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report

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Libel Insurance: The Inside Story

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Libel and Liability

Weighing the potential for libel against the cost of insurance

A newspaper article alleges an educator behaved improperly in a conference with a student. A front-page story identifies a local restaurateur as having been indicted on drug trafficking charges. A columnist writes a piece accusing his landlord of managing his properties poorly. In one of these cases the newspaper was found guilty of libel; another is slowly making its way to court; and the third has involved only the threat of a lawsuit thus far. What these instances have in common is that all occurred at college newspapers.

The possibility of being sued for libel hangs over newspapers like a weight that could drop at any time. Suits against college papers are infrequent, according to reports by college media advisers and calls received by the Student Press Law Center. Newspapers also fare well in court: studies of professional newspapers have shown the press wins its cases 80 percent of the time. Still, these vindications often occur only after an appeal. Win or lose, the cost of defending a paper's reputation can be enormous.

Most professional papers have taken out libel insurance as a way to control their losses. A basic policy guarantees the insurance company will pay off both judgment costs and attorneys' fees, up to several million dollars.

College papers, too, may benefit from libel insurance. But the rising cost of the annual payment premiums, coupled with the small incomes of weekly papers and those at small colleges, is making the expense prohibitive for all but the largest state university dailies.

Plus, with insurers sometimes reluctant to offer coverage to independent, student-run papers where the editorship changes every year, and with surcharges tacked on for past libel claims, securing a policy can become even more costly — if one can be obtained at all. The concern that insurance can only provide a "deep pocket," a cache of available funds making the paper an attractive target for suits, also has made some papers question whether they should want libel coverage at all.

Currently, only three national companies have identified themselves as writing libel insurance policies for college newspapers: Media/Professional Insurance Inc. and Employers Reinsurance Corp., both located in the Kansas City area, and the Mutual Insurance Co. of Hamilton, Bermuda.

To further restrict the choices for college papers, Mutual limits its customers to members of the American Newspaper Publishers Association. The ANPA, in turn, restricts its membership to newspapers that publish at least once a week and charges dues based upon the paper's circulation and advertising rates. Papers with a circulation of 20,000, for instance, can expect to pay roughly between \$900 and \$1,400 yearly in dues alone. Only 17 college newspapers are ANPA members.

Under Mutual's program, for a daily publication with circulation between 15,000 and 25,000, \$500,000 worth of coverage costs \$1,400 a year, according to Arthur Macaulay of Blades & Macaulay, a consulting firm that works with Mutual. The insurance company

will pay any damages assessed against the paper in any libel judgment, as well as attorneys' fees for the case, up to \$500,000 for the policy year. This policy would also carry a \$5,000 deductible, meaning that if any claims are filed during the year, the paper would have to pay the first \$5,000 in costs out of its own pocket.

Such a policy amount is even a little on the conservative side, Macaulay says.

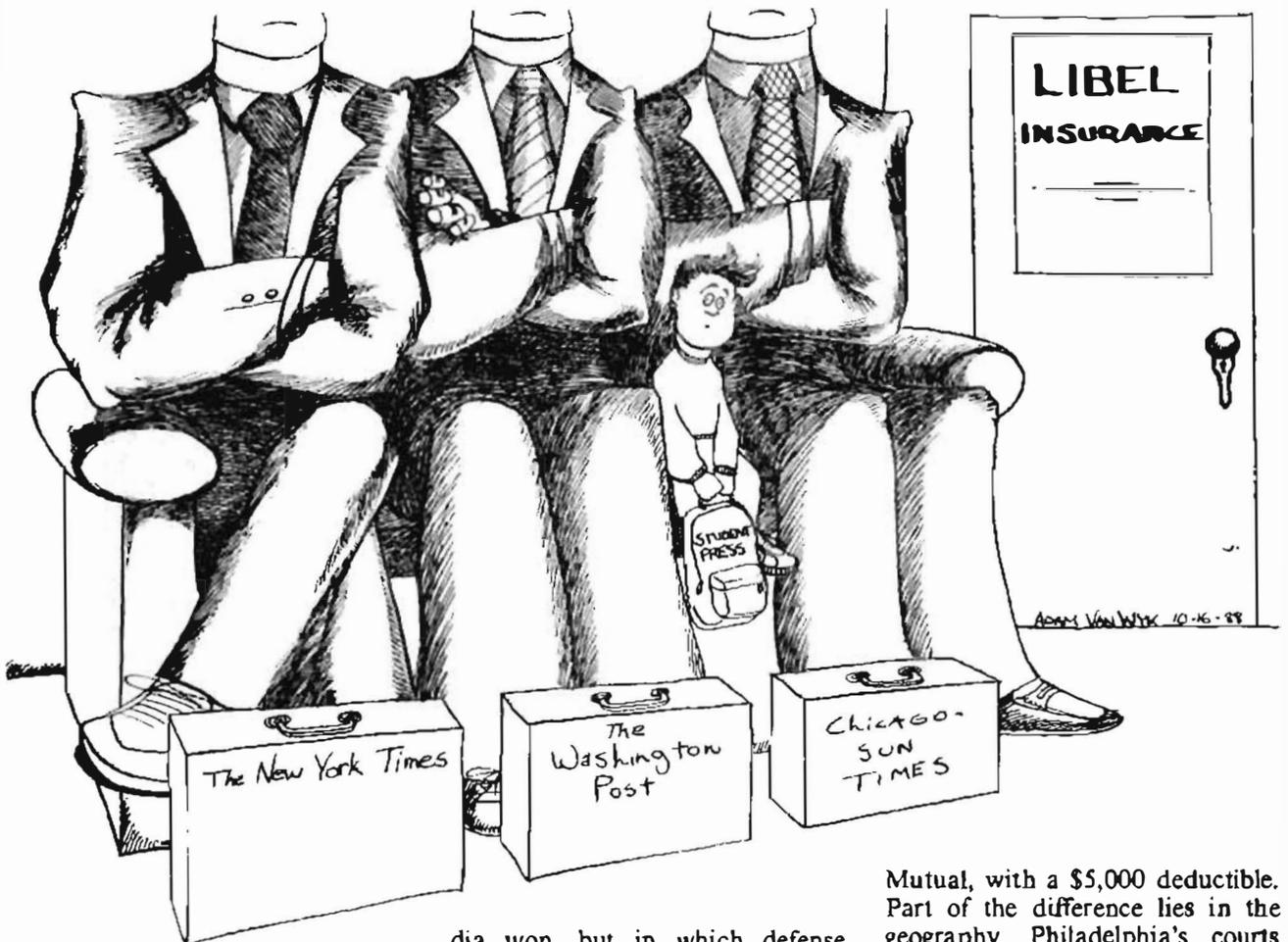
"I can't imagine any newspaper today buying less than \$500,000 worth of coverage," he says. "Frankly with today's society and today's libel claims, for a college newspaper to take less than a million would be inappropriate."

Media/Professional, an arm of Safeco, can insure a college weekly newspaper with circulation under 1,500 for about \$700 a year, offering \$500,000 worth of coverage. The cost rises steadily, with weeklies of 35,000 to 40,000 circulation paying around \$1,700. Dailies from 1,000 to 30,000 circulation pay between \$1,100 and \$3,000 a year for the same coverage.

A 10 percent discount is available from Media/Professional to papers that belong to the National Newspaper Association. The NNA accepts papers that publish at least once weekly and adhere to a newspaper format. Dues range from \$48 to \$400 annually, more for papers over 60,000 circulation. Media/Professional also offers 10 percent off for papers with a five-year claim-free history, and another 10 percent for those in a state with a press association hot line, according to Jon Ruding, a senior

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COVER STORY



continued from page 3
underwriting executive.

Employers Reinsurance quotes a price range of \$715 to \$2,500 for weeklies under 40,000 circulation, for a policy limited to \$500,000 coverage a year with a \$5,000 deductible. Rates are higher for papers that choose a plan providing \$500,000 coverage for each suit, since several could arise within a year. The firm accepts only papers it considers to follow good journalistic practices, says vice president Rodger Rudkin, and had fewer than 10 college newspapers as clients in 1988.

The cost of libel insurance wasn't always this high. But since the early 1980s, particularly in the wake of high-profile, big-bucks libel suits such as Israeli defense minister Ariel Sharon's action against *Time* magazine and Gen. William Westmoreland's suit against CBS (cases where the me-

dia won, but in which defense costs were enormous), insurance rates have been rising for both professional and college media.

The business manager at one college paper noted that their premiums had risen \$300-\$400 a year since 1985. Eric Jacobs, business manager for *The Daily Pennsylvanian* at the University of Pennsylvania said his paper's premiums dropped slightly this year, the first decrease in a decade of coverage. Still, for a \$1 million policy from Employers Reinsurance, the paper paid \$3,300 in 1987-88. In 1982-83, the price was \$483.

The Daily Pennsylvanian, a five-day-a-week paper with a circulation of 14,000, seems at first glance to be paying more than some college papers of similar size. For instance, the *Indiana Daily Student* at Indiana University, circulation 10,500, paid \$1,840, a little more than half as much, for \$5 million in coverage from

Mutual, with a \$5,000 deductible. Part of the difference lies in the geography. Philadelphia's courts are considered some of the country's least favorable spots for libel defendants, Jacobs says, making premiums higher for papers located there.

A paper's past problems and present procedures also can influence the cost of insurance. Prior libel actions against a paper can raise premiums or the deductible. Walter Coady, president of Watterly Insurance Brokers, a Maryland firm that connects media clients with insurers, says a judgment against the paper won't necessarily prevent a policy from being written, but the reasons behind the claim just might.

"One single claim, no matter what the amount, isn't going to stop us from covering the paper, unless that is the type of claim that is a blatant example of being libelous," Coady says.

Nuisance claims, where the plaintiff sues out of annoyance at

an article that is not in fact libelous, will not produce penalties because the insurance company recognizes the suit is not the paper's fault, Coady says. But where the claim resulted from sloppy reporting or malice, he says, "We're going to ask to have the reporter removed, or we're going to have to give up the policy."

Because of the fear that unsupervised student reporters will be more likely to commit libels, the insurance game is stacked against independent newspapers. When student newspapers do not have a faculty adviser available to review potentially libelous stories, or where that adviser is new to his job and inexperienced, even obtaining libel insurance can be difficult, Coady says.

"It's not so much a fear of what's going to be said. It's just that they [student staffers] might not be able to recognize something that might be libelous."

According to Employers Reinsurance, having an adviser whom students may ask for help, but are not required to show articles to, is just not safe enough.

"If they have an option of going to them or not going to them, then they're not someone we care to insure," says Rodger Rudkin, vice president at Employers Reinsurance. This position has the ironic effect of encouraging schools that want insurance for their student publications to violate First Amendment prohibitions against prior review by school officials.

"No matter how much any of us are in favor of supporting the First Amendment, . . . there's still some responsibility involved. It's somewhat akin to agreeing to un-



derwrite the contents of the *Ladies Home Journal* against the opportunity to insure *Hustler*," says Rudkin.

"When you have students running the show . . . you often have people with a lot of stuff to do. They've got to study for finals or they've got a hot date, and they just stick it [a problem story] in the paper."

If the paper obtains legal counsel to examine sensitive articles before they go to press, even by simply corraling a faculty member at the university's law school, that could help diffuse some of an insurer's concerns, Coady suggests.

Policy applications also inquire into the paper's procedures. The Media/Professional form asks if the editors are familiar with current libel law, if letters-to-the-editor are edited to weed out any libelous statements and if the paper makes a habit of investigative reporting, a more dangerous practice, claim-wise, and how sources are documented to ensure accuracy.

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Libel insurance pioneer offers hints to student press

Nancy Green, president and publisher of the *Richmond (Ind.) Palladium-Item*, was student publications adviser to the independent *Kentucky Kernel* at the University of Kentucky from 1971-82 and served as general manager for publications at the University of Texas at Austin from 1982-85. In the late 1970s she was one of the pioneers of the movement to bring libel insurance to student publications. Here are some points she says a student publication needs to consider in debating whether to obtain libel coverage:

— Size of publication. "Obviously, if this is a publication that brings in big bucks, then you ought to have protection," Green says.

— History of the operation. Do the students know what statements can constitute libel? Are they able to readily consult with an expert? What consequences could a suit have?

The *Kentucky Kernel* separated from the university in 1971. The paper bought libel insurance to protect its assets and its feistiness,

Green recalls, saying she "didn't want to take chances with a fledgling corporation."

— The paper's relationship to the school. Independent newspapers usually obtain their own insurance, but Green says papers with ties to their colleges should consider it as well. Libel insurance is one way a non-independent newspaper can gain some autonomy in its dealings with administrators, without giving up the benefits of university support.

— Access to legal counsel that is well-versed in media law issues. Many university legal staffs have little knowledge about libel law. Student newspapers might want to hire their own lawyers, and libel insurance can help the paper pay them.

— Steps the student editor can take to better supervise content. Provisions should be made so the editor can consult with advisers or lawyers about problem stories, to lessen the chances for libel to occur. ■

COVER STORY

continued from page 5

Employers Reinsurance asks if admissions from stringers are accepted, if the paper runs a regular column or section devoted to a certain ethnic group, and if any of the publication is printed in a language other than English. Each of these areas has been identified as a potential trouble spot, ripe for errors or inflammatory statements, and their presence can make a difference in the premium rate. Advertising, paid or free, display or classified, also is a factor.

Lest the costs and requirements make libel insurance seem completely out of the question, college papers should be aware that they have alternative ways of obtaining coverage. For instance, they can ask the school to get it for them. Where the paper is not independent, many schools extend it insurance under the college's blanket liability policy. Sometimes these policies include libel coverage, other times not. A paper promised

coverage in this form should check with the school's risk manager to determine precisely which of its activities are insured. The editors should also ask whether the policy will pay the paper's expenses in case it is sued for libel by the university itself, if punitive damages are included and whether the policy extends to cover judgments against individual student staffers.

In other cases, schools sometimes take out specific libel policies for all publications on campus, whether school-run or independent. The University of Texas at Austin paid \$7,350 in fiscal 1988 for a Media/Professional policy on *The Daily Texan* (circulation 40,000), two yearbooks, a quarterly magazine and an FM radio station. That policy provides \$1 million in coverage per libel problem, and carries a \$10,000 deductible. Another university, Media/Professional's Ruding noted, has a policy encompassing its newspaper, year-

book, radio station, faculty newsletters, private sorority magazines and a closed-campus cable TV network.

At papers where advisers play an active role, they sometimes take out additional insurance on themselves. David Adams of Kansas State, a publisher without prior review rights, says he has a million-dollar professional liability policy simply because "You never know what a court will rule anymore."

However, in *Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983), courts have held that a university, because its faculty may exercise only advisory control over the student paper, is not liable for any libels the paper publishes. Likewise, according to *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981), where the libel was committed by a student paper at a state university, a plaintiff is not permitted to recover damages from the state.

Still, with the U.S. Supreme

Insurers

Firms that offer libel insurance to the student press:

Employers Reinsurance Corp.

5200 Metcalf Ave.

P.O. Box 2991

Overland Park, KS 66201

(913) 676-5200

Media/Professional Insurance, Inc.

2 Pershing Square

2300 Main St.

Suite 800

Kansas City, MO 64108

(816) 471-6118

Mutual Insurance Co., Ltd.

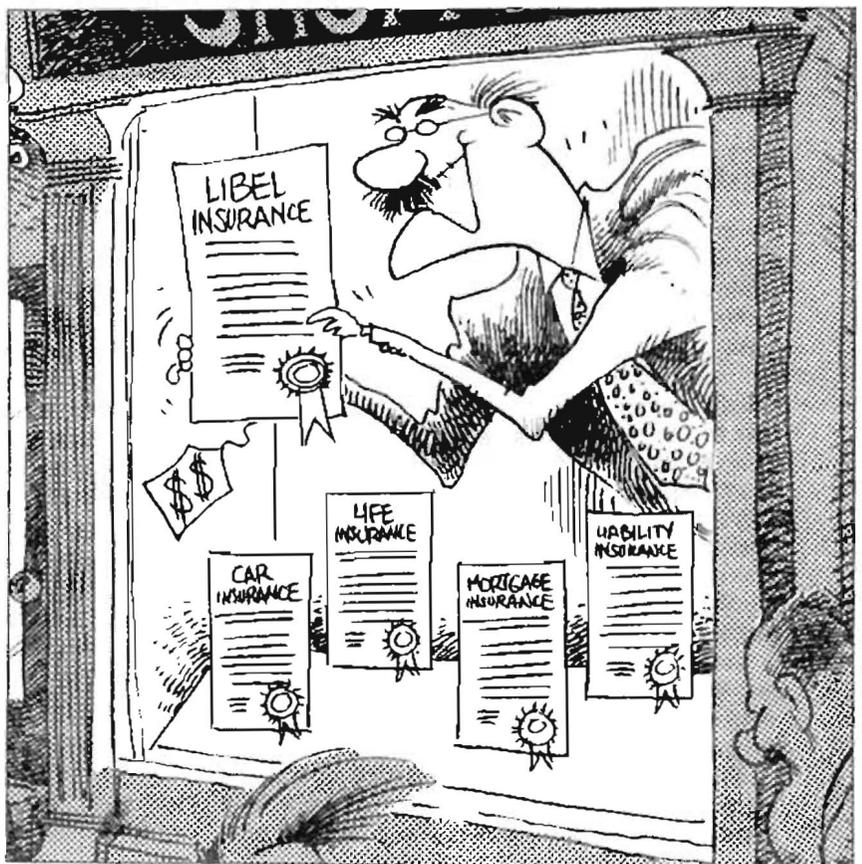
P.O. Box 1179

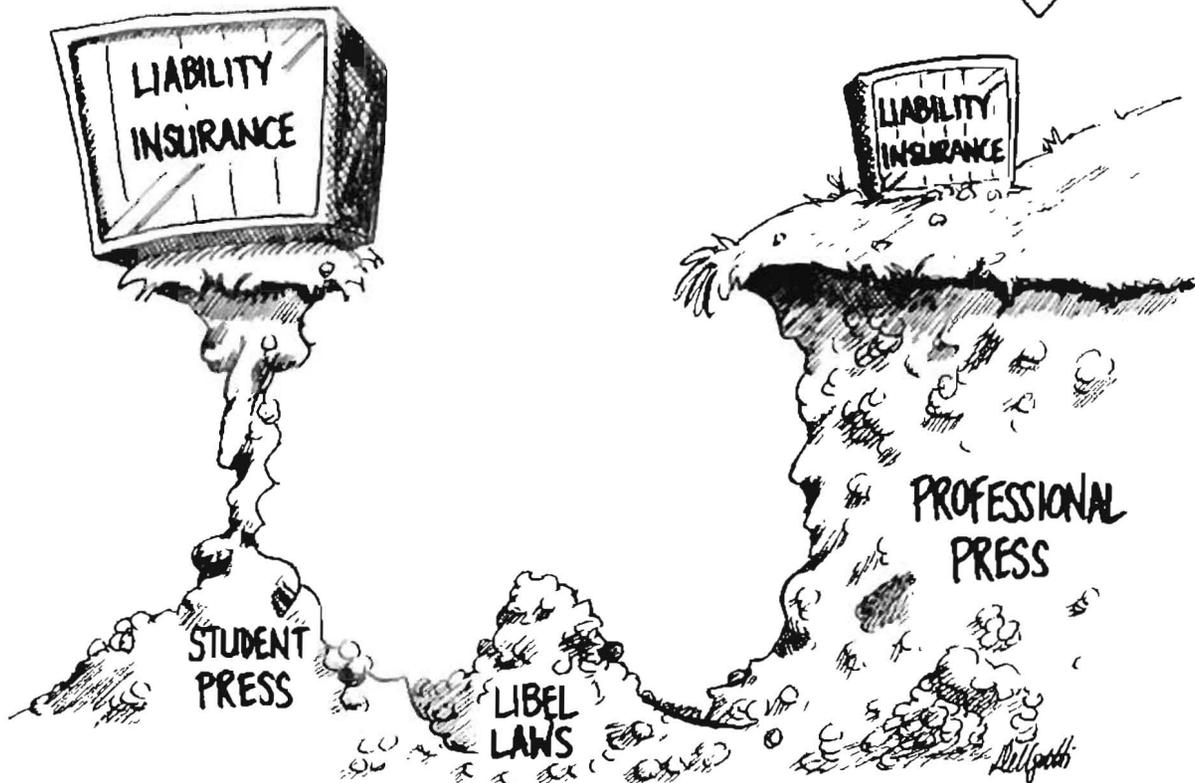
Hamilton 5

Bermuda

(809) 292-7633

(Mutual insures only papers that belong to the American Newspaper Publishers Association.)





Court recently holding in *Hazelwood v. Kuhlmeier* that sometimes a high school paper could be considered to be under the adviser's control, although the student editors had claimed responsibility for content, some advisers are wary.

Professors who are members of the America Association of University Professors can obtain this type of insurance through the association. Prices are \$75 a year for \$500,000 worth of coverage, \$102 a year for \$1 million, both with a deductible around \$100. High school teachers may take out policies through either of the major teachers' unions, the National Education Association or the American Federation of Teachers.

The big question still troubling many college newspapers is if they need libel insurance at all. With a small operation where the students have content control, the temptation to "go naked" can be fierce.

"We really walk a very fine line," says one university newspaper's adviser, who requested anonymity. "The question is whether

we walk on a tightrope or a razor blade."

This adviser takes the position that his paper's assets are so few that most lawyers would be unwilling to proceed, and would talk their clients into dropping the suit. The adviser has access to the university's legal counsel and once consulted with a lawyer about an investigative piece the paper planned to run.

Insurance underwriters, who, naturally, have a professional stake in this issue, say a lack of insurance places a paper in a dangerous position.

"I think a paper who goes without libel insurance is just as reckless as a physician who goes without malpractice insurance," says broker Walter Coady. Particularly where the paper is covering police news, an area where novice reporters can easily make mistakes, Coady says insurance is vital.

"If they cannot afford libel insurance they don't belong in the paper business."

And cost shouldn't make a difference, says Rodger Rudkin of Employers Reinsurance. Papers

that would rather save up for a new typesetter or increase salaries for overworked staffers gain little by cutting out libel insurance from their expenses column, he says — especially since papers can run up huge legal fees just defending nuisance claims, suits generated through no fault of the newspaper.

"What can you get for \$1,500 a year?" Rudkin asks. "You're not getting a better product, but you are getting a little peace of mind."

The anonymous adviser still is not certain whether his paper will stay uncovered. He worries that a hefty policy would be seen as a "deep pocket," and incite subjects of stories to sue the paper in hopes of a megabucks recovery.

Most of his students have never asked if the paper carries libel insurance, but even those who know it doesn't have taken the information in stride. Reporters and editors have not shied away from tough stories, the adviser says.

"The posture ought to be the same whether or not we have libel insurance—treat the stories with care." ■

Court rejects prior review

Policy requiring approval of underground paper unconstitutional

Washington — In a dramatic reaffirmation of the rights of student journalists, a U.S. Court of Appeals in Seattle ruled in November that a policy requiring students to submit non-school-sponsored publications for review before distribution was unconstitutional.

Administrators at Lindbergh High School in Renton, Wash., disciplined five students in 1983 for distributing an "underground" newspaper at a class picnic without submitting the publication for approval as was required by a school policy. The newspaper, called *Bad Astra*, contained political poetry and criticism of school officials and policies.

The five student editors of the newspaper along with their family members brought a lawsuit against the school challenging the constitutionality of the policy that required administrative approval of non-school-sponsored materials before distribution. The students also asked that the reprimands they received be removed from their personal records.

In January 1987, a federal district court in Washington ruled that the prior review was constitutional as long as school administrators implemented certain safeguards that would protect students from random censorship. (*Burch v. Barker*, 651 F. Supp. 1149 (W.D. Wash. 1987)). Nevertheless, the judge said that school officials should follow the maxim, "When in doubt, do not censor."

The students appealed the decision, and on November 18, 1988, the U.S. Court of Appeals for the Ninth Circuit reversed the lower court's decision. Relying on the U.S. Supreme Court's decisions in the cases *Tinker v. Des Moines Independent Community School District* and *Hazelwood School District v. Kuhlmeier*, the court

said that "a policy which subjects all non-school-sponsored communications to predistribution review for content censorship violates the First Amendment."

"Interstudent communication does not interfere with what the school teaches; it enriches the school environment for the students," the court went on to say in *Burch v. Barker*, No. 87-3612 (9th Cir. Nov. 18, 1988).

In rejecting the Renton School District's policy of prior review for non-school-sponsored publications, the court affirmed that prior restraints on expression, even in public high schools, come with a heavy presumption against their constitutionality.

"The student distribution of non-school-sponsored material ... cannot be subjected to regulation on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials, and no more than undifferentiated fear appears as a basis for regulation here," the unanimous three-judge panel of the court said.

The decision provides a dramatic affirmation that students retain significant First Amendment protections in regards to non-school-sponsored publications after the Supreme Court's decision in the *Hazelwood* case. The decision applies to all public high schools in the states of Washington, Oregon, California, Arizona, Nevada, Idaho, Montana, Alaska and Hawaii. The U.S. Court of Appeals for the Seventh Circuit issued a similar decision in 1972 in the case *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), which applies to the states of Illinois, Indiana and Wisconsin.

The Renton School District has until mid-February to ask the U.S. Supreme Court to review the case. ■



Adviser reinstated following contract violation

Florida—A high school newspaper adviser who was reinstated to her job after being fired for “insubordination” is “thrilled” to be back at her position.

Susan Earley returned as adviser to Pineallas park High School’s student newspaper, the *Powder Horn Press*, this fall after the local teachers union/arbitrator decided that Principal Marilyn Heminger’s decision to remove her violated Earley’s contract.

Heminger’s decision, which came at the close of the 1988 school year, claimed Earley violated orders not to distribute a censored issue of the paper. The issue detailed the shootings of two assistant principals at the school in February and was not sent home with students because of alleged inaccuracies.

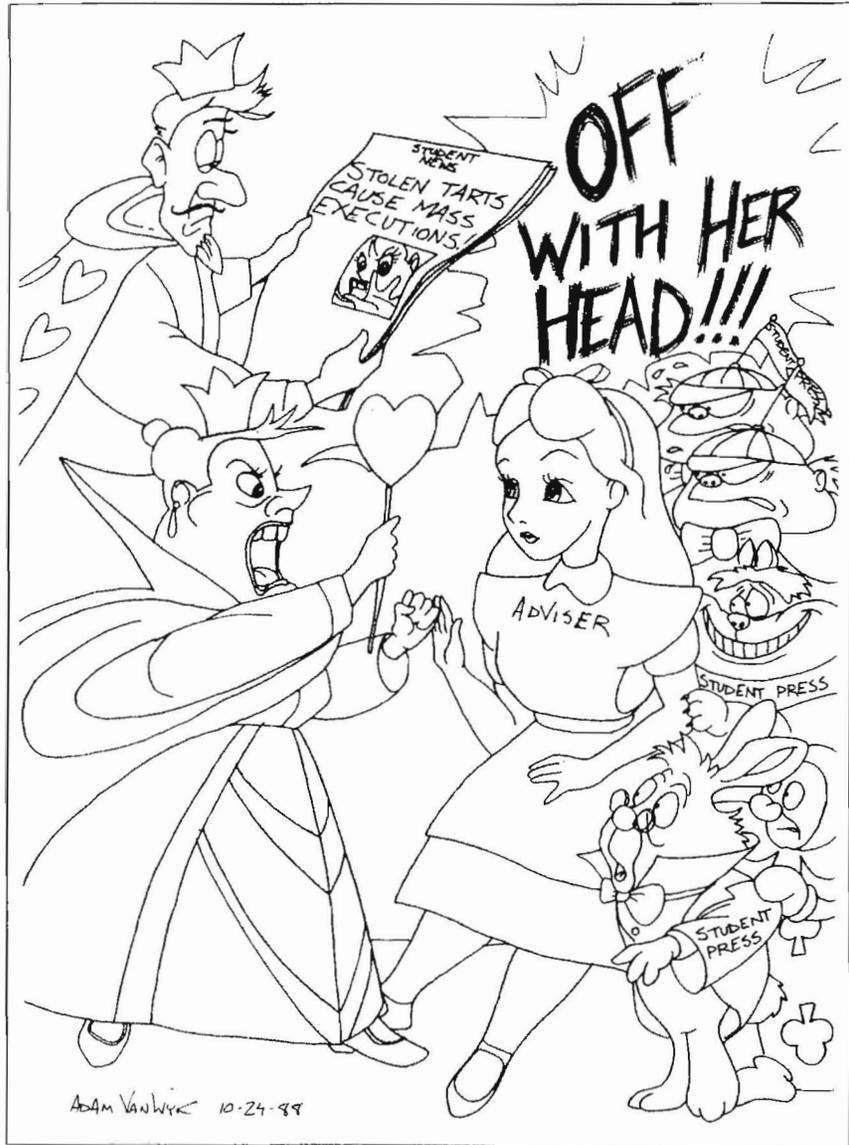
After the incident, Earley showed the issue to a staff member of *The St. Petersburg Times* who served as a consultant to the *Powder Horn Press*. A story and photo of the issue ran in the *Times*, which Heminger claimed violated her order not to distribute the paper.

In July, parents and teachers voiced their opinions to the Pineallas County School Board. Because the case was in arbitration by the union, the board could not reverse the decision, Earley said. The meeting did not aid in her reinstatement, she added, but did help “keep the issue up.”

Jade Moore, a representative for the teachers union, said Heminger “did not act fairly.”

“Our contract does not permit removal from a position unless there is just cause,” he said. “We felt Heminger acted more on a feeling about the negative tone of the paper.”

The arbitration decision also stated that Heminger acted unfairly when she told Earley an improvement in tone was expected



at the same meeting in which she relieved Earley “of any chance to make that improvement.”

Heminger and Earley clashed previously over the content of the paper and the adviser’s position, according to Earley.

“I see my job as instructing how to do things and offering guidelines, not censoring [the students] work, which is in accordance with the Pineallas County publications code,” Earley said.

Earley said Heminger expected

her to take more of an active role, even making direct assignments to students.

“[Heminger] doesn’t perceive withholding an issue [to be] censorship,” she added.

Heminger declined to comment on the reversal, but Carol Jackson, the board of education’s public information officer, said that Heminger always said she would accept whatever decision the arbitration officer came to “graciously.” ■

Battle over CSLA paper continues

California—Some say the battle for control of a student newspaper at California State University-Los Angeles is over.

But for fired adviser Joan Zyda it has just begun.

Zyda has filed a claim for \$2 million charging the university wrongfully dismissed her from her publisher position at the *University Times*, according to reports in that paper.

Zyda was fired in March, six months before her one year contract was scheduled to end. She claimed it was because of her participation in an on-campus rally for freedom of the press, but administrators said her firing would "better meet the educational goals of the university."

Administrators wanted to redefine the communications code, which called the paper both a laboratory experience and a forum. Under the changes the *Times* would be only a laboratory experience, the publisher position would become a laboratory supervisor and circulation would decrease from 8,000 to 1,000.

According to the new faculty adviser, Mark Haeefe, only the definition of the paper as laboratory experience was enacted.

"The paper is as big as ever with circulation up to 10,000 from 8,000 and advertising revenue is up 25 percent," Haeefe said.

Zyda claimed the administration was attempting to "*Hazelwood*" the newspaper by redefining it as a laboratory experience, which would change it to a non-public forum and allow the administration to censor its contents.

But Haeefe said the claim was "false" and the change was to clear up "an ambivalence in the

"What was portrayed as a struggle for freedom of the press was nothing more than a scramble for adequate funding."

—E. Strothers
assistant professor

communications code because [the newspaper] was described as both a forum and a lab experiment."

"We've had no attempt from the administration to censor us," he added.

Keith Henning, Communications Studies Department chair was unavailable for comment.

At the time Zyda was fired, the *Times* also was experiencing financial difficulties. The student government withdrew \$12,000 in advertising revenue from the paper because of clashes with *Times* editors over stories. During Zyda's second quarter, the advertising editor also resigned. To add to the problem, Zyda and her editors claimed that the administration attempted to close the paper because of negative stories.

E. Strothers, an assistant professor in the communications department, said the claims made by Zyda and the staff were false.

"What was portrayed as a struggle for freedom of the press was nothing more than a scramble for adequate funding," Strothers said, "[It is] fueled with the fires of clashing communications styles and a poor information flow within the Communications Studies Department." ■

Adviser's firing suit in court after several delays

New York—A fired newspaper adviser's suit made it to trial this fall after the court denied two motions by the school for summary judgement.

Michael Romano, former adviser to *The Crow's Nest*, filed suit in 1984 on behalf of his journalism students. Romano claimed the principal at Port Richmond High School violated their First Amendment rights by demanding "balanced reporting."

The principal fired Romano

after an editorial appeared in February 1987 criticizing the creation of Martin Luther King, Jr. Day. Romano claimed he was fired for not forcing his students to run a rebuttal to the editorial.

The school's first motion for summary judgement was dismissed by a federal district court in July 1987. The court set the trial date in February 1988.

But in January the *Hazelwood* decision appeared, and the trial was postponed.

In June the school again asked for summary judgement claiming the students' newspaper was a non-public forum so the First Amendment did not apply. The court dismissed the motion in September. According to Romano's attorney Paul Janis, the court decided that at the time Romano was fired *The Crow's Nest* arguably was an open forum.

The court heard oral arguments in the case in late October. ■

Ex-adviser sues school for invasion of privacy

Ohio—A high school yearbook adviser at an all-male Catholic high school, who had his office searched by the school administration for information on an underground paper, is suing the school for invasion of privacy.

John McCartney filed suit in August over a conflict with administrators about an underground paper that several students published. Administrators believed that because he was the students' yearbook adviser he aided in publishing the underground paper. School officials searched the publication's room and McCartney's computer files for evidence.

McCartney said the only input he had about the paper was to tell the students not to do it.

McCartney purchased the computer equipment and files with his own money and no one was allowed to enter the room unless he was there, according to McCartney's legal counsel Tim Nusser. Subsequently, the search violated his "expectation of privacy," Nusser said.

After the incident, the school did not renew McCartney's teaching contract. He said it was because of his contact with legal counsel. School officials claim it was because he went over budget on the yearbook.

But Nusser said he is unsure why administrators did not renew McCartney's contract because the budget was not known until after the contract decision.

The case is moving slowly, according to Nusser, because the school's lawyers "want to know the law before they say anything."

School principal Rev. Ronald Olsewski declined comment on the case and refused to release the name of the school's legal counsel. ■



ACLU reviews school district's new publishing policy

Missouri—Publishing guidelines for the high school newspaper in Ladue School District were updated to reflect the *Hazelwood* decision at a school board meeting in August 1988.

Associate Superintendent John Shaughnessy was quoted in the *Clayton Citizen* (July 28, 1988) as saying that the district's publishing policy of the last 20 years gave students rights not consistent with *Hazelwood*.

The American Civil Liberties Union of Eastern Missouri said it wanted to review the new policy

before the board voted to approve it but was unable to obtain a copy in time.

Superintendent Charle D. McKenna said in a *Missouri Press News* article (September, 1988) "I think when viewed substantively and in practice there won't be any change [in the newspaper]."

The ACLU said it was trying to obtain a copy of the old policy for purposes of comparison.

The *Missouri Press News* reported (September, 1988) that the updated policy outlines specific subjects the board and administra-

tion deem unacceptable. This includes articles that are judged to interfere with the school's work, to infringe on the rights of others, to advocate the use of drugs, alcohol, or irresponsible sexual behavior, to adopt a point of view on controversial political issues or to be unsuitable for immature audiences.

Joyce Armstrong, a member of the ACLU's newly formed committee on student press, said they were studying Ladue's new policy and reviewing other school districts' policies. ■

Editorial leads to libel suit

Sports writer calls coach incompetent

Iowa—A sports commentary in a student newspaper has led to a libel suit.

Jim Fenton, a coach at Burlington High School, filed suit after an editorial criticizing his coaching ability appeared in the *Purple and Gray* in May. The piece said Fenton lacked competence and "should change his methods, or get out of coaching before he really hurts someone."

Fenton is suing the school district, the newspaper's adviser and the student who wrote the article for damaging his reputation.

Fenton has coached the boys and girls cross-country teams for four years. He also has coached the girls basketball team for three years.

The school district's lawyer, Robert Engberg, refused to comment on the case. Engberg said comments made to the local press already had damaged the case. He said his clients would not comment while the case was in litigation.

The school district filed a motion asking the court to dismiss the case. According to Fenton's lawyer Jay Hammond, the district has argued the article constitutes "pure opinion" and therefore can not be considered libelous.

The court heard oral arguments concerning the motion for dismissal in November 1988. ■

Senator's comment prompts suit

Pennsylvania—The student newspaper at Clarion University faces a libel suit after publishing statements made by a student senator at a student government meeting in November 1987.

The Clarion Call reported that student senate vice president Dean Rank said in the group's regular public meeting that Clarion University athletic director Richard Besnier was removed from his position because he misused student activities fees. The student senator said the information came from the university president in a private meeting held to discuss Besnier's removal.

The paper later published a retraction of the statement and an apology to Besnier.

Besnier claimed in his complaint filed on Sept. 8, 1988, that the university president and the students knew the allegations were false and that they "damaged his good name and reputation." He is asking for damages in excess of \$10,000. The university president, two student senators, a band director at the school, the student reporter who wrote the story for the *Call*, the student newspaper and the university itself were all named as parties to the suit. ■

Smoke bomb story triggers legal stink

California—A student newspaper's coverage of a smoke bomb has resulted in a million dollar libel suit.

Larry Moyer, a business and math teacher, claims an article published in Foothill High School's *Inflight* March 11, 1988, contained false and libelous information that damaged his reputation.

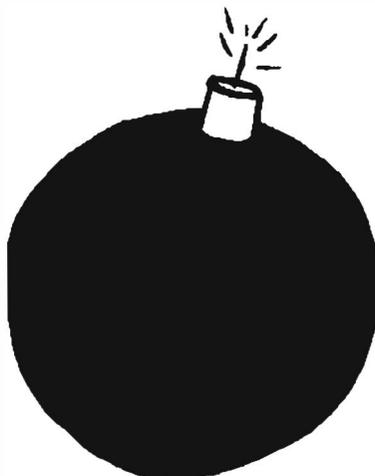
The article included quotes from two unidentified students who set off the smoke bomb in Moyer's class March 3, 1988. One of the students called Moyer a "babbling" and "the worst teacher at FHS."

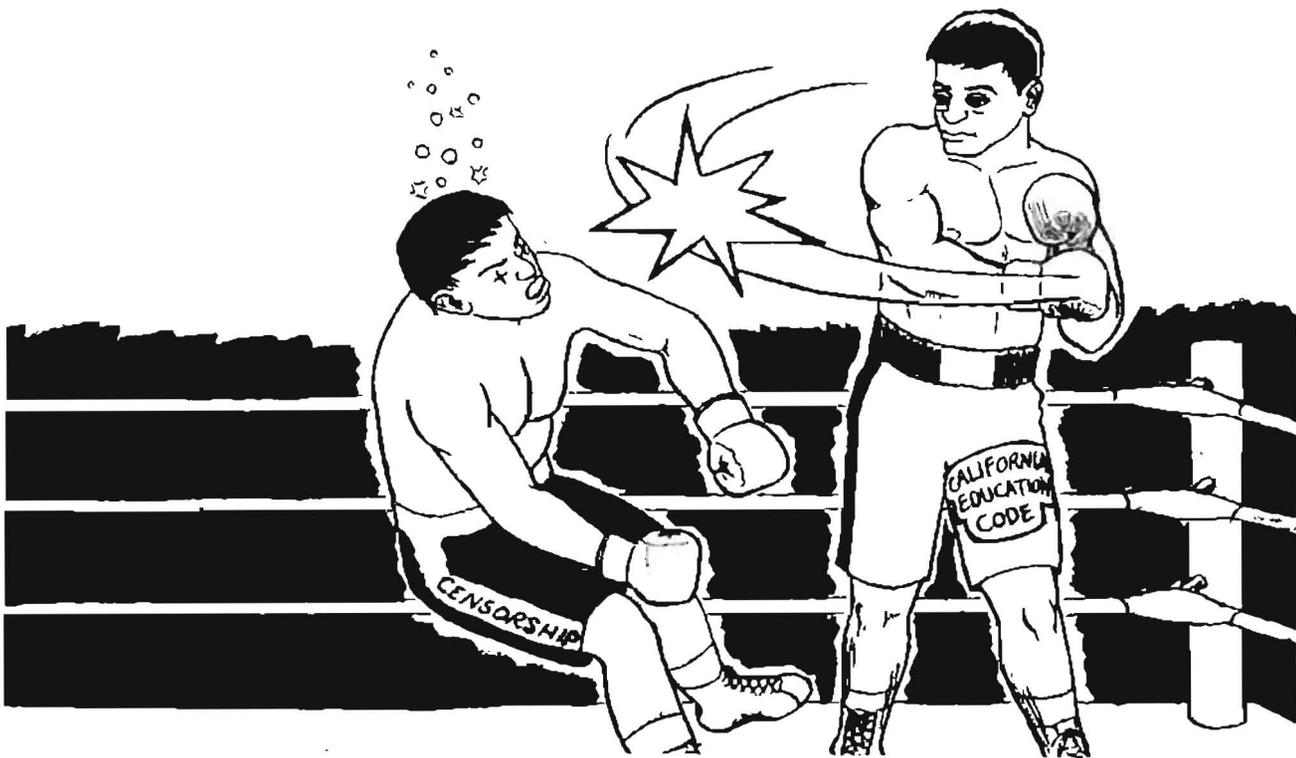
In May, Moyer filed a \$1,001,040 personal injury claim against the school district, but the district's insurance carrier refused to settle the claim. In June, Moyer took the case to court.

Moyer's attorney said she and her client would not comment while the case was in litigation.

Bob Kingsley, general counsel for the school district, said Moyer claimed the decision to publish the article caused "intentional, malicious, emotional distress." \$1,040 of the requested damages is for psychiatric care.

Kingsley said the law firm retained by the district's insurance carrier will handle the case, but that his firm would help with the defense. He said the parties could settle out of court. ■





School allows sex survey after out-of-court settlement

California—The California Education Code has proven once again that censorship does not pay.

An out-of-court settlement reached between Tustin Unified School District and student journalists at Foothill High School has reaffirmed that the state's education code stands above the *Hazelwood* decision for determining student press rights.

Carol Sobel, a lawyer for the American Civil Liberties Union of Southern California who represented the students, said an earlier case, *Leeb v. DeLong*, established the precedent.

Sobel said, "The judge said basically, '*Hazelwood* is nice but it doesn't apply in California.'"

The editors of Foothill's newspaper, *Knightlife*, were prohibited in April from distributing a survey to students in the school. The results of the survey were to provide the basis for an article on health and sex attitudes at the high school.

Sean Flynn, 1987-88 editorial editor for *Knightlife*, said the pa-

per had received permission from the principal to distribute the survey. But the administration later prohibited the survey because of its subject matter and because sections 51550 and 60650 of the state education code bar surveys of students' sexual activity.

The editorial staff contacted ACLU lawyers who reviewed the code and found that the administration's policy contradicted the guidelines established by Section 48907 of the code. Section 48907 states that school districts can exercise prior restraint only when publications contain obscenity, libel, slander or incitement of imminent unlawful or materially disruptive activity on campus. In addition, the section allows students to distribute any kind of pamphlet or petition on campus, with the same restrictions on subject matter.

In May the students filed suit claiming that the administration had violated their free expression rights as guaranteed by Section 48907.

On May 5, Orange County Superior Court Commissioner Eleanor Palk granted a temporary restraining order requiring that the school allow the distribution of the survey.

Palk ruled that the clause barring surveys on students' sexual activity only applied to surveys administered by the school district. She also ruled that the survey was a petition and, therefore, protected by Section 48907.

Palk referred the matter for hearing before a judge, and the court set the hearing date for May 19.

On May 18, the school district asked the ACLU and the students for an out-of-court settlement.

The school district agreed to create a revised policy consistent with Section 48907 and to allow the results of the poll to be published in the June 3 issue of *Knightlife*.

Flynn said because the settlement redressed all of the major

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Settlement *(continued)*

grievances the students agreed to drop the suit.

"We didn't want to go to court," Flynn said. "We wanted to establish our rights . . . get rid of the controversial clauses [in the school district's policy] and basically get them to promise to follow the education code."

Principal Jim Ryan said the lawsuit could have been avoided if more time had been allowed for the school district to review its policies and the state's education code.

"They took us to court instead of resolving the issue," Ryan said. "If we had had more time this need not have gone to court."

Sobel said the revised policy, adopted in September, is good, but the school district is attempting to violate the spirit of the settlement.

"They have classified the newspaper as a laboratory activity, using the language of *Hazelwood*," she said. "Students must submit controversial stories in advance of publication and they must produce a theme newspaper. In other words, they will no longer be reporting on the news, so we haven't signed off on this case yet."

Ryan said the controversy at Foothill occurred because of the confusion surrounding students' rights.

"Laws pertaining to students are not understandable to the laymen," he said. "There needs to be improved clarification of students' rights, which are constitutionally protected, as they should be, but in some ways students aren't considered citizens until 18 years of age."

Flynn agreed that there was confusion on the part of administrators and students but he said students have to fight for the rights they do have.

"Even though you have rights you have to fight for them," he said. "We got the word out [through the case], especially in our area, that you do have rights. It was real neat to establish that." ■

Litter: Student papers tossed in confusion over policy

California—When the grounds maintenance crew at the University of California-San Diego calls newspapers "trash" they are not talking about content.

Several student newspapers on campus claim the grounds crews have been tossing out stacks of their newspapers, in some cases on the same day the papers are distributed. The newspapers have filed a complaint with the university administration.

The university maintains that only loose or outdated papers are treated as litter.

Monty Kroopkin, editor of the *New Indicator*, said no clear university policy regarding newspaper disposal had been communicated to the nine publications involved in the complaint.

"Enforcement of a disposal policy is erratic," Kroopkin said. "We have discovered from the chief of grounds maintenance that no university policy exists. The lower-level staff says their policy is, if there is a mess you clean it up. They won't admit their staff is taking entire stacks of perfectly neat newspapers and throwing them away."

Editor Robert Triplett of the *California Review*, another newspaper involved in the grievance, said their lawyer requested a copy of the university's disposal policy. He said their response was, "they only throw away trash."

Nick Achelar, a judicial adviser for the student affairs department, said no specific regulation on disposing of student publications existed.

Achelar added, "The university abides by First Amendment protection of media."

He said that in the course of daily operations grounds crews dispose of whatever appears to be litter, including newspaper stacks that have been knocked over, blown around or have become outdated.

Kroopkin said the disposal problem was just another in a long list of conflicts between the university and student publications.

"The university has had a long history of a rather arrogant disregard for student press rights," he said.

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Newspaper wins battle with student government

California—A judiciary committee foiled an attempt made by student senators to permanently shut down an alternative student newspaper at California State University-Long Beach.

The Associated Student Senate at UCLB passed a resolution on Sept. 28 ordering *The Long Beach Union* to cease operation. The resolution was passed following the publication on Sept. 26 of a three-page satire, "The Grunion Sexually Frustrated Male Issue," which contained a picture of three nude men and drawings of sexual organs.

The senate claimed the Grunion issue violated university codes prohibiting "lewd, indecent or obscene behavior."

But Gary Stark, editor of the alternative newspaper, said the code did not apply to publications. In addition, Stark claimed the senate violated the First Amendment and its own bylaws by passing the resolution.

The senate's bylaws state that a publications board will act on behalf of the publisher, the Associated Students, Inc., and will set policy for the *Union*. The bylaws also state, "Staff and editorial content grievances shall not be subject to review or approval by [the Associated Student, Inc.]."

"Our bylaws specifically state that staffing and editorial content shall not be subject to review or approval by the AS Senate," Stark said. "Yet, the senate never consulted with the publications board about this. [They] circumvented the whole process."

The AS judiciary agreed with Stark when it ruled Oct. 26 that the senate did not have the power to close the newspaper. But the committee did not address the free expression issue.

The decision put the *Union* back in business, but Stark said the newspaper's worries are not over.

"What I'm worried about now is next semester [the senate] will

be planning the budget for the next fiscal year," he said. "I'm pretty sure they'll award zero funding [to the *Union*]."

"It's possible we could have an initiative on the ballot where students vote for 50¢ from their student activity fees to go to the student newspaper. That would take it out of the senate's hands."

Stark said he intended to research whether the senate could cut funding next year, which would effectively kill the *Union*.

He claims the senate took action against the newspaper because of stories criticizing it, and if the senate cut funds in 1988-89 it would be for "vengeance."

"There are a lot of [alternative] papers on campus that are functioning just fine and they don't get a dime"

—Terri Andrews
student senator

One of the four senators who drafted the resolution said that tension between the ASS and the *Union* stemmed from their close relationship.

"It's in our bylaws, we're the publisher and a lot of students have a problem with it," Terri Andrews said. "[The *Union*] wants us to give them all these special considerations, but we don't have a say in what they print."

Andrews, senator for the Graduate School of Education, said she expected the *Union* would be funded when the budget committee meets in the spring. But she said the *Union* should ask for appropriations like any other campus group and give up its special relationship with the senate in order to avoid conflict of interest.

"They should come to us like

any other group," she said. "They won't get free equipment and free space, but we can't do it for them and not do it for anyone else."

"There are a lot of [alternative] papers on campus that are functioning just fine and they don't get a dime."

An opinion published Sept. 29 in *The Daily Forty-Niner*, UCLB's independent student newspaper, accused the Senate of "vigilante justice." The opinion, written by the editorial board of the *Forty-Niner*, said, "While we're not the *Union's* greatest fans, the A.S. action raises freedom of the press and political questions that the Senate, in its haste, did not consider."

The senate waived the standard procedure for a first reading of proposed resolutions, which would have delayed voting for one week.

The resolution was first introduced on Sept. 21 by senators who alleged that the *Union* printed false and biased information and only served a small percentage of the student body. The original draft proposed that if the *Union* did not "adjust its present situation by involving and benefitting a minimum of fifty percent of the student body and reporting factual and unbiased information" by Oct. 19, then funding to the newspaper would be frozen.

The resolution was amended after the Grunion issue appeared to include allegations that the newspaper violated state and university codes concerning lewd behavior and sexual harassment.

Senate president Roger Thompson said they passed the resolution because money given to the *Union* could be better used elsewhere. According to Thompson, the decision to shut down the *Union* was not a freedom-of-the-press issue but a question of responsible appropriations.

The *Union's* budget was cut from \$25,000 in 1987-88 to \$10,000 for 1988-89. ■

WSU considering lab paper proposal, staff anticipates school censorship

Kansas—Wichita State University's student-run newspaper, *Sunflower*, is under cloudy skies these days.

The university is considering a proposal, made by an administration task force, to turn the *Sunflower* into a laboratory newspaper for journalism students only.

Les Anderson, former adviser of the newspaper, said the journalism department had been considering the change for several years because of staff turnover, personnel problems and the perceived poor quality of the paper.

Anderson said the problem came to a head in 1986 when the student editor resigned under pressure. But he said the motivation for changing *Sunflower's* status was unrelated to censorship.

"People are often against a lab set up because they think, 'censorship' whether actual or implied," he said.

Under the old system Anderson was a part-time unpaid adviser and the president of the university was designated as the publisher. The proposed system would place the *Sunflower* under the supervision of the WSU's new School of Communications, provide at least one full-time paid adviser and reconstitute the Student Publications Board.

The proposal states that the adviser would not act as a censor. The adviser's responsibilities would be to "insure that news coverage and editorial decisions are fair and responsible, but not to control those decisions." If the administration made any attempt to censor the paper under the new system, the responsibility for interposing "on behalf of the staff and the newspaper" would rest with the adviser and the head of the School of Communications.

Anderson said the proposed changes would only improve the newspaper's quality.

"There were problems with student staff turnovers and personnel problems," he said. "The product itself was poor. Journalistically the lab set up is the best."

But the current editor Dave Johnson said that the changes would make censorship more convenient for the university than the old system.

"[The administration] could do anything they want [censor the paper, etc.]," he said. "But establishing a written provision for a chain of command makes it much more convenient [to censor] than to have the president to step in."

"Control is the major issue here and I think people are stepping around it."

Johnson also said the changes would not necessarily improve the quality of journalism produced by the students.

consider them quite students," he said. [Their being on staff] deprives a student of that position."

But Johnson said that lack of interest kept people from working on the paper, not the system itself.

"No one is coming here [to WSU or the *Sunflower*] for an education in editorial and news writing," he said. "Students are more interested in advertising and public relations. We have a hard time getting people to work down here."

However, a former editor of the *Sunflower*, Jennifer Comes, said that changes were needed to improve the quality of the paper and the journalism program.

"I feel that the *Sunflower* should be a lab paper," Comes said. "I felt it even more as my tenure as editor progressed."

"It's not a requirement to work

"People are often against a lab set up because they think 'censorship' whether actual or implied."

— Les Anderson
former adviser

"For some reason students aren't being churned out of the [journalism] program that can produce for the paper; either what they write is printable or it's not," he said. "Money is an incentive, experience is an incentive, I really don't see the difference whether you get credit or get paid. There is no difference."

According to Anderson, another motivation for the changes was too few journalism majors were involved with the paper and that too many of the staff were not traditional students.

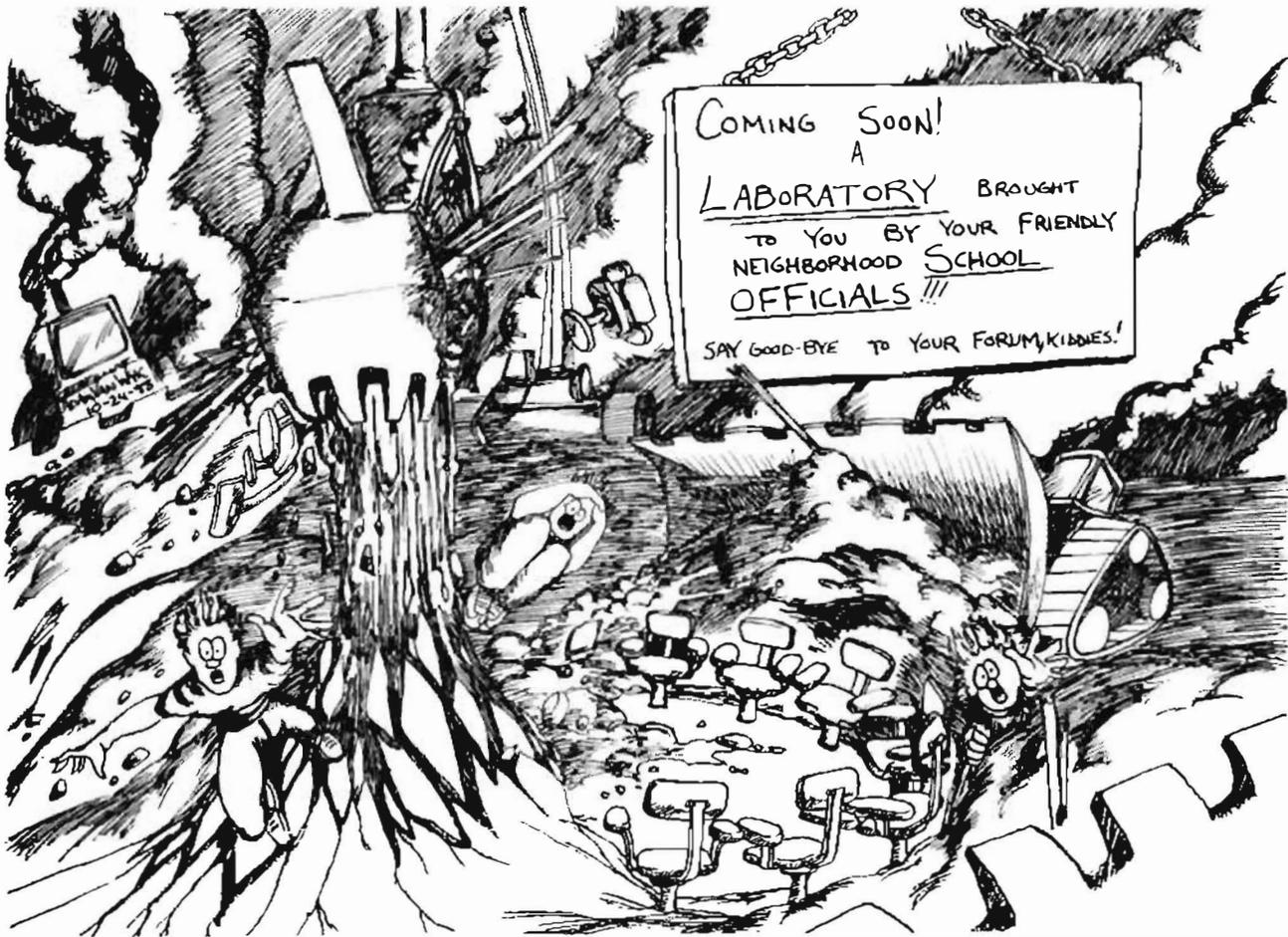
"There are six to 10 students on staff. The editor has already graduated. The business manager is only taking a few credits. I don't

on the paper and [journalism students] just don't understand, without that opportunity they are not getting anything from their education."

The Student Government Association has taken a stand against the proposed changes. SGA President Angela Windham was a member of an investigation committee created by the administration to review the *Sunflower's* status.

Windham said she wrote a minority report challenging the findings of the majority report proposing the paper be turned into a lab.

"Basically, I said middle ground [between an independent



and laboratory paper] should be examined before saying it should be turned into a lab paper," Windham said. "My whole problem with the committee was we were suppose to investigate whether or not a lab paper was feasible and whether it was needed. Instead, the committee made that into ways to turn it into a lab paper. They totally twisted the charge."

Johnson said not all the proposed changes were negative.

"The problem [with the *Sunflower*] would be easier to solve with a full-time paid adviser," he said. "Someone to be there for help and advise when the students need it. I think it would be a good idea."

Windham's report also stated that SGA would discontinue its funding of the *Sunflower* if it became a lab paper.

"Once it's a lab paper it becomes an academic program," she

said. "No student activity fees will go to it."

The *Sunflower* currently receives \$96,000 a year from SGA, about 44 percent of its budget.

Windham said her term ends in December, so the next president could promote a different policy.

However, the threat of funding cuts has made proposed changes to the *Sunflower* "not fiscally responsible," according to Vice-President of Academic Affairs Joyce Scott.

Scott said the proposed changes to the *Sunflower* were not an issue the university administration chose to consider.

"The student publications board, two years ago, developed this idea," she said. "This is not an issue I would have picked. It's not one of great importance to me in terms of heavy issues related to academics at the university."

Scott has reviewed the commit-

tee's reports and will make recommendations to the university's president, but no decision will be made until after a dean for the new School of Communications and an adviser for the *Sunflower* are hired.

Les Anderson left the position as adviser after 11 years to avoid a conflict of interest. He joined a publishing firm that will bid on the *Sunflower's* publishing contract.

Johnson said the paper is operating without an adviser and that no changes will be made in the paper's operation.

"The whole thing is really up in the air," he said. "For this year at least, it is business as usual."

Windham said if the changes go through a lawsuit could result.

"It might go so far as a court case," she said. "This is the only independent student newspaper left in Kansas." ■

Conservative newspaper moves to independence, banned issue causes withdrawal of VSA funding

New York—In a battle over community values, Vassar College's conservative publication, *The Spectator*, decided to publish independently last fall after the student government cut its funds.

The Vassar Student Association froze and later withdrew the newspaper's \$3,800 budget after editors distributed an issue banned by the VSA. The article "unnecessarily jeopardizes an educational community based on mutual understanding," according to a letter from the VSA to the university community.

The April/May 1988 issue contained a regular feature of the paper "Hypocrite of the Month." The piece blasted black student Anthony Grate for disrupting a reception following a speech sponsored by *The Spectator* with anti-semitic remarks. Grate allegedly called several of the paper's staff "dirty Jews" and "F—ing Jews" and told them "I hate Jews."

"Yes, Anthony is a racist," part of *The Spectator* article, which solicited student reply, said. "He complains about racism when it is against his people, but he throws racial slurs at other ethnic groups."

The VSA charged *The Spectator* with discrimination, but in a campus-wide mailing the editors denied the allegations.

"[We] consider this issue to be beyond the liberal/conservative; black/white scope. It is an issue of community values... public expressions of anti-semitism and racism will not be tolerated in this community," the letter said.

Grate later wrote a letter of apology to Natalie Marshall, vice president for administrative and student services, taking responsibility for his remarks. But the letter was never made public because Grate requested that Marshall only release it for publication if *The Spectator* also apologized, Marc Theissen, editor-in-chief of the newspaper, said.

Theissen and several of the staff have read the letter, which is available in Marshall's office for anyone who wants to read it.

"We have nothing to be sorry for," Theissen said. "He should have apologized to us directly."

Theissen believes Grate was treated with "kid gloves" by the administration because he did not receive a harsher punishment. VSA president Jean Schock said the university often is lenient when dealing with harassment incidents.

"Most incidents of harassment aren't dealt with appropriately by the administration," she said. "I

believe all punishments [for harassment] should be harsher."

Marshall and others at the school claim *The Spectator* was partially at fault for creating an air of "intimidation" by having security people present at the speech given by Jorge Salaverry from the Nicaraguan Democratic Resistance. Theissen said the security was necessary because of the Contra leader's position.

The cut in funding led to a scramble for publishing money. Theissen said he hopes the paper will be able to work on increased advertising revenue and alumni contributions. The addition of a desktop publishing computer would also greatly decrease costs, he added.

The Spectator can reapply for funding this winter, but Theissen said he doubts it will receive any money because another conservative paper has been authorized by the VSA. Only one paper from a particular viewpoint can be funded at one time, he said.

Theissen said he felt the VSA attack was an attempt to silence the conservative views of some students.

"It is important to have a conservative paper because the majority of the campus is liberal," he said. "We need a balance." ■



Paper overcomes attempt to control editor selection

Illinois—It may be too soon for Chicago State University student journalists to pull their wagons out of a circle, but they are claiming victory after an attack on their First Amendment rights by school officials.

Tension developed between CSU's student-run newspaper *Tempo* and university officials over several editorials criticizing the administration that appeared last spring.

After the critical editorials appeared, the university asked *Tempo*'s editors to submit the paper for prior review.

Christine Somerzill, dean of student development, said the university had received complaints that the editorials were potentially libelous.

"The university wanted to make sure nothing was published that was harmful to the university or the students with regards to libel," Somerzill said.

Tempo's editors claim the university refused to sign typesetting vouchers unless the paper was submitted for prior review. They say that because they did not

agree to the demand, three issues scheduled for the spring semester never went to press.

Somerzill said the editors' claims were incorrect.

"The university signed vouchers for any authorized publications," she said. "The student newspaper, for whatever reason, decided not to publish."

Byron Walker, editor of the *Tempo*, said in addition to demanding prior review the university also wanted to impose a new method of choosing student editors by placing the newspaper under a publications board.

In the past, *Tempo*'s staff voted for the next editor and managing editor independently of the university administration as outlined in the paper's constitution and by-laws. University officials told the *Tempo* staff that an administration-appointed student publications board would choose the editor and managing editor from the entire student body.

Walker said he and the editorial staff met with the publications board on July 14 and presented their case.

"We used the publications board against [the administration]," he said. "We presented our case to the board and pointed out that a lot of the rules they were operating under were not legal and the publications board would become liable if they operated under the administration guidelines."

Publications board parliamentarian Eldridge Freeman said there was no written record that the new university guidelines had ever been ratified as a constitution for student publications.

Freeman, a professor in the College of Business, said the present board chose not to ratify the university guidelines and is in the process of writing a new constitution for student publications. Walker, as editor of the *Tempo*, is on the board. He said his major concern is that the administration should not have any fiscal or editorial control over the newspaper.

Prior review and the role of the student publications board may continue to be points of contention between *Tempo*'s editors and the university.

Somerzill said that the issue of prior review was still being debated. But, Walker said the publications board would never require prior review.

"[The administration] can't have editorial control if these publications are to function," he said.

Walker said the board will function as an approval body for student publications' editors. The board will vote on candidates suggested by the individual publications. Walker was approved as editor for the *Tempo* at the July 14 meeting.

But Somerzill said the board was created to advise the university on how to direct student publications and that its purpose had not changed. ■

Litter *continued from page 14*

But Achelar said that there was no tension between the university and the news media.

"There is always a difference of opinion in interpreting university policy," he said. "There is a need for clarification as in this case."

He added that the alternative student publications like the *New Indicator* and others involved in the complaint have had a problematic relationship with the student media board, which allocates student activity fees to publications. Achelar said sometimes the media board does not allocate the amount of money requested by the newspapers.

The university recently adopted a more detailed grievance procedure. Achelar said that the student publications should attempt to resolve the problem under the new guidelines before taking any further action.

Triplett said he and the other editors were waiting to see if any distribution problems occurred this fall before deciding on any further action. ■

Religious magazine controversy awaiting trial

Colorado—High school students and school officials involved in a lawsuit over distribution of religious materials both have asked the court to rule in their favor without a formal trial.

La Junta High School students filed suit in July 1987 against East Otero School District claiming the district's distribution policy violates the freedom of expression and religion clauses of the First Amendment.

The policy, adopted in January 1987, prohibits the distribution of printed non-curricular "material that proselytizes a particular religious or political belief." Several students distributed copies of *Issues and Answers*, a religious magazine promoting faith in Jesus Christ, on the high school campus. Two distributions took place in February and March of 1987 in direct violation of the policy. The students were suspended and then filed suit.

The students' attorney David French said that students were hoping to have the policy declared unconstitutional and have their suspensions removed from their records.

French said their motion for summary judgement concerned the first of these two issues.

"We've filed a motion for partial summary judgement asking the court to consider, 'Is the policy constitutional on its face and can that policy or any policy be used to limit distribution,'" he said.

French argued in a brief before the court that the students' right to free speech was violated since

they did not interfere with school activities or the rights of other students when they distributed *Issues and Answers*.

"[The distribution] was entirely peaceful," he said. "They didn't say anything, they just handed out the magazine to people who wanted one."

French also argues that the *Hazelwood* decision does not apply because the school did not sponsor the publication. According to French, the magazine is a personal expression on the part of the students, and the school censored it because they disliked its content.

Student Action for Christ/The Caleb Campaign publishes *Issues and Answers*. The magazine is available by subscription.

The students also raise in their defense the establishment clause of the First Amendment, which prohibits the government from becoming involved in the establishment of religion. The students claim the district's ban on all religious materials automatically involves the government with religion because the district will have to determine what constitutes religious materials. They say the school should accommodate any religious expression to avoid the appearance of promoting any one religion. The students also argue that the high school is a public forum since it permits distribution of all printed material with certain exceptions.

The school district's attorney, Steve Epstein, declined to comment because the case was in litigation.

But in his brief before the court Epstein argued that the school district's policy shows that La Junta was not intended to be a public forum. Because the school is a non-profit forum the school district can restrict which groups have access to it. Therefore, the distribution policy does not violate students rights because it applies universally to any religious or political viewpoint. In addition, the policy relates to an important objective of the school which is to avoid violation of the establishment clause prevent disruptive activity on campus.

The school district said that allowing distribution of religious materials on campus would involve the school in the establishment of religion, which would violate the First Amendment. The school district also said the distribution of *Issues and Answers* causes tardiness and violence among the students.

But French said the school district's claims were unfounded.

"None of the students distributing the magazine saw an altercation nor were they involved in one," he said. "[And] we're confident the tardy claim can't be substantiated." ■





Hazelwooding: School board considers regulations for student publications

Virginia—When the Supreme Court handed down the chilling *Hazelwood School District v. Kuhlmeier* decision in January 1988, student journalists, advisers and school administrators alike asked, "What does this mean for us?"

The Fairfax County School Board attempted to provide the answer for its students in a controversial addition to the district's Student Responsibilities and Rights policy last fall. The student expression regulation proposal drew so much fire from advisers and student journalists, it was withdrawn for further discussion.

The addition, which would have allowed principals to censor, among other things, articles "inappropriate to the achievement of the instructional objectives of the publication," was withdrawn during the Sept. 22 school board meeting. Several students, advisers and community members addressed the board at the meeting to criticize the policy.

Superintendent Robert R. Spillane initiated the change to be sure the district was following the law in the wake of the *Hazelwood* decision, he said at the meeting.

Hazelwood gave school districts greater authority to review stories and censor articles than they had before. But the decision did not require schools to exercise such authority. Since the Supreme Court's decision, school districts across the country have reaffirmed their decision not to censor despite *Hazelwood's* permission.

The Fairfax County proposal allowed the district to censor stories that were "unsuitable to the maturity level of the audience" and "ungrammatical, poorly written and inadequately researched."

Previously, several Fairfax County schools operated under a "hands off" policy which allows the sponsor and students to determine content, said Dr. Patrick McCarthy of the Fairfax County Publications Association.

McCarthy, adviser to the student newspaper at Lake Braddock High School, told the board in his statement that the *Hazelwood* decision does not mandate a change in Fairfax County's policy.

"The ability of an administrator to censor an

article which is deemed 'ungrammatical' or 'poorly written' leaves the door open for censorship based on the whim of an individual," he said.

Spillane refused comment, but Assistant Superintendent Dolores Bohlen said the regulations were not meant to tighten student expression and the proposal was "misinterpreted."

"We didn't realize it would be interpreted as it was," Bohlen said. "[The proposal] was not intended to be restrictive, it was written to follow the *Hazelwood* ruling."

Bohlen pointed out that Spillane has been "strongly supportive of student journalism" and met with student journalists after the *Hazelwood* decision to tell them "nothing had changed."

"We have a policy here that has worked well for 10 years and we don't want to rock the boat," said Bohlen. "We have tremendous faith in our teachers and students."

McCarthy agreed that Spillane has been supportive of Fairfax County student journalists, but said Spillane did "not fully understand what he was doing," when he set up the proposal.

Jason Hintz, student representative of the school board, offered an alternate proposal that added to and modified the existing Fairfax County policy.

"I took it from the view of putting a clamp on the censors rather than the students," he explained.

His suggested policy would make the county's student papers forums of open expression, with letters to the editor and editorials, and not solely for instructional purposes. Also, no prior review would be allowed. His policy is under consideration.

Hintz said most students and advisers were "taken aback" by Spillane's policy because "it was so negative and sounded like the papers in Fairfax County were trash and needed to be guarded."

While Spillane said that his proposal would not change how the papers in the area worked, both McCarthy and Hintz said that if Spillane's idea had been accepted by the school board it would have eventually chilled student speech.

"The change was so radical that its hard for me to believe that it wouldn't happen," Hintz said. ■

Court orders FCC to review time frame, upholds expanded indecency definition

FCC must reconsider warning given to student radio station

California — A federal judge has ordered the Federal Communications Commission to reconsider a warning given to a student radio station.

The FCC determined in April 1987 that KCSB-FM at the University of California-Santa Barbara violated restrictions on indecent broadcasts. KCSB-FM broadcast the song "Making Bacon" by the Pork Dukes after 10 p.m. Past FCC practice allowed indecent broadcasts after 10 p.m., but in the 1987 ruling, the FCC further limited those hours to after midnight and expanded the definition of indecency in the UCSB case and two other similar cases. The FCC warned KCSB-FM against broadcasting indecent materials before midnight.

In its expanded definition of indecency, the FCC used language from the 1978 Supreme Court *Pacific* decision, which defined indecent materials as "language or material that depicts or describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual and excretory activities or organs." The old standard for indecency was the "seven dirty words" made famous by George Carlin. Concerned broadcast, journalism and public interest groups filed suit in May claiming the FCC's definition was overbroad and vague and the time frame for indecent broadcasts too narrow.

The U.S. Court of Appeals for the District of Columbia Circuit considered the suit and ruled in July that the FCC did not "implement its authority to channel [indecent] material in a reasonable manner" and must reconsider the time frame for indecent broadcasts. The court upheld the expanded definition of indecency.

FCC staff attorney Michael Farquar said that an internal rule-making proceeding was pending to comply with the court order.

The court's ruling could have an impact on a related investigation being conducted by the FCC concerning the control UCSB has over its student radio station. The investigation began as a result of the 1987 ruling when the FCC directed its Mass Media Bureau to determine whether UCSB had sufficient control over the station's broadcast content. The university said it could not control content without violating the students' First Amendment rights. The FCC said it issued the license to the university's board of regents, and they must control the radio station's broadcasts.

The FCC co-ordinator of the investigation, Marcia Diamond, said she had not yet had a chance to analyze the impact of the ruling, and consequently, if the investigation should be closed. ■

Fired editor fails to prove expression curtailed

Illinois—A \$200,000 lawsuit ended in disappointment for a fired student editor.

Brian Lunn, 1986-87 editor of the *Kahoki*, lost his suit against the Board of Education for the Collinsville Community School District in October 1988. The suit alleged that the school violated Lunn's First and 14th Amendment rights when the high school principal fired him in March 1987.

Lunn claims he was fired for two editorials, which appeared in December 1986, criticizing the school board's student code of conduct. The code barred students

from school-sanctioned activities unless they agreed to abstain from drinking, drug use and other unlawful acts.

But the principal and the school board maintain that Lunn was fired for failing to "define his role of editor." According to the school board's attorney Jack Leskara, no First Amendment rights were violated.

"No expression by [Lunn] was curtailed," Leskara said.

He also said that the American Civil Liberties Union, which brought suit on Lunn's behalf, had no evidence for their claim that

Lunn was punished for the editorials.

"Even though [Lunn] was allowed to speak out, their inference is that he was punished later on account of it," he said. "But no witness could give direct evidence... [that] he was punished in retribution for expression which had been permitted. The evidence demonstrated nothing had been done in retribution."

But, Lunn's attorney Jane Whicher, a staff counsel for the ACLU, said, "Brian was punished for the content of editorials."

Whicher said Lunn had not yet decided whether to appeal the decision. ■

Open meetings case declared moot

Indiana—The wheels of justice turned a little too slowly for former student journalists' open meetings suit.

A state court dismissed their case in October because the committee at Ball State University that barred student reporters Diane Goudy and Robert Vitale from attending its meetings in December 1986 no longer existed.

Goudy and Vitale filed suit in March 1987 claiming the university violated the Indiana Open Door Law. The suit asked the court to order the university's Calendar Transition Committee to hold open meetings.

BSU's president created the committee to recommend changes to the curriculum as the university switched from a quarter to a semester system.

The administration claimed that the committee was not subject to the open meetings law because it had not been created by the "governing body" of the university [the board of trustees] nor did it advise that body.

Indiana law states that a committee appointed by the governing body of a public agency or its presiding officer to take official action on public business must conduct its meetings openly. The law also states that "official action" includes acting to "receive information, deliberate and make recommendations."

The reporters' lawyer argued that the transition committee acted as a governing body because it took official action when it made recommendations concerning the calendar.

The case was delayed when the students' attorney dropped the case in July 1987. He took the case without pay but later could not continue for free. Goudy found another lawyer, Frank Harshey, with the help of the Indiana Civil Liberties Union.

But the delay aided the university's cause. They filed a motion in August asking the court to dismiss the case because it was no longer relevant.

Harshey also filed a motion in August asking the court to rule in their favor without any further legal action.

But the court decided the case had become moot and did not determine whether BSU violated the open meetings law.

Harshey said the former students did not plan to appeal. However, he said a similar case could arise because the law needed to be interpreted.

The university's lawyer Jon Moll said the law did not need further interpretation. ■

Supreme Court rejects religious group's appeal

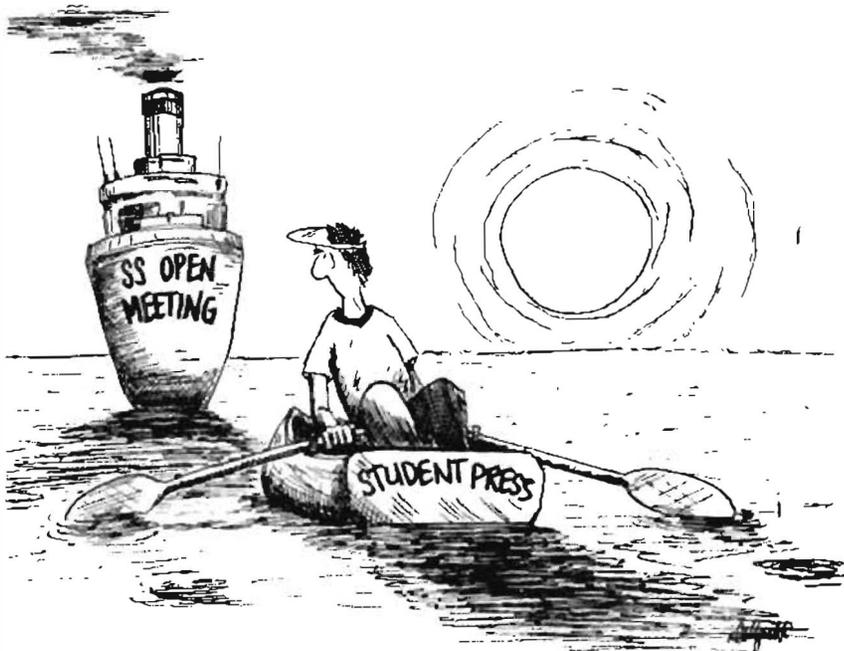
California — The U.S. Supreme Court rejected an appeal by high school students seeking to overturn a school district's policy barring the distribution of religious flyers.

In January 1988, students at El Toro and Mission Viejo high schools asked a state court to order Saddleback Valley School District to allow them to advertise a student religious group, New Life, in school. They claimed the California Education Code protected their right to distribute printed materials in school.

But the court upheld the district's policy forbidding groups not sponsored by the schools to publicize their meetings on campus and supported the district's claim that allowing the New Life group to publicize their meetings in school would violate the establishment clause of the First Amendment.

The students attempted an appeal to the California Supreme Court, but their petition for review was denied in April.

They then asked the U.S. Supreme Court to review the case, but in October the court denied their petition. ■



SWTS students win open meetings battle

Texas—Four Southwest Texas State University students were awarded \$3,000 in a lawsuit against the Texas Board of Regents who violated the state open meetings act last May.

District Court Judge Jon Wisser handed down a declaratory judgment in the case stating that students were "interested persons" and according to law should be allowed to attend the regents' meetings. He also defined college journalists as "bona fide" members of the media who should have access to meetings they want to cover.

Student government president Lee Brand, student government

senator John Harris, student activist Jody Dodd and the student newspaper's opinion editor Jeff Herndon sued the board because of a May meeting at which no students were present. During the meeting the regents decided to dismiss the school president and discontinue the contraceptive service at the student health center.

Wisser ruled the board violated the Texas open meetings act, which states an adequate agenda must be posted before holding meetings. The board did not post an agenda and in effect "deliberately set out to violate the act," according to Herndon.

Because of the violation decisions made at the meeting were overturned, Herndon said.

But following the decision the board held another meeting, this time posting its agenda before hand. It again voted to remove the university's president and ban contraceptive distribution at the health center.

Despite the board's reiteration of its earlier decisions, Herndon said he does not regret bringing suit. Student organizations on the campus have begun distributing contraceptives, and the money from the suit was donated to Planned Parenthood, he said. ■

Complaints filed in university job office not considered public records

New Mexico—The state Supreme Court upheld a lower court ruling that complaints filed by students in the University of New Mexico student employment office were not public record.

Giorgio Spadaro posted a job listing through the student employment office. His job notice was cancelled after two separate complaints were received by the

office that the duties listed were not those required. Spadaro filed suit, demanding that the complaints be released to him as stipulated in the state's public records acts.

The student employment office refused disclosure, claiming the records were considered confidential under federal and state privacy acts.

The New Mexico Inspection of Public Records Acts state that every citizen has a right to inspect any public records with a few exceptions, including letters of opinion in personnel files or students' cumulative files.

Assistant Director of College Work Study Dorothy Chartier-Boyer said the university was pleased with the decision but questioned the basis for it.

"We felt that since employment is due to their student status, [the complaints] fall under the education records which cannot be released without student permission," Boyer said.

Chief Justice Tony Scarborough stated in the majority opinion that the records did not fall under the state's definition of public records, therefore, Spadaro could not demand their release.

The state defines public records "as a record made by a public official who is authorized by law to make it." Since the university is not required by law to make a record of student complaints, Scarborough determined the complaints were not subject to open records acts. ■



Before starting the tape, set the record straight

Journalists rely on tape recorders for accurate reporting, but using one can constitute intrusion and lead to court

Tape recorders provide the journalist with an important resource for broadcast newsgathering, as well as a good back-up to notetaking abilities. But tape recording also can present a source of difficulty for journalists. A claim of intrusion, a type of invasion of privacy, is an issue for a journalist to consider every time he uses a tape recorder.

The legal definition of invasion of privacy says, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person."¹ This means an objective standard will be applied by the court to the actions of any reporter who is charged with intruding on the privacy of another's life, thoughts, home, or any area that the person wishes to keep to himself.

It is important to note that a claim of intrusion does *not* require publication or broadcast of the recorded segment.² Thus, the mere act of tape recording without first obtaining the consent of the interviewed person could violate that person's rights.

The following article outlines the possible legal difficulties inherent in tape recording, and advises journalists on how to handle these problems.

What consent is required before I can tape record an interview?

State laws generally require the consent of at least one party to the conversation before that conversation can be recorded, and some



require consent from all parties. The policy of requiring consent is based in the belief that confidential conversations which the pub-

lic is not meant to hear should be within the control of the participants. See the chart accompanying

continued on page 26

continued from page 25

this article for a list of states' statutes. In any case, you cannot tape record a conversation to which you are *not* a party. In this situation, you must obtain one or all parties' consent, depending on the state statute.

The Federal Wiretap Statute³ prohibits interception of "any wire or oral communication." However, the statute creates two exceptions. First, there is an exception for recording a conversation "where such person is a party to the communication." Second, there is an exception for recording a conversation where only one of the parties consents *and* there is no intent to commit "any criminal or tortious act ... or for the purpose of committing any other injurious act." Thus, the statute effectively creates a one-party consent rule, but only when the recording is not intended to be used in violation of the law.

In *Boddie v. ABC*⁴ the court interpreted the scope of the intent exception to the Federal Wiretap Statute. Reporters for ABC's "20/20" obtained consent to an oral interview with Sandra Boddie, a woman who claimed she knew from personal experience that Judge James Barbuto was extending leniency to criminal defendants in exchange for sex. Boddie refused to be videotaped, but she did agree to an interview. ABC nevertheless secretly videotaped the interview. The trial court dismissed Boddie's claim under the federal statute, holding that it does not provide a right to private individuals to file suit against the media. The appeals court, however, reversed on the grounds that a private cause of action does exist under the Act and that the question of intent of ABC in recording without her consent was "an issue of fact for the jury." It interpreted the language "any other injurious act" narrowly, and implied that any legitimate desire by the reporter to protect himself — for example, tape recording a conversation to make an accurate record, or to

preserve information to turn over to the police — would remove the reporter's obligation to obtain consent from the party being tape recorded under federal law.

What about public officials and public speeches?

Under both state and federal laws, exceptions to the consent requirements exist for statements made by public officials, public statements and statements made in such a way that the speaker could not have any expectation of privacy. A good example of the latter is *Holman v. Central Arkansas Broadcasting*.⁵ In *Holman* an attorney was arrested for drunkenness. A reporter recorded from outside the cell area statements made by the attorney inside the cell. The attorney was speaking

very loudly and harassing the policemen and his own lawyer. The court held that no consent was required since he could not expect that his conversation was confidential. "[T]he boisterous complaints which were recorded were not made with the expectation of privacy or confidentiality." For similar reasons, public speeches can be recorded without first obtaining the speaker's consent. One warning is necessary here: the speech must be truly public such that any person who chose to could hear the speaker without buying a ticket, a dinner or passing an admissions requirement (e.g., you have to be a student of X University to attend the speech, or all attendees are Republicans).

Within this area of public speaking also fall persons in the public interest and public figures. This includes celebrities, elected officials and public servants. An illustrative case in this area is *Cassidy v. ABC*.⁶ A journalist with a tape recorder and hidden camera recorded a policeman's statements made in the course of his investigation of a massage parlor. The policeman sued ABC for invasion of privacy. The court held for ABC, stating that police conduct is a legitimate matter of public interest and the press has a public duty to report on such conduct. An important distinction to draw from *Cassidy* is that the person challenging the reporter's tape recording was acting as a public official in his public capacity. This case would not give support to the press if the same facts were present, except the policeman was a private investigator or other private individual. Neither would it support the journalist who tapes the policeman's private conversation with his wife.

What about people who know I'm a reporter already. Do I have to ask for their consent?

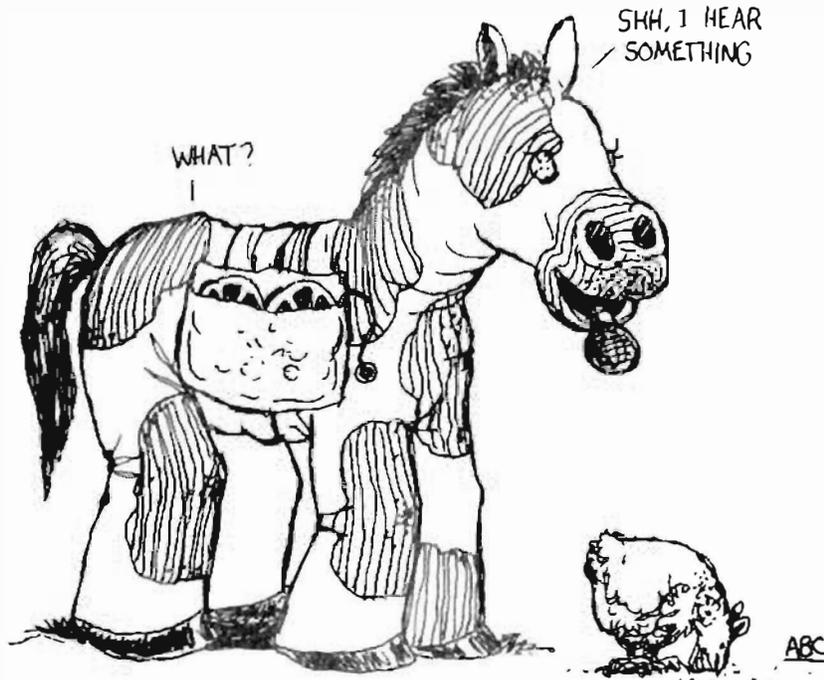
If consent is required under your state law, yes, you should. But there are cases to support the argument that there is implied

Consent

- Eleven states have a statute requiring that all parties to the conversation give their consent: California, Florida, Georgia, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Oregon, Pennsylvania and Washington.

- Two states' statutes allow one-party consent when the recording party is a participant in the conversation: Michigan and Virginia.

- Thirty-seven states do not have a statute governing consent: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin and Wyoming.



consent if the recorded party suspected tape recording and nevertheless continued with the interview. A case on point is *McCall v. Courier Journal*.⁷ Here an indicted drug dealer actually asked the reporter whether a recording device was being used. The reporter denied it. The lower court held that the drug dealer consented to the recording by continuing the conversation. The appeals court reversed because the reporter misled him by denying that he was wearing a recording device. This implies that had the reporter somehow avoided misrepresentation, the consent would have been upheld. Thus a journalist may have an argument — albeit a shaky one — should such a situation arise. But note that, should such a case go to trial, the journalist would have to *prove* the subject suspected the recording. And evidence of a suspicion held by a party opposing you is clearly difficult to show.

Do I have to tell them I'm a reporter when I get their consent or access to interview them?

Absolutely. This goes back to

the theory behind consent. That is, the expectations people have when they say things to other people. If they know they're speaking to a journalist, obviously they will not reveal the same things as they would to a friend or business acquaintance or client. This may be what you're after — but it is also something that the law protects.

To illustrate the legal prohibition against misrepresentation, consider *Buller v. Pulitzer Publishing*⁸ in which a reporter used a false name and concealed her identity as a journalist in order to meet with a psychic. The court held there was no consent since the consent given was not made with the expectation that she was speaking to a journalist or that her statements would be made public.

Is there anything else I should be aware of?

The Federal Communications Commission (FCC) regulates interstate telephone and wireless communication. One important FCC rule prohibits participant recording without a device which automatically produces a beep-tone intermittently throughout the

conversation.⁹ The beep-tone is seen as a compromise between the needs of journalists to tape record and the rights of citizens to decide whether they are tape recorded. The beep-tone requirement has been challenged repeatedly, but the FCC has declined to revise or expand it. As recently as September 1988, the FCC rejected a proposal to change to a postinterview/prebroadcast consent. Press organizations argued this would preserve the rights of citizens while freeing journalists to extract candid comments during telephone interviews.

The FCC chose to leave the beep-tone requirement alone, stating "[w]hile we recognize that the prior notice obligations ... impose certain restrictions on broadcasters in using telephone conversations, we believe these limitations are both reasonable and necessary to protect the legitimate interests of the public in privacy in communications. Accordingly, we have elected to retain ... [the beep-tone requirement] ... without modification."¹⁰ The only penalty for recording without a beep-tone is loss of phone service.

In conclusion, the most important thing to consider whenever you use a tape recorder or other recording device is the expectation of the person or persons you are recording. If they can reasonably expect that their words will be confidential, then you have an affirmative obligation to obtain their express consent. And if you have any doubts, contact a lawyer or the Student Press Law Center, and get the legal advice you need before you end up in court! ■

¹ Restatement (Second) of Torts, §652B.

² See, e.g., *Smith v. Fairman*, 98 F.R.D. 445 (C.D. Ill. 1982).

³ 18 U.S.C. Sections 2510 et al.

⁴ 731 F.2d 333 (6th Cir. 1984).

⁵ 610 F.2d 542 (8th Cir. 1979).

⁶ 60 Ill. App. 3d 831 (1st Div. 1978).

⁷ 6 Med. L. Rptr. 1112, (Ky. Ct. App. 1980), rev'd, 623 S.W.2d 882, 7 Med. L. Rptr. 2118 (Ky. Sup. Ct. 1981).

⁸ 684 S.W.2d 473 (Mo. Ct. App. 1984).

⁹ 47 C.F.R. Section 64.501; Section 73.1206 of FCC Rules.

¹⁰ Report and Order, adopted July 11, 1988 (1988 FCC Lexis 1695).

Newspaper alleges college violated contract

New Hampshire—Student journalists have filed lawsuits in state and federal court after being suspended from Dartmouth College for allegedly harassing a professor.

The *Dartmouth Review* published an article in February criticizing the academic quality of William Cole's music class. Cole and students on campus considered the article racist. Four *Review* staff members approached Cole in his classroom for comment on the article. An altercation resulted that a college disciplinary committee found as grounds to suspend the students.

Three of the four students have filed suit in state court claiming the college violated a contract outlined in the student handbook guaranteeing free expression. The handbook states, "Freedom of expression and dissent is protected by College regulations. Dartmouth College prizes and defends the right of free speech." The students claim they were punished because of the article rather than the incident with Cole. They say because the *Review* has been a critical voice, the university has used the classroom confrontation to punish them.

The students' lawyer, Arthur Reugger, said the length of the suspensions was one indication

that their punishment was related to the articles.

"They were suspended for six terms, which works out to be about two years," Reugger said. "The [disciplinary] committee members said they don't remember any incident meriting that kind of punishment.

"Students taunting and assaulting a police officer got one or two semesters."

Sean Gorman, a spokesman for Dartmouth, said the university did not respond to the article but to the incident in the classroom.

"When they wrote the articles, what happened?" Gorman said. "Nothing, they wrote it and nothing happened.

"Cole did nothing. The university did nothing. Something happened when they invaded a classroom. Students acted up in a classroom and they were disciplined for it."

He also said that the *SPLC Report's* coverage of the case had been biased in the past.

"[The bias is that] the student press can do no wrong, if they can [do wrong] that ought to be reported," Gorman said.

The suit asks the court to order Dartmouth to lift the suspensions and erase them from the students' records.

The federal suit claims that

they were discriminated against because they are white.

The students asked the New Hampshire Civil Liberties Union to consider taking their case, but the NHCLU declined. Claire Ebel, a staff attorney, said she and five other staff members, including the National Director of the ACLU, read the transcript of the disciplinary committee's proceedings and concluded that the students were punished for the classroom incident.

"Very frankly, the students claimed their punishment was based on the newspaper article, and the transcript did not give any credence to that assertion," Ebel said.

The students also filed a complaint with the National Endowment for the Humanities. The NEH provides funding to the college.

The NEH referred the complaint to the U.S. Department of Education's Office of Civil Rights, which ruled that the students' federal lawsuit supercedes the administrative complaint.

Reugger said that the state suit was in the preliminary stages of gathering evidence, but that they had asked for a December hearing.

Gorman said the federal case probably will move more slowly than the state case. ■

University withholds diploma in dispute over damaged newsroom

Michigan—A former student editor claims the University of Michigan-Dearborn punished him for criticizing the school during his editorship.

Kevin Evans, 1986-87 editor of the *Michigan Journal*, said the university refuses to release his diploma and transcripts until he pays \$500 and writes two letters of apology for damage done to the newsroom during his editorship.

But Evans said his only real crime was reporting on topics of interest to the students.

"I thought the paper should be for the students and not for the administration and that was the basis of the problem," he said.

Gary Graff, former adviser for the *Journal*, said that the university resented Evans' aggressive reporting style.

"I wouldn't call it a muckraking

newspaper [under Evans], but he did find a few controversial subjects and reported on them," Graff, a reporter for the *Detroit Free Press*, said. "The latest hearing requiring the \$500 and two letters of apology was a kangaroo court. They set it up months after the fact. Because Kevin had begun legal proceedings, they wanted to hang him up as an effigy.

"It's not all their fault — there

was a little of that holier-than-thou attitude that I think we all have as student journalists. But, did he commit any crimes? Did he do anything wrong? Definitely not."

The Dearborn campus draws students from the Detroit metropolitan area. Evans said that students at the school were dissatisfied with the lack of campus life and that the *Journal* attempted to give the diverse student body a common point of interest.

"It's a commuter campus with not a lot of appeal," he said. "I coined the expression, 'It's a four-year community college.'"

According to Evans, the university administration resented criticism inherent in articles that highlighted problems at the school.

Graff also said that the students felt the administration did little to provide campus life and that Evans reported on campus issues, unlike previous editors.

"Ironically, the paper Kevin edited was something [the students] had in common," he said. "It was the campus paper."

"What it all comes down to is that Kevin for the first time that I could see in the history of that newspaper put out a real newspaper. He reported the news. The university got ticked off because they weren't used to it. They were used to 'good-news puff rags.'"

The school's attorney Maria Alfario-Lopez said that the punishment Evans received was not related to his actions as editor of the *Journal*.

"It has nothing to do with his being editor, except that the damage done to the newsroom occurred before he gave up his editorship," Lopez said.

The university claims that Evans burglarized and vandalized the *Journal* office. But Evans was never formally.

Evans was scheduled to graduate in August 1987, but the university held his diploma until the

May hearing when they determined he was responsible for \$500 in damages.

Evans has asked the court to issue a writ of mandamus, which would require the university to release his diploma. He has also filed a suit against the university for violating his civil rights and the newspaper for libel in an article published Jan. 13, 1988.

The *Journal* article said Evans had admitted to "certain violations" and had agreed to pay the university \$250 and write two letters of apology.

Evans said the *Journal* never contacted him to check the facts.

David Barbour, Evans' attorney, said that the case was being delayed by questions about jurisdiction. Evans filed the suit in Wayne County Circuit Court, but the university had the case removed to the U.S. district court. Barbour said the district court will determine which court should hear the case. ■

Disciplined student editor brings suit

California—The editor-in-chief for the East Los Angeles College newspaper faces a year-long disciplinary probation for revealing what administrators claim are private transcripts of the former student body president.

Porfirio Flores is taking his case to court claiming the administration "stomped on [his] First Amendment rights," and acted "discriminatorily" in charging him.

"[The administration] is out to get me because I ran the student president off campus back in the seventies," Flores said. He was a staff member for the *Campus News* while attending ELAC in the mid-1970s.

Last May, as managing editor for the paper, Flores collaborated on an article regarding president Lisa Quesada's qualifications to hold office. Presidents must carry nine academic credits, but Quesada was taking only three, according to Flores' article. Both administrators and Quesada claim the article was inaccurate.

Flores said he based the article on a copy of Quesada's transcript, which was mailed to the paper anonymously.

Administrators disciplined Flores, they said, because federal and state laws that require students' permission before releasing their transcripts publicly.

But according to Flores, Quesada's transcripts were a matter of public knowledge.

"The information had come to the attention of the dean of students before the story came out," he said. "And two days before publication, letters about [Quesada's status] circulated to other teachers."

Flores and his supporters contend that he broke no law printing the allegedly public records. Flores said he believed that Quesada gave up her right to privacy regarding her qualifications when she became a student government official.

Flores attempted to appeal his suspension to the Chancellor's Office, which usually handles cases like this, but it was passed on until it ended up at the office of the director of student enrollment.

"Basically, [the administration] has violated all their own rules in bringing charges against me," Flores said. ■

Former editor continues public access fight, appeals decision allowing closed sessions

Student journalist battles to open school committee's review process

Massachusetts—A former high school editor is appealing a court decision that could allow state agencies to broadly interpret the state's open meeting law.

Joshua Gerstein, 1987-88 editor of Weston High School's *Viewpoint*, filed a civil lawsuit in February against the Superintendent Search Screening Committee for Weston Public Schools. Gerstein claimed the committee had violated a 1986 amendment to the state's open meeting law.

The amendment allows state agencies to conduct closed sessions during a preliminary screening of prospective employees, only on the condition that the applicants have not passed a "prior preliminary screening." Gerstein argued that two screenings of applicants had already occurred when the committee held an executive session to interview 13 candidates for the superintendent's job in early February.

In July the Superior Court of Middlesex County ruled in favor of the school committee. The ruling defined a "prior preliminary screening" as one which includes interviews with applicants. The court said that since the committee's applicant review sessions prior to the closed session in February did not include interviews the law was not violated.

Gerstein said he was disappointed with the ruling but that it had seemed probable that any decision would have been appealed. He said the judge ignored completely the restriction on closed sessions to a "preliminary screening" of applicants.

"His interpretation takes all the teeth out of the law," Gerstein said. "It sets up an absurd situation where people can flout the whole law, not just that section."

Wendy Murphy, an assistant district attorney for Middlesex County, said, "The judgment in effect gives unbridled control to the governing bodies."

The district attorney's office brought a separate suit against the school committee in March and also is appealing the ruling.

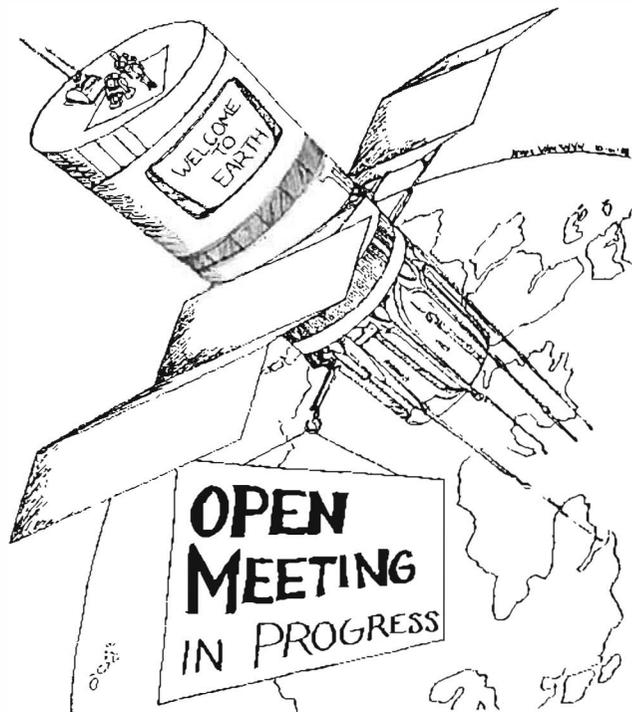
Murphy said that there was a good chance that the decision could be overturned but that the case had a larger significance.

"The interest in the appeal is not the winner, because it has never been our contention that the government acted in bad faith," she said. "But there is no case on the books interpreting that particular section of the open meetings clause. A ruling would benefit the whole state."

James Heigham, a lawyer for the Massachusetts Newspaper Publisher's Association, said, "There have already been problems [with the amendment]," Heigham said. "Sooner or later an appellate court would have to straighten out what's what."

MNPA filed a friend-of-the-court brief after 17-year-old Gerstein was removed from the case in March because he was not a registered voter as is required by law. Gerstein was reinstated in May when he became old enough to vote.

Murphy said oral arguments before the appellate court probably would be heard in February or March of 1989. ■



Public access case sets precedent, paper wins fees

North Carolina—A recent Superior Court decision awarding attorneys fees to a newspaper in a case concerning denial of access to a public university's documents may create additional incentives for press organizations to take cases involving press access to court.

In *North Carolina Press Association v. Spangler*, 15 Med. L. Rptr. 1806 (N.C. Aug. 15, 1988), the court

held that the North Carolina Press Association and the News and Observer Publishing Co., publisher of the *Raleigh News* and the *Raleigh Times*, could recover \$29,425 in attorneys fees after a suit challenging the University of North Carolina's refusal to release reports and recommendations regarding intercollegiate athletics. Judge D. Marsh McLelland held the documents were public under the state

Public Records Act and refused to read in an exception for interagency communications.

Court costs and attorneys fees can prevent some news media from taking cases concerning denial of press access to court, even when the case involves a "clear-cut" violation of the law. Cases like *Spangler*, however, may encourage more press organizations to take such winning cases to court. ■

Alligator joins attempt to lift gag order

Florida—Student and professional journalists joined forces last fall against the University of Florida in a court case to lift a gag order on student athletes' drug test results.

The University of Florida's *Independent Florida Alligator*, the *Tampa Tribune* and the *Gainesville Sun* expected a decision from the U.S. Court of Appeals for the 11th Circuit soon, according to lawyer Greg Thomas of Tampa, Fla. The University of Florida chapter of

the Society of Professional Journalists was also involved in fighting the restrictive order.

The suit began when the Drug Enforcement Administration was conducting an investigation of crack dealers and possible sales they had made to University of Florida athletes. When the U.S. Attorney's Office requested testing records for certain athletes, the university requested and received a court-issued gag order on the documents that prohibited public access to them.

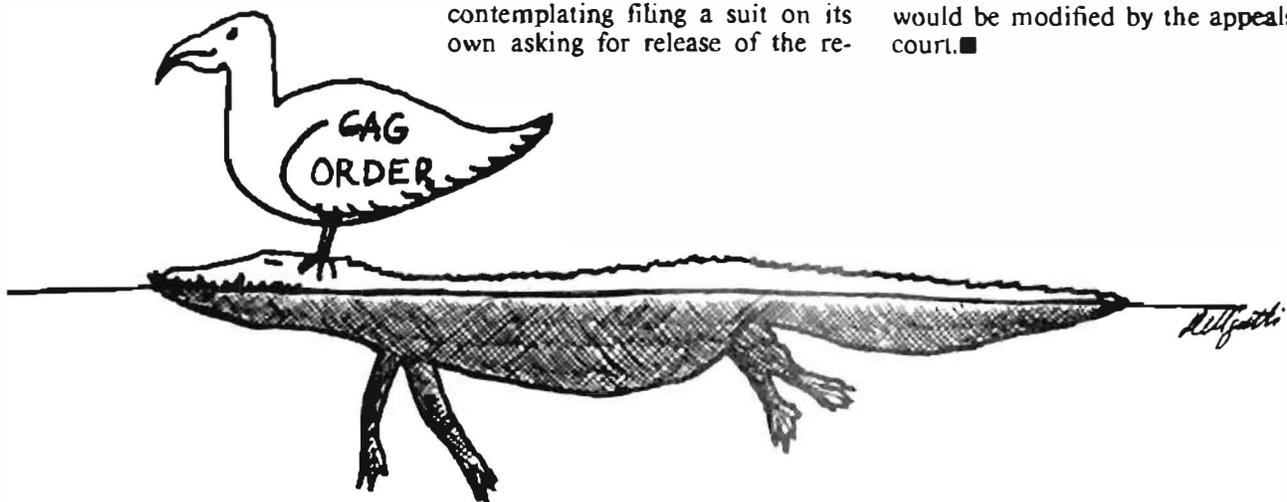
News editor of the *Alligator*, John Newman, said the paper was contemplating filing a suit on its own asking for release of the re-

ords, but instead joined the action initiated by the *Tampa Tribune*.

"The order was very vague and could be interpreted to mean any record, not just the results from the drug testing," Newman explained.

The suit asks the court to lift or redefine the order, Thomas said. A federal district court judge denied the request last fall because "he believed the secrecy of the grand jury [investigating drug sales and use] was more important than lifting the order."

Thomas believed the order would be modified by the appeals court. ■



Board rejects removal policy, protects public right to know

Colorado—A threat to the public's access to challenged materials in Douglas County public schools was overcome at a May school board meeting.

The Douglas County School Board approved on first reading a policy that would have allowed the superintendent, school officials and protesting parents to remove books, periodicals, newspapers or any published material from schools without any public notification. The proposal was drafted following a controversy over challenged materials earlier in the year.

Parents of a 12-year-old student claimed that their daughter received undue attention because of their complaint requesting that a novel be removed from the junior high school library.

The student checked out *A Solitary Secret*, a book about incest, from the Parker Junior High library and, according to her parents, was disturbed by its content. The district's Challenged Materials Committee and the superinten-

“What really seemed to turn the tide, however, seemed to be protest at the board meeting from members of the public.”

— CURE Newsletter
April/May/June 1988

dent decided to move the book to the high school because it was not appropriate for the junior high age group.

The proposed policy would have allowed parents to complain directly to the building administrator who would then consult with the librarian or teacher supervising the material and the superintendent. If they all agreed the material was inappropriate it then could be removed without public notice. The board claimed the procedure would protect the privacy of individuals making the complaint.

But at the May 3 board meeting many groups and individuals protested that the public had a right

to know if materials were removed from schools.

An article published by Citizens United to Revitalize Education in their April/May/June 1988 newsletter said the board reversed its position because of public protest.

The article said, “What really turned the tide, however, seemed to be protest at the board meeting from members of the public, showing once again the importance of community participation in the battle to defend intellectual freedom.”

CURE describes itself as “a multi-denominational, non-partisan and non-profit citizens group that promotes diversity in the public schools.”■

Judge narrows scope of open records act

Texas—The NCAA and the Southwest Athletic Conference are not governmental bodies under the Texas Open Records Act and, therefore, are not subject to that act's provisions, the U.S. Court of Appeals for the Fifth Circuit ruled in July.

Although both athletic organizations use public funds, they were held not to be governmental bodies because they provide specific, measurable services to member colleges and universities rather than general support, which the court said distinguishes a governmental body.

Kneeland v. National Collegiate Athletic Association, 15 Med. L. Rptr. 1783 (5th Cir. 1988), involved several media organizations in Texas that invoked the open records act to compel the NCAA and the Southwest Athletic Conference (SWC) to disclose information about a football recruiting scandal at Southern Methodist University in Dallas. Both athletic groups refused to answer the requests and the media organizations filed suit.

The appeals court ruling reversed a trial court decision that the athletic organizations were

governmental bodies. The appeals court agreed that the NCAA and SWC received public funds from the public universities belonging to the SWC (Texas A&M, University of Texas, University of Houston and Texas Tech). But the court held that those funds are given in exchange for “known, specific, and measurable services” and do not go toward the “general support” of the NCAA or the SWC.

This ruling narrows the scope of the open records act in Texas.■



State legislatures to consider anti-*Hazelwood* measures

After success in Massachusetts in July, those urging a legislative response to the Supreme Court's *Hazelwood* decision have set their sights on New Jersey with other states not far behind.

Legislation in New Jersey was introduced by Assemblyman Anthony Imprevaduto, D-Hudson County, in November. John Tagliareni, president of the Garden State Scholastic Press Association, said the bill followed the Student Press Law Center's model legislation but contained specific references that apply in New Jersey.

In other states lawmakers plan to consider new legislation that safeguards student press rights and reintroduce legislation that failed to become law in 1988.

Illinois, Iowa, Rhode Island, Wisconsin and Wyoming considered similar legislation in the spring and summer of 1988, but only the Massachusetts bill became a law.

Kansas will be the eighth state to consider student freedom-of-expression legislation, if a sponsor can be found.

The Kansas Scholastic Press Association said it is building a coalition among journalism advisers, students, debate coaches and

drama advisers to generate support for the Student Press Expression Act.

Ron Johnson, chairman of KSPA's committee drafting the act, said they had not yet found a sponsor.

"We are working on a coalition of legislators," Johnson said. "We are making them aware we want to work with them."

He said the KSPA wants to capitalize on the post-*Hazelwood* enthusiasm, but change would come slowly.

"The ball is rolling," he said. "But what we keep telling our people is don't expect change for at least a year."

The Ohio Coalition for First Amendment Rights search for a sponsor prevented its freedom-of-expression legislation from being introduced in 1988.

But Eileen Roberts of the Ohio Civil Liberties Union said the search seems to be over. Rep. Judy Scheerer [D-Shaker Heights] said she would consider introducing the bill in 1989.

In Rhode Island and Iowa bills that passed the Senate but not the House will be reintroduced in January.

State Sen. Sean Coffey of Rho-

de Island said he hoped to get the House to consider the measure more thoroughly and, at least, get it passed out of committee for a vote before the entire House.

Bills in Illinois, Wyoming and Wisconsin also will be reintroduced by their sponsors in 1989.

Although a Massachusetts student freedom-of-expression bill succeeded in becoming law last July while bills proposed in other states failed, its supporters have doubts about its future effectiveness.

Rights education director of the Massachusetts Civil Liberties Union Nancy Murray said, "There is a lot of controversy about the law, whether it will do anything."

Murray said school administrators and similar groups have not given full support to the law, in part because the state department of education has not initiated any policy interpreting it.

The law guarantees students' right to free expression, provided that it does not cause material disruption or disorder within the school. The law also states that the school district and school officials can not be held liable for student expression. ■

Copyright Law: A Primer

Suppose your high school or college uses an article you wrote for the student newspaper as a press release and sends it to dozens or even hundreds of media organizations. After the flattery subsides, you would probably be angry that your work is being distributed without your permission and without any mention of you as author. Can the school do this? Do you have any rights as the author?

This hypothetical illustrates that copyright law can affect student journalists. The following article updates and expands the "Copyright Primer," which appeared in the Spring 1984 issue of the Student Press Law Center *Report*.

What is copyright?

Copyright law protects the authors of original literary, musical, dramatic and certain other works, for example, photographs, record album covers, advertisement designs and cartoon characters. These authors and designers are protected against the unauthorized use of their work for the user's own benefit. If someone infringes on a copyrighted work, the creator can sue for damages. By granting rights to authors and designers in their works and by allowing for compensation if that right is infringed, copyright law encourages people to create more works. Copyright is governed by federal law enacted by Congress.¹ Works are deemed copyrighted automatically when they are in a form that is fixed, for example, written on paper.

Copyright protects the way in which an author expresses an idea, not the idea or facts themselves; it protects an author's style, words and organization. Two editorials may be written about the same issue or idea without breaking the law, but if the editorials as a whole are substantially similar in their organization and word use, the second editorial probably infringed on the first.

In the same vein, a news event cannot be copyrighted, although a reporter can copyright his or her version of it. For example, if a student journalist is the only eyewitness to an event, his or her first-person account can be copyrighted and other news media could only summarize what the reporter said about the event: "Jane Reporter said in a copyrighted story . . ." Also, if a student reporter attends a student government meeting and writes a story about a decision or announcement that the local daily wants to pick up, the local paper must write its own story based on the facts in the student article or ask the student newspaper or reporter for permission to print that article.

Under copyright law, the copyright holder has the exclusive right to make copies of the work, to

distribute the work by sale or other means and to do certain other things with the work. This exclusive right is subject to exceptions, the most important of which is the doctrine of "fair use," which is discussed below.

Minors are entitled to copyright protection of works they create, but state laws may govern the rights of minors to enter into contracts and make other business deals.

Reprinting whole works

If your yearbook just would not be complete without printing the lyrics of the prom's theme song or if the literary magazine wants to publish the Pulitzer Prize-winning poem written by the English professor or if the newspaper wants to illustrate an article with well-known cartoon characters, permission must be obtained from the copyright holder. The best way to find out who holds the copyright for these types of works is to look on the title page of a book, on the back of the record album cover or on material or merchandise where the cartoon characters appear. If you would like to reproduce a photograph, look at the caption for the name of the copyright holder. There may be different copyright holders to certain aspects of the same work. A singer may hold the copyright to a song's lyrics, but the album cover design copyright may belong to the record company.

Maybe the student newspaper wants to reprint the student essay that will represent the school in a statewide contest. Even if it was never published or registered with the Copyright Office (see below), the student's permission is needed. A work does not have to be published or registered before legal rights attach.

To get permission to reprint a work from a record company or a publishing company, the American Association of Publishers recommends writing to the permissions department of the company and providing it with the following information:

- the title, author or editor of the work, name of medium, date of publication and edition number, if relevant;
- a photocopy of the work, if possible, or a description of what exactly is to be used, for example page numbers, chapter number, etc.
- number of copies that will be made
- why the copied material will be used
- how the material will be distributed
- whether the material will be sold
- how the material will be reprinted (photocopy, typeset, etc.).

If the address of the copyright holder does not appear on the work itself, consult a directory that publishes the names of companies in a particular field, for example, *Editor and Publisher International Yearbook* lists the publishers of newspapers and syndication services in the United States and abroad.

Reprinting partial works (Fair Use)

Journalists do not need permission to copy limited amounts of copyrighted works if they are used in certain ways. The doctrine of "Fair Use" is an exception to an author's or publisher's exclusive right to a work. The Copyright Act itself lists several purposes for which limited copying may be considered fair, including news reporting, criticism and comment. For example, a record review may include a photograph of the album cover and a news story on Walt Disney may include a reprint of a Disney cartoon character. The act also lists factors to be considered in determining whether the particular use is fair:

- The purpose and character of the use; is it commercial or nonprofit educational.

The main idea here is that copyright holders do not want their potential earnings diluted by others copying and profiting from the copyright holder's work. For example, if a student makes photocopies of a book that is required for a course and sells the copies to other students to earn some money, that student has violated copyright law. On the other hand, if someone makes a single photocopy of an article while doing research for a report or paper, no

infringement has occurred because the copier's purpose is educational and not for profit.

- The nature of the work in question.

Copying news articles or material from a reference work is less likely to infringe a copyright than copying a workbook or sightseeing guide. The publisher or author of the latter is more likely to lose money if those works are copied.

- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

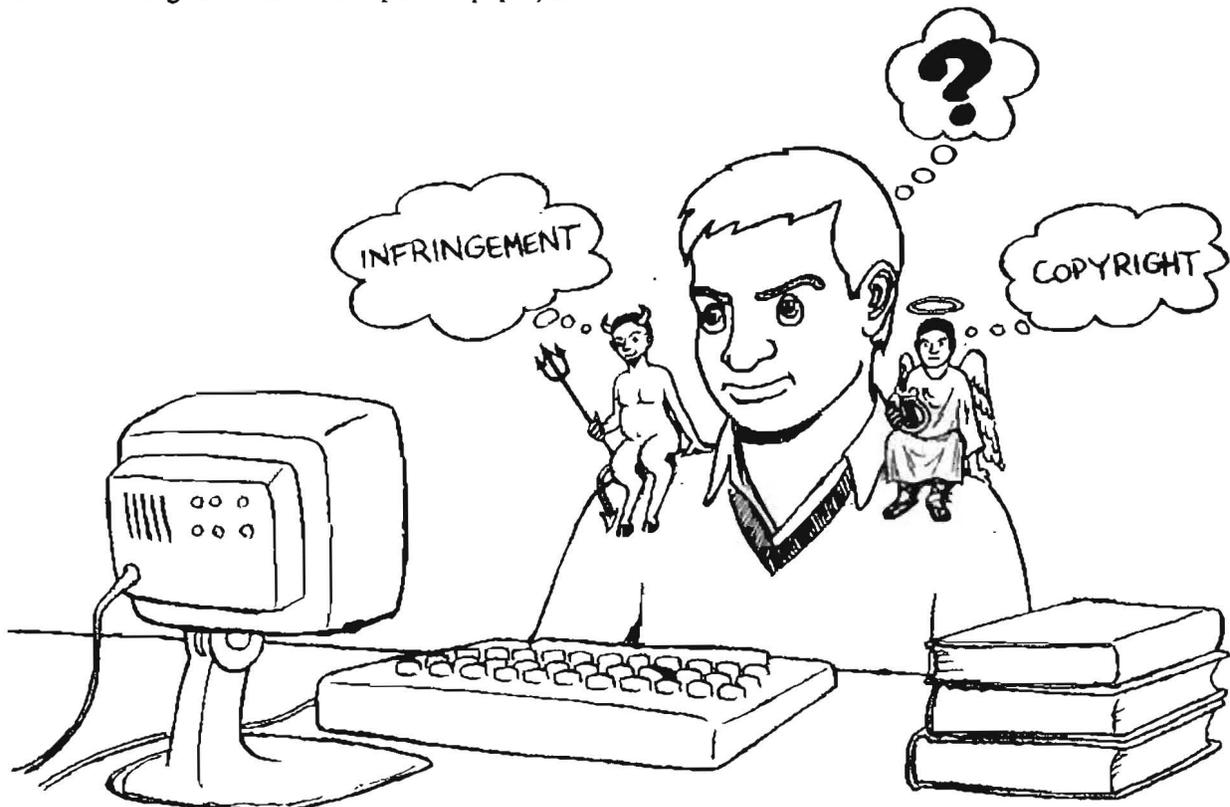
The greater proportion of a work used, the more likely it is illegal.

- And the effect the use will have on the value of the work.

The Supreme Court has said that this is "the single most important element of fair use."² In *Harper & Row v. Nation*, the court assessed the direct economic effect that the use of unpublished memoirs of President Gerald Ford by the *Nation* magazine would have on the forthcoming publication of that work. The author's "right of first publication" was a significant factor in ruling against the magazine. But the Supreme Court will be less likely to find infringement if a commercial use has no effect on the value of the work to the copyright holder.

There is a fuzzy distinction between fair use and infringement. No bell rings when a use crosses the line and infringes on the copyright, so journalists need to weigh the relevant factors and get permission from

continued on page 36



LEGAL ANALYSIS

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the holder if there is any question as to possible infringement.

One aspect of fair use that may concern student journalists is parody. A parody, by definition, makes fun of someone else's expression of something by retaining enough of the original work so the memory of it is conjured up. The city of New York sued NBC in the late 1970s for copyright infringement resulting from a "Saturday Night Live" skit that parodied the city's public relations campaign. Included in the skit was a parody of New York's theme song, "I Love New York." The words were changed to "I Love Sodom." The U.S. Court of Appeals for the Second Circuit said, "A parody is entitled to conjure up the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."¹

Work made for hire

The copyright concept of "work made for hire" is ambiguous when applied to student journalists. The doctrine says that the employer is the copyright holder of anything written by an employee in the scope of employment.

According to the Copyright Information Office, if no contract exists between a writer or photographer and the publication that defines the rights of the parties, the individual author owns all the rights to a work. At the college level, where newspaper editors are often salaried employees of a publishing board or a corporation, the relationship probably falls under an employer/employee classification, vesting ownership of a copyright in the employer. In general, therefore, absent a contract to the contrary or an employer/employee relationship as described above, a journalist owns the copyright to his or her work whether or not he or she is paid. Student journalists and publications wanting to avoid confusion should spell out in writing who will hold the copyright to the works they create and publish.

How to get copyright protection

Technically, an original work is copyrighted when it has been fixed in a "tangible form of expression." This means that when an article or a poem has been written, the author holds the copyright to it. To ensure that your work will be protected and recognized as copyrighted if it is published, all copies of it should bear copyright notice. Notice of copyright lets people know that your work is original and cannot be copied without your permission. Notice of copyright may be placed on a published work without advance approval of the Copyright Office. It should include either the copyright symbol ("C" in a circle), "Copyright" or "Copr." In addition, the year of first publication and the name of the copyright owner should be printed. The notice should look like this:

Copyright 1988 Mark Reporter. It should be placed under the byline of an article, in the caption of a photograph, or in the masthead of a magazine or newspaper if the whole work is to be copyrighted.

Once notice of copyright has been placed on a published work, the Copyright Act requires that two copies of the work be deposited with the Copyright Office within three months of publication. They should be sent to the Register of Copyrights at the address below.

Also after publication, the Copyright Office recommends that the work be registered. Registration is not mandatory but it offers greater legal protection to a copyright holder than he or she would otherwise enjoy. By registering, the holder secures the right to file an infringement suit and has more remedies available if infringement is found.

To register, the Copyright Office requires that it be sent a completed application form, which can be obtained by telephoning or writing the Copyright Office, \$10 (not cash) and two copies of the work. These two copies also satisfy the mandatory deposit requirement mentioned above.■

For forms or more information, call the Copyright Office at (202) 479-0700 or write to:

Information and Publications Section, LM-455
Copyright Office
Library of Congress
Washington, D.C. 20559

¹ Title 17 of the United States Code.

² *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

³ *Elsmere Music v. NBC*, 623 F.2d 252 (2nd Cir. 1980).



Paper shows 'outstanding support' for students' rights, receives Center's Scholastic Press Freedom Award

Washington, D.C.—The high school student newspaper that overcame the Supreme Court's *Hazelwood School District v. Kuhlmeier* decision to publish a story about AIDS has been awarded the 1988 Scholastic Press Freedom Award.

The award, sponsored by the Student Press Law Center (SPLC) 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.

The Epitaph at Homestead High School in Cupertino, Calif., became the nation's first victim of censorship under the Supreme Court's January 13, 1988, ruling, which allowed school officials in Missouri to censor stories about teen pregnancy and divorce from a school-sponsored student newspaper. Only hours after the Supreme Court's decision was announced, Homestead High Principal Jim Warren ordered *Epitaph* staff members not to publish a story about AIDS scheduled to appear in their January 15 issue. The story included an interview with an unidentified Homestead student who had recently tested positive for the AIDS virus. *Epitaph* editor Mike Calcagno re-



signed in protest of the principal's action.

After consulting legal authorities and contacting local and national media, *Epitaph* staff members learned that California has a state statute, the only one of its kind in the country at the time, that prohibited school officials from censoring student publications. When informed of the state law, the Homestead principal lifted his hold on the story. Calcagno withdrew his resignation and the piece appeared as scheduled on January 15.

In selecting *the Epitaph* for the award, SPLC Executive Director Mark Goodman cited the refusal by the student journalists and their adviser to give in to censorship after the Supreme

Court decision. Goodman noted the exceptional efforts of editor Calcagno and his staff to use wide-ranging public pressure including local and national media and other legal avenues of protection to assure their freedom to cover important issues.

"Some student publications would have thought 'we can't fight the Supreme Court'" Goodman said. "But *the Epitaph* demonstrated that *Hazelwood* does not have to mean the end of press freedom for students. More than a half-dozen states have followed California's example since January and begun discussion of legislative measures to constrict the Supreme Court decision.

The 1988 Scholastic Press Freedom Award was presented to *the Epitaph* on Sunday, November 20, at the National Scholastic Press Association/Journalism Education Association national convention at the Hyatt Regency Hotel in Washington, D.C.

Nominations for the Scholastic Press Freedom Award are accepted until August 1 of each year. 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. Send your nomination to Scholastic Press Freedom Award in care of the Student Press Law Center.

The Report Staff

Cathy Crosby is a third year law student at George Washington University's National Law Center. She received her journalism degree from the University of Missouri in Columbia where she was active in state policies and campus organizations.

Eileen Fisher is a sophomore

studying communications at The American University, Washington, D.C. Originally from Florida, Eileen was editor and chief of her high school paper the *Marauder*. She hopes to go into newspaper or magazine production.

Elena Paoli is a second-year law student at George Washington University. She graduated from the University of Maryland with a

journalism degree. Before law school, she worked as a copy editor for *The Baltimore Sun*.

Catherine Zudak is a recent graduate of Texas A&M University where she worked for the student newspaper, *The Battalion*. She began her college career studying aerospace engineering but finished it studying history and Russian.

FRIENDS

SPLC gratefully acknowledges the generous support of the following institutions and people, without whom there might not be an SPLC, and without whose support defending the First Amendment rights of the student press would be a far more difficult task.

(Contributions from July 27 to November 3.)

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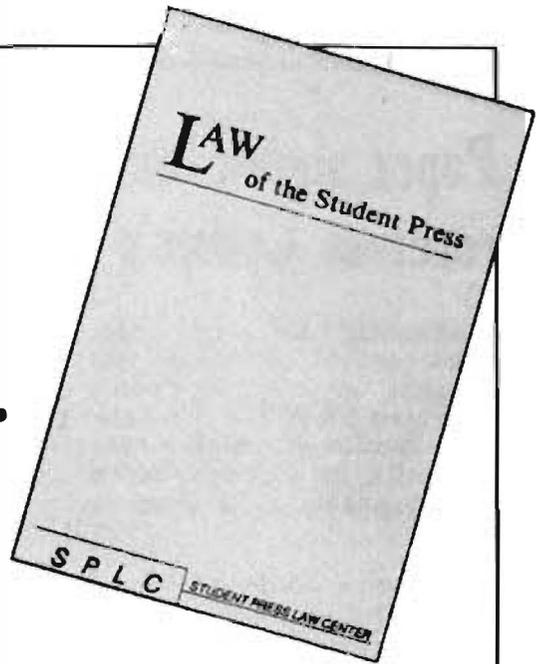
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CMA gift honors Tenney

The College Media Advisers Board of Directors donated \$300 to the Student Press Law Center in the memory of Leland Tenney who died July 15, 1988.

Tenney, a long-time member of CMA, was the CMA Advertising and Business Committee Chairman 1986-87. A highly respected speaker and authority in the advertising and graphics areas, Tenney headed a committee which was working on a CMA Advertising Monograph at the time of his death.

A member of the journalism faculty at Oklahoma State University since 1974, Tenney also served as general manager of student publi-

cations at the university. The publications included the daily newspaper, *O Collegian* and the yearbook, *The Redskin*. Before becoming the student publications general manager, Tenney headed the Printing Technical School of OSU at Okmulgee from 1967 to 1974.

In addition, Tenney had an extensive background in the newspaper publishing field. He was publisher of the Okemah Daily Leader (1959-67) and the Weleetka American weekly newspaper (1951-59).

"Leland Tenney was loved by his students and respected by his peers," said Marlan Nelson, Director of Journalism and Broadcasting at OSU.



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