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report
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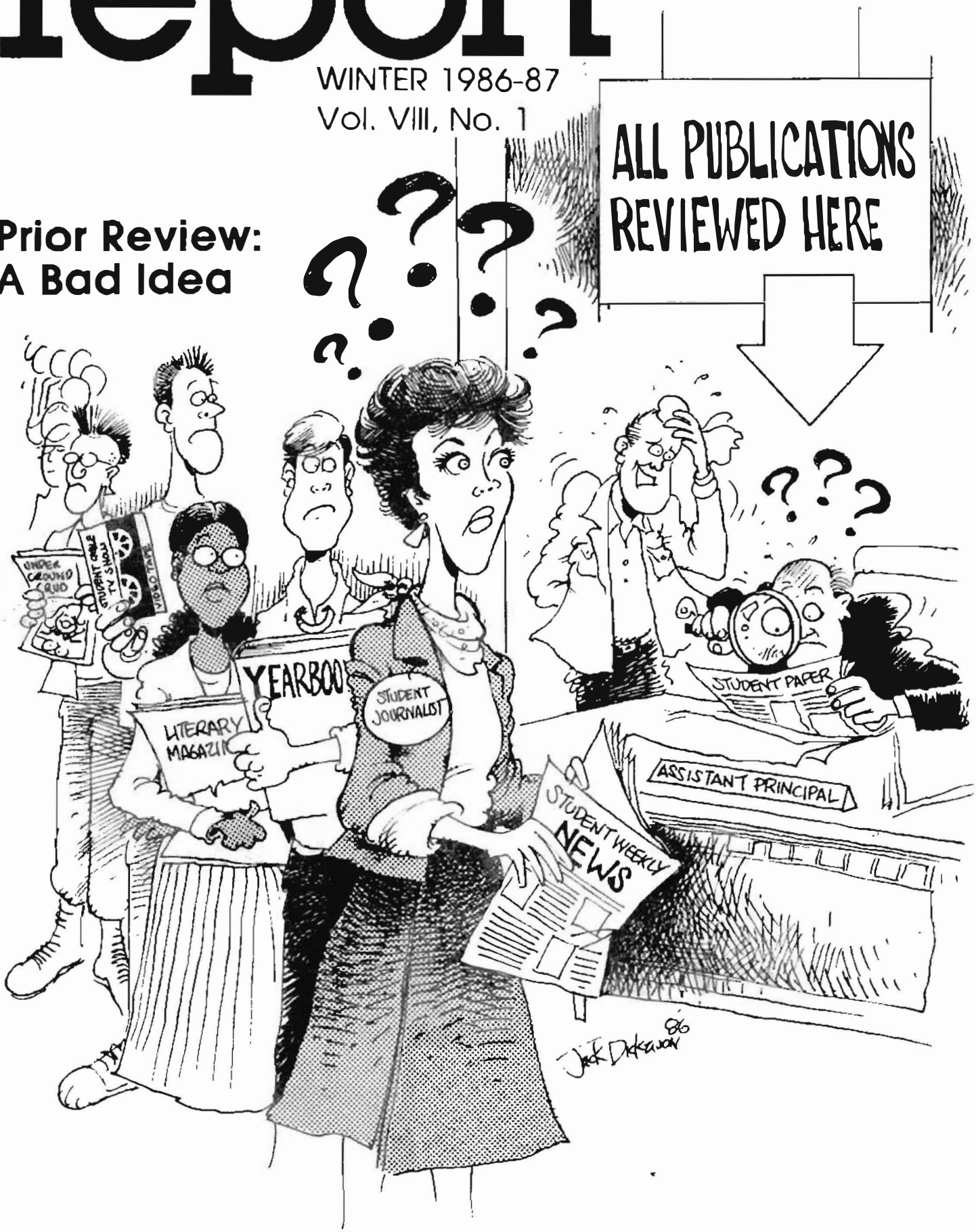
Prior Review: A Bad Idea



The SPLC Report

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

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Minnesota

Press awaits ruling on prior review

The briefs have been filed and the oral arguments have been made. Now its up to three federal appellate court judges in Minnesota to decide whether school rules forcing an underground publication to submit copies to a principal for review before distribution is an unconstitutional restraint on student First Amendment rights.

The Eighth Circuit Court of Appeals will be deciding the case in the context of an alternative newpaper called *Tour de Farce* that was passed out and banned at Fridley High School in suburban Minneapolis. The decision will affect public high schools from Minnesota to Arkansas.

"If we got to win the case based on who made more sense, we would surely win," said Stephen Foley, attorney representing the student creators of *Tour de Farce*. Foley felt the school did his clients' case little harm in oral argument before the court on October 17.

"[The school's attorney] mentioned the *Kulheimer* case [a decision by the Eighth Circuit handed down last summer that supported student First Amendment rights and overturned a lower court's decision] and the judge said, 'Yes, ... but we reversed that decision.' He obviously hadn't read the decision. The judge tried to explain it and help him out," Foley said.

Foley said he spent his time addressing the issue of prior review.

"The school district argued that since [*Tour de Farce*] wasn't school sponsored [the students] shouldn't have it, shouldn't need it."

In the spring of 1985, school officials threatened to suspend the student publishers of *Tour de Farce* if they did not submit the paper to the principal for review before distribution. The students refused.

After exhausting all administrative remedies in the school district, the students filed suit in federal district court, which granted summary judgment in favor of the students, ruling that any prior review of unofficial student publications is unconstitutional.

The school district voiced concerns surrounding liability if the students published libelous statements and the extent to which it would be able to exert its authority to punish such actions.

Foley addressed this concern upon questioning from one of the judges. He pointed out alternative rememdies available to the school district in the event that such an instance occurred rather than the reliance on a system of prior review.

"The judge asked us if the students published something libelous, then could the school then punish them," Foley said.

"We said yes; but it better have

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been libelous and they had better be right."

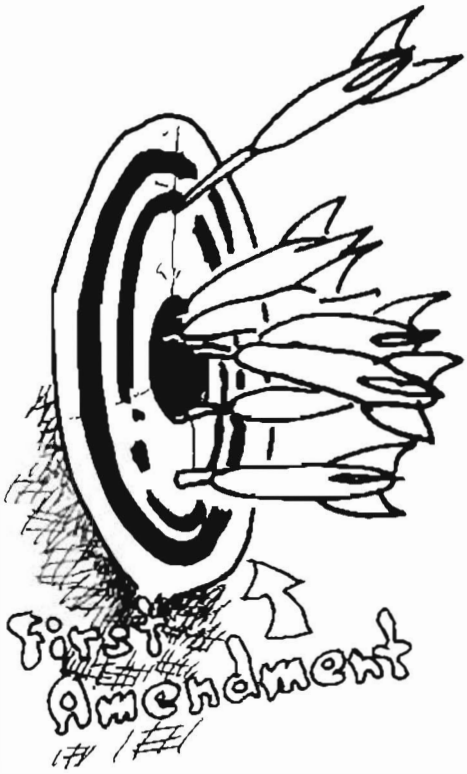
He argued the lack of demonstrated need for prior review citing a neighboring court of appeals circuit as an example. The Seventh Circuit in *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), specifically held that a high school's rule prohibiting students from distributing any written material on school premises without first submitting that material to the school for prior review constituted an unlawful and unconstitutional prior restraint.

Despite this ruling, the school district said in a brief to the court, "Schools should not be placed in the difficult situation of having to act as a 'safe harbor' for patently offensive and indecent materials and language, giving rise to an inaccurate public perception that the school condones or supports them."

Foley stressed the need for an affirmation of the lower court's ruling saying, "You can't rely on school administrators to be concerned about students' constitutional rights."

If *Tour de Farce* loses, Foley says he would be hesitant to ask his clients to appeal the decision to the Supreme Court, given the conservative political climate and the makeup of the Court at this time.

"If the school district loses I think they will try to take it to the Supreme Court. They have a much better chance for review than we would



have. There is a good chance [the Court] might do what they did in *Fraser*," Foley said, referring to the Supreme Court decision this summer in which the court held schools had the right to regulate vulgar speech in the context of a school-sponsored assembly.

David Hols, the attorney representing the school district, echoed this statement. "The issue is certainly one which the Supreme Court would be interested in," he said.

Hols added that the judges were "gentle" with him in questioning, while they asked "hard and challenging" questions of his opponent.

"I try not to draw conclusions on these things," Hols said, "but if you drew your conclusion based on how they asked their questions, we would win hands down."

A second suit was filed by Foley in June in federal district court on behalf of students at Fridley who were suspended from school following the appearance of an article called "Slash and Trash '86" in an issue of *Tour de Farce*.

He is seeking a permanent injunction to have the suspensions removed from the students' files and to stop the schools from taking such action again.

The article detailed vandalizaton of the home of a foreign language teacher at the school. It stated that many of the students attending Fridley High School would like to have claimed responsiblity for the act.

The suspensions resulted because school officials believed the article had advocated student vandalism directed against teachers.

Foley says the trial date in this second case is set for some time in May unless a decision is reached in the first case that decides them both.

"A decision [in the first case] could take anywhere from 90 days to nine months. We just have to sit and wait."■

Missouri

High Court asked to hear student press case

A Missouri school district has asked the U.S. Supreme Court to review a decision that upheld the rights of students to write about teenage pregnancy and the effects of divorce on children in their student newspaper. If the Court agrees to hear the case, it could result in the first high school student press decision ever issued by the nation's highest tribunal.

The Hazelwood School District filed a petition with the Court on November 22, asking for the reversal of last summer's decision of a U.S. Court of Appeals in St. Louis. In *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368 (8th Cir. 1986), the court of appeals said that the school district had violated the First Amendment rights of three former Hazelwood East High School students by censoring articles that appeared in 1983. The court ruled that the student newspaper at Hazelwood East, *Spectrum*, was a "public forum for the expression of student opinion and that the articles objected to by the administrators could not have been forecast to materially disrupt classwork, give rise to substantial disorder or invade the rights of others."

Although seen as a significant victory for student free expression, the court of appeals' decision was in general agreement with other federal court opinions from around the country decided in the past 10 years.

The Supreme Court is expected to decide whether it will hear the *Kuhlmeier* case or let the lower court's decision stand by mid July.

Ohio

Court OKs yearbook photo contracts

The Supreme Court of Ohio ruled in January 1986 that three Ohio school districts whose contracts with a photography studio granted an exclusive right to take student photographs for the schools' yearbooks did not violate antitrust laws.

The lawsuit, *Thaxton v. Medina City Board of Education,* 488 N.E.2d 136 (Ohio 1986), was brought by Cynthia L. Thaxton, a senior at one of the high schools affected by the contracts, and by Victorian Photography Studio, Inc., a competitor of the studio that received the schools' contracts. They alleged that the contracts between Contemporary Photography Studio, Inc. and the Medina City, Cloverleaf and Highland boards of education violated Ohio's Valentine Act. The Valentine Act sets standards to determine liability for antitrust actions.

The supreme court based its decision in favor of the school districts upon its determination that a public board of education is not a "person" for the purposes of the Valentine Act when the board operates within its clear legal authority. The act prohibits certain restrictions on free trade by a "person" falling within its statutory definition. The court reasoned that if the legislature had intended the term "person" to include all governmental entities, it would have included them in the definition. In addition, since the legislature did expressly include foreign governmental entities within the statutory definition of "person," the legislature impliedly excluded all other governmental entities from the definition.

The supreme court explained that occasionally boards of education have been found to be "persons" for the purposes of a statute. However, in these instances, the boards have been engaged in commercial activities rather than acting in their governmental capacity.

Since the court determined that the school boards were "acting within their authorized governmental capacity by providing for and managing extracurricular activities," the court found that the boards were not acting as "persons" within the scope of the Valentine Act. Therefore, the court concluded that the three public boards of education could not be sued for antitrust violations under the Valentine Act.

Ohio is the second state to rule that exclusive yearbook photography contracts do not violate antitrust laws. Arkansas made a similar ruling in *Burge v. Bryant Public School District,* 520 F. Supp. 328 (D. Ark. 1980). ■

Nebraska

Advertisers continue fight with college paper

After being rejected by one federal judge, two members of the University of Nebraska community are talking their battle for advertising space in the school's student newspaper to the nation's second highest court.

In 1984, the *Daily Nebraskan* refused to accept thier ads seeking roommates in which each indicated that he or she was homosexual. They filed suit in federal court, and last June received a decision denying them a right of access.

The decision, viewed as a victory for student editors, stated that campus newspapers, even though supported in part by the state, did not constitute an open forum for any person who wanted to run an ad.

"The campus newspaper of a state supported university is entitled to the constitutional protections afforded the 'press,' including freedom of expression for the editors," said the judge in *Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb. 1986).

"The degree of discretion which editors utilize in rejecting advertisements is not distinguishable, under any First Amendment analysis, from that exercised over any other submitted material."

Therefore, the court added, "Rejection of an advertisement is a constitutionally protected editorial decision."

Jerry Soucie, Nebraska Civil Liberties Union attorney representing plaintiffs Pam Pearn and Michael Sinn, says the decision whether to list sexual orientation "would properly rest with the person placing the advertisement."

In presenting his case before the U.S. Court of Appeals for the Eighth Circuit, Soucie contends that the advertisements are protected commercial speech and are entitled to constitutional protection as long as the advertisements are not false or misleading and do not advocate illegal activities.

The university argues that Pearn stated during testimony that "she was in fact seeking a lesbian roommate" and thus attempting to discriminate in her advertisement.

Soucie responds that his clients "were not advertising for a roommate of a particular sexual orientation. They were seeking a roommate with whom they would be compatible and who would not be upset to discover that they were homosexual.

"By being open and honest about their own sexual orientation rather than concealing their homosexuality, they prevented anyone who chooses to answer the advertisement from being confused or misled."

Soucie argues that the failure to identify their sexual orientation would be more likely to mislead and confuse anyone who might choose to answer the advertisemnent.

"Disclosure avoids many potentially embarrassing and awkward situations. By keeping the potential roommate ignorant, the *Daily Nebraskan* policy requires difficult phone disclosure, a face to face confrontation, or the withholding of the information indefinitely.

Soucie states that had the ad read, "Lesbian roommate wanted to share apartment," one might reach the conclusion that "no heterosexuals need apply."

"Under these circumstances the policy could be constitutionally applied since the ads are discriminatory on their face," said Soucie.

Wiltse, the attorney representing the university and the *Daily Nebraskan*, offers that the editorial decision of the editor not to run the ad did not constitute the "state action" necessary for demonstrating a First Amendment violation, and that the policy adopted by the publications board was made in response to the decision made by the editor not to run the ad.

However, Soucie cites an editorial which appeared in the *Daily Nebraskan* in January of 1985 in which Chris Welsch, the editor who had rejected the ads, expressed his opposition to the policy against self-descriptive advertisements. He advocated a policy which would have allowed self description.

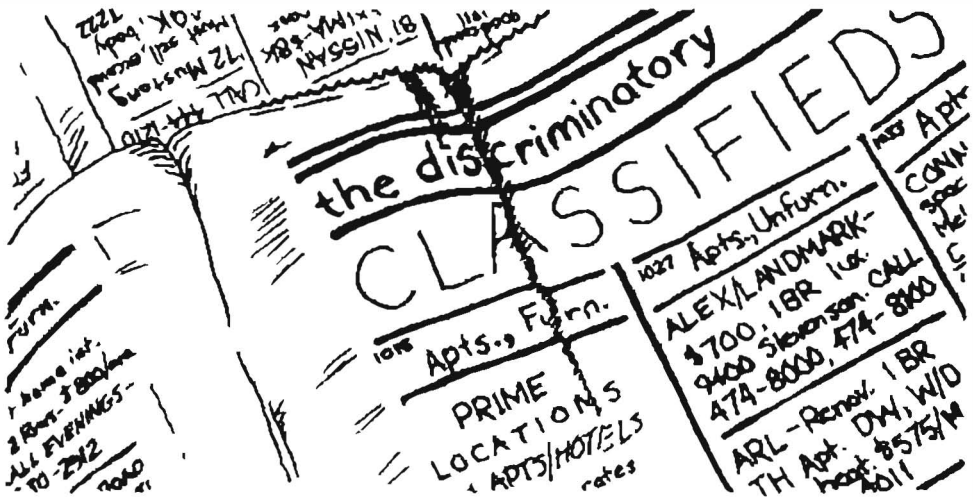
In speaking with Welsch, Soucie said it appeared that rejection of the ad "was not his decision and that left to his own editorial judgement" the ad would have been run.

"Self-description would be a better service to our readers," Welsch said in the editorial. "Knowing something about potential roommates is important—after all, you have to live together. By using self-description, the discrimination can take place before a phone call is made, before a person is met, before you move in together."

According to Soucie, Welsch took Pearn's ad to the general manager who said "don't run it." The matter was then taken to the publications board, who in effect, said Soucie, "imposed a policy on the staff of the *Daily Nebraskan* that was contrary to the policy favored by the editor."

Despite this, Soucie did not call Welsch to testify. Wiltse said that fact presents problems for Soucie.

"(Soucie) never proposed (at trial)



that the First Amendment rights of the paper were involved."

"Welsch apparently just changed his mind. I am at a loss to explain why he changed his mind. In that particular editorial he criticized a policy which he in effect helped to make. When that editorial appeared, he was no longer editor.

"What the publications board did was back up his original decision not to run the ad. He simply made known that he had second thoughts," Wiltse said.

The trial court's opinion stated that "The University, acting through the Publications Committee or otherwise, could not have directed the *Daily Nebraskan* not to publish the advertisement had it chosen to do so."

Wilste disagrees with that part of the decision.

"I don't believe that the decision of one person can control an entire newspaper." Nevertheless, he plans to argue for affirmance of the lower court's opinion.

No date has been set for argument before the court of appeals in the case.■

Arkansas/Florida/Tennessee

Courts open campus police records

Campus police at the University of Florida and Eastern Tennessee State University (ETSU) have recently received court orders to release records requested by newspapers through their state open records laws. And after battling for two years with campus police, *The Herald* at Arkansas State University (ASU) is considering a similar lawsuit against its school.

The Independent Florida Alligator filed suit against the president of the University of Florida after the campus police refused to release the names of two students who were the victims of campus crimes last summer. President Marshall M. Criser contended that the records sought were protected by a Florida statute that requires student educational records to be kept confidential.

In response, *The Alligator* argued that the question of access to campus police records does not fall within the provisions of the Florida educational statute, but rather is governed by the state's Public Records Law. The Florida Circuit Court for Alachua County in *Campus Communications v. Criser*, 13 Med. L.Rptr. 1398 (1986), agreed with the students and held that the state legislature clearly did not intend to include university police records "within the ambit of the confidentiality requirements for educational records."

Under slightly different circumstances, the Tennessee Court of Appeals in *Press, Inc. v. Board of Regents for the State of Tennessee*, No. 91 (Tenn. Ct. App. July 8, 1986) (per curiam), held that the Tennessee Open Records Law covers the release of campus police records, citing a recent Tennessee Supreme Court decision that opened the records of the Memphis Police Department. ETSU did not raise any educational record privacy statute in its defense.

The Johnson City Press, the local city newspaper, filed the lawsuit in November 1985 to force university officials to release campus police records relating to an investigation into homosexual activities occuring in public places on campus. The trial court ruled for the newspaper and the university appealed. While the appeal was pending, *The Press* reported that although ETSU had prosecuted a student for indecent exposure, it did not press charges against at least 17 other people who had signed sworn statements admitting to engaging in homosexual activities in campus bathrooms. Several of the statements allegedly were signed by ETSU faculty members and prominent local citizens. During the appeal, the Tennessee Supreme Court handed down its decision in *Memphis Publishing v.*

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Holt, 710 S.W.2d 513 (1986). ETSU agreed that the case was controlling and acquiesced to the court order requiring release of the records.

After these court decisions, editors and advisers at *The Herald*, Arkansas State University's twice-weekly newspaper, are considering a lawsuit to challenge their campus security office's policy of allowing student journalists access only to their activity report. According to the ASU administration, campus security does not make any arrests, but merely detains offenders until local police arrive to make the official arrest. Therefore, official arrest records are available only from the local police station and student journalists should request the records from local officials.

The activity report in question is a record of all calls received by campus security. It does not list any names and until two years ago was also off-limits to student journalists. Access was only granted to students after an informal opinion issued in May 1985 by Arkansas Attorney General Steve Clark stated that the activity report "should be open for public inspection and copying." However, even with this concession, student journalists at ASU believe they are not being given access to all relevant campus security records.

ASU officials maintain that the Buckley Amendment, a federal law that denies government funding to institutions that fail to restrict access to educational records to students and their parents, prevents the University from releasing any further records. As yet, no court has ruled on the Buckley Amendment's applicability to campus police records. All cases in this area have dealt strictly with interpretation of state freedom of information or public records statutes. The only official guidance on the federal law comes from an opinion issued by the U.S. Department of Education.

According to a 1983 opinion letter by the director of the DOE's Family Educational Rights and Privacy Act Office, campus law enforcement records are education records under the Buckley Amendment. A campus police unit cannot disclose personally identifiable information about a student to any individual other than law enforcement officials of the same jurisdiction. Although many colleges and universities do make campus police reports open to the public, no school has ever had federal funding removed as a result of this disclosure. University of Florida and Eastern Tennessee State officials did not raise the Buckley Amendment in their defense.

If *Herald* editors decide to pursue a lawsuit, the case may provide the first test for the DOE's interpretation of the Buckley Amendment's applicability to campus police records. ■

ADVISERS

New York

Former adviser combats school and illness

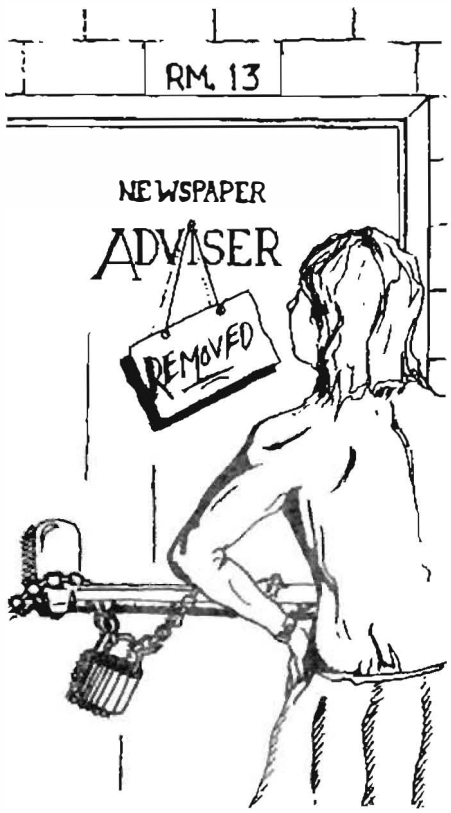
A high school newspaper adviser on Long Island is continuing to battle the school district that took away her position and the illness that has kept her from facing that school district in court.

In August 1981, without explanation, principal Edward Leistman of Carle Place High School removed Joan Sulsky as adviser of *The Crossroads*, a position that she had held for 20 years.

Sulsky filed suit in federal court in April 1982 claiming a violation of her First Amendment rights. She alleges that her dismissal was in retaliation for refusing to censor her students. The suit cites 11 instances in which the principal ordered Sulsky to change or delete articles that appeared in the newspaper.

Sulsky, who has been suffering from leukemia, has since retired as an English teacher at the high school.

Ciro Matarazzo, Sulsky's attorney, said that the judge hearing the case agreed to allow a presentation of videotaped testimony from Sulsky. But her doctor would not allow it, saying that the strain would be too much for her.



"The judge consented to the videotape in July and said that it would be admissable at trial. The jury had been picked and we were all ready to go. New drugs have the leukemia in abatement, but Joan's doctor didn't think she could tolerate it.

"Right now we're looking at maybe the worst side [that Sulsky's illness will not alow the trial to be held], and hope at least to get some First Amendment guidelines adopted for the school district.

"We're still trying to settle this thing," said Matarazzo.

Robert Mulligan, an attorney representing the school district, declined to comment on the case, but said that it would be discussed at an upcoming meeting of the school district in a special executive session. No new trial date has been set. ■

Oklahoma

Parties clash on motivation for firing

A high school adviser in Oklahoma City who lost her position continues to exchange jabs with her school district as she awaits a ruling by a federal court.

Settlement negotiations entered into by the two parties in a court-ordered conference were unsucessful in resolving the issue.

Patricia Miller claims she was fired for allowing the student newspaper at Putnam City West High School, the *Town Cryer*, to publish in April 1984 in-depth articles that dealt with teenage pregnancy, birth control and abortion.

Miller is seeking reinstatement as faculty adviser of both the yearbook and newspaper. She is also requesting compensatory and punitive damages. She alleges that the school district acted in "bad faith" and violated her constitutional rights.

The school district contends, however, that this is not a First Amendment case and that there were related personnel problems which led to her dismissal, prior to the appearance of that issue of the paper.

Miller allegedly failed to comply with an unwritten policy of clearing controversial issues with the administration before publishing them.

According to Linda Meoli, an attorney representing the Putnam City School District, the content of the articles and a chart that appeared along with them detailing the varying degrees of effectiveness of different forms of birth control was not a factor in the superintendent's decision to transfer Miller.

"In the beginning of the year the principal asked her to please tell him beforehand [about any possible controversial articles which would appear in the newspaper], not that he wanted to censor them beforehand, but just so that he would know and be aware," said Meoli. She said Miller agreed to abide by the policy and later went back on her promise.

Meoli also noted Miller's lack of guidance to the students in preparing that April 1984 issue. When the articles were finished and ready to be

pasted up, the staff realized that there was insuffucient copy to fill the last page of the special section. The blank space was filled with a box containing a list of names and phone numbers of persons to go to for information or advice concerning the issues discussed in the special section.

According to Meoli it should have been the responsibility of Miller to have the students check with those whose names were used, who included other teachers, before publishing them. This failure, said Meoli, "jeopardized the close working relationship expected by the district to exist between Miller and her co-workers.

"It is unbelievable to think that an expert in the publication of a paper would ignore the basic requirements of fair and accurate journalism and permit the preparation of the box in this manner."

Meoli said that a severe deterioration of the relationship between Miller and the Putnam West High School principal led to the decision to transfer Miller.

"It appears that a principal and a faculty adviser should have a good working relationship. When a principal requests that he be forewarned of controversial issues so that he can be prepared for any backlash from the community, it would seem that a responsible adviser would comply in order to make both the adviser's job and the principal's job less stressful."

"Bill Bleakley [an attorney also representing the school district] and I, and for that matter, the majority of the Putnam City School Board, agree that the articles were not obscene or libelous, and were not the cause of Ms. Miller's transfer," said Meoli.

Meoli added that the topic of human sexuality had been dealt with by student publications in the past without difficulty.

"The school district understands and encourages a free press and the right to print controversial articles," said Meoli.

In the deposition taken on behalf of the school district. Miller's student teacher at the time stated that she had been told that board members had come to the school and taken several copies of the newspaper.

Joel Carson, an attorney representing Miller in the case, sees this as contradicting the district's contention that the articles were not a factor in the decision by the school district to reassign Miller.

"I have reports that one of the school board members stormed up there, and she demanded copies of the paper." Carson says that he sees that as odd and thinks a jury would as well.

Miller's attorneys filed a motion requesting that details of all meetings held by the school board, including a May 1984 executive session, and subsequent closed meetings of the board and its attorneys be made public. The motion was granted by the court, but was resisted by the school district. The judge ordered the district to disclose again. As a result, Carson learned that discussion of the newspaper articles had taken place.

"When we asked people earlier if it

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was discussed they'd tell us 'nope, it wasn't considered.' But later we found that there was considerable discussion about it. They denied that they ever mentioned it, and they still denied it before they would tell us anything. Some said that 'yeah it was talked about,' but they wouldn't tell us what was said. Others still contend that it wasn't a consideration."

Miller's attorneys initially contended that her right to due process under the law was violated. The court dismissed that claim on the basis of a contractual agreement which states that public school teachers in Oklahoma may be reassigned without any prior notice.

"The court was right in saying that we didn't have the right to procedural process. The contract does say that a school district can transfer a teacher from place to place without reason.

"What we're saying is that yes, they can transfer someone without reason, but not for the wrong reason.

"They're simply punishing her for allowing students to publish this material," said Carson.

"There are various legal technicalities to get over and in some cases you don't. I think when you look at this thing as a whole it doesn't pass the 'smell test.' When you get to a jury with this thing with reasonable people, they will come up with a reasonable decision.

"Seventy percent of the time in these civil liberties cases, you lose. But even if you lose you get attention and people start to think a little differently. The next time, they think long and hard before attempting to do the same thing again," Carson said.

"It's important to win, but it doesn't matter near as much to win as to ... let school boards know that this sort of thing will not go uncontested."

The school district has filed a motion for summary judgement and is awaiting the court's decision.■

CENSORSHIP

Connecticut

Anti-gay satire escapes punishment

After receiving widespread criticism from free speech supporters, a Yale University governing board voted in October to rescind its punishment of a student who had satirized the campus gay community.

Wayne Dick, a junior economics major at Yale, was placed on two years probation in May 1986 by the school's executive committee, a panel of 13 faculty and students. Had Dick committed a "serious" offense during the probationary period, he would have been suspended or expelled from the university.

On September 3, the judicial body agreed to rehear the case and held a new hearing on October 1. The committee, whose proceedings are conducted in secret, gave no reason for its decision to rescind the punishment.

Dick had written and distributed a poster entitled "Bestiality Awareness Days" (BAD Days), satirizing the college's annual "Gay and Lesbian Awareness Days" (GLAD Days). A prominent gay student activist was also parodied in the poster.

GLAD Days, held in April at Yale for the past five years, is sponsored by the Gay and Lesbian Co-op.

The parodied student, the director of the Afro-American Cultural Center at Yale, and a member of the university's Racial and Ethnic Harassment Board submitted a complaint to the executive committee alleging that the poster constituted harassment in violation of the university regulation against "physical restriction, assault, coercion, or intimidation of any member of the community."

Dick was then informed that he would face charges before the college executive committee.

In his defense, Dick cited the "Report Of the Committee on Free Expression at Yale," known as the Woodward Report, as it appears in the 1985-86 Yale University Undergraduate Regulations. A porion of the report reads: "even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression."

In a pre-trial letter written to members of the committee Dick said, "the 'Woodward Report' is clear. Even if my poster had caused shock, hurt, or outrage, it is still protected. It may be properly subject to personal or moral criticism on that basis — although I do not believe my poster would merit such criticism — but it is not properly subject to university punishment."

The committee ruled that the poster produced by Dick constituted an act of harassment and intimidation toward the gay and lesbian community and towards individuals named in the poster.

The Woodward Report was the result of instances in the mid-seventies when William Shockley, who has asserted that blacks are genetically inferior, and other campus speakers who held unpopular views were shouted down. It was written in 1975 by a committee appointed under the chairmanship of historian and professor emeritus of history at Yale, C. Vann Woodward.

Woodward and many others in the university community, including newly appointed president of Yale Benno Schmidt, agreed with Dick.

Said Schmidt in his inaugural speech in September, "No institution devoted to the spirit of free inquiry can survive in a society so riven with doubt and fear that it hunkers down in futile rejection of the ugly truths of our imperfect world.

"... To stifle expression because it

is obnoxious, erroneous, embarrassing, not instrumental to some political or ideological end is—quite apart from the grotesque invasion of the rights of others—a disastrous reflection on ourselves.

"There is no speech so horrendous in content that it does not in principle serve our purposes . . . ," Schmidt said.

Guido Calabresi, dean of Yale Law School and a supporter of gay rights, spoke for Dick along with Woodward at the hearing in October.

They noted that Dick's exercise of his free speech did not advocate violence or intimidation or fall under the definition of harassment as defined in university regulations. Although they may not have agreed with his views on homosexuality, his speech should be protected, they said.

Woodward was quoted in the *Village Voice* as saying, "The 'Woodward Report' was misused and abused by the executive committee in Wayne Dick's case. The report was intended to protect people in the use of their freedom of speech—not to punish them for that use.

"The 'Woodward Report' does not guarantee that the speech has to be acceptable or pleasant or even correct. It simply guarantees the right to all to exercise their speech. Mr. Dick, it seems to me, was doing just that."

After his punishment was removed, Dick commented that he hoped the controversy had "done something for the university in the area of free speech."

Under Yale University rules, ethnic and racial slurs can still be brought before a grievance board at Yale. Some students are unhappy with the committee's decision to remove Dick's punishment. They feel that Dick's posters did constitute harassment and his actions would not have been tolerated if aimed at black or Jewish students instead of homosexuals. But Dick's supporters contend that the principle of free speech, not his position on homosexuality, has been the victor.■

Texas

Alternative paper fights university favoritism

A conservative student journal at the University of Texas has gone to federal court to force the school to stop discriminating in favor of its official student newspaper.

The dispute centers around a university regulation restricting the distribution of literature in the student commons area of the university to publications which do not run paid advertisements.

The Daily Texan, the official student newspaper of the Austin campus, is the only organization exempt from the rule.

The Texas Review Society was permitted to distribute its newspaper, *The Texas Review,* from its organization table located in the commons area until the society included a paid advertisement in its newspaper.

According to James Todd, the assistant Texas attorney general who is representing the university, the case clearly deals with preferential treatment for *The Daily Texan* as opposed to *The Texas Review.*

"Prior to this advertising controversy, they were treated like everyone else. I am not aware of them ever being treated differently."

Todd agrees that *The Daily Texan* is allowed more places for distribution on campus. The university contends that the difference in place restriction is justified because *The Daily Texan* is the "official" student newspaper.

Todd also cites the existence of *The Daily Texan* as a teaching tool and laboratory exercise for students in the journalism department.

"*The Texas Review* is affiliated with the university only in that they are recognized as a student organization. *The Daily Texan,* as a house organ, is the official organ for official announcements, paid for in part by student fees," Todd said.

The university offered a compromise that would have allowed the Texas Review Society to display copies of the *Review* at its organization table located on the West Mall. Members could then direct students to an area of vending machines where publications containing paid advertisements, including the *Review,* could be obtained.

The university, however, would not permit the free-of-charge distribution of *The Texas Review* from the organization table because of its inclusion of paid advertisements.

The *Review* found this arrangement to be unsatisfactory.

"They violated our freedom of press rights and that is the reason for the suit," said Drew Coates, publisher of *The Texas Review.*

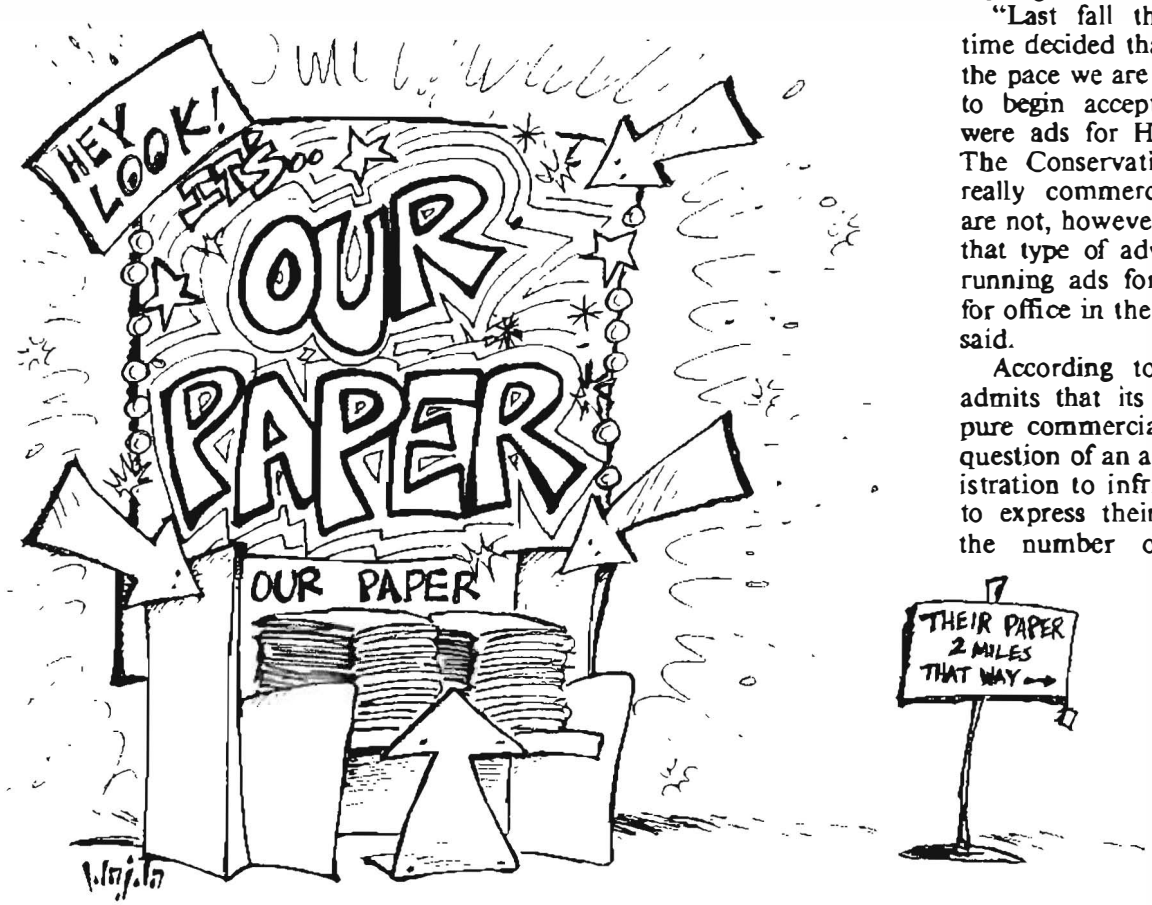
"What they suggested was that we distribute from vending machines in one of three isolated areas around campus.

"As an opinion journal, we felt that we could be subject to vandalism, and as a student-run paper, as far as upkeep, we have neither the facilities nor the funds to [maintain vending machines]," Coates said.

Financial concerns initially prompted the *Review* to begin accepting paid advertisements.

"Last fall the publisher at that time decided that to keep growing at the pace we are now, we would have to begin accepting paid ads. They were ads for Hillsdale College, and The Conservative Book Club, not really commercial advertising. We are not, however, backing away from that type of advertising. We will be running ads for candidates running for office in the near future," Coates said.

According to Todd, the *Review* admits that its lawsuit is a case of pure commercial speech, and not a question of an attempt by the administration to infringe upon their right to express their opinions. He cited the number of other alternative



newspapers in existence at the university as testament to the administration's receptiveness to such publications.

"If it weren't for preferential treatment, there would be no lawsuit. The university does have a rational basis for treating *The Daily Texan* differently," said Todd.

However, Susan Dasher, attorney for the *Review,* indicated that the inclusion of paid advertising is only one consideration in the case. Dasher stated that the types of advertisements also may have had bearing on the reaction of the university. Some advertisements were for the *American Spectator, Chronicles of Culture* and other conservative publications.

Coates said the suit rests on the constitutionality of the distribution rule and was not intended as a vehicle to gain prominence or receive special treatment from the university. He noted support from *The Daily Texan* in the dispute.

"*The Daily Texan* never has been adversarial towards us in this at all, and in fact they have come out in support of us editorally. I don't see why the university is pursuing this at all now, since it seems pretty sure that we will win the case," said Coates.

"It's pretty obviously prior restraint," said Sean Price, associate managing editor for *The Daily Texan.*

"The university's best argument is that they are trying to protect us, but the *Review* is not a threat to us. Someone must have had their nose in fine print somewhere to come up with this rule."

"This rule would protect us from the encroachment of major Texas dailies, like the *Austin American—Statesmen,* that are in the position to drain away advertising when we don't have the resources to compete. Or perhaps if AT&T wanted to come in and start papering campus and trees with their ads, then I could see the reasoning behind it. The rule in itself is not bad, but I think the rule could be changed to accommodate student publications," said Price.

In a similar case at the University of Texas in 1970, *New Left Education Project v. Board of Regents of the University of Texas System,* the regents argued that students distributing a newspaper called *The Rag* were in violation of a regulation prohibiting commercial solicitations on campus.

The regulations made permissable distribution of such publications only if they were authorized by the university. Designated areas were created in which vending machines might be located for the sale of commercial publications.

The court ruled these two provisions of the regulations unconstitutional because they were a direct infringement on the publishers' First Amendment rights.

The court conceded the rights of the university to regulate time, manner and place of distribution, but said that the burden of proof rested with the university to provide "compelling" reasons for such regulations, such as substantial disorder or material disruption of classroom activity. The court saw the rules as a direct attempt by the university to stifle free speech.

The court said the regulations vested "standardless discretion in the institutional head or his agency delegate to grant or withhold exercise of First Amendment freedoms contingent upon the will of an administration . . . ."

Todd concedes that the university has received no complaint that university work has been disrupted by the distribution of *The Review* by the Texas Review Society at its organization table location. Todd however, feels that the rules are necessary to insure the school's West Mall retains its character and its principle purpose as an area for the free exchange of ideas.

"If the rule were changed to accommodate *The Texas Review,* someone like MCI or AT&T could come in and offer student organizations commissions to hawk their advertising, and hordes of student publications would take them up on it. There is such a financial incentive to do so, as it stands now, the climate, the exchange of ideas, it just won't be there anymore.

"If we drop that distinction [commerical versus noncommercial], it puts the university in the position of having to decide what is permissable advertising and what isn't.

"How do we now say no to some fraternity or sorority that wants to distribute these materials? How do we draw the distinction between them and the Texas Review Society?"

Todd does not dispute the fact that the compelling reasoning of *The Texas Review* in accepting advertising was financial.

"We've offered them alternatives. They could sell their publication as long as it did not have paid ads. With the exception of *The Daily Texan* there is nothing in the West Mall area which includes paid advertisements. This is not a constitutional issue. Neither is the inability to raise money, if that were a factor."

Price, however, was at a loss to rationalize the motive of the university in pursuing this matter.

"I have not heard yet why they invoked this rule at all, when it hides behind protection of *The Daily Texan* and that's not a very good reason. *The Daily Texan* has said this not once but twice.

"What they have done is taken what was a third-rate student project for a bunch of conservative students and turned it into a national student rights case and made a martyr of *The Texas Review,* and there is no reason for it. Before all this the *Review* was virtually unknown; they could not have paid for the publicity that they are receiving now," says Price.

"It's a fairly strife publication and it does what it wants to do. It irritates a lot of liberals and radicals on campus, but among students there is no uprising to ban the *The Texas Review.*

"It's fine for the *Texas Review* to distribute on campus; more power to them. The university lost the first time and they are bound to lose the second," said Price, referring to the 1970 *Rag* decision.

Coates concluded, "I don't know whether it's a case, as on other campuses nationwide, of conservatives versus '60s liberal-types. Although there may be some elements on campus who wish to see us cease to exist, more than likely [the problem is] an outgrowth of the huge bureaucracy here."

Todd conceded that the policy giving preferred status to student publications on the basis of their inclusion of paid advertisements might be unique, but he felt the justifications for it made it worth keeping.

The trial in the case began in Austin on December 10. A decision is expected in early 1987.■

South Carolina

Political cartoon causes a wee controversy

High school journalists in Columbia, S.C., discovered in October that politics and satire don't mix, at least in the eyes of their school principal. Their cartoon about mandatory drug testing at issue among candidates in the November election prompted the principal to impound the student newspaper until local media coverage forced its release.

Principal Keith Callicutt of Irmo High School objected to a cartoon lampooning state gubernatorial candidate Carroll Campbell. Callicutt halted distribution of *The Stinger* after he found the wording of the cartoon and the use of Campbell's name inappropriate. The students filed a grievance with the school district.

The cartoon by student Blan Holman depicted Campbell holding a urine sample and saying, "I am very serious. Would you vote for Mike Daniel, or would you vote for me, a man who is willing to share his wee-wee with all of you. Wee-wee shall overcome."

An arrow pointing to the candidate's hand noted "Mr. Campbell's personal sample available for public scrutiny."

Campbell, an advocate of mandatory drug testing, had criticized his Democratic opponent, Mike Daniel, for refusing to submit to urinalysis testing.

The newspaper contained a series of articles dealing with the upcoming election as well as two editorials debating the pros and cons of drug testing. Editor Kathy Michaelis, who had written the editorial in support of drug testing, said she did not find the cartoon offensive. Michaelis said that she was surprised when distribution of the newpaper was halted.

About a hundred copies of the newspaper were circulated that morning among the 2400 students at the school before Callicutt could retrieve the remaining copies from teacher mailboxes.

School Superintendent H.E. Corley said that he did not want to take on the role of censor. However, he supported Callicutt's decision.

After a story about the ban illustrated with the cartoon appeared in an edition of *The State*, a local newspaper with the largest circulation in South Carolina, Callicutt relented and allowed distribution to occur.

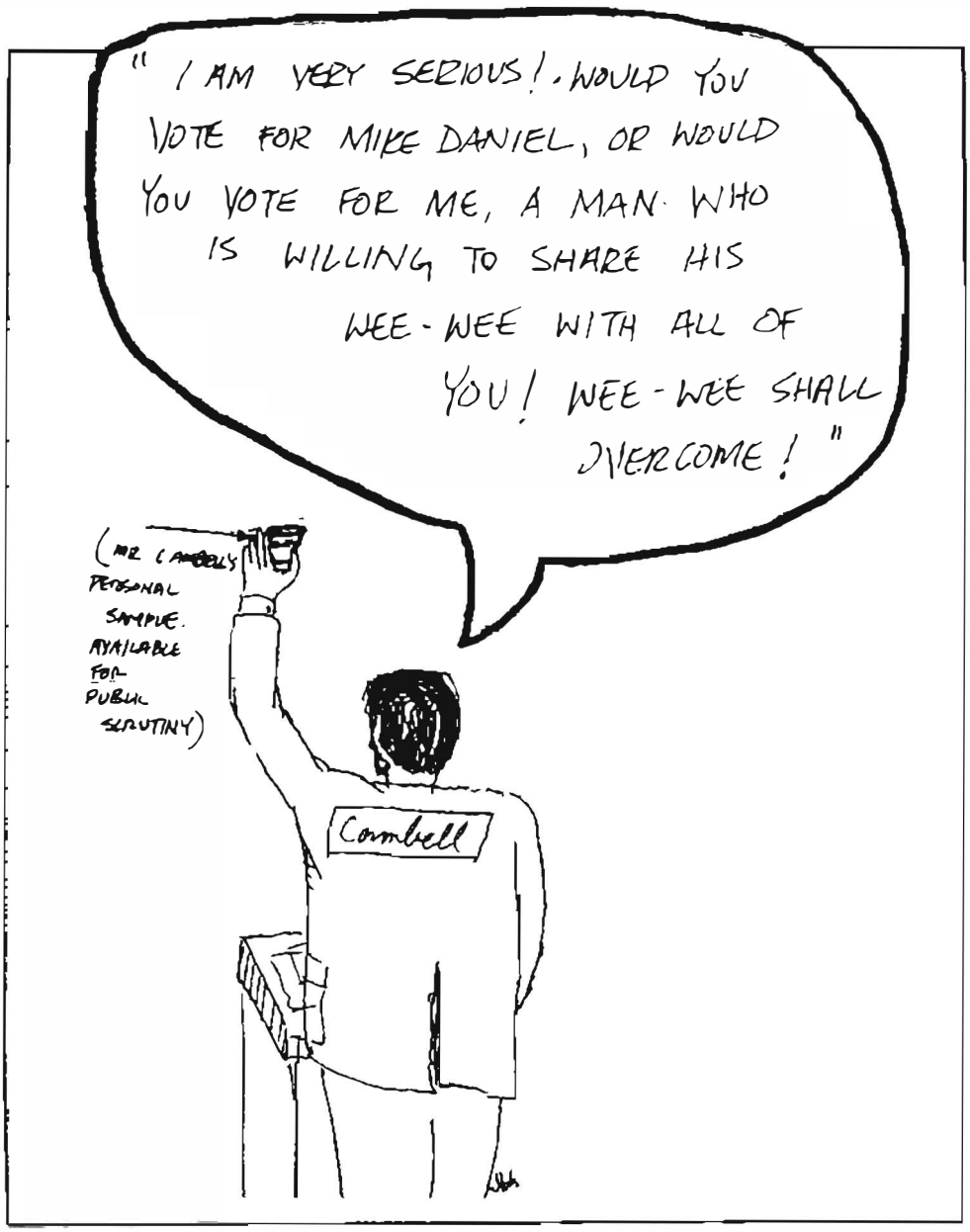
"Since everyone in the state has already seen the cartoon, there is no longer any reason to hold distribution," he said.

However, Callicutt stood by his earlier decision, stating that although he was against censorship, he viewed the school newspaper differently than the professional press. He said his intentions were to assume his responsibility as principal and to insure that the rights of students and others involved were protected.

As a result of the controversy, the adviser, Karen Flowers, wants to establish a publications board to aid the newspaper in screening material that is submitted for publication in the future.

Flowers found the cartoon "in poor taste" and said she would have suggested that it be replaced or altered.

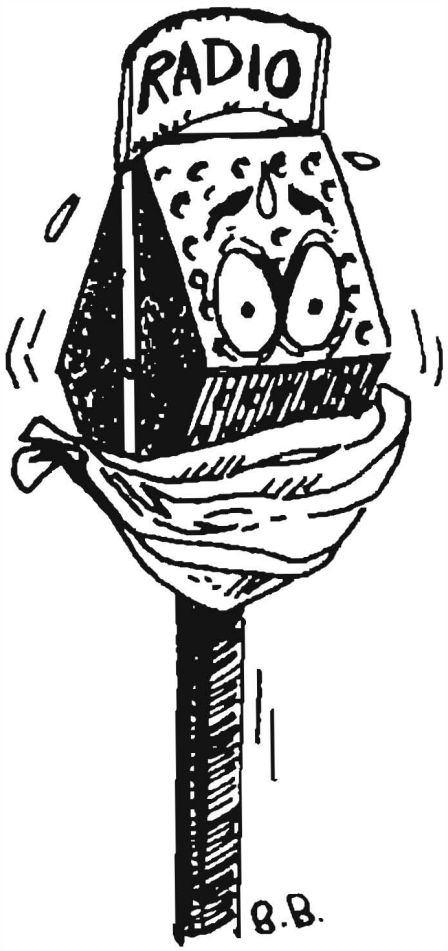
The school's policy states that the administrators are responsible for the content of the school newspaper. The



school district views itself as publisher.

However, court cases indicate that unless a school can show the material in question is libelous, obscene or likely to create a substantial disruption of the school environment, it is prohibited by the First Amendment from censoring.

The candidates for governer who were the subject of the cartoon had little comment. A spokesman for Campbell was quoted in *The Columbia Record* as saying that he knew of no one in the candidate's office who was offended by the cartoon. Campbell won the election with 52 percent of the vote.■



California

Complaint about explicit lyrics on student broadcast station prompts government action

In what could signal the beginning of a new crackdown on the broadcasting of "indecency," the Federal Communications Commission has ordered a student radio station to respond to complaints about sexually explicit song lyrics.

The regents of the University of California, who hold the broadcasting license to student station KCSB-FM at the university's Santa Barbara campus, received a letter from the FCC in September. The Commission asked for comment on complaints raised by Santa Barbara resident Nathan W. Post. Post objected to the lyrics of a song by the British group The Pork Dukes that referred to oral and anal sex he heard on the station in July during a 9:30 p.m. to midnight heavy metal/punk rock program. Post indicated that he was a regular listener of the station and had complained about the programming in the past, but his complaints were only acted on by the FCC after he directed them to the Parents' Music Resource Center.

The PMRC has been at the forefront of the explicit lyrics controversy in the past two years, testifying before Congress and putting pressure on record companies to place warning or lyrics labels on the outside of albums that might be inappropriate for some children. The organization was created by a group of suburban Washington, D.C., women, many of whom are the wives of Congressional or executive branch office holders. It was a letter Post sent to PMRC vice president Tipper Gore that the FCC cited in their letter to the University of California regents.

In its response to the FCC, the university noted that the radio station's own review procedure had concluded that the lyrics in question were not obscene, but might have been seen as profane by some listeners. Under current court decisions, the FCC can penalize a station for broadcasting "indecent" material during a time of day when children could reasonably be expected to be in the audience. However, neither courts or the FCC have determined what those times of day are. The station concluded that without guidance from the FCC, they presumed that 10 p.m. on a Saturday night (the time of the incident in question) was outside normal child-listening hours. However, they requested their disc jockeys in the future to play songs that might be seen as objectionable closer to midnight.

In addition, the university noted that it had no power to censor the student radio station. University counsel Gary Morrison said that the First Amendment prohibits public school officials from censoring the content of student newspapers or radio stations. Nevertheless, the university felt that no broadcasting legal standard had been violated.

The FCC has not responded to an obscenity complaint in over three years, according to the Commission's Mass Media Bureau chief. The action against KCSB, as well as a similar letter sent in September to a Los Angeles radio station, are seen by some as the beginning of a new crackdown on broadcasters. The FCC has not applied sanctions to a station for broadcasting obscene or indecent material since 1978.

If the Commission determines that KCSB has violated the broadcasting indecency statute, it could impose a fine on the station and revoke its broadcast license. No action has been taken since the university responded in October.■

Florida

Underground editor loses out in court

The case of an underground high school journalist in St. Petersburg, Fla., has been thrown out of federal court based in part on the U.S. Supreme Court's decision last summer involving student free speech rights.

Seventeen-year-old Manny Sferios was charged with violating school board policy when he failed to submit *Not for Profit* for review prior to distribution. Sferios has since moved from the school's district.

The judge dismissed the case in late July on the basis of the Supreme Court decision in *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), and the failure of Sferios to file an answer to the contentions set forth in the school's motion to dismiss by the court-set deadline. Michael Schwartzberg, Sferios' attorney, says that he and Edwin Johnson, the school's attorney, agreed to an agreement to extend the deadline. However, they failed to notify the court.

The judge wrote that in light of *Fraser*, "considering the reasons expressed in that opinion, ...'surely it is a highly appropriate function of public school education to prohibit use of vulgar and offensive terms in public discourse,'" and the "vulgar terms" printed in *Not For Profit*, he would grant the school's motion to dismiss. He rejected a request for a rehearing of the motion in November.

The Supreme Court said in *Fraser* that school administrators did not violate the rights of a student by suspending him in 1983 for giving a speech that contained sexually suggestive language in a school assembly.

The Court went on to say that the school had an interest in protecting minors, "especially in a captive audience," from exposure to such speech.

Schwartzberg says *Fraser* dealt with oral versus written speech and that the school assembly constituted a captive audience situation. He saw no similarity between the two cases and thought the reasons for dismissal unfounded.

"What the judge said essentially, is that *Fraser* provides that the school can regulate public discourse. He claims that *Fraser* is not distinguishable. What we are saying is that *Fraser* applies to a captive audience, and in this case the students are free to read [*Not for Profit*] or not to read it, whichever they choose."

Edward Johnson, attorney representing the Pinellas County School District, disagrees.

"It was a wonderful decision. It gave control to the schools to decide what is and is not acceptable. [The federal district court] said that we can prevent just anyone from coming in and distributing to our students."

"Here we had an underground newspaper published by students or people off campus; it never was established that they were students .... He was not a Pinellas County student," said Johnson.

"That 'publication,' for want of a better word, contained four-letter words and derogatory remarks about folks here. It was offensive and abusive and downright obnoxious, and that's not something we want in our schools.

"Quite frankly, it was a piece of trash," said Johnson.

Justice William Brennan, concurring in the *Fraser* decision in a separate opinion added that in the *Fraser* case, the "school officials sought only to ensure that a high school assembly proceed in an orderly manner."

Brennan stated, "There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express. Nor does this case involve an attempt by school officials to ban written materials they consider 'inapropriate' for high school students, or to limit what students should hear, read, or learn about.

"Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."

"School officials . . . do [not] have limitless discretion to apply their own notions of indecency. Courts have a responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar," Brennan concluded.

Spherios said that the language in *Not for Profit* was not sexually suggestive in any way and that the students had the choice to either read or disregard the publication.

"Although it contained four-letter words, none of it dealt with sex, and it was not forced on students."

Johnson, however feels that this is flawed reasoning, stating that once someone picks up a copy of the publication, the effect would be the same.

"Once you pick it up, it's too late. If you read only a little, which you have to do to find out what is inside, it's too late then."

Initially, issues of *Not For Profit* were confiscated from Sferios and other students for distributing the magazine on school grounds. Even after Sferios began to distribute the magazine off school property, he says school officials continued to confiscate copies of the magazine when students brought them back on campus claiming that the magazine was obscene and unsuitable.

However, Johnson denies this allegation.

"I never heard anyone ever tell me that someone bought something from somewhere else [and] that it was taken from them. Nobody alleged that."

According to Schwartzberg, a direct attempt has been made by the school district to censor the materials students read.

"What they appear to be saying is that, students are reading it [*Not for Profit*] during the course of the school day and that's not what we want our students reading. Big Brother lives."

Johnson contends however, that although members of the school board found the content of *Not for Profit* to be offensive, this was not the main factor in their decision to ban distribution of the magazine at Pinellas County Schools.

Johnson said the decision was due to a district policy which bans distri-

bution of advertisements on school property and *Not For Profit* contained ads.

"Although we felt that the material it contained was objectionable, and it certainly bordered on slander and libel, the decision not to permit them to distribute was based on the fact that it contained advertisements, and that is not permitted."

Johnson added that the school superintendent offered to allow distribution of the magazine if the *St. Petersburg Times* would run an issue of *Not for Profit* in full. The *Times* declined.

"He asked if the local newspaper, one of the great 'liberal' newspapers in the state, would publish it. The superintendent said he would allow it .... They did not take up the challenge."

Sferios is no longer publishing his magazine, but he feels that it is important to pursue his case.

"After we started our paper, several others were started, and it's great that students realize that they can do that."

After the motion for rehearing was denied in November, Sferios and his attorney had not yet decided whether to appeal the decision.■

...But wins press freedom award

Manny Sferios, the 17-year-old editor of the alternative high school news and opinion magazine *Not For Profit*, has been selected the winner of the 1986 Scholastic Press Freedom Award.

The award, sponsored by the Student Press Law Center and the National Scholastic Press Association/Associated Collegiate Press, is given each year to the high school or college student or student news medium that has demonstrated outstanding support for the First Amendment rights of students.

Sferios, a former student at St. Petersburg High School and the Thom Howard Acadamy, led the production and distribution of *Not For Profit* to thousands of public and private high school students in Florida's Pinellas County during the 1985-86 school year. The magazine discussed issues such as nuclear war and racism in South Africa and offered pointed criticism of President Reagan, Moral Majority leader Jerry Falwell and Pinellas County school officials.

The Pinellas County School Board banned the magazine in October of 1985, citing the presence of advertising and vulgar language in its pages in addition to Sferios' failure to submit the publication to school officials for prior review before distribution. In April, Sferios and other students filed a class action lawsuit in federal district court against the school board for violation of their First Amendment rights.

The magazine began after Sferios read about a north Florida school board removing books including *Catcher in the Rye* from school library shelves. He also noted that students writing for some of the

county's official school newspapers were encouraged not to write on controversial subjects. These incidents prompted him to ask, "What kind of world will we be living in 10 years from now if people keep trying to 'save' people from themselves?" That was the spark, Sferios says, that ignited *Not For Profit* as a forum for students to speak freely on issues that were of inerest to them.

Sferios says that five other alternative publications have sprung up in the St. Petersburg area since the creation of *Not For Profit*. And his magazine has received over 400 letters from students, all but a handful of which have been positive. Even the negative letters were regularly printed for the magazine's readers. "I like to show that there are people with other viewpoints," Sferios says. "I believe that for the truth to come out, both sides have to be heard."

In selecting Sferios for the award, SPLC Executive Director Mark Goodman cited the fundamental understanding the young journalist had of the importance of free expression and his willingness to stand up for his First Amendment rights.

"Whether we like it or not, many high school students are not going to be satisfied with a student publication that is all 'happy news.' Manny deserves this award for his efforts to give those students outside of the political or social mainstream a chance to discuss issues that are important to them," Goodman said.

The award was presented on Sunday, November 23, at the National Scholastic Press Assoication/Journalism Education Association national convention awards brunch held at Chicago's Hyatt Regency Hotel.

Nominations for the Scholastic Press Freedom Award are accepted until August 1 of each year and should clearly explain why the nominee deserves the award and provide supporting material. A nominee should demonstrate a responsible representation of press freedom through writing or actions and the ability to raise difficult and necessary issues in news coverage. Nominations should be sent to:

Scholastic Press Freedom Award
Student Press Law Center
800 18th St., NW, Suite 300
Washington, DC 20006 ■

California

No end in sight for signed editorial dispute

The California State University Board of Trustees refused in November to put an end to the two-year controversy over endorsements of political candidates in their schools' student newspapers.

The trustees rejected a settlement that would have allowed the student publications in the 19-school system to run political endorsements under the name of their newspaper.

The controversy has focused on a part of the state education code that prohibits the funds of any organization in the California State University system to be used for the endorsement of political candidates. The CSU administration interprets the code as requiring that editorials in student newspapers be signed by the editor who wrote them in order to make it clear that the views expressed are those of the author and not those of the newspaper, the students or the university.

The separate University of California system, although also state supported, is not covered by the code. Student newspapers at UC schools routinely run political endorsements.

The dispute began in 1984 when editor Adam Truitt of the *Lumberjack* at Humboldt State University in Arcata was fired from his position because he ran unsigned editorial endorsements for candidates and issues in that year's general election. In May 1985, a second *Lumberjack* editor was fired for running endorsements. The *Lumberjack*, Truitt and other newspaper staff members filed a lawsuit against the school and the CSU system for infringement of their First Amendment rights. They agreed to the settlement propasal hoping that the issue could be put to rest.

But settlement prospects did not look promising after California Gov. George Deukmejian earlier in the fall vetoed a related bill that had been introduced in the spring of 1985 by the California State Students Association. The proposed settlement mirrored the bill's language. Passage of the bill was hampered almost at its inception when the trustees, who are appointed by the governor, went on record opposing it.

"In both houses the vote was very close," said Sherry Skelly, legislative director of the CSSA.

"The board doesn't take lightly having the legislature telling it what to do, and the governor felt that this was an issue which should be dealt with from within by the trustees," said Denise Gronki, special assistant to Skelly.

A spokesman for California Assemblyman Dan Hauser, who introduced the bill, said the Republican governor also was influenced by information provided by members of his party indicating that student newspapers endorse Democratic candidates nine out of 10 times.

"You'd think that our governor, the former state attorney general, would reason out the constitutionality of the issue," says former *Lumberjack* editor Tom Verdin. "Instead he listened to the erroneous arguments and almost scare tactics of the Chancellor's office."

Arnie Braafladt, attorney for the *Lumberjack*, says that the *Lumberjack* has no course of action now other than pursing its lawsuit.

"It's clearly a question of the constitutional validity of this regulation and the protection of student newspapers. To take the position that the legislature doesn't have the right to get involved when (the education code) affects 19 campuses and over 300,000 students is absolutely absurd.

"The issue is very much alive. We tried to exhaust all administrative and legislative options before asking the court to intervene," Braafladt says.

However, the CSSA says that the endorsement policy, supposedly in effect at all of the CSU campuses, is

being enforced in a haphazard manner. They discovered that 11 of the 20 student publications in the CSU system, including the *Lumberjack*, carried political endorsements during the November 1986 election. Only the student editor of the San Diego State University newspaper was threatened with punishment for his action, and his one-day suspension was 'indefinitely postponed" after he appealed to his school's vice president.

"As far as the state policy goes there is no across-the-board application. Some newspapers are entirely self-sufficient. Others rely on money from the state, and even among them, some do have unsigned editorials and political endorsements. The code needs a lot of clarification and a lot of work," says Gronki. "For us, it's still an issue, even though it's no longer a bill."

Assemblyman Hauser's office indicates that they may reintroduce the bill during the next legislative session if they feel they can convince the governor to change his mind. But until such a bill is made law, *Lumberjack* staff members say that the controversy and their lawsuit will continue. ■

New York

Teen paper demands money county promised

A county-wide youth newspaper on New York's Long Island is asking a federal court to force the Nassau county government to return $30,000 in funding it withdrew last March.

Teen to Teen, a publication "written for and by Nassau county youth," claims that the county's action violated the First Amendment because it was motivated by objections to Planned Parenthood advertisements.

In October, *Teen to Teen* asked the court either to order the county to continue providing the agreed upon funding so the newpaper could continue publication or to grant an immediate hearing on the matter.

The conflict arose in March 1986 when the county withdrew money it had allocated to the project immediately after the first edition of *Teen to Teen* was published.

That issue contained an ad for Planned Parenthood and a "personals" advertisement column that county officials felt members of the community might find objectionable.

Ed O'Brian, attorney representing the county, rejects the contention that the action involves a violation of rights to free speech as guaranteed under the First Amendment. He says the county feels that it was fully within its rights to cancel the agreement.

"The terms [of the agreement] allowed termination. This is strictly a contractual situation," O'Brian says.

Patricia Weiner, executive director of Nassau Youth Connection, Inc., the non-profit corporation whose principal purpose was to publish *Teen to Teen*, disagrees.

The contractual agreement signed by Weiner and members of the Nassau County Youth Board provided that the board would monitor the project but would have no control over operations other than to insure compliance with the agreement.

Termination of the agreement would be allowed if *Teen to Teen*'s publisher breached its obligations in any "substantial manner" and, after being given notice of the breach, failed to correct the violation in five working days.

Weiner says that the county was fully informed in the grant application that the newspaper would be dealing with potentially controversial issues relevant to teenagers and that advertisements directed towards the teenage community would be solicited.

In the proposal the county approved Weiner stated, "We expect to deal with important, broad-range topics which are relevant to teens and about which they are concerned" including "teenage pregnancy."

According to New York Civil Liberties Union lawyer Stephen Hyman who is representing *Teen to Teen* in the dispute, deputy County Executive Harry Dwyer and County Executive Francis Purcell "commenced a campaign to terminate *Teen to Teen*'s funding solely because they objected to the content of the publicaton."

At Dwyer's request, the Nassau County Youth Board met in what Hyman called "an unprecendented special Saturday meeting" to reassess the county subsidy of the newspaper.

The meeting, which took place on March 15 in closed executive session, is a direct violation of the New York state open meetings law Hyman says.

He alleges that the closed meeting was held in order to "keep secret the fact that county officials wanted *Teen to Teen* stopped."

He contends that the board, whose 19 members are appointed by the county executive and which obtains its funding from the county, submitted to pressure from the county

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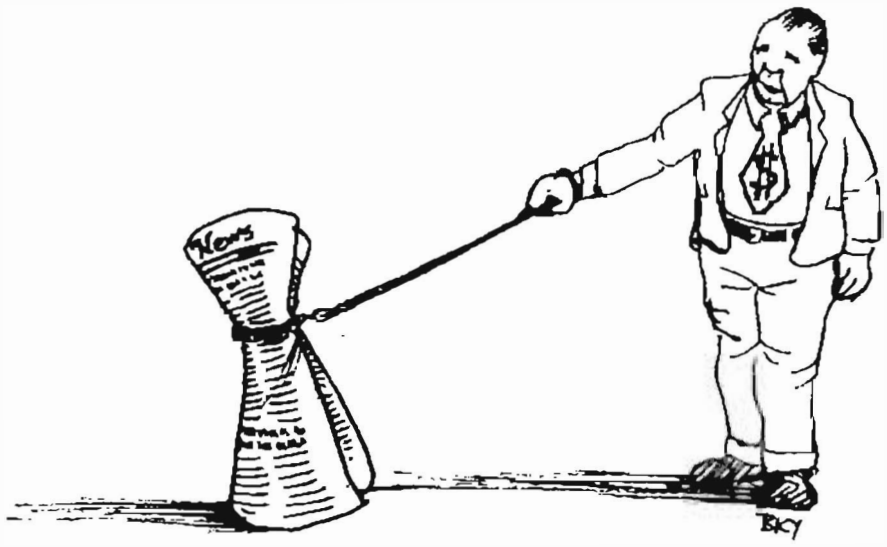

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executive's office to recommend termination of the funding grant.

According to Hyman, Purcell announced "within days of the vote," that funding for *Teen to Teen* would be terminated.

"[The board members] did not even attempt to find a basis in the agreement for their actions. Rather, in their rush to stop funding for *Teen to Teen* [they] chose to ignore both the contract and the Constitution," Hyman says.

In a letter to Weiner dated March 25, Purcell said the county would no onger provide funding for the newsoaper as of March 31. The reason he :ited for the withdrawal of county unding was that "certain segments of he county populace" had found the ıewspaper's content to be objectionaole. Funding withdrawal, said Purcell,

teen to teen

would be a better alternative than having the Youth Board impose censorship.

"As the elected representative of all the residents of the county, it is the responsibility of this office to ensure that no public funds be expended for any project which even a few might find offensive," he continued.

Hyman says that this action is clearly impermissible.

"[That the county] purportedly believed that a Planned Parenthood ad might offend a portion of the electorate does not give Purcell the power to override the First Amendment," Hyman says. Purcell's assertion of an alleged "but wholly unsubstantiated lack of support among a segment of the electorate is nothing more than a clumsy attempt to control the newspaper's content."

"It has been clearly established 'once a governmental entity or educational institution has created a campus or student newspaper, it may not then impose restrictions on expression or terminate funding so as to regulate content," Hyman said in a brief to the court.

"While they claim they only want to disassociate themselves from funding a controversial newspaper, their actions go far beyond that."

Teen to Teen also claims that the county is intentionally preventing it from getting a $15,000 grant awarded to it by the state. The newspaper is asking for over $100,000 in damages in its lawsuit.■

Montana

Kaiman ups allotment but still faces hard times

After feuding last spring resulted in a $1 budget allocation, the student ıewspaper at the University of Mon:ana has convinced the school's stuient government to increase that ımount to $10,000.

The *Montana Kaiman* had reıuested that amount initially as part ɔf their normal budgeting process in ebruary 1985, but their request was ejected for a symbolic $1 contribuion.

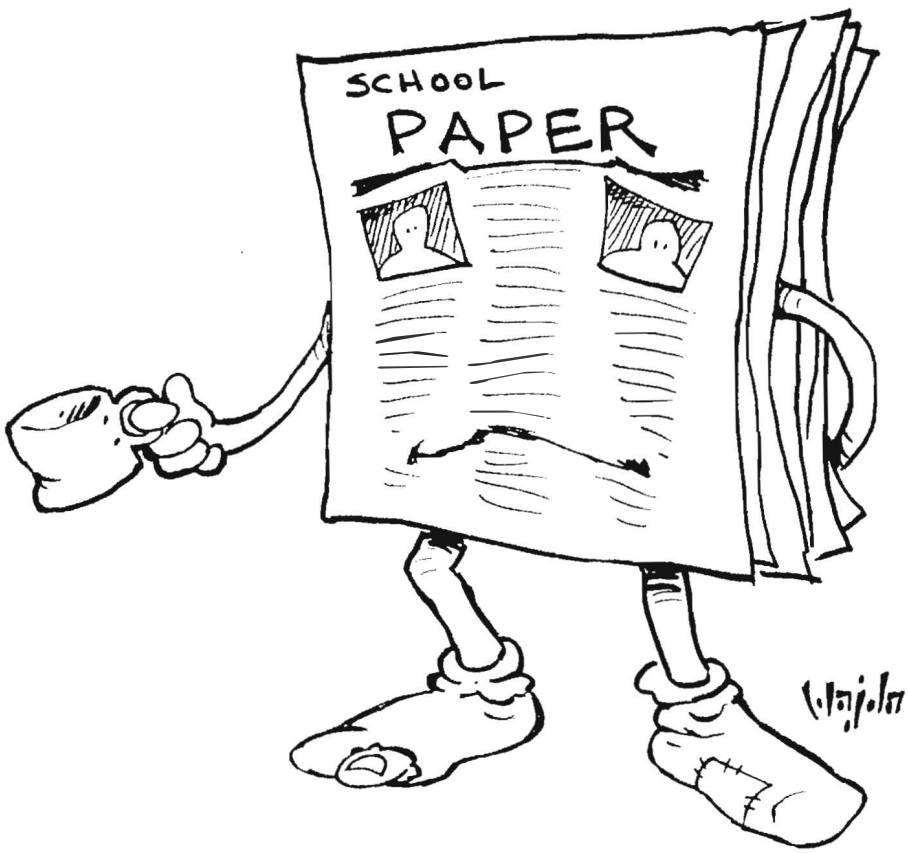
The *Kaiman*'s budget request was lashed after a series of confrontaions with the former student governnent president. During that dministration the salaries of new ewspaper employees or employees ho changed positions were reduced ubstantially while student governnent salaries were raised.

An attempt was also made by the tudent government president to reructure the newspaper's publicaons board to enable it to dictate the ontent of the *Kaiman*. This proposal as never agreed upon by the entire udent government and thus was ever enacted.

Because of the budget cut and the sulting fiscal crisis, Carol Van-Valenberg, faculty adviser to the newsaper, has filled the role without pay nce the school year began.

"[The adviser's position is] pretty much in limbo because the *Kaiman* didn't do as well financially as they had anticipated. Right now they're trying to figure out a way to pay me. Their two-thirds contribution to my salary last year was $15,000, which it won't be this year," Van-Valkenberg said.

The new president of student government and its business manager



met throughout the summer with the editor of the *Kaiman*, Kevin Twidwell, and the newspaper's business manager. They recommended that the *Kaiman* receive the $10,000.

The student government's central board agreed without any dissent to give the $10,000, which although the amount originally asked for, is, according to Van-Valkenberg," much less than they had traditionally received."

In the past the newspaper had received up to $50,000 from student government. Van-Valkenberg said the *Kaiman* has attempted in recent years to increase advertising revenues and decrease its dependence on funds from the student government.

"The previous business manager thought [the $10,000] along with the anticipated advertising revenue would be sufficient. But as you probably know, the economy is not good in eastern Montana, and it has affected all media locally.

"[The *Kaiman* staff] had billed out a substantial amount of money, which they are still trying to collect on, but they also spent a good deal of money. The $10,000 was just not enough to put them into the black.

"They're going to need this transitional period to get back on their feet again," Van-Valkenberg said.

Twidwell said relations had improved greatly between the two groups since he met with officers of the new student government over the summer to resolve the budget allocation issue.

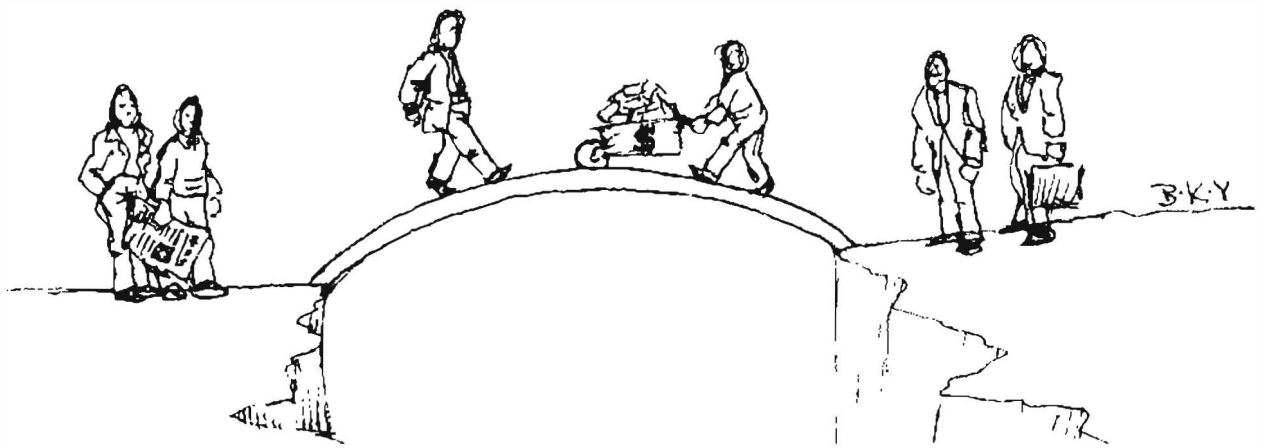
"They had told us that they wouldn't let us die. They have been pretty accomodating. They didn't want to get into the type of adversarial relationship that we had with the previous student government."

Twidwell said that they have been able to collect on many of the outstanding debts Van-Valkenberg mentioned. According to Twidwell the newspaper's financial situation should improve substantially in the coming weeks.

He added, however, that the possibility of the restoration of editorial staff salaries to their previous levels is not feasible at this time given the overall university budget this year. The *Kaiman*, however, does hope to commence paying a salary to Van-Valkenberg again during the winter quarter.

"She's the biggest asset the *Kaiman* has, and it's not fair for her to work without being paid," Twidwell concluded.■

LIBEL



Florida

Paper gets attorneys fees for vexatious suit

The *Florida Flambeau*, the independent student newspaper serving Florida State University in Tallahassee, was recently awarded $6,500 in attorneys fees for its defense of a libel complaint filed by a local businessman and $1,248 for the businessman's unpaid advertising account.

The lawsuit, *Florida Flambeau Foundation, Inc. v. Shaffer,* arose out of a dispute between the *Flambeau* and the former proprietor of a long-standing local restaurant who had run advertisements in the newspaper. In August 1984, the newspaper had run a story abut the closing and reopening of the restaurant in which the new owners stated the business was in a state of disrepair. The story included quotes explaining that the previous owner had left food to rot after closing the restaurant.

The former owner, Jeff Shaffer, refused to pay his advertising bill and threatened to sue for libel if the *Flambeau* attempted to collect the debt. Nevertheless, the *Flambeau* filed suit in small claims court. Shaffer then filed a counterclaim against the newspaper for libel, which moved the case over to state circuit court. He claimed that the August 1984 news story damaged his business reputation.

The circuit court allowed Shaffer three opportunities to amend and refile his complaint after defects were found in it before finally dismissing the claim with prejudice. Because Florida law permits an award of attorneys fees for frivolous complaints, the court ordered Shaffer to pay $6,500 in attorneys fees to the *Flambeau* in addition to the money owed for the ads.■

Texas

Agency rejects underground editor's appeal

A high school underground editor has lost his appeal before the Texas Commissioner of Education and may soon be asking a court to review his school's decision to punish him for distributing his newspaper.

Karl Evans was suspended for handing out his alternative newspaper, *The Twisted Times*, without gaining the prior aproval of the Bryan Independent School Distict administration. *The Twisted Times* included criticism of school officials in its content.

At an earlier prehearing before a state board, the school district agreed to remove all references to the incident from his permanent record.

But James Harrington, American Civil Liberties Union attorney representing Evans, contends that all references have not been removed from the file.

The state commissioner of education disagreed and found "ample evidence" that Evans' permanent file and disciplinary record had been expunged of all references to the suspension.

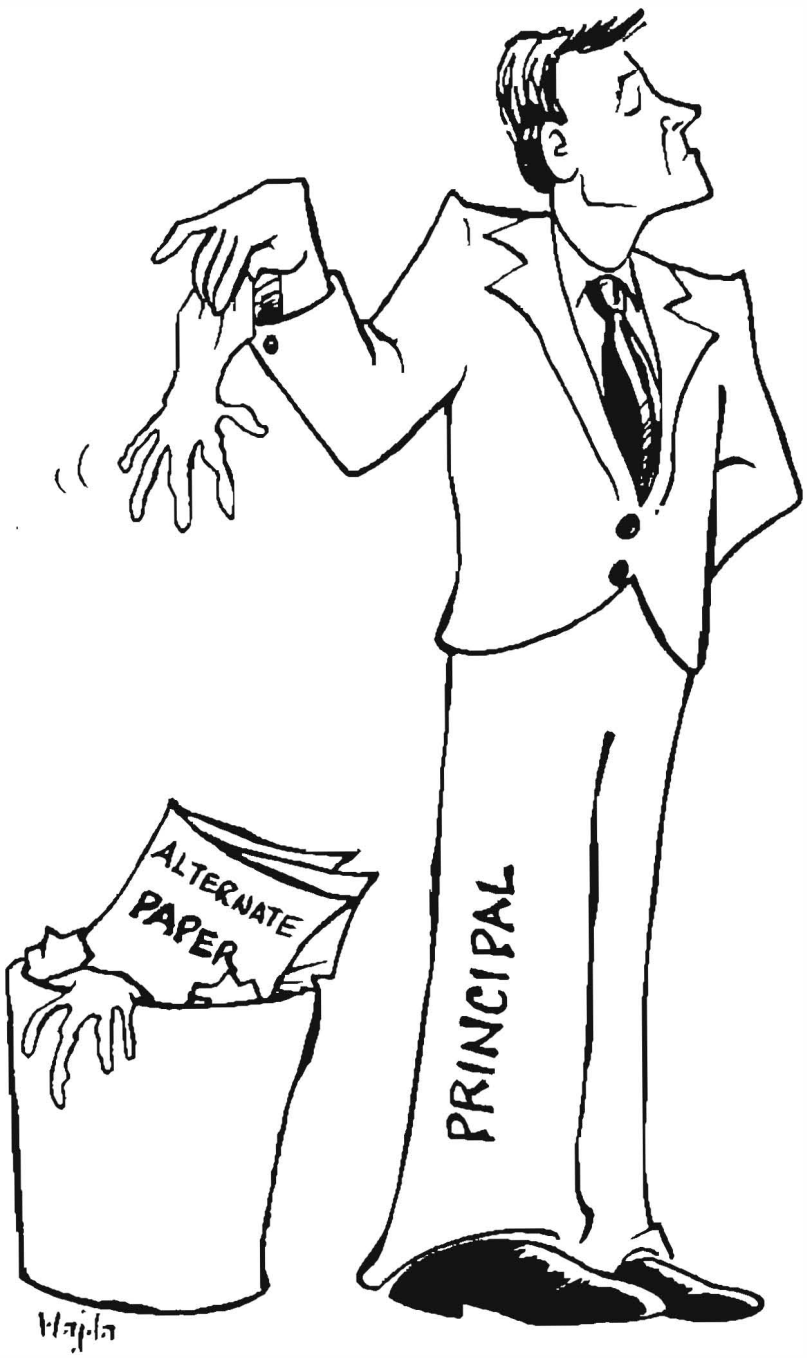
Harrington's claim of selective enforcement of the policy was declared moot, because no effective relief could have been granted other than deletion of references to the incident from Evans' permanent record and that had already been done.

The commissioner refused to rule on the constitutionality of the school district's policy of prior review, claiming that Harrington argued for invalidation of the policy as a violation of the Texas Constitution for the first time on appeal. Harrington expressly waived any reliance on the U.S. Constitution in his appeal, instead arguing that the free speech clause of the Texas Constitution was broader in scope.

"If a petitioner before the board of trustees is alleging the violation of some law, the board of trustees is entitled to know what law is at issue. Petitioner apparently realized this, as he gave a lengthy discourse on the state of federal First Amendment law at his hearing before the board of trustees. However, his argument concerning the Texas constitution was never presented," the commissioner's opinion said.

"It may be that had similar argument been presented with regard to (Evan's) claim under the Texas Constitution, the school board would have been persuaded. But not having been raised below, the issue will not be considered here," the commissioner added.

Harrington has filed a motion for a rehearing. If his request is denied, he says his client will pursue the case and file a lawsuit in district court.■



Prior Review

A Problematic Practice That's Worth Rejecting

A principal of a public high school is upset about a recent story in the school newspaper criticizing the school's new drug testing policy for varsity athletes. Because the newspaper has printed other controversial articles in the past, the principal decided that he will

I—LEGAL ANALYSIS

review each issue before it is sent to the printer and censor material in appropriate situations. This practice is known as prior review.

The United States Court of Appeals for the Eighth Circuit is now considering a case called *Bystrom v. Fridley High School,* which focuses on whether any prior review of unofficial student publications is a violation of the First Amendment. A federal trial court in Minnesota sided with the student editors of an alternative newspaper and said that such a policy was unconstitutional. That court's decision was appealed by school officials and argued before the Court of Appeals on October 17.

The court's decision, which is not expected until sometime in 1987, will establish legal precedent on students' First Amendment rights to be applied in the seven states within the court's jurisdiction. The Student Press Law Center's position is that prior review violates First Amendment guarantees and is an educationally unsound practice. Therefore, SPLC filed a friend-of-the-court brief supporting the students.

However, several courts have allowed the practice of prior review. Many high schools across the country practice it. Why, given these facts, is prior review such a bad idea?

There are several bases underlying the anti-prior review position. Any initial inquiry into the constitutionality of prior review policies reveals a long-standing judicial intolerance to prior restraints on speech and the press. Prior restraints, unlike punishment after the fact, keep the material in question from ever becoming a part of "the marketplace of ideas." Inevitably, some valuable ideas that deserve protection are lost in the process.

Since the early 1900s, the Supreme Court has consistently ruled that any system of prior restraint comes "with a heavy presumption against its constitutional validity,"[1] and has only allowed such a system in "exceptional" cases. These exceptional situations generally involve speech that is pornographically obscene, threatens national security or would deprive a criminal defendant of the right to a fair trial. In addition, when such a situation arises, the Supreme Court has mandated that immediately after initiating a prior restraint the censor must initiate an adversarial judicial determination as to the validity of the restraint.[2] As the publication of a high school newspaper does not remotely present the same type of threat as any of these exceptional cases, these decisions suggest the difficulty in overcoming the heavy presumption against

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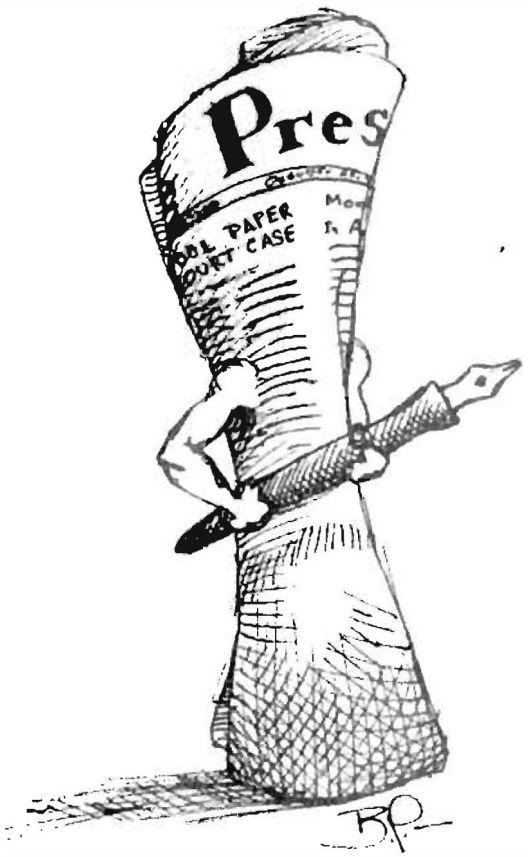

Tinker constituted no basis for establishing a system of censorship and licensing designed to prevent the exercise of First Amendment rights.

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he constitutional validity of such a system.

Furthermore, although the seminal case on student First Amendment rights, *Tinker v. Des Moines Independent Community School District,*[3] did establish that school officials have the authority to punish student expression in limited situations, it constituted no basis for establishing a censorship and licensing system that prevents the exercise of First Amendment rights.

Several federal courts of appeal have adopted positions that approve in theory a policy of prior review. The Second, Fourth, Fifth and Eighth Circuit Courts of Appeal have said that in a given situation prior review could be permissible.[4] These courts have focused on the "substantial and material disruption" language of *Tinker* as justifying the need for prior review policies. Each court, however, did limit its acceptance of prior review by providing that each system enacted by school officials must be accompanied by a detailed set of procedural guidelines in order to be constitutionally sufficient. As yet, no prior review policy challenged in court has passed constitutional muster.

The Seventh Circuit Court of Appeals, however, has refused to approve prior review.[5] That court said in *Fujishima v. Board of Education* that "prior approval of student) publications . . . is unconstitutional as a prior restraint in violation of the First Amendment."[6] In addition, *Fujishima* held that *Tinker* constituted no basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First Amendment rights."[7] Because of its careful analysis, *Fujishima* seems a better reasoned opinion and most accurately adheres to the First Amendment precedents established by the Supreme Court.

A rejection of prior review in the *Fridley* case by the Eighth Circuit Court of Appeals would mitigate that court's somewhat tenuous approval of prior review issued in *Kuhlmeier v. Hazelwood School District.*[8] In *Kuhlmeier,* which was decided after the district court decision in *Fridley,* the court indicated in a footnote that the disruption language in *Tinker* can be applied to justify prior content regulation of a student newspaper. However, since *Kuhlmeier* concerned an official school-sponsored newspaper, and not an alternative newspaper as is at issue in *Fridley,* the appeals court can affirm the lower court's decision while not overturning *Kuhlmeier.* If it does, the Eighth Circuit will be the first to make a distinction between official and unofficial student publications.

In addition to case law, there are several public policy considerations that oppose implementation of prior review policies. First and foremost, prior review policies foster censorship and ultimately will encourage school officials to ignore the constitutional rights of their students. School authorities can hardly be expected to be immune to the natural inclination to suppress criticism or unpopular views, especially if their decisions are not subject to any type of judicial review.

This inclination is well documented, as many cases exist establishing proof of the routine censorship by school officials of student speech that is well within the confines of First Amendment guarantees. For example, in 1980 a federal district court in Georgia determined that the confiscation of a student newspaper containng articles about the military draft and the energy crisis violated the students' First Amendment rights.[9] Similarly, a U.S. Court of Appeals in Virginia affirmed a finding that the censorship of an article describing existing methods of contraception was unconstitutional.[10]

Second, several state departments of education have issued guidelines rejecting the implementation of prior review policies in their schools. The leading educational authorities in these states, such as Arkansas, Delaware and Massachusetts, have determined that an "essential concern at the secondary school level is the maintenance and encouragement of freedom of expression, . . . so that constructive student involvement assures individual educational progress and provides the initial experiences for responsible citizenship."[11] The New York and West Virginia educational departments have also indicated disapproval of prior review. This is significant as both these states are located within the jurisdiction of a federal court of appeal that has upheld the exercise of prior review in schools.[12]

Finally, as a practical consideration for a school district, adoption of a prior review policy creates a much higher risk of school district liability in libel suits brought against official or unofficial student publications. Although no cases have been brought on the high school level, courts in two instances have ruled that a public university was free from liability for libel published in its student newspaper because it did not exercise prior review over the content of the newspaper.[13] Conversely, if a school district were to

exercise prior review, the risk of their liability for libelous material increases dramatically.

The foregoing legal and public policy considerations conclusively establish that the practice of prior review is both unconstitutional and undesirable. Indeed, the constitutionality of prior review has not yet been settled. Five federal courts of appeal have not definitively ruled on the issue. Until each has dealt with prior review or the Supreme Court makes a ruling on the subject, the practice will remain questionable and the Student Press Law Center will continue to fight for the rights of students to be free from it. ■

NOTES

[1] *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

[2] *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

[3] 393 U.S. 503 (1969).

[4] The following states fall under the jurisdiction of the Second, Fourth, Fifth and Eighth Circuits: Arkansas, Connecticut, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Vermont, Virginia and West Virginia.

[5] The Seventh Circuit has jurisdiction over Illinois, Indiana and Wisconsin.

[6] 460 F.2d 1355, 1357 (7th Cir. 1972).

[7] *Id.* at 1358.

[8] 795 F.2d 1368 (8th Cir. 1986).

[9] *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980).

[10] *Gambino v. Fairfax County School Board*, 429 F. Supp. 731 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977).

[11] Delaware Department of Public Instruction, *Resource Materials for Developing Local School District Policies Regarding Student Rights and Responsibilities* 2 (September 1971).

[12] *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (West Virginia); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971) (New York).

[13] *Milliner v. Turner*, 436 So.2d 1300 (La. App. 1983); *Mazart v. State*, 441 N.Y.S.2d 600 (1981).

Copyright infringement

Be Careful Not to Copy Those Cartoon Characters

When a small college magazine decided to use the Peanuts comic strip characters for a parody of the abortion controversy, Charles Schultz was not amused. A letter from the cartoonist's attorney arrived at the college, demanding, among other things, destruction of the similar cartoons and publication of an apology.

The charged offense was copyright infringement.

It's not as if the magazine editors had printed the parody irresponsibly. Knowing that almost all cartoon characters are copyrighted and thus the possibility of infringement existed, the editors had made a cursory

check of the law and decided that using the Peanuts characters in this instance would be a "fair use" of Snoopy, Charlie Brown, Linus and Lucy. This fair use doctrine, as it is called by the courts, allows anyone a limited privilege to use copyrighted material in a reasonable manner.

However, as the editors soon learned, there are definite limits to a fair use of copyrighted material—and those limits definitely do not include graphically identical characters involved in situations the attorney called "antithetical" to the wholesome images usually found in Peanuts.

So, just how much protection does the fair use doctrine provide to artists and journalists who want to use the established characteristics of well known, copyrighted cartoon characters to make a political or social statement or just a joke?

The law of copyright is based on a federal statute that recognizes a fair use doctrine.[1] The law attempts to encompass all the preceding court decisions dealing with copyright, including a four-part method of analyzing when a fair use was fair and when it went too far and infringed a legitimate copyright.

Therefore, when courts are confronted with an artist claiming his infringement of a copyright was a fair use, they will consider the statute's four factors:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational uses;
2) the nature of the copyrighted work;
3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work.

In addition to these statutory factors, the legislative notes accompanying the statute lists examples of the sort of activities the courts might regard as fair use under the circumstances, including parody.[2]

The legal boundaries of parody have evolved mainly in federal courts of appeal in New York and California, and the result they've come up with reads: "Where it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper."[3]

What this means for cartoons, graphic parodies, is twofold. First, the artist who wants to parody an original must not use more of the original work than is necessary to evoke thoughts of the original in the viewer's mind. This is the so-called "conjure up" test and was the problem with the Peanuts situation presented above. In that case, every detail of the well known comic strip was duplicated, from the stripe on Charlie Brown's shirt to Lucy's psychiatrist booth (which in the parody was Snoopy's abortion clinic). Second, the parody may not decrease the market for or the value of the original work. What this means is that no one should be willing to purchase the parody as a substitute for the original work; the parody cannot be in competition with the original. One purpose of copyright,

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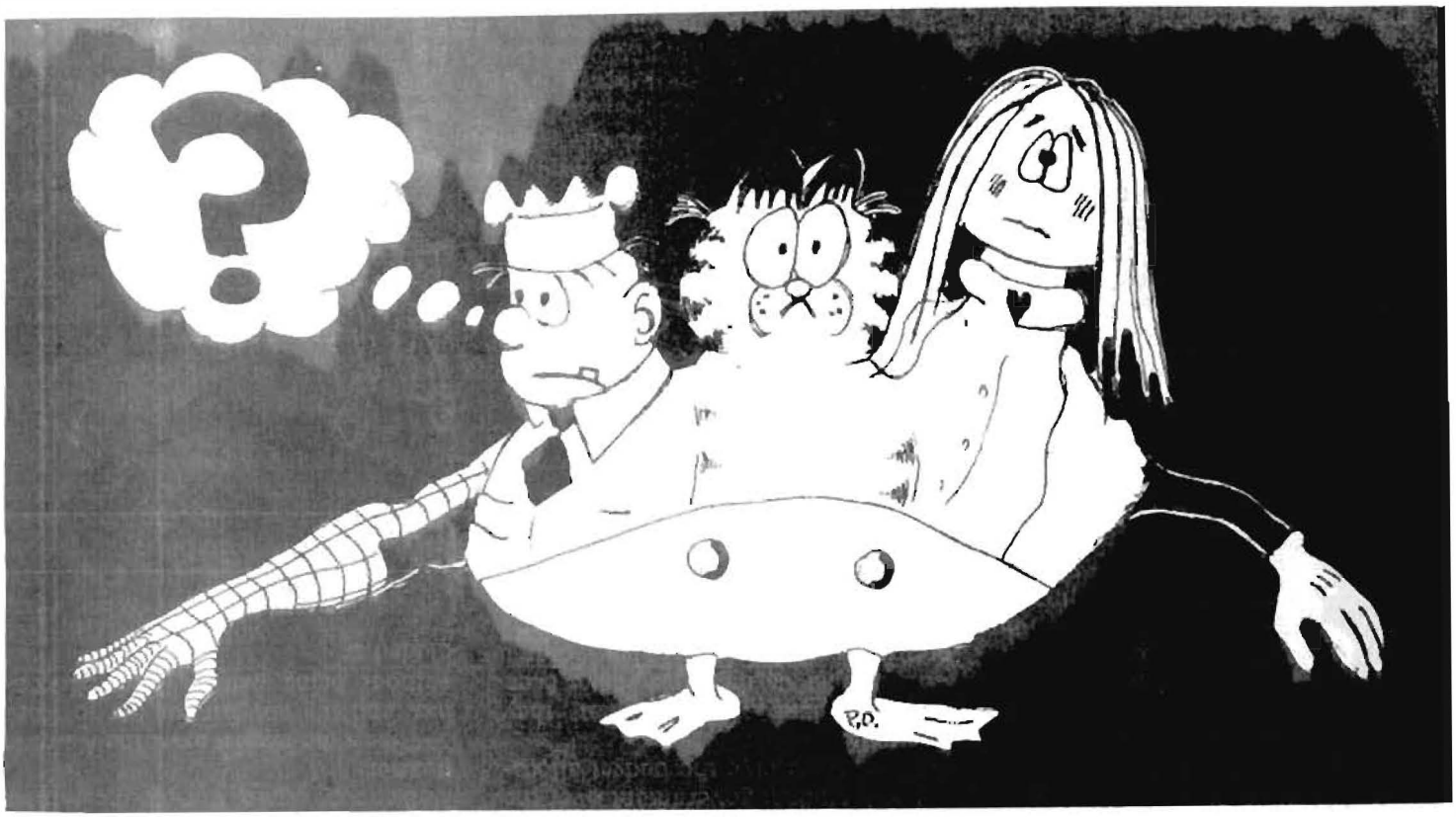

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after all, is to protect the market value of the original idea.

One of the major cases in which parody was defined and used regarding cartoons involved Walt Disney Productions.[4] In that case, famous Disney characters, such as Mickey Mouse and Donald Duck, were portrayed in a "counter-culture" magazine, leading a lifestyle that included promiscuity and drug use. Walt Disney Productions sued for copyright infringement and the federal court of appeals in California agreed, basing its decision on the fact that the artist had identically copied the Disney characters. In doing so, the parodist had crossed the line of copying more than was necessary to "conjure up" the original in the minds of the viewers.

"In evaluating how much of a taking was necessary to recall or conjure up the original, it is first important to recognize that given the widespread public recognition of the major characters involved here, such as Mickey Mouse and Donald Duck, in comparison with other characters, very little would have been necessary to place Mickey Mouse and his image in the minds of readers," the court said. "When the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied."

"Here, the copying of the graphic image appears to have no other purpose than to track Disney's work as a whole as closely as possible."[5]

The problem, apparently, was that the Disney characters had been used for their recognition value. Substitute any other type of cartoon characters, and the plot would have been the same. A valid parody, on the other hand, would have required use of the Disney characters, along with their famous personalities. A valid parody would have played on the qualities unique to Mickey Mouse or Donald Duck to make a specific point, and thus, would have been a fair use. Of course, the court still would have expected the artist to use only enough of the original characteristics to evoke the appropriate images in the minds of the viewers.

The three factors a court will consider in determining whether a taking from the original is excessive are the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody.[6] This means that the more famous a cartoon character is, the easier it is to conjure it up in a viewer's mind, and therefore, less of the original can be used in the parody. The reverse also is true. The more difficult it is to conjure up the original in a person's mind, that much more of the original may be used to do so. This is particularly true in cases involving parodies of songs and speeches.

In New York, the federal appellate court has considered the economic effects of the parody. Though most cases there have dealt with parodies of songs, the court has been reluctant to find copyright infringement unless the value of or the market for the original was diminished by the parody. Such a case occurred when NBC was sued because the show "Saturday Night Live" performed a parody of the advertising theme, "I Love New York."[7] To the same tune, the cast sang, " I Love Sodom." Though the words were different, several bars of the original melody were used, which caused the copyright holders to argue that too much of the original had been used by the parody. The court disagreed, saying that the advertisement obviously was a parody of the original and was not affecting the market for the original.

There is one case that appears to break the standard set by the California and New York courts, though, dealing with Pillsbury's Poppin' and Poppie Fresh characters. A federal trial court in northern Georgia ruled in 1981 that there was no copyright infringement when those characters

were portrayed engaging in various sexual acts in an adult magazine.[8] In that case, the court acknowledged that copying of the characters had been identical, exceeding the "conjure up" standard. However, the court said the most important factor was whether the infringement had affected the market for or the value of the original characters. The court said there was no evidence that Poppin' and Poppie Fresh had been adversely economically affected, therefore, there was no infringement.[9]

That case appears to be an anamoly, however, and is in conflict with the two higher level courts in California and New York, where the amount taken from the original is a major consideration in deciding whether an infringement has occurred. Both courts, however, have said that the economic factor is the one to be most emphasized.

Student journalists and artists who want to parody a well known work should keep the following factors in mind. First, make sure that the parody can not be seen as competing with the original. If it is possible that someone may purchase or obtain the parody in substitution for the original, that affects the market for the original and is an infringement. For instance, a one-time parody of a comic strip generally would not affect the number of people who buy or read the original strip, but using the parody regularly over a long period of time could.

Second, use a minimum of copying when drawing off an original cartoon. An artist should mimic just enough of the original to "conjure up" the image of the character in someone's mind. To maintain safety, backdrops should be different, as should clothing and even props the characters use. Of course, if a specific characteristic of the cartoon is being parodied, it will need to be included, but the parody must be sufficient to let the reader know the object is the subject of a satire or parody.

Third, do not use well known characters just for the sake of their recognition. If an artist wants to make use of a quirky, unique quality of Charlie Brown to make a political point, he probably can do so. (Remember, use only as much of Charlie Brown as necessary to make the point.) However, if any other cartoon character could just as easily be used to make the point, don't use Charlie Brown.

Courts have said that making a caricature, instead of an exact duplicate, of a well known cartoon is a relatively easy thing to do and still create a good parody of the orignial. Therefore, don't create any parody that could be a substitute for the original and don't even come close to copying it exactly. Following these guidelines will help achieve a reasonable, fair use of the original, without infringing on the copyright of the original. ■

NOTES

[1] 17 U.S.C. sec. 107 (1982).

[2] *Id.* sec. 107 (historical and revision notes) (1982).

[3] *Berlin v. E.C. Publications,* 329 F.2d 541, 545 (2d Cir. 1964).

[4] *Walt Disney Productions v. Air Pirates,* 581 F.2d 751 (9th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979).

[5] *Id.* at 758.

[6] *Id.* at 757-58.

[7] *Elsmere Music Inc. v. National Broadcasting Company, Inc.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd.*, 623 F.2d 252 (2d Cir. 1980).

[8] *Pillsbury Co. v. Milky Way Products,* 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981).

[9] *Id.* at 132.

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