defamation lawsuit against St. Cloud State University’s student newspaper because the University Chronicle did not publish its statements with “actual malice,” knowing the statements were false. The Minnesota Supreme Court refused to review the case in May.

The Chronicle quoted a former student saying Lewis “mistreated” her by changing her grade from an A to an incomplete. The student also said that the former dean was anti-Semitic and accused him of using racist slurs, but she later retracted those statements, saying she meant them about someone else. The Chronicle printed a partial correction, and Lewis sued.

But in January, the Minnesota Court of Appeals threw out the lawsuit, ruling that Lewis is a “limited-purpose public figure.” Lewis was meaningfully involved in a public controversy regarding anti-Semitism on campus and the paper’s allegedly defamatory statements were related to that controversy, the court ruled. For those reasons, Lewis could win his lawsuit only if the paper published the statements with “actual malice.”

“It’s always gratifying in a case like this when there’s an admitted and serious error that’s made and you win,” said the Chronicle’s attorney, Mark Anfinson. “That’s the whole notion of New York Times v. Sullivan where the actual malice standard came from — a necessary breathing space for error and debate.”

Truth as a defense

In Maine, a federal appeals court ruled that administrator David Fiacco could not win his intentional infliction of emotional distress lawsuit against a fraternity because the statements he claimed members made were essentially true. Fiacco is the director of the Office of Community Standards, Rights and Responsibilities at the University of Maine at Orono.

Whereas private individuals can win emotional distress claims even if they concede the statements in question were true, public officials or public figures must show those that published the statements knew they were false or were reckless in verifying their accuracy.

And because what the campus chapter of Sigma Alpha Epsilon said about Fiacco was essentially true, Fiacco — as a public official — had to meet this standard of “actual malice.” The 1st U.S. Circuit Court of Appeals ruled he did not.

After Fiacco began investigating Sigma Alpha Epsilon for misconduct in 2002, a group of fraternity brothers hired a private investigator to look for evidence of bias Fiacco might hold against fraternities. Instead, the investigator uncovered a Colorado Driving While Ability Impaired conviction and a restraining order against Fiacco that his former girlfriend had secured.

Members of the fraternity decided to use this information. They made copies of the records, sealing them with an unsigned memo that read: “Enclosed please find newspaper articles and court documents detailing Mr. Fiacco’s previous legal difficulties: DWI, Sexual harassment, and Domestic Violence. Is this honestly the best qualified candidate the University of Maine could find for the Office of Judicial Affairs?”

With the help of an alumnus in Colorado, the fraternity members mailed the packages without return addresses to the university president, several deans, the University of Maine System Board of Trustees and two local newspapers. In his lawsuit, Fiacco said this caused him insomnia, nightmares and depression.

But the court ruled the statements in the memo were not false because Fiacco was convicted of Driving While Ability Impaired, similar to Driving While Intoxicated, and his former girlfriend obtained the restraining order under the Colorado Domestic Abuse Act, which indicated the court found Fiacco had committed an act of violence or threatened to do so.

Drawing lines

Gary Dickstein, president of the Association for Student Judicial Affairs, said presidents of universities are obviously public officials. But he said judicial affairs officers at fair-sized institutions are not typically considered to wield that much executive power.

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might have thought it was a good idea to talk to the newspaper about their sex lives in February, but when the paper comes out in May they might change their minds.”

It also never hurts to get parental consent, if possible, Hiestand said, though court rulings suggest such consent is not legally required.

Lauren Smith, a member of the JagWire’s editorial board, said a couple of students changed their minds about being quoted even before the issue went to print. The staff respected a girl’s wish to retract her comments and altered a boy’s quote a couple of days before publication at his request.

Gerry LeConte, also an editorial board member, said they considered eliminating names altogether but feared losing the message they wanted to convey in the first place. The newspaper conducted a poll that found one in three students had participated in oral sex, but the district’s sex education curriculum did not address the topic.

“People think the design and the quotes were just to be sensationalistic, and that’s not what they were for. They were so parents couldn’t say, ‘That’s not my kid,’” LeConte told the SPLC. “If you put a pull quote that says one in three kids is having oral sex, many, many, many parents will say ‘Well, that’s the bad one third of the students. That’s not my kids.’ And that’s just not the issue.”

No administrators at Emerald Ridge High School were available to speak with the SPLC. One parent bringing a claim said all families had been advised not to comment.

Their attorney, John R. Connelly, Jr., said the students did not know their names would be printed and did not understand the consequences of sharing their oral sex experiences with the paper.

“The concern that I’ve got is that you’re publishing very private information, and it’s the type of information that if someone wrote it up on a bathroom wall, the school would hurry to erase it and make sure it was taken down,” he said. “And in this case, they put it in a newspaper.”

Kathy Schrier, past-president of the Washington Journalism Education Association, said it was her understanding that the students at the JagWire took sufficient precautions before printing the students’ names. In any case, she said she did not think there was anything illegal about a student newspaper quoting an undergraduate who knew he or she was on the record. It would be devastating for journalism if minors could not talk openly with reporters, Schrier said.

“I think it’s hard to imagine that could ever happen, but it is a slippery slope, so when things like this happen at the JagWire, and that’s the direction things seem to turn in, it makes me pretty nervous,” she said. “It would put a real chilling effect on the reporters’ possibility of getting a full story if something like that would happen.”

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**LIBEL IN BRIEF**

**Former student plans appeal in suit against Colo. prosecutor**

**COLORADO** — A former University of Northern Colorado student will appeal a federal judge’s decision to dismiss his lawsuit against a prosecutor to the 10th U.S. Circuit Court of Appeals.

Thomas Mink is contending that a deputy district attorney wrongfully issued a warrant to search his home and seize his computer while investigating a criminal libel accusation against Mink in 2003.

A professor at the university, Junius Peake, had alleged that doctored photos and parody columns that Mink published in his online journal, The Howling Pig, defamed Peake. Susan Knox, the deputy district attorney, approved a search warrant for Greeley police to investigate Mink, but her office never pressed any charges.

Mink filed his lawsuit in 2004, arguing the state’s criminal libel law and the investigation violated the First Amendment. He also said Knox owed him damages for her role in reviewing the search warrant application.

The federal district court refused to address the criminal libel statute’s constitutionality, ruling that Mink could not contest the law because he was never charged under it. An appeal was unsuccessful on that claim, but the appeals court allowed Mink to continue his case against Knox.

In district court in June, Judge Lewis T. Babcock ruled that Knox was entitled to qualified immunity, which generally protects most public officials from being sued for actions performed as a part of their official duties.

A reasonable official in Knox’s position could believe that the statements in the Howling Pig were not protected statements under the First Amendment and could violate the state’s criminal libel law, justifying the warrant, Babcock concluded. Mink filed a notice to appeal in July.

**Case: Mink v. Knox, No. 08-1250 (10th Cir. appeal docketed July 15, 2008), appealing from No. 04-00023 (D. Colo. June 28, 2008).**

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“Generally, they’re somewhere between middle managers and senior staff,” he said. The court’s reasoning, distinguishing Fiacco as a public official because he had authority to decide whether students were allowed to continue in school, could be applied to many school officials, he said.

Jane Kirtley, director of the Silha Center for the Study of Media Ethics and Law, said without the actual malice standard, it would be impossible to evaluate people in positions of power.

“When we’re talking about professors at any kind of state university, certainly at least there is a threshold to the argument that since you’re on the public payroll, your actions are clearly a matter of public interest and you should be considered a public figure for at least that particular purpose,” she said.

But the expanse of that classification is a reasonable topic for debate and discussion.

Said Kirtley, “I’m not sure just becoming a professor, and I speak as one, doesn’t necessarily open you up as a public figure in every instance.”

From Jagwire, Page 26
A new year and a new path
Editors at 3 schools prepare for their outlets’ first years of independence

BY ROB ARCAMONA

When student editors decide to go it alone, the road can be a rocky one. At Quinnipiac University, Jason Braff looks at his online publication’s bank account. It’s empty. Meanwhile, Aaron Montoya of Colorado State University wrangles with the Internal Revenue Service as Bobby Melok of Montclair State University sits with his lawyer drafting paperwork.

These student newspaper editors, from Connecticut to Colorado to New Jersey, all have one thing in common: They are moving their newspapers away from the shelter of the university and into the outside world.

Rocky Mountain Student Media

On June 3 Colorado State University announced it would spin off its student-run media outlets from the school. The Board of Governors approved a measure that allowed Student Media — which consists of the school’s student newspaper, radio station, television station and magazine — to form a nonprofit 501(c)(3) corporation.

The newly formed Rocky Mountain Student Media Corporation has filed paperwork with the Colorado Secretary of State and the IRS for official recognition as an independent nonprofit company. Other universities, such as Michigan State University, Iowa State University and the University of Texas, have taken similar steps to form nonprofit corporations for their student media operations.

“We’re stressing the fact that we’re no longer a university department,” said Aaron Montoya, editor in chief of Student Media’s newspaper, the Rocky Mountain Collegian. “Our goal is still to be here for students, but we work for the corporation now.”

The move to reorganize Student Media, which includes the Collegian, College Avenue Magazine, KCSU radio station and CTV television, came after a Sept. 21 editorial in the newspaper that read “Taser This… Fuck Bush.”

The editorial created a media firestorm that prompted officials to look for a way to restructure the newspaper, and eventually all of Student Media. Several ideas were thrown around, including selling the paper to media giant Gannett. Eventually, a university committee endorsed a plan to form a nonprofit corporation.

The Board of Governors gave Student Media a deadline of Aug. 1 to make the switch to their new structure.

“The last couple of months have been a little hectic because the timeline is fairly short,” Montoya said. “We’re working day and night to make sure things are in place.”

Larry Steward, president of Student Media, said forming the nonprofit was the best thing the university could have done with the program.

“We’re going to be more student-oriented and more student-focused,” Steward said. “Students will be protected from all forms of prior restraint and content censorship.”

In July the university released its formal operating agreement with Student Media. A nine-member governing board — composed of five students and two members of the university, as well as Steward and Ray Caraway, president of the Community Foundation of Northern Colorado — will run the corporation.

Under the deal, Student Media will receive $1 million in assistance from the university for transition funding, broadcast services and a subscription fee to the Collegian and College Avenue, as well as for providing an educational laboratory experience for the 2008-09 year. According to the agreement, the university must hand over $500,000 of that amount by Aug 1.

The agreement, which ends in July 2011 if it is not renewed, calls for funding levels to be renegotiated in May 2009 and May 2010 for the following year.

One of the first things Steward said would happen is updating the radio and television stations’ equipment.

“The TV and radio station has been under-funded and needs to be upgraded,” Steward said. “That’s a high priority. These kids need the right tools to do a good job.”

Although Montoya said forming Student Media was done at a breakneck pace, he expects everything to be up and running by the time Colorado State students begin classes on Aug. 25.

“Our goal is to have readers not notice a difference because of the change,” Montoya said. “Our professional advisers will notice changes, but we don’t want our readers to notice a thing.”

The Quad News

After wrestling with Quinnipiac Univer-
Colleges Censorship

We thought they were taking too much control out of our hands and at that point thought it better to walk off and start our own paper.”

Jason Braff

former editor in chief of The Chronicle at Quinnipiac University

At a Feb. 27 SGA meeting, University President Susan A. Cole said that by July 1 The Montclarion would no longer be a part of the SGA and that the university would ensure the newspaper would have enough funds to print for the rest of the academic year, in case the SGA decided to pull funding for the paper again.

Later in that same meeting the SGA, in a 7-to-7 vote that came down to a tiebreaker from the SGA vice president, voted to unfreeze the newspaper’s budget for the rest of the year.

The separation deadline was pushed back until the Board of Trustees meeting, which guaranteed funding for the new corporation. The university will not fund The Montclarion’s entire projected $120,000 budget. Karen Pennington, vice president of student development and campus life at the university, said some of newspaper’s funds would come from outside sources such as advertisement revenue.

“All we’re doing is giving them seed money because they’re starting from scratch,” Pennington said. “We’re giving them an opportunity to get up and running.”

In mid-July, members of the SGA began removing some office equipment from the newspaper’s office.

“The SGA is taking two computers, a desk, a couch, a keyboard, a paper cutter, a stapler, and two pairs of scissors,” Melok said. “It’s not really much at all. We still have almost everything and ordered all new computers and furniture.”

Melok said the university’s money will go toward buying new equipment for The Montclarion newsroom.

Melok and Pennington agree the Board of Trustees’ latest move is the first step in their eventual goal of having The Montclarion able to support itself with little or no university help.
Dirty words

If the FCC wins before the Supreme Court this term, a split-second of profanity could put student broadcasters in peril

BY ROB ARCAMONA

K alyn Feigenbaum was sitting in the DJ’s chair at Pennsylvania State University’s WKPS radio when it happened. Through the driving bass line and shattering cymbal crashes, she heard it come over the airwaves as though it was a hand slapping her in the face.

“Oh, God,” she thought. “I hope nobody caught that.”

On that darkening November evening during her radio show, The Indy 500, a caller asked to hear a song by punk band the Dead Kennedys. In a rush to please her listening faithful, Feigenbaum spun the disk, forgetting to screen it first.

“A swear word got dropped. I can’t remember which one, but I knew I shouldn’t have played it,” Feigenbaum said. “We have a button to fix that sort of stuff, but I don’t know if it worked.”

It was only Feigenbaum’s second time behind the microphone and already she thought she had gotten herself fired, or worse, fined by the Federal Communications Commission. WKPS has a strict policy, Feigenbaum said: No swearing, at all. Minutes passed as she waited for the fallout, her eyes repeatedly fixing themselves to the studio’s telephone, sitting mercifully quiet.

The call never came. Feigenbaum did not receive a complaint about the song, and her bosses did not raise the issue either. Her story, a common one in student broadcasting, is a sobering reminder to any student in front of a camera or microphone to not only watch what they say, but what others are saying.

Since 1976 the FCC has policed the airwaves for indecent speech, such as swear words, issuing fines to stations that violated its regulations. These fines can be cripplingly steep to a low-budget, student-run station.

And now, the U.S. Supreme Court will hear a case that could allow those restrictions to tighten.

Fleeting expletives

In its next term, the Supreme Court will hear oral arguments in the case FCC v. Fox Television Stations. The case centers on fleeting expletives, one-time utterances of words that may be indecent according to FCC regulations but were not penalized by the commission — until recently.

The case will be the first major review of the FCC’s indecency policy since the landmark 1978 decision in the case FCC v. Pacifica Foundation. In the case, which involved the late comedian George Carlin’s comedy skit “Filthy Words,” the Supreme Court affirmed the FCC’s right to regulate speech on the airwaves.

Although the FCC issued a policy statement in April 2001 to give broadcasters a better idea of what language it considered to be indecent, the commission has not issued a list of words it considers to be explicitly indecent or obscene.

According to managers of student radio stations, honest, one-time mistakes, like cursing while on-air or playing a song that contains a swear word, are all too common in student radio.

“It happens all the time,” said Sarah Colombo, general manager at the University of Georgia’s WUOG Radio in Athens. “We try to stop it but these are students, many of them aren’t even broadcast majors. Slips happen.”

The current Supreme Court court case originates from the 2002 and 2003 Billboard Music Awards ceremonies where expletives were said during the programs.

The most infamous case, however, happened during the 2003 Golden Globe Awards where singer Bono of the rock band U2 performed.

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The commission did not fine the Pacifica Foundation, which owned WBAI, but did say it could administer formal sanctions in response to any similar complaints in the future.

Pacifica successfully appealed the FCC’s decision to the District of Columbia Circuit Court of Appeals. Judge Edward Al- len Tamm, one of three judges who heard the case, wrote in his opinion the FCC’s action amounted to censorship. The FCC appealed to the U.S. Supreme Court.

In overturning the D.C. Circuit’s decision, the Supreme Court said the FCC has a legal right to regulate the content of speech over the radio. The court stressed that the FCC may not censor radio broadcasts but is permitted to regulate them.

The court also ruled that indecent speech is not synonymous with obscene speech, which has no First Amendment protection. This ruling shot down Pacifica’s argument that because Carlin’s routine was not obscene, it deserved full First Amendment protection. Thus, indecent speech is protected by the First Amendment, but not in all circumstances. Indecent speech in over-the-air broadcasts (not cable or satellite) may be regulated but not banned.

As a result of the 5-to-4 ruling, the FCC had a clear mandate to regulate broadcast speech. The ruling also led to the “safe harbor” rule. Because the Supreme Court ruled that indecent broadcast material may be “uniquely accessible to children,” the FCC banned indecent material from 6 a.m. to 10 p.m. Indecent speech may be aired outside of those hours, unlike obscene speech, which is completely prohibited from the airwaves.

The Pacifica case

On Oct. 30, 1973, WBAI, an FM radio station in New York City, broadcast comedian George Carlin’s 12-minute monologue titled “Filthy Words.” In the satirical routine, Carlin repeatedly rattled off strings of expletives. A man, who said he was driving with his son at the time, heard the comedy skit and complained to the FCC.

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In March 2004, television station KCSM-TV, a PBS affiliate owned by the San Mateo County Community College in Calif., broadcast the Martin Scorsese documentary *The Blues: Godfathers and Sons*. The film’s dialogue includes several F-words and S-words. KCSM-TV subsequently was fined $15,000 for airing indecent speech. However, in a move that has confused broadcasters and legal experts alike, in February 2005 the commission ruled that it would not fine ABC Television for its presentation of the film *Saving Private Ryan*, in which several of the same words are said.

“Broadcasters want a clearer understanding of where the line of permissible broadcast lies. It’s a difficult line to find, for broadcasters and the government,” said Richard Wiley, former FCC chairman. “Hopefully the Supreme Court decision will provide some guidance.”

Current FCC commissioner Deborah Taylor Tate, in a speech at the First Amendment Center in June, defended the commission’s regulation of indecent speech, saying it protects children from words that may prove to be harmful to mental health.

Tate said the commission’s approach is a “balance [of] First Amendment rights with the protection of our most valuable resource, our children.”

In June the Parents Television Council filed a friend-of-the-court brief with the Supreme Court supporting the FCC’s policy. On its Web site, the PTC argued the 2nd Circuit’s decision, which said the FCC had no right to radically change its policy, “ran contrary to nearly 80 years of jurisprudence about the publicly-owned airwaves.”

“The simple solution here is that broadcasters could and should adopt a zero-tolerance policy towards indecency, just as they promised they would during a Congressional tribunal after the Janet Jackson incident,” PTC President Tim Winter wrote in a press release.

“Janet Jackson” refers to the 2004 Super Bowl halftime performance where the singer’s breast was revealed during what was coined a “wardrobe malfunction.”

In July, the 3rd U.S. Circuit Court of Appeals, in a three-judge panel, threw out the $550,000 indecency fine the FCC levied against CBS for the halftime show. In its ruling, the court said the FCC “acted arbitrarily and capriciously” when it issued the fine for such a fleeting image.

According to court documents, Jackson’s breast was exposed to the 90 million people watching for nine-sixteenths of one second, enough time for it to fall under a fleeting image category. The court said the FCC fine was issued without proper notice that the commission had changed its fleeting images and expletives policy.

“Like any agency, the FCC may change its policies without judicial second-guessing,” the court opinion said. “But it cannot change a well-established course of action without supplying notice of a reasoned explanation for its policy departure.”

Radio stations may be able to protect themselves from fines for knowingly airing repeated swear words, said Leslie Kolovich, general manager of 30A, a small radio station in Seaside, Fla., but stopping one-time mistakes are much harder.

“That’s what worries me,” Kolovich said. “Everyone could have a slip-up.”

30A is licensed to the Seaside Neighborhood School, a middle school in a small beachfront community. Kolovich said the FCC’s policy might force her to be more careful about whom she allows behind the microphone.

“Students get to come in and learn about broadcasting and radio. They even get to go on air with a little supervision,” Kolovich said. “It’s a great learning experience for them, and teaches them things they can’t learn any place else.”

Over the last seven years, indecency complaints have skyrocketed. In 2001 the

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Shades of gray

One of the toughest issues facing student broadcasters is that, at the moment, it is not clear what the FCC will consider indecent and what it will not.

“The uncertainty they’ve created is bad,” O’Neil said. “Everything is in utter confusion.”

In March 2004, television station KCSM-TV, a PBS affiliate owned by the San Mateo County Community College in Calif., broadcast the Martin Scorsese documentary *The Blues: Godfathers and Sons*. The film’s dialogue includes several F-words and S-words. KCSM-TV subsequently was fined $15,000 for airing indecent speech. However, in a move that has confused broadcasters and legal experts alike, in February 2005 the commission ruled that it would not fine ABC Television for its presentation of the film *Saving Private Ryan*, in which several of the same words are said.

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College Censorship

U2, upon receiving the award for Best Original Song, said, “This is really, really fucking brilliant.”

Complaints poured into the FCC after Bono’s remarks, largely facilitated by activist organizations such as Parents Television Council. But despite the uproar, the FCC ruled in October 2003 that it would not fine the broadcast.

“We have previously found that fleeting and isolated remarks of this nature do not warrant Commission action,” the agency ruled.

So, it seemed, the FCC believed one-time use of the F-word was excusable. Not quite.

Just five months later, the FCC did an about-face, saying that not only are fleeting expletives subject to indecency fines, but that any use of the F-word, “in any context,” is indecent and would constitute a violation of FCC policy.

“It is problematic how radically the FCC’s policy has changed in the last 5 to 6 years,” said Robert O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression.

Several television stations asked the 2nd U.S. Circuit Court of Appeals in November 2006 to review the FCC’s policy change, claiming the commission did not have an adequate reason for changing its policy so abruptly. In supporting the television stations, the court ruled that the change went against nearly 30 years of precedent set by the commission.

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According to court documents, Jackson’s breast was exposed to the 90 million people watching for nine-sixteenths of one second, enough time for it to fall under a fleeting image category. The court said the FCC fine was issued without proper notice that the commission had changed its fleeting images and expletives policy.

“Like any agency, the FCC may change its policies without judicial second-guessing,” the court opinion said. “But it cannot change a well-established course of action without supplying notice of a reasoned explanation for its policy departure.”

Radio stations may be able to protect themselves from fines for knowingly airing repeated swear words, said Leslie Kolovich, general manager of 30A, a small radio station in Seaside, Fla., but stopping one-time mistakes are much harder.

“That’s what worries me,” Kolovich said. “Everyone could have a slip-up.”

30A is licensed to the Seaside Neighborhood School, a middle school in a small beachfront community. Kolovich said the FCC’s policy might force her to be more careful about whom she allows behind the microphone.

“Students get to come in and learn about broadcasting and radio. They even get to go on air with a little supervision,” Kolovich said. “It’s a great learning experience for them, and teaches them things they can’t learn any place else.”

Over the last seven years, indecency complaints have skyrocketed. In 2001 the
FCC received 346 indecency complaints stemming from 152 different programs. Last year, according to Tate, there were more than 150,000 indecency complaints filed with the FCC.

David Black, general manager and adviser to WSUM, the University of Wisconsin's student radio station, said the message to student broadcasters is that their work is not like “playing in a sandbox.” People are listening.

With the recent spike in complaints and millions of dollars in fines issued, student stations have a reason to be wary of the FCC's indecency policy.

“A fine would kill us. Absolutely kill us,” Black said. WSUM started as a school project in 1993 and assumed its current form in 2002. Black boasted that WSUM is one of the largest student radio stations in the country.

“It’s hard to decide in 20 seconds whether or not something is indecent,” Black said. “Can someone speak metaphorically? What if it’s just once? You have such little time to decide whether to hit the dump button.”

Within the radio industry, a “dump button” is commonly understood as a mechanism that will delete a small portion of a broadcast, usually only a few seconds, before it is broadcast.

But for this to work a station needs to run on a time delay, be equipped with the proper machinery and have skilled technicians running the on-air booth.

Kristen Mattern, KZSC station manager and a senior at the University of California at Santa Cruz, said even with the delay system at KZSC, there are no guarantees that the station could monitor every word said.

“It’s just really hard and would be horrible if we had to closely monitor everything. Especially when someone calls in,” she said.

Kolovich echoed Black’s concern that despite the best efforts of many student broadcasters, one slip or obnoxious caller could mean the end of a valuable learning experience.

“We’re just a small volunteer station. A first offense would kill us,” Kolovich said. “We’re totally supported by the community. Every dollar keeps us on the air.”

Student radio and TV stations are offered no additional protection from fines than are commercial stations. In 2005, those fines became much harsher. The Broadcast Decency Enforcement Act of 2005 raised the amount the FCC may fine a station for an indecent broadcast ten-fold, to $325,000 for every indecent word.

Although Wiley said the FCC does take a station’s budget into account when issuing fines, college stations are not exempt from large penalties. In 1993, WSUC, the student radio station of SUNY Cortland, was fined $23,750 for airing a rap song the FCC ruled was indecent.

The line between indecent and non-indecency speech lies at the core of the controversy for student broadcasters. Conflicting rulings from the commission and several legal challenges have muddied an already unclear area of broadcasting law.

Glen Robinson, a former FCC commissioner, said the current FCC is “definitely overstepping the boundaries” in choosing to regulate speech that was never previously considered indecent.

For some cash-strapped student broadcasters, a $23,000 fine, or even $2,300, could drive them to bankruptcy. But, according to Black and others, if a student station were to violate FCC policy, a hefty fine would be the least of its worries.

Defining indecency

Below is the FCC’s explanation of what constitutes indecency:

Material is indecent if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium. In each case, the FCC must determine whether the material describes or depicts sexual or excretory organs or activities and, if so, whether the material is “patently offensive.”

In our assessment of whether material is “patently offensive,” context is critical. The FCC looks at three primary factors when analyzing broadcast material: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock. No single factor is determinative. The FCC weighs and balances these factors because each case presents its own mix of these, and possibly other, factors.

Source: FCC

Chilling education

In most cases, student broadcast stations are licensed to a university’s board of trustees or board of regents. Many universities have adopted the policy of allowing their student-run stations to manage themselves.

However, Black said if a station were to get fined by the FCC, the university would likely change its laissez-faire policy.

“The best news that can happen to a station like ours is no news,” Black said. “If we’re on their radar screen, they can be more draconian than the FCC would ever be about what we do.”

This fear of insurmountable fines and university censorship has led to a culture of self-censorship, Black said.

Lili Levi, a professor at the University of Miami School of Law, said the increase in indecency fines, in conjunction with the FCC’s unclear guidance as to what it considers indecent speech, has led even commercial television stations to err on the side of caution.

She pointed to the Saving Private Ryan
case as an example. Although the FCC eventually concluded the film did not contain indecent speech, Levi said dozens of stations at the time refused to carry the broadcast out of fear of an FCC penalty.

Feigenbaum, of Penn State’s WKPS, said if college broadcasters thought they would get fined for every mistake, or if the university began meddling in content restrictions, no student would take the time to become a DJ.

“Half the kids I know would quit. They would be sitting in their chair shaking the whole time and wouldn’t ever learn anything,” Feigenbaum said.

Also at stake are student broadcasts’ coverage of live sporting and music events. Under the current FCC policy, a station is responsible for all of the content it sends out, even if it doesn’t have control over it.

Malcolm Moran, professor of sports journalism at Penn State, said it is nearly impossible to control everything that fans and onlookers say at big sporting events. “If you’re in a stadium with 100,000 people, how are you going to control everyone?” Moran asked. “Or let’s say a student is working at a basketball game. The play-by-play announcers are right on the floor next to the coaches. What if the coaches start cursing? What are you going to do, shut the announcer’s mic off?”

Even when college television and radio stations have time-delay systems, indecent images or words slip by and make it onto the airwaves.

“How can you prevent something if you don’t know that it’s there?” Black said. “I’ve heard of a case where during a loud rock performance, you can hear the F-word said very softly in the background of this loud rock concert. How are we supposed to catch things like that?”

Colombo, of the University of Georgia’s WUOG, said she has had similar troubles.

“We want to keep providing live broadcasts of music events. We have a segment called Live in the Lobby where we have local bands come in and play,” Colombo said. “Sometimes, the musicians make a mistake and curse. We tell them not to before they begin, but it happens.”

Moran said students studying to be broadcasters would be missing a valuable learning experience if they were forced to stop coverage of all live broadcasts because of a change in FCC policy.

“Stopping live broadcasts will absolutely hurt students,” Moran said. “There were things that I learned doing play-by-play that helped me as a newspaper reporter that I never would have figured out had I not done live play-by-play.”

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**IN THE COURTS**

**Editors sue school, student government over budget cutback**

GEORGIA — Editors at The Inkwell, Armstrong Atlantic State University’s student newspaper, filed a lawsuit against the university and its Student Government Association in June accusing the school of stifling their right to free speech.

Angela Mensing, former editor in chief of The Inkwell, claimed the university slashed the newspaper’s budget for 2008-09 year because of the paper’s aggressive and critical approach to covering the school administration and SGA.

“The university didn’t like our content choices, they didn’t like the stories and they didn’t like the way we covered the student government,” Mensing said.

In March, the university’s student government cut the amount The Inkwell receives from student fees by $14,760. The SGA raised its projection of the newspaper’s ad revenue by $10,500, representing a net reduction in the paper’s budget of $4,260 from the year before.

At the budget meeting in February, SGA Sen. Chris Nowicki asked for copies of every issue The Inkwell published that year. Mensing said this was proof the SGA was using the newspaper’s content as a reason for the budget cut.

The Inkwell was one of just two student organizations to have its funding cut for next year.

The university has yet to comment on the lawsuit. On August 5, it filed notice to remove the suit to federal court.

The Inkwell plaintiffs — editors Mensing, Kristen Alonso and Brian Anderson — claim the university violated both the federal and state constitutions and are asking the court to return the newspaper’s funding to its previous level.

Attorney Gerald Weber, who is representing the student editors, took the case through the SPLC’s Attorney Referral Network.


**ADVISERS**

**Adviser group issues letter of concern to Western Oregon U**

OREGON — The faculty group College Media Advisers has issued a letter of concern for the health of student media at Western Oregon University and offered to work with officials to create a better working environment.

The organization investigated a number of claims of wrongdoing, including accusations that the student newspaper’s adviser was fired for protecting her students’ newsgathering abilities after they found unsecured, sensitive student data on the school’s Web site.

A student editor had also accused
Web publishing carries promise and pitfalls
Legal tips for students looking to speak out online

By Jenny Fein

Maintaining a personal Web site is a fun and creative form of expression that is becoming increasingly popular and commonplace for students of all ages. People who create Web sites may not think of themselves as “publishers” but in the eyes of the law, they have responsibilities similar to publishers of traditional print media. In addition to the legal issues of which every publisher, whether in print or online, should be aware – copyright issues, libel and defamation, and privacy rights – the Internet raises new questions regarding whether speech posted by a student off-campus on his or her own time can be regulated or punished by school officials.

The following explains some of the most common issues related to online publishing and school officials’ reactions, as well as a few general publishing tips to reduce the likelihood of legal battles arising out of an off-campus Web site.

School administrators’ authority over online speech

The traditional tests used by the courts to determine whether student speech is protected from censorship by the First Amendment arose out of speech at school-sponsored events or on school grounds.1 Where the speech does not occur on school grounds, as is often the case with content posted or viewed off-campus, some courts have nevertheless upheld punishment where the speech was directed at the school and/or calculated to cause a substantial disruption at school.2

Some simple precautions can help minimize the risk that school officials will try to punish or regulate student speech on an off-campus Web site.

Threats to students or faculty

One type of student speech that has prompted school administrators to take action is speech that constitutes a threat. The First Amendment does not protect true physical threats.3 In recent years, because of an increase in school violence, school officials have disciplined students for making threats, even those intended as jokes. In cases where school officials punish students for Web sites containing what could be perceived as a threat of violence, courts have given school officials considerable leeway to determine what they believe is an appropriate response.4 It is advisable, therefore, for Web site publishers to steer clear of any speech that could conceivably be viewed as a threat, even when your intention is simply to poke fun.

Insults and profanity

School officials are inclined to take action against Web site posts that personally insult a teacher or administrator. Where insults have resulted in a significant disruption to school, courts tend to favor the school’s disciplinary authority over the student’s freedom to speak.5

While parodies and jokes may be intended in good fun, online speech that is mean-spirited or that offends a teacher or administrator might be taken seriously and punished. To avoid this kind of hassle, make it clear that the intent of the comment is harmless or, safer yet, refrain from posting the insult altogether.

Unnecessary profanity posted online can also result in backlash from the administration.6 This is specifically important to remember when legitimately criticizing the actions of a teacher or administrator. When upset about a decision or action of a school official, voicing that opinion is fine, even encouraged. To do so effectively, however, one should maintain his or her composure and refrain from blanket insults and profanity. Respectful postings that are carefully researched and written and provide insight to a problem that might have been overlooked may not only be seriously considered but could bring about the change you desire.

Avoiding gratuitous insults and unnecessary profanity will generally give a message greater impact. It is also likely to put the Web site on stronger footing with a judge or jury if its content becomes the subject of litigation.

Other Legal Considerations

Online publishers should also be aware of issues that plague the traditional print media: copyright, defamation, and privacy. By understanding and successfully navigating these issues, online publishers can avoid incurring legal difficulties.

Copyright

One of the more common pitfalls in publishing, either in print or online, is copyright infringement. Copyright infringement occurs when you publish all or a substantial part of an original work that belongs to someone else. This can be avoided by taking a few necessary precautions prior to publication.

Copyright belongs to the original author (or, in cases of work made for hire, to the employer). It protects work that is fixed in a tangible form of expression, such as a literary, musical, or dramatic work. Pictorial, graphic, sculptural, and architectural works are also tangible forms of expression, as are sound recordings, motion pictures and audio-visual works. The federal Copyright Act provides protection to the authors and gives them the exclusive right to reproduce, distribute, perform, and display their work, as well as create adaptations and sequels.7

To ensure you are not infringing on a copyright, get explicit consent from the owner. Sometimes this is as simple as asking permission. Other times, a fee may be charged. Some uses of copyrighted work fall under the “fair use” exception, requiring no express permission for reprinting. For example, a typical fair use would be publishing some of the lyrics to a song as part of a student paper’s review of the musician’s latest CD. Courts look at four factors to determine
if the use of a copyrighted work is fair.

- **The purpose and character of the use.**
  Non-commercial uses for purposes like news reporting, teaching, criticism or commentary are more likely to be fair.

- **The nature of the copyrighted work.**
  Uses of works containing mostly factual material like maps or biographies are more likely to be fair than uses of highly creative and original works like novels and cartoons.

- **How much of the original work is used.**
  No more of the work than what is necessary may be used fairly. The test is both quantitative and qualitative.

- **The effect of the use on the commercial value of the copyrighted work.**
  This is the most important factor. If the use would eliminate the need for consumers to buy the original, it probably will not qualify as a fair use.9

The use of copyrighted material in parodies can constitute a fair use under certain conditions. First, the parody must be obvious. The audience must reasonably perceive that the use is a criticism or commentary of the original. A disclaimer or notice (like a heading, “Satire”) that clearly alerts readers of the parody may prove useful. Second, the use must reproduce no more of the work than the minimum necessary to conjure up the original in the audience’s mind. For example, a slight change in the appearance of a cartoon character will be insufficient to satisfy fair use. Finally, the use must not destroy the market for the original work. If the public will purchase your use as a substitute for buying the original (or a parody of the original created by the actual copyright owner), then the use is probably not fair.9

If you are unsure of whether a work is copyrighted, a starting point is to contact the Copyright Office. For works created after 1978, you can search the Copyright Office’s Web site to see if a particular work has been registered.10 This simple inquiry could save a lot of headaches later and help avoid the legal hassles of a copyright infringement. But remember that registration with the Copyright Office is not a requirement for protection; further investigation may be necessary to ensure that a publication is not infringing another's copyright protection. In fact, it is a good practice to assume that a work is protected by copyright unless you are able to conclusively determine that it is not.

**Defamation**

Another potential pitfall is libel, a form of defamation. Libel is the publication of a false factual statement, which can include images, about another person that seriously damages his or her reputation. If an identifiable person is defamed, a Web site owner can be held liable. Individuals, corporations or business entities can all be defamed by a Web site post. Very large groups, such as “every Vietnam veteran” or “all Republicans,” cannot bring a claim for “group libel.” However, individual members of much smaller groups (for example, a six-person tennis team) might be able to claim that their individual reputations have been harmed by libelous statements about the group. In order to bring a successful libel lawsuit, a person must show that the published statement has seriously harmed his or her reputation; speech that only mildly embarrasses or hurts a person's feelings is generally not enough. Examples of seriously harmful speech include false comments about a person's sexual activity, health issues, illegal or immoral behavior, or allegations of racism or bigotry. The publisher may be liable for defamatory speech if the subject can show that the statement was made with fault – that is, without taking reasonable precautions to verify its accuracy.

To avoid defamation, the best precaution is, of course, to make sure all information published is true; where it can be proven, a true statement cannot provide the basis of a successful defamation lawsuit no matter how harmful it is. Also, statements of “pure” opinion are not defamatory (for example, “Sturges is the worst teacher in the school”). To be protected by the opinion defense, however, such statements must not state or imply a fact that is provably false (“Sturges is the worst teacher in the school because he bought his college degree on eBay”).11

**Privacy**

The legal right of privacy has been defined as the right to be left alone.12 There are four kinds of privacy invasion of which to be aware and avoid.

First, if a person can show that information published about them is sufficiently private and not already publicly known, sufficiently intimate, and highly offensive to a reasonable person, then the publisher may be held liable for publicly disclosing these facts, whether in print or online.

Second, where the portrayal of the person is found to be “highly offensive to a reasonable person” and the publisher had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false impression it would convey, the publisher may be liable for a false light claim.13 “False light” issues commonly arise from the use of photos or videos out of context, such as a stock photo of a person standing outside of a mosque to accompany a story about the links between terrorism and the Islamic extremist groups.

The act of newsgathering can also cause privacy problems. Reporters can be liable for “intrusion” where they engage in newsgathering in a place or in a manner that invades an individual’s reasonable expectation of privacy. Be careful not to trespass, use hidden surveillance or misrepresent yourself in gathering the news. Whether it is to be published in print or online, the process of gathering the information should be done honestly and respectfully.

Finally, the unauthorized use of a person’s name, photograph, likeness, voice or endorsement to promote the sale of a commercial product or service is misappropriation. This can easily be avoided by having the person sign a waiver.

A statement’s newsworthiness will trump a claim of privacy invasion. Use common sense to determine what is newsworthy and what is private information. Generally speaking, if you would be outraged about this type of information being published about yourself or a close friend or family member, it should be considered private. In such cases, you can attempt to obtain consent from the subject to publish the information, or consider publishing in
a more generic form by carefully concealing
the subject’s identity (although you should clearly acknowledge the concealment to your readers). Of course, you may reasonably decide not to publish it at all.

**Liability for third-party postings**

The federal Communications Decency Act (“Section 230”) protects the operators of Web sites from liability for unlawful content that is posted to their Web sites by outside parties, such as reader comments to a news story. That protection can be lost if the Web site operator crosses the line and becomes a co-creator of the content. So, while it is legitimate to delete profanity from a reader comment or to pull down an unacceptable posting entirely, it is dangerous to rewrite a reader submission.

Also, if you actively solicit specific reader-submitted content – “tell me something about Janey Jones’ sex life” – you may lose your Section 230 immunity when Janey’s lawyer comes calling.

**Conclusion**

Online publishers face unique challenges in today’s digital world. By taking necessary precautions, one can avoid the punishing hand of school administration bent on controlling student speech. At the same time, by being a responsible reporter and steering clear of traditional legal traps, you can avoid having your Web site become the target of traditional legal traps, you can avoid the punishing lawyer comes calling.

**Endnotes**

1. The Supreme Court concluded in *Tinker* that on-campus student speech could only be abridged where it materially and substantially interferes with the operation and discipline of the school or invades the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). The Court modified the rule and found in *Fraser* “the First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech…would undermine the school’s basic educational mission.” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986). And the Court held in *Hazelwood* that “educators…[may] exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

2. See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2001) (finding that the school had the authority to punish a student for Internet speech because it was aimed at the school and it would inevitably wind up on school property). But see *Emmett v. Kent Sch. Dist.*, 92 F. Supp.2d 1088 (W.D. Wash. 2000) (finding that although the student’s Internet speech regarded the school, it was outside the school’s authority).


10. See www.copyright.gov for more information and to search records.


13. Restatement (Second) of Torts, Sec. 652E.

14. 47 U.S.C. § 230(c)(1), (f)(2). See *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (holding that plaintiff’s claims are barred by 47 U.S.C. § 230(c)(1), (e)(3), which prohibit claims against Web-based interactive computer services based on their publication of third-party content) (citing *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (holding, under 47 U.S.C. § 230, a Web-based dating-service provider was not liable when an unidentified party posted a false online personal profile for a popular actress, causing her to receive sexually explicit phone calls, letters, and faxes at her home); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that 47 U.S.C. § 230 protects Web-based service providers from liability even after the provider is notified of objectionable content on its site).

From **College Briefs**, Page 34 administrators of violating First Amendment freedoms of speech and press in several incidents throughout the school year. The school’s own “Ad-hoc Committee on Free Press” investigated and found no evidence of First Amendment violations but concluded that a better-operating Student Media Board was necessary to heal the relationship between the newspaper and the administration.

Because the former adviser, Susan Wickstrom, does not want her position back, CMA will work with school officials to develop better policies regarding student journalists, said Ken Rosenauer, the organization’s president.

Officials at Western Oregon University did not respond to several requests for comment. Since CMA developed its adviser advocacy program in 1998, it has censured seven schools for wrongly removing advisers and issued statements of concern for four institutions, including Western Oregon University.

Is a third-year student at the University of the District of Columbia David A. Clarke School of Law.
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