

Fall 2010 Update
Communication Law in America

AUTHOR'S NOTE: My goal is to create a new Update to the textbook at least twice annually, in time for typical Fall and Spring semester schedules. This update covers cases and trends through **mid-October, 2010**, including the end of the 2009-2010 Supreme Court term.

NOTE: Please take advantage of frequent links in this document to **still photos** and **video clips** elsewhere on the website [www. PaulSiegelCommLaw.com]. This may be the penultimate Update (I always liked that word) to the 2nd edition, in that the manuscript for the 3rd edition is at the publisher, and is scheduled to arrive at a bookstore near you in March, 2011.

CHAPTER 1

Standard Legal Citation “Paradigm” Under Fire

Although it is still a good idea to be familiar with the standard legal citation systems discussed in chapter 1 (see pp. 30-36¹), more and more legal researchers, both practitioners and academics, do their work online. They rarely step into a law library to actually examine an actual printed volume. And this should be cause for concern, according to Professor William Mills of the New York Law School, in that errors and modifications often crop up in the online versions of cases and statutes, while courts still accept only the printed versions as the official ones.² Mills calls for a partnership between government and the private sector to create reliable, “official” online versions of legal documents.

SLAPP Down that Copyright Infringement Suit

SLAPP's (see p. 7) usually come in the form of libel suits. But in the fall of 2010, a federal magistrate struck down a copyright infringement suit against the distributors of Michael Moore's film, *Sicko*, using the state of Washington's SLAPP statute. While preparing to shoot the film, Moore had widely publicized a request for help in the form of personal testimonies about the health care system. Among the responses he received was a short film depicting Eric Turnbow foolishly injuring himself while crossing famed Abbey Road on his hands, and showing the fine health care he received in the UK. But Turnbow had not shot the film. His friend Ken Aronson had done so. Moore's use of the footage in *Sicko* would thus normally seem to be legitimate fodder for a copyright infringement suit. Concluding that the suit would have the effect of negatively impacting Moore's freedom to comment on an important political issue, Judge Strombom found the wording of Washington's anti-SLAPP statute— it could be used “to strike

¹It is likely that the next edition of the text will offer a much truncated discussion of the topic, perhaps augmented with a document here on the web site.

²“The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age,” 53 *N.Y.L.Sch. L. Rev.* 917, 935 (2008).

any claim that is based on an action involving public participation”— broad enough to cover the situation.³ [CLICK HERE](#) to see the relevant scene from *Sicko*.

Second Amendment, “Incorporated”

Chapter 1 (see page 9) speaks of how the doctrine of incorporation has been used by the Supreme Court to apply individual provisions from the Bill of Rights, originally applicable only to the federal government, to the states as well. In 2010 the Court used the doctrine to hold for the first time that the Second Amendment’s right to bear arms cannot be abridged by the states without a compelling interest.⁴

Step Down, Your Honor

An old joke advises potential legal clients that a “good” attorney knows the law, while a “great” attorney knows the judge. Cynical perhaps, but what about those times when it is the litigants themselves who not only *know* the judge, but have also been major contributors to the judge’s election campaign? As we know from chapter 1 (see page 19), the issue would likely not come up in the case of federal judges, who are appointed for life. But most states elect their judges, and judicial election campaigns have grown rather expensive in recent years. Former Supreme Court Justice Sandra Day O’Connor, who made a point of sitting in on the oral arguments in *Caperton v. A.T. Massey Coal Company*,⁵ has adopted judicial independence as her major cause in recent years. She has argued forcefully that states should appoint rather than elect their judges.

Caperton was an “extreme case” (Justice Kennedy’s words) of at least the appearance of judicial impropriety. At issue was whether a civil litigant’s due process rights had been violated by the fact that a judge on the West Virginia Supreme Court refused to recuse (disqualify) himself from hearing an appeal in a multi-million dollar judgment, despite the fact that the opposing litigant had been instrumental in getting the judge elected in the first place. Kennedy’s opinion for a 5-4 Court is rather narrow, holding that judges should recuse themselves “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”

[Click Here](#) for a detailed discussion from Boalt Hall (UC-Berkeley’s law school) about the problems of electing state judges.

Pungent Case

A novel and some would say odious twist on the notion of engaging in “speech” to complain to the government was seen in 2007, when a Colorado jury refused to convict a defendant who

³*Aronson v. Dog Eat Dog Films, Inc.*, 2010 U.S. Dist. LEXIS 91417 (W. D. Wash. 2010).

⁴*McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

⁵129 S. Ct. 2253 (2009). The CEO of Massey Coal had spent about \$3 million dollars, some in donations, some in “independent” expenditures, to elect attorney Brent Benjamin to the West Virginia Supreme Court, which would soon be hearing an appeal of a \$50 million judgment against his company. *Justice* Benjamin then became part of a 3-2 majority of the court voting to reverse the damages award.

expressed her disdain for repeated, self-serving brochure mailings from her congresswoman by stuffing one such brochure with her dog's feces and placing it outside her representatives's local office. Defendant Kathleen Ensz described the act as a "political protest," and the jury apparently agreed. The case has strong Petition Clause elements; to the extent the jury found that Ms. Ensz's behavior was protected expression, the case is also an example of Symbolic Conduct (which is discussed in chapter 2).⁶

Shopping Centers in Oregon

On page 11 (footnote 35), I cite decisions from several states which I claim have in common a finding that a state constitution provides at least some rights to distribute leaflets or otherwise engage in non-disruptive expressive activities on the grounds of privately owned shopping centers, despite the fact that the U.S. Supreme Court has held there is no federal right to do so. Professor Kyu Ho Youm of the University of Oregon has graciously pointed out to me that, based on more recent case law than I cited, Oregon really belongs in the "no more rights than the First Amendment provides" box. In fact, the Oregon Supreme Court, in *Stanahan v. Fred Meyer, Inc.*⁷ rejected the notion that Oregonians have an unfettered right to gather petitions for ballot initiatives on private property, despite the tradition in the state of encouraging citizens to engage in such direct democracy. A concurring opinion in the decision argues that a distinction should be recognized between common grounds of large shopping centers, where more expressive activity should be permitted, and the grounds of individual stores (even if part of a larger shopping mall), where the property owner's rights should be paramount. It is too early to know whether that concurrence will sway a later court.

Make Benefit Glorious Judiciary?

Probably a whole book could be written about the numerous court cases brought against the motion picture *Borat*. Most of these cases involved claims for libel, invasion of privacy, or outright fraud (duping participants into signing dubious consent forms). One case, however, turned on the threshold issue of jurisdiction. The Alabama Supreme Court dismissed a case filed by etiquette teacher Katie Martin— her one-on-one sessions with Borat were interspersed with such outlandish behavior as his showing off nude photos of his son, bringing his bagged feces to the dining table, and introducing the dinner guests to a local prostitute— because the consent form she signed made clear that only courts in New York state could serve as the forum for any legal disputes.⁸ [Click here](#) to see the relevant scene from *Borat*.

Even Harder to Get to the Supreme Court

As chapter 1 indicates (see pp. 20-21), very few litigants get to live out the fantasy of taking their cases "all the way to the Supreme Court," in that the U.S. Supreme Court takes very few cases

⁶Diane Carman, "Legal Stink Poops Out with Jurors," *Denver Post*, May 27, 2007, C1.

⁷11 P. 3d 228 (Or. 2000).

⁸*ex parte Cohen*, 988 So. 2d 508 (Ala. 2008).

from among the many thousands of petitions it receives each year. The Court decided only 82 cases in its 2005-2006 term. The trend toward fewer Supreme Court decisions continued in the next two years, with the Court handing down only 68 actual decisions in the 2006-2007 term and 67 in the 2007-2008 term, with a slight increase in 2008-2009, which found the Court handing down 74 signed decisions.

More *sub silentio* overturnings

On p. 18, we saw Martin Shapiro's contention that Supreme Court justices often deny they are overturning one of their precedents, claiming disingenuously that they are merely distinguishing an earlier case. The end of the 2006-2007 Supreme Court term provided a couple of examples of this phenomenon. Justice Scalia accused Chief Justice Roberts of "faux judicial modesty" in a case that could be characterized as the overturning of a recent precedent involving campaign finance reform. And when the chief justice was part of a majority opinion that claimed again not to be overturning a precedent in a case that will make it more difficult for individual taxpayers to bring suit against government expenditures on religion they see as inconsistent with the Establishment Clause, Scalia wrote that "minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions."⁹

OVERTURNED DECISION

Page 19 reports on *Torres v. New York State Board of Elections*, a 2005 federal decision invalidating New York State's method of selecting specific kinds of lower court judges. The U. S. Supreme Court has since overturned the lower court decision, thus upholding New York's judicial selection procedure.¹⁰ The statutorily provided method of selecting these judges—the constitutionality of a 1921 state law was at issue—required political parties to elect delegates at a convention who would in turn select the parties' candidate for the judicial posts. Writing for the Court, Justice Scalia concluded that the state system did not impose an undue burden on potential candidates who did not succeed in getting major party backing. Such candidates need only submit petitions with a certain number of bona fide voters' signatures in order to be placed on the general-election ballot. Besides, he went on, there is nothing untoward about allowing leaders of a political party to have nearly complete control over who their party's candidates for office will be. That is what freedom of association is all about.

CHAPTER 2

Is that cigarette trying to tell me something?

For decades now states and municipalities have been enacting anti-smoking ordinances, often called Clean Indoor Air Acts. In the beginning, statutory exemptions from such regulations have

⁹Linda Greenhouse, "Even in Agreement, Scalia Puts Roberts to Lash," *New York Times*, June 28, 2007, A1.

¹⁰*New York State Board of Elections v. Torres*, 552 U.S. 196 (2008).

been pretty far-reaching, including restaurants, bowling alleys, pool halls, and bars. Increasingly, however, regulations have covered more and more sites, usually under the mantle of protecting workers from second-hand smoke. One of the last holdouts has been “theatric” smoking, when theater companies stage plays in which one or more characters is a smoker.

With this background a 2009 case from Colorado is an unusual one. Three theater companies challenged the state’s Clean Indoor Air Act’s applicability to stage smoking. If smoking could ever be considered symbolic conduct, after all, actors performing on stage would seem to be. The state supreme court did not feel the need to assess whether stage smoking is expressive, in that Justice Coats’ opinion for a nearly-unanimous court (there was one dissenter) held that even if stage smoking *is* expressive, the state’s regulation would prevail as a content-neutral and narrowly tailored act in furtherance of a legitimate state goal. Actors can always use fake or prop cigarettes, Coats suggested, and thus the plaintiffs have sufficient alternative avenues available to them to convey whatever message the smoking of traditional cigarettes might otherwise have done.¹¹

No First Amendment Exception for Animal Cruelty Films

Mention is made in Chapter 2 (pp. 59-60) of Justice Kennedy’s “absolutism with exceptions” approach to First Amendment cases. In 2010 the Court rejected an invitation to add one more “exception” to the list of speech categories (e.g., obscenity, knowing libels, etc.) that are beyond First Amendment protection, when it struck down a federal law prohibiting the creation and distribution of films depicting some kinds of animal cruelty.¹² The decision also is an explicit rejection of ad hoc balancing in favor of “preferred position” balancing.

Who Signed that Petition?

In recent years the issue of gay marriage has been very much in the news. In some states citizens have participated in a petition drive to get the issue on the ballot. Such petition sign-up sheets have generally been considered public documents. But what if some of the signatories fear reprisals if their neighbors learn that they have signed such a petition? Is there a right to “speak” anonymously in such circumstances? The Supreme Court ruled in 2010 that disclosure of signatories on a state of Washington anti- gay marriage petition serves several interests, including the ferreting out of any “bait and switch” signature-gathering (wherein individuals are told they are signing one kind of petition but are actually signing something quite different). Although the Court therefore refused to strike down the state law providing for disclosure, the majority permitted plaintiffs a chance to prove that the revealing of their names would indeed lead to harassment.¹³

¹¹*Curious Theatre Company v. Colorado Department of Public Health and Environment*, 230 P. 3d 544 (Colo. 2009). Apparently Colorado’s law is unusual but not unique, in its scope. Dissenting Justice Hobbs points out that Montana, New Jersey and Washington statutes also ban even theatric smoking.

¹²*U.S. v. Stevens*, 130 S. Ct. 1577 (2010).

¹³*Doe v. Reed*, 130 S. Ct. 2811(2010).

“Escort” me to the Courtroom

Brief mention is made in chapter two (see p. 60, and the diagram on p. 62) of the fact that courts can invalidate laws on the basis of vagueness whenever law-abiding citizens would have a difficult time understanding exactly what they have to do to avoid violating the law under review. An interesting example of this “void for vagueness” doctrine appears in a 2009 decision from the Supreme Court of Utah.¹⁴ The case was the culmination of a challenge against the 2004 Sexually Explicit Business and Escort Service Tax. True to its name, the law imposed a ten percent gross receipts tax on, among other things, “escort services.” Ah, but how to define that industry? The Utah legislature defined “escort service” as “any person who furnishes or arranges for an escort to accompany another individual for . . . companionship,” whether the escort is paid a fee, a commission, or a salary. To accompany another individual for companionship? As Justice Durrant pointed out, “individuals who are paid for providing care for the elderly as well as those who are paid as tour guides would fall within the definition, . . . and any person or business who employs them would be subject to the Tax.” Since the legislature “could not conceivably have intended” this result, the law had to be struck down as unconstitutionally vague.

Old Glory Diminished?

Zoning ordinances are often good examples of the kinds of time, place and manner restrictions mentioned on page 84. Financier Donald Trump has run afoul of town zoning restrictions in Florida and Southern California governing the height of flag poles on private property. With respect to [Trump’s Palm Beach, FL property](#), there was an out-of-court settlement, which resulted in the flag being moved to a slightly shorter pole (70 feet instead of the original 80 foot height). Apparently the settlement involved the government waiving the thousands of dollars of fines it had imposed, and Trump withdrawing his First Amendment lawsuit.

Those Pesky National Security Letters

Chapter 2’s short discussion of the Patriot Act (see pp. 51-53) includes reference to the Connecticut librarians who had risked a felony conviction by contacting the ACLU for assistance when they were presented by the FBI with a “national security letter” demanding information about one of its patrons. There has since been additional litigation concerning these NSL’s and whether and how recipients may challenge them. In *Doe v. Mukasey*,¹⁵ the D.C. Circuit Court of Appeals construes later amendments to the Patriot Act so as to demand that the issuance of an NSL-related gag order on its recipient may only be done by a “high level” Department of Justice official, and that such issuance must be taken to automatically trigger judicial review.

The Bill of Rights Defense Committee has produced a film about the issue entitled “FBI Unbound.” As of this writing the film is up on YouTube in two parts:

[Click Here for Part One](#) [Click Here for Part Two](#)

¹⁴*Bushco, DBA Babydolls Escorts v. Utah State Tax Commission*, 2009 UT 73 (Sup. Ct. Utah 2009).

¹⁵549 F. 3d 861 (D.C. 2008).

For your Classroom Use– Million Youth March

(This is actually a relatively old case, but I recently uploaded the video for it.). The organizers of the Million Youth March had to go to court to obtain a permit for their demonstration-- see *Million Youth March v. Safir*, 155 F. 3d 124 (2nd Cir. 1998). If you choose to show [the video](#) in class, you might ask students: Do you think that Khalid Abdul Mohammad's speech constituted incitement under the *Brandenburg* test? Notice that anytime he suggests violent action against the police, it is done in the form of a conditional sentence-- "IF they riot or attack you, THEN you do this." He may be inciting imminent action, but is he inciting imminent *lawless* action? As a matter of law we will never know. A grand jury was convened to investigate the matter, but it refused to indict the speaker.

***Hustler* "Orgasm of Death" Article Now on Website**

In *Herceg v. Hustler* (1987), mentioned on page 51, n. 17, and associated text, the Fifth Circuit Court of Appeals held that this magazine article about the sexual practice called autoerotic asphyxiation was not proximately enough tied to the death of a young reader who engaged in the practice after reading the article. In other words, there was not enough "imminence," as required by the *Brandenburg* test. [Click Here](#) to see the magazine cover and the opening page of the article.

***Natural Born Killers* and *Born Innocent* Clips Now on Web Site**

Passing mention is made (p. 51, n. 18) to *Olivia N. v. National Broadcasting Company*,¹⁶ in which NBC was not held liable for damages to the victim of a real-life rape highly reminiscent of the one depicted in the TV film, *Born Innocent*. A similarly unsuccessful incitement case, *Byers v. Edmondson*,¹⁷ found that the many violent scenes in the film *Natural Born Killers* could not form the basis for a negligence suit after a real-life shooting spree in Louisiana.

[CLICK HERE](#) to see the relevant scene from *Born Innocent*, and [HERE](#) to see a representative scene from *Natural Born Killers*.

CHAPTER 3

Still Criminal to Defame, Amigos

Chapter 3 reminds us that, despite their seeming inconsistency with the Court's having rejected the crime of sedition, many states still retain criminal libel statutes. As recently as 2010 a court in New Mexico rejected an invitation to strike down the state's criminal libel law.¹⁸

¹⁶178 Cal. Rptr. 888 (Ct. App. 1991).

¹⁷826 So. 2d 551 (Court of Appeals, LA. 2002).

¹⁸*Mata v. Anderson*, 2010 U.S. Dist. LEXIS 9257 (D. New Mexico 2010). On the other hand, the state of Washington's criminal libel statute was struck down in 2008. *Parmelee v. O'Neel*, 186 P. 3d 1094 (Wash. Appel. 2008).

“Abusive” Little League Coach Wannabe?

One of the lessons of chapter 3 is that the complexity of many libel suits is explained by the fact that language is “ambiguous, subject to multiple interpretations” (p. 103). Such was the case in an Illinois Supreme Court ruling from 2009 which dismissed a libel claim made against Steven Rogers, the president of the Clarendon Hills, Illinois Little League.¹⁹ When local attorney-and-dentist-in-one John Green volunteered to coach his son’s team, his application was rejected repeatedly. Green later heard indirectly that Rogers may have been spreading rumors about him to the effect that he “exhibited a long pattern of misconduct with children” and “abused players, coaches and umpires.”

The state supreme court unanimously dismissed the libel suit, in part because words like “misconduct” and “abuse” are open to many relatively innocent interpretations. Citing Webster’s dictionary, Justice Thomas pointed out that “abuse” can mean simply to “reproach” someone “coarsely.” Even if Dr. Green were guilty of repeatedly “abusing” children in this way, it would hardly amount to the kind of libel per se he alleged (i.e., that the accusation would make him seem incapable of performing competently in his professional life). For a reminder about the libel per se categories, see pp. 99-100.

Brother of a Terrorist Ain’t Necessarily a Terrorist

James Nichols, brother of Oklahoma City bombing co-conspirator Terry Nichols, sued Michael Moore for libel over several inaccurate or at least ambiguous statements in Moore’s documentary film, *Bowling for Columbine*. The suit was dismissed, however, in that even the questionable statements were *substantially* true. Was Nichols arrested “*in connection to*” the bombing, as the film asserts? Not if the intended meaning is that the police thought he was himself a part of the conspiracy. Indeed he was never so charged. But his arrest and detainment as a material witness did happen just a few days after the bombing, and it was a direct result of the FBI’s investigation [into the bombing](#).²⁰ [Click Here](#) to see the relevant scene from the film.

Privilege in Wyoming for Statements to Victims’ Rights Groups

We know that there is generally a privilege against libel suits for statements made at legislative hearings, judicial proceedings, and the like (see pp. 114-116). The privilege extends not only to the press, of course, but also to participants in such proceedings— e.g., statements made by litigants, potential witnesses, etc., to a trial judge, or to a prosecutor.

The Supreme Court of Wyoming in 2009 extended this privilege to statements made to a victim rights’ organization, where such statements are “prepared for the purpose of submission to the court.”²¹ The victim had been rear-ended in an auto accident, and had written a note to the prosecutor expressing dismay with what were seen as delaying tactics employed by the faulty driver and her attorney-husband. For the Wyoming Supreme Court to find a privilege in that note was unremarkable; the novelty of the case was the justices also extending the privilege to a

¹⁹ *John Green v Steven Rogers*, 234 Ill. 2d 478 (Sup. Ct. 2009).

²⁰ *Nichols v. Moore*, 477 F. 3d 396, 401 (6th Cir. 2007).

²¹ *Abromats v. Wood*, 213 P. 3d 966 (Wyo. 2009).

letter written by the victim to a non-profit group called Crisis and Referral Emergency Services (C.A.R.E.S.). As a result, the libel suit brought by the driver's husband was dismissed.

Which Group of Corrupt Cops?

Chapter 3 speaks of the difficulty in figuring out who is libeled, if any, when an utterance refers to a group, or a high ratio of the members of a group (see pages 121-124). This lesson was re-affirmed in *Diaz v. NBC*- 536 F. Supp. 2d 337 (S.D.N.Y. 2008), *aff'd*, 2009 U.S. App. LEXIS 15653 (2nd Cir. 2009)- in which a few members of the New York office of the federal Drug Enforcement Administration sued producers of the feature film, *American Gangster*, for libel. The film, we learn in the opening credits, is "based on a true story," that of Frank Lucas (portrayed by Denzel Washington), who was "a major heroin importer and dealer in New York City in the 1960s and early 1970s." Part of the true story is that Lucas "flipped" and provided evidence of the systemic police corruption that had permitted his own business to flourish.

The suit focuses on two features of the film. First it points to the closing moments of the film, when on-screen text updates the lives of the characters presented. One such snippet tells us that Mr. Lucas's cooperation with law enforcement led to "the convictions of three quarters of New York City's Drug Enforcement Agency." The second feature, earlier on in the film, is a scene in which a group of corrupt New York Police Department officers (led by a character portrayed by Josh Brolin) conduct a search of Lucas's home, during which "Lucas' wife is assaulted, his dog is shot in a vicious manner," and the cops steal hundreds of thousands of dollars. Brolin tells Lucas's wife that he is there to take his "gratuity" before "the Feds" come to "take it all." (The scene is interwoven with a contrasting scene in which the "good cops" from New Jersey are conducting a search of the incoming military planes used by Lucas's gang to import huge amounts of heroin from VietNam.)

Diaz claimed that the end-of-film text, when seen in the context of the depictions of police corruption throughout the story, libeled "approximately 400 present and former Special Agents of the New York office of the United States Drug Enforcement Administration." Judge McMahon found that the element of Identification could not be established, however. In many ways this is an everyday group libel case, he found, and no court has ever applied New York law to permit recovery when allegations have been made about entire groups larger than 60 people, let alone 400. Moreover, the end credits refer to the a non-existent law enforcement entity (the Drug Enforcement *Agency* rather than *Administration*). McMahon also concludes that the Brolin character's prediction that "the Feds" would soon be making their own trip to the Lucas home to "take it all" was not necessarily defamatory. He very likely meant that they would be quite legally seizing Lucas's assets. [CLICK HERE](#) to see a scene cited by the court.

You Gonna Sue Me, or What?

In chapter 3 (see pp. 116-117) we learn that the Fair Report privilege can be raised as a defense to libel suits stemming from actual judicial proceedings and related documents. A 2009 decision from the Nevada Supreme Court goes further, holding that an absolute privilege exists to protect potential litigants' communications about pending (or even threatened) litigation. At issue was a vendor of college courses designed for continuing education (and salary enhancement) for such professionals as K-12 teachers. When an administrator in the Clark County School District

balked at allowing his teachers to get raises based on specific courses offered by this vendor, he received e-mails threatening litigation. The administrator's more detailed response to that letter, in which he pointed out that the universities ostensibly offering the courses apparently did not think too much of them (in that they did not accept them for their own students' academic credit hours), and expressing concern that "some of the courses can be completed in three to five hours and the tests can be successfully passed without reading the material," that letter was deemed privileged. Thus even if the allegations made in it were false, they could not serve as the basis for a libel suit, in that the letter was very closely tied to (likely, future) litigation.²²

Libel in a TV News Caption?

We already know from the discussion in chapter 3 (see pp. 106-108) that a headline or a photo caption can form enough of a basis for proving the element of defamation to prevail over a defendant's motion for dismissal. A fascinating case from California²³ has rejected a libel plaintiff's claim that a stationary video caption, in the context of a 4-minute FOX News story about an alleged assault and battery, itself conveyed a defamatory meaning. Fox's "Hannity and Colmes" program devoted its story to an interview with John Monti, an "anti-illegal immigration activist" who claimed that a number of illegal aliens whom he had photographed beat him up. During the interview Monti displayed a hand-made "Wanted" poster with the alleged batterers pictured. But later investigations led police to conclude that it was Monti, if anyone, who had been guilty of battery (though his later trial ended in acquittal). Some of the individuals pictured on the poster then sued Fox News for what they saw as the defamatory nature of the 4-minute story. They claimed, among other things, that the caption used by Fox on the bottom of the screen, "MANHUNT AT THE BORDER," at the very least suggested that the police assumed the truth of Monti's version of the story, and were hunting down the men described by him and depicted on the poster. A 2-1 majority of the state appellate court concluded that the caption merely emphasized that the police were investigating the incident, and might even refer to Monti's own purported hunting down of the men he was describing as his assailants. A strongly worded dissenting opinion chides the majority for straining the definition of "manhunt" beyond any reasonable scope, and argues that the plaintiffs should have their day in court.

[Click Here](#) to see the original Fox News broadcast, and [Here](#) to see a rebuttal a few months later with the lead plaintiff and his two attorneys.

A Throwback to the Past: Truth can be Libelous?

We often forget that in pre- *New York Times v. Sullivan* America, "malice" in libel law often meant pretty much the dictionary meaning— harboring ill will toward plaintiffs, being "out to get them." And so it is that a First Circuit Court of Appeals decision told a disgruntled former employee of the Staples company that he can have his day in court to try to prove his libel claim against the company, even though he was unable to demonstrate that any of the allegations made

²²*Clark County School District v. Virtual Education Software*, 213 P. 3d 406 (Nev. 2009).

²³*Balzaga v. Fox News Network*, 173 Cal. App. 4th 1325 (2009).

by his ex-boss were false.²⁴ Apparently the plaintiff was fired for having fudged more than occasionally on travel expense reports. But his boss, who trumpeted the fellow's firing in an email sent to some 1500 other employees, may have thus gone too far and manifested ill-will toward the plaintiff, singling him out for public humiliation.

How many Ravi's Have to Practice Law in NYC?

The textbook's discussion of the Identification element in defamation suits (see pp. 120-121) makes clear that litigation gets especially complicated when the offending story is unabashedly presented as fiction. In such instances, plaintiffs must prove more clearly than most libel litigants the seemingly contradictory assertions that (a) the story was sufficiently "of and concerning" them so as to have "identified" them in the public's mind; and (b) the story's false and defamatory "allegations," which are presented by the defendant as fiction, will nonetheless be seen as truthful. It is very hard for "libel in fiction" plaintiffs to prevail; indeed, in New York State, the site of a disproportionate number of libel suits, no such plaintiff had survived a motion to dismiss since 1983— that is, until a plaintiff prevailed in a 2008 suit against the creator of *Law and Order*.²⁵ At issue was an episode from 2004 called "Floater," in which a murder victim's body found in the Hudson River leads to the exposure of a huge corruption scandal by which a number of well-connected attorneys funneled huge bribes to a divorce court judge in order to both appear before that judge more frequently than would otherwise be the case, and presumably receive favorable treatment for their clients when they did "draw" this particular judge.

Take the "floater" herself out of the narrative, and the *Law and Order* story line follows faithfully several elements of a real-life judicial scandal in the city that had been playing out in the headlines, involving a Brooklyn judge accused of granting preferential treatment to a matrimonial attorney in exchange for bribes. Faced with arrest, the judge told law enforcement officials that there was a larger scandal to be revealed involving the selling of judicial positions, and she agreed to wear a "wire" in an (unsuccessful) attempt to record testimony about the issue from a local attorney of Indian descent named Ravi Batra. Batra's name surfaced in several media accounts suggesting that he was involved in some way with the scandal (even though no charges along those lines were ever brought against him).

In "Floater," a fictional attorney also of Indian descent ("Ravi Patel") is depicted as very much a part of the judicial corruption scandal. Plaintiff Ravi Batra here prevails against the TV producer's motion to dismiss. Justice Shafer finds too many similarities between Batra and "Patel" to deny Batra his day in court. There were only six attorneys in New York City at the time whose first name is "Ravi," and only Patra at all resembled the actor who portrayed "Patel" in the *Law and Order* episode. As the state judge summarized the plaintiff's argument, "because

²⁴*Noonan v. Staples*, 556 F. 3d 20 (1st Cir. 2009). In chapter 4 of the textbook, you will see that to prove actual malice entails proving falsity, but only public officials and public figures are always required to prove actual malice. A 1986 case (*Philadelphia Newspapers v. Hepps*— see the discussion on pages 141-143) tells us that even private plaintiffs must prove falsity when suing a media defendant over an issue in the public interest. But private plaintiff Noonan's defendant was not the media, and the alleged libels were internal personnel matters, not the stuff of "news in the public interest."

²⁵*Batra v. Wolf*, 36 Media L. Rep. 1592 (Sup. Ct. NY 2008).

of the uniqueness of his name, ethnicity, and appearance, any person who knew him, or had heard of him, would identify him with Patel. Moreover, because of the widespread media coverage of the [real-world] scandal, with which the accusations against him were inextricably intertwined, it would be reasonable for a viewer to associate Batra with Patel.”

[Click Here](#) to see relevant scenes from that *Law and Order* episode.

We Don't Shed Our Common Sense When We Don a Military Uniform

One of the elements of a libel suit is defamation itself– to show that the alleged libel did, in fact, harm one's reputation, if not in the eyes of the general public, then at least in the eyes of a relevant subset of individuals. In *Damon v. Moore*,²⁶ a soldier badly wounded in Iraq sued Michael Moore, director of the film, *Fahrenheit 9/11*, claiming that a short scene in which he appeared would give soldiers and their families (though not necessarily the average viewer), the false impression that he had become an embittered critic of the war effort. Writing for an appellate panel, Judge Delgado-Colon determined that *no* reasonable audience would so find. [Click here](#) to view the relevant scene, and judge for yourself.

SLAPP me down, gently

Several states have created in recent years anti- SLAPP legislation aimed at making it difficult for litigants to bring pre-emptive lawsuits (SLAPP = “Strategic Lawsuit Against Public Participation”) aimed at squelching public debate on important public issues, suits that may or may not actually include defamation as a cause of action, but which can have the same “chilling effect” on speech of which the U.S. Supreme Court spoke in 1964.

California has an anti- SLAPP law, which, as a result of a state supreme court decision in late 2008, was construed so as to make it a bit more difficult for plaintiffs to survive defendants' anti- SLAPP suits motions to dismiss. The impetus for the case was a hotly contested election of board members to the Sierra Club. When incumbents, in advance of the election, sent materials to members highly critical of some of the current board's more vocal critics, a group of those critics sued, challenging the validity of the election. Unanimously, the California Supreme Court held that the anti- SLAPP can be found inapplicable only when plaintiffs' own motives were wholly to further the public interest. Here, where litigants had mixed motives, not only to have opposing views aired but also to have the court install their preferred candidates on the Board, the anti- SLAPP law was correctly applied.²⁷

The Kay and Libby Show

Libel suits are often filed by politicians in heated election campaigns as a strategic political move. In 2008, for example, incumbent Senator Elizabeth Dole of North Carolina was sued by challenger Kay Hagan after Dole's campaign ran a TV spot that strongly implied Hagan was an atheist. [The ad is readily available on YouTube– [CLICK HERE](#) to see the ad and a critical commentary about it.] A key element of Hagan's complaint is that the ad falsely leads viewers to

²⁶520 F. 3d 98 (1st Cir. 2008).

²⁷*Club Members for an Honest Election v. Sierra Club*, 196 P. 3d 1094 (Cal. 2008).

believe it is her voice at the end saying “There is no God.” *Senator-elect* Hagan later dropped the suit.

Limiting the Fair Report Privilege

As Chapter 3 indicates (see pp. 114-115), the Fair Report privilege flows logically from the Speech or Debate Clause. If government officials cannot be sued for libel stemming from their official pronouncements, then reporters who share those pronouncements with a wider audience should be similarly privileged. A 2008 decision from a New Jersey appellate court suggests that, in the Garden State, at least, the privilege may apply to media accounts of judge’s decisions, but likely not to pleadings filed in court by one or another party. Judge Fisher reversed a ruling that had dismissed a libel suit against two newspapers whose stories were based on a complaint filed in bankruptcy court.²⁸

Not Just Naughty, but Notoriously So

Libel-proof plaintiffs are litigants whose reputations are presumably already so sullied that one or two additional allegations, true or false, won’t hurt them much more (see the discussion on pp. 102-103). A ruling from the New Hampshire Supreme Court makes clear that in the Granite State a libel defendant cannot have a case dismissed merely by pointing to the plaintiff’s established criminal record. Rather, it must be demonstrated that the plaintiff is *known* to be an established criminal.²⁹

CHAPTER 4

No More International Forum Shopping?

In 2010 President Obama signed into law H.R. 2765, the “Securing the Protection of our Enduring and Established Constitutional Heritage Act” (“Speech Act” for short), preventing American courts from enforcing foreign libel judgments in cases that would not have been winnable in American courts. The law is now found at 28 USCS § 4101 (2010).

Protected Opinion is not Bullshit

Chapter 4 discusses such topics as the status of opinion in libel suits (see pp. 149-152), as well as what journalistic transgressions might form the basis for a finding of actual malice (see pp. 147-148). A case not cited in the book but that likely should have been resulted from an episode on “creationism” and especially “intelligent design” in magicians Penn and Teller’s cable series, “Bullshit.”

The lead named plaintiff, Russ Brock, a resident of Cobb County, Georgia, was shown testifying in support of pro- intelligent design policies under consideration by the local school

²⁸ *Salazano v. North Jersey Media Group*, 958 A. 2d 1023 (N.J. Appel. 2008).

²⁹ *Thomas v. Telegraph Publishing*, 929 A. 2d 991 (N.H. 2007).

board, as well as in short interview segments with the TV show's producers. Almost by definition, Judge Charles Pannell, Jr., held, using one's own words can not form the basis of a libel suit in the absence of an allegation that the words were somehow distorted in actionable ways. And although Penn himself had some harsh words for the sentiments expressed by Brock and other Cobb County residents, those words for quintessentially protected opinion. [Click here](#) to see relevant excerpts from the episode.

CHAPTER 5

Limiting the Newsworthiness Exception

New York State, we learn in Chapter 5, interprets the newsworthiness exception to misappropriation suits very broadly. Recall especially the case involving *YM* magazine, discussed on page 188. In 2009, the Eleventh Circuit Court of Appeals interpreted Georgia's newsworthiness exception more narrowly.³⁰ At issue were nude photos of Nancy Benoit, a professional wrestler with a previous life as a model, who was murdered by her husband in 2007. Apparently the photographer had taken the shots in the 1980s, and had been asked not to disseminate them. After Benoit's admittedly newsworthy demise, the photos found their way to *Hustler* magazine, which published them in its March, 2008 issue, accompanying a biographical article about Benoit. [Click Here](#) to see the issue's cover.

After reviewing the article and photo layout, Judge Wilson concluded that "the article was incidental to the photographs" rather than the other way around:

The magazine cover advertises "WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE." The table of contents lists "NANCY BENOIT Exclusive Nude Pics of Wrestler's Doomed Wife." Neither the cover nor the table of contents makes any reference to the accompanying article. The article is entitled "NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife." The title and page frame, which reads "EXCLUSIVE PICS! EXCLUSIVE PICS!," comprise about one-third of the first page. A second third of the page is devoted to two nude photographs of Benoit. The final third of the page discusses Benoit's murder and her nude photo shoot, twice referencing her brief desire to be a model. The second page of the article is entirely devoted to photographs, displaying eight additional photographs of Benoit. The heart of this article was the publication of nude photographs- not the corresponding biography. [The magazine's] brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs. Therefore, the biographical piece cannot suffice to render the nude photographs newsworthy.

Speaking of Wrestlers

In 2010 wrestler Hulk Hogan filed suit against Post Foods, manufacturer of Cocoa Pebbles cereal, over a TV commercial featuring a character identified as "Hulk Boulder." Hogan claimed, not surprisingly, that the character was clearly based on his own persona, and was used

³⁰*Toffoloni v. LFP Publishing Group*, 572 F. 3d 1201 (11th Cir. 2009).

without his authorization. [CLICK HERE](#) to see the commercial.

That Milk-a-holic!

Also in 2010, Lindsay Lohan sued Etrade over its Super Bowl commercial in which one baby asks another if “that milkaholic Lindsay” had been over to visit recently.³¹ Had the case gone to trial (Lohan dropped it in a few months), she would have had to demonstrate that her first name alone—perhaps juxtaposed with the playful reference to substance abuse?— is enough to have viewers think of her. [CLICK HERE](#) to see the commercial.

And Paris, too

Another individual often accused of being “famous for being famous,” Paris Hilton, sued Hallmark for producing a greeting card that attached Hilton’s face to a drawing of a diner waitress. The Ninth Circuit Court of Appeals denial of defendant’s motion to dismiss the suit was based not only on the visual image, but also the card’s use of the phrase, “that’s hot,” often associated with Hilton’s appearances on the TV reality program, *The Simple Life*.³² [CLICK HERE](#) to see the greeting card.

***Borat* a Lightning Rod for Lawsuits**

Several lawsuits alleging invasion of privacy and similar transgressions have been filed against the folks involved in production and distribution of the hit film, *Borat*. In the early minutes of the film, soon after the main character lands in New York City, reactions of big-city pedestrians to Borat’s upbeat overtures are chronicled. One such New Yorker, [Jeffrey Lemerond](#), hastens to get out of Borat’s path— “Get away!” “What are you *doing*??!”— even before the star has a chance to utter his greeting. United States District Judge Loretta Preska dismissed Lemerond’s suit, even though the plaintiff never signed a consent form for his image to be used in the film. New York law provides a broadly defined “newsworthiness” defense (recall the discussion of this on page 188 of the textbook), and Preska had no trouble finding that the film was newsworthy:

Borat attempts an ironic commentary of modern American culture, contrasting the backwardness of its protagonist with the social ills that afflict supposedly sophisticated society. The movie challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from “average” Americans. Indeed, its message lies in that juxtaposition and the implicit accusation that the time will come when it will disgust you to look in a mirror.

In a suit prompted by a later scene, driver education instructor [Michael Psenicka](#), claimed that he was tricked into signing a release form and accepting a token \$500 payment for what he thought was a “public service” in support of a documentary film. Also, two of the three fraternity

³¹Kieran Krowley, “Tot Shots and Lindsay— E Trade Baby Poops All Over Her,” *New York Post* May 10, 2010, p. 3.

³²*Hilton v. Hallmark Cards*, 2010 U.S. App. LEXIS 6104 (9th Cir. 2010).

members from [the RV scene](#), in a suit alleging invasion of privacy and intentional infliction of emotional distress, tried unsuccessfully to enjoin distribution of the film (or at least to have their own scene excised). The credibility of their factual claim, that it was only because the film crew had gotten them so drunk that they uttered misogynistic, racist, and xenophobic comments, seemed diminished by one of the plaintiff's Face Book listing, which included multiple references to his fondness for alcohol.³³ And Ellen Johnston, one of the faithful who is taken in by Borat's apparent religious conversion at [a Pentecostal camp in Mississippi](#), was told by a federal district judge that her claims for misappropriation and for false light invasions of privacy would survive the defendant's motion to dismiss.³⁴

Jeff Goldblum May Be No *Borat*, But...

Unlike *Borat*, *Pittsburgh* was a small, independent film, though it did boast some major Hollywood talent, most notably Jeff Goldblum as himself. The film's premise is that Goldblum is enticed by a friend to come to the title city and star in a local production of *The Music Man*. Toward the end of the film, in preparation for opening night, Ms. Debbie Sue Croyle facilitates the taping down of Goldblum's wireless mike by swabbing down the star's neck with rubbing alcohol. When [she blows on his neck](#), he coos at her to "blow some more."

Apparently Croyle never signed a release to have the scene appear in the "mockumentary" film. She filed an unsuccessful suit to enjoin further distribution of the film, alleging that the scene placed her in a false light by implying that "she is a woman who would engage in fellatio." Her claim for misappropriation could also not stand, ruled federal judge David Cercone, in that Croyle could not demonstrate that her name or likeness had any notable marketability that the film producers were thus exploiting.³⁵

False Light Rejected in Florida

Because it strikes many jurists as a back door means of getting an otherwise unwinnable libel suit into court (see p. 207), False Light privacy has been the least well accepted of the four privacy torts. In 2008 Florida was added to the list of states that explicitly reject the tort, in that it does not provide such constitutional protections as the Actual Malice standard enjoyed by many libel defendants. At issue was an article in the organization Jew for Jesus's membership newsletter which falsely indicated that a staff member's relative was herself a member of the group.³⁶

Contact video on website

On pages 184-5 of the textbook, we learn how President Clinton's attorney lodged a protest with the producers of the motion picture, Contact. [Click here](#) to see some of the relevant video from the film, In this scene, a speech Clinton gave when NASA found some rocks from Mars was used

³³Larry Williams, "Just Being Himself," *Hartford Courant*, November 16, 2006, D2.

³⁴ *Johnston v. One America Productions, Inc.*, 2007 U.S. Dist. LEXIS 62029 (N.D. Miss. 2007).

³⁵ *Croyle v. Roar*, #07-1491 (W.D. Pa. 2007) (denying motion for temporary restraining order).

³⁶ *Jews for Jesus v. Rapp*, 967 So. 2d 1098 (Fla. 2008).

so as to cleverly suggest that the president had participated in the film and was commenting on the exciting news that we Earthlings had finally received a clear radio signal from intelligent life on a distant planet. It is clear that all the White House could do was to express its displeasure; no invasion of privacy lawsuit (for misappropriation, or even false light) would ever have succeeded.

***Titicut Follies* Video Now on website**

As the textbook explains (on page 224), the Frederick Wiseman documentary, *Titicut Follies*, was for many years only open to viewing by mental health professionals. Massachusetts argued that such restrictions were necessary to protect the privacy of the mental patients at the state's correctional institution in Bridgeport, while skeptics suggested that the state's real motivation was to hide the deplorable conditions at the institution. See what you think after viewing these short, representative scenes. ([Click here](#) to see the scenes.)

***Cheers* Robots Now on Website**

On page 180, mention is made of *Wendt v. Host International Inc.* (1997), in which actors George Wendt and John Ratzenberger sued a company that had created robots "Bob" and "Hank," which the plaintiffs alleged were clearly designed to profit from their *Cheers* characters Norm and Cliff. Attorney Robert Chapman was kind enough to provide me [these images](#) from the court record.

CHAPTER 6

Whose Got Hope Now?

In 2010 U.S. District Judge Alvin K. Hellerstein in New York pressed litigants to produce a settlement in a fascinating copyright lawsuit involving artist Shepard Fairey's ubiquitous "Hope" poster using President Obama's image in a Peter Max-like color scheme. As you will recall from chapter 5, the political speech exception to misappropriation law means that President Obama himself would have no recourse against Fairey. But Fairey admitted that he did not just conjure up Obama's image from memory. Rather he followed very closely (in terms of angle and facial expression) a photograph taken by Mannie Garcia for the Associated Press. Thus the AP likely would have a plausible claim against Fairey (Garcia dropped out as a plaintiff). [CLICK HERE](#) to see the poster and the photo upon which it was based.

Disturbia* not a Ripoff of *Rear Window

If only the *expression* of ideas is copyrightable, then even fairly complex combinations of ideas can be copied with impunity. The trust fund holding rights to the short story that begat the Hitchcock film (and the later remake) *Rear Window* learned this when it sued Steven Spielberg in his capacity as producer of the 2007 film, *Disturbia*. Even while dismissing the suit, federal judge Laura Swain admitted that both films inarguably "tell the tale of a male protagonist,

confined to his home, who spies on neighbors to stave off boredom and, in so doing, discovers that one of his neighbors is a murderer.” She refers to the shared “idea” of the two works in shorthand as “voyeur-suspicion-peril-vindication.” But the expressions of that shared idea were very different in the two films, in terms of time frame (4 days in *Rear Window*, over a year in *Disturbia*), development of characters and plotting, and even number of physical settings.³⁷

[Click Here](#) to see a short clip from *Disturbia*.

Not That There’s Anything *Wrong* With Eating Your Vegetables

A federal appellate court determined that much of what the book *Deceptively Delicious* (written by Jerry Seinfeld’s spouse Jessica) had taken from Mary Chase Lapine’s *The Sneaky Chef* was the uncopyrightable “idea” that kids can be fooled into eating more healthily. Ideas shared between the two works included sneaking vegetables into kid-friendly foods like pudding and brownies.³⁸ [Click Here](#) to see the two cook covers.

“Thomas and Friends” Source of Unfriendly Conflict Over Photo

In the short description of the copyright infringement suit surrounding *Midnight in the Garden of Good and Evil* (see pp. 250-251), a larger notion is hinted at— that the relationship of a copyrighted artistic work (e.g., a sculpture) and a photograph of that work is a complex one. The issue is presented again in *Schrock v. Learning Curve, International*,³⁹ which involved the company owning the rights to the popular children’s TV series, “Thomas and Friends,” (which features anthropomorphized trains and other vehicles) wanting to create a toy line based on the characters, resulting in the hiring of photographer Daniel Schrock to help publicize the new products. When Schrock noted his photos being used for a longer time than he recalled having authorized, he registered a copyright in the photos, and filed a copyright infringement suit. The Seventh Circuit Court of Appeals winds up remanding the case back to a lower court to nail down exactly what the contractual relationship had been between Schrock and Learning Curve. Along the way, however, the 3-judge panel reminds us of that complex relationship between a copyrightable entity (here, the toys based on the TV characters) and a photo of that entity.

Federal courts have historically applied a generous standard of originality in evaluating photographic [depictions of copyrighted] works for copyright protection. In some cases, the original expression may be found in the staging and creation of the scene depicted in the photograph. But in many cases, the photographer does not invent the scene or create the subject matter depicted in it. Rather, the original expression he contributes lies in the rendition of the subject matter--that is, the effect created by the combination of his choices of perspective, angle, lighting, shading, focus, lens, and so on.

In the case at hand, the photographer “explained how he used various camera and lighting techniques to make the toys look more ‘life like,’ ‘personable,’ and ‘friendly.’ He explained how

³⁷ *Sheldon Abend Revocable Trust v. Spielberg*, 2010 U.S. Dist. LEXIS 99080 (S.D.N.Y. 2010).

³⁸ 2009 U.S. Dist. LEXIS 82304 (S.D.N.Y. 2009), aff’d, 2010 U.S. App. LEXIS 8778 (2nd Cir. 2010).

³⁹ *Lapine v. Seinfeld*, 586 F. 3d 513 (7th Cir. 2009).

he tried to give the toys ‘a little bit of dimension’ and that it was his goal to make the toys ‘a little bit better than what they look like when you actually see them on the shelf.’” This the court found sufficiently original to qualify for copyright protection, most likely as a “derivative” work based on the toys themselves.

To Help, Perchance to Author Jointly?

We know that copyrights can be given to individuals, and that some projects are the result of joint authorship. But what happens when individual creators disagree as to whether a work was created by one or both of them? A fascinating 2009 case out of the Seventh Circuit⁴⁰ focuses on just such a drama, when members of the doo-wop group, Stormy Weather, decided to pitch a tune to the Lake County (Indiana) Convention and Visitors Bureau, which was creating a PR campaign to tout the county’s proximity to Chicago and its ethnic diversity. Apparently the song was written primarily by group member Cheryl Janky, but she later incorporated suggestions offered by fellow band member Henry Farag that made the lyrics more directly relevant to Lake County (rather than to the state of Indiana as a whole).

The county did indeed like the finished product, and used it in several features of its PR campaign. The litigation was a bit more of a mess than some in that Janky copyrighted the tune as sole author (prior to incorporating Farag’s proposed changes), then filed a new copyright application acknowledging joint authorship. Moreover, the county contracted only with Farag, and Janky later concluded she had been far too generous when she listed him as a co-creator.

Interestingly, the court makes clear that the registration as joint authors with the Copyright Office is merely one piece of evidence. The proper standard is two-fold: that the writers themselves saw the work as a joint creation *while they were working on it* (and this has nothing to do with how or whether they intended to credit each other legally); and that each individual’s contribution would have been itself copyrightable. In this instance, the court found that Janky and Farag, at the time of creation, did indeed see themselves as a team. And while admitting that the second inquiry was a close call, Farag’s contribution, even if it resulted in only a couple of changes in lyrics, was sufficient to have merited copyright.

CD-ROMS vs LEXIS

The copyright infringement suit involving the freelancer who objected to his *New York Times* articles later being made accessible in the LEXIS/NEXIS database without the paper giving him additional compensation was addressed in the Internet chapter (see pp. 558-559, citing *New York Times v. Tasini*). A later litigant tried in vain to use the precedent in order to compel National Geographic to give him additional compensation when his work was to appear in a CD-ROM of the magazine’s back issues. The Eleventh Circuit Court of Appeals held that this was quite a different situation from the *Tasini* case, in that the plaintiff’s work was being made available in its original context. Folks who buy the CD ROM would see mock-ups of the exact pages from the magazine, the only difference being that they would be reading on screen instead of in paper form. This is quite unlike being able to call up articles in isolation from their original contexts,

⁴⁰*Janky v. Lake County Convention and Visitors Bureau*, 576 F. 3d 356 (7th Cir. 2009).

as one does when conducting NEXIS searches.⁴¹

Not So Glad About *This Time Together*

Hollywood icon Carol Burnett lost a suit against the producers of the Fox animated series, *Family Guy*, in which Ms. Burnett's famous cleaning lady character was shown mopping up in an X-rated book store, while a slightly altered version of the Carol Burnett theme song played. This was a classic example of protected parody, held federal judge Dean Pregerson. "The eighteen-second clip of the animated figure resembling the 'Charwoman,' mopping the floor next to 'blowup dolls,' a rack of 'XXX' movies, and 'video booths' in a porn shop is clearly designed to imitate [Ms. Burnett's] characteristic style."⁴² [Click here](#) to see the scene from *Family Guy*.

But Is *Family Guy* Playing Cricket?

The *Family Guy* series also prompted a law suit from the owners of the copyright in the song, "When You Wish Upon a Star," which cartoon character Jiminy Cricket famously croons in the Disney film, *Pinocchio*. The suit sought damages because of an episode in which main character, Peter Griffin, sings "I need a Jew," a melody at least highly similar to that of the Disney tune. Griffin's quest is for a Jewish accountant to solve his financial woes.

In 2009 federal district Judge Deborah Batts granted summary judgment to *Family Guy*'s producers, finding that "I Need a Jew" was a protected parody. It made fun first of the naive notion that "wishing on a star" will solve one's problems. More pointedly, that Peter is singing of Jewish stereotypes was clearly designed to conjure up in listeners' minds long-standing belief in Walt Disney's own anti-Semitism.⁴³

[Click here](#) for the original *Pinocchio* scene.

[Click here](#) to see the *Family Guy* scene.⁴⁴

Eleanor Is Quite a Character, Don't You Think?

The matter of what can and can't be copyrighted is not always an easy one to resolve. Witness *Halicki Films v. Sanderson Sales and Marketing*⁴⁵, involving the 1974 cult car-theft film, "Gone in 60 Seconds," and the 2000 remake of the film by Disney. One of the issues under contention was whether the "character" of Eleanor - in the original film, a yellow 1971 Fastback Ford Mustang, and in the remake, a 1967 Shelby GT-500 (a Ford Mustang variant)- could legitimately be copyrighted. The appellate panel pointed to precedents establishing that "literary characters" are usually not copyrightable, but that such protection "may be afforded to characters visually

⁴¹ *Greenberg v. National Geographic Society*, 533 F. 3d 1244 (11th Cir. 2008).

⁴² *Burnett v. Twentieth Century Fox Film Corporation*, 491 F. Supp. 2d 962 (C.D. Cal. 2007).

⁴³ *Bourne Company v. Twentieth Century Fox Film Corporation*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009).

⁴⁴ The court notes that Peter Griffin's looking skyward is visually reminiscent of Gepetto's similar pose later in *Pinocchio* when he wishes for a "real boy."

⁴⁵ 547 F. 3d 1213 (9th Cir. 2008).

depicted in a television series or a movie.” The court noted too that “Eleanor” was a key element of the two movies plots: “In both films, the thefts of the other cars go largely as planned, but whenever the main human character tries to steal Eleanor, circumstances invariably become complicated.” In the 1974 film, “the main character says, ‘I’m getting tired of stealing this Eleanor car.’” And in the 2000 remake, there are a couple of scenes explicating the main character’s long history with trying to steal this classic car. Thus the appellate panel found that the district court had improperly thrown out the lawsuit brought by the widow of Toby Halicki (the producer and star of the original film). [Click here](#) to see excerpts from the two films (the original is on the bottom, the Disney remake with Nicolas Cage on the top).

The Name, “John Q.” may be Generic, but the Film Isn’t

In *Tillman v. New Line Cinema*⁴⁶, plaintiff Chitunda Sillman claimed that the hit movie *John Q* was a ripoff of his screenplay called *Kharisma: Heart of Gold*. Although Judge Matthew Kennelly could have found for defendants on the basis of access alone (i.e., that there was no proof the writers of the film had ever seen the screenplay), he made a point of comparing the two works so as to be able to also speak to the issue of substantial similarity.

While there was some overlap between the narratives, which both dealt with parents struggling with a health care system unresponsive to their child’s needs, those similarities were the unprotected kinds covered by the *scenes-a-faire* doctrine discussed on pages 249-251 of the textbook. As Kennelly put it, “Mr. Tillman cannot claim copyright infringement based on the presence in *John Q* of elements such as parents sitting in a hospital waiting room, nurses asking parents to fill out paperwork, parents praying over their sick child's bedside, parents singing and reading to their child, parents watching with sadness as their child is hooked up to monitors, or one parent pleading to the other to do something or fix the situation. . . . Similarly, there is nothing actionable about common depictions of parents who go to church to pray for their child. . . . [O]ver the years, these common themes and ideas have appeared in movies again and again.”

Moreover, there were many important dissimilarities between the two works, most notably that the main arc of the *John Q* narrative involves the Denzel Washington character taking hostages (the beginning of which is shown [in the scene excerpted here](#) , an element wholly missing from the plaintiff’s screenplay.

“I Love Sodom” SNL Skit Now On Website

(This is a classic case, included here because the video only recently became available). On page 256 of the textbook, we learn how the producers of the long-running NBC program *Saturday Night Live* successfully defended against a copyright infringement suit stemming from this skit depicting the city fathers of the Biblical town of Sodom devising a public relations campaign for their town reminiscent of the one that New York had recently embarked on. Note that the skit’s finale has the participants singing “I Love Sodom” to the tune of “I Love New York,” the centerpiece of the New York campaign. The court got the joke and recognized that it was at the expense, at least in part, of the earlier tune’s creators. Thus the *SNL* team had achieved a pure parody. See *Elsmere Music, Inc. v. National Broadcasting Company*, 482 F. Supp.

⁴⁶295 Fed. Appx. 840 (7th Cir. 2008).

741(S.D.N.Y. 1980), *aff'd*, 623 F. 2d 252 (2d Circ. 1980).

● [Click here to see the SNL skit](#)

And since many of your students likely will have no familiarity with the New York State “I Love New York” PR campaign, [Click Here](#) to see a very impressive video documentary on the issue compiled by then- high school senior Emily Egan.

***Devil’s Advocate* Video Now on Website**

As explained on pp. 263-4 of the textbook, sculptor Frederick E. Hart settled out of court with the producers of *The Devil’s Advocate* for the unauthorized use of a sculpture reminiscent of his own famous *Ex Nihilo*. The version of the scene offered [here](#) is from the retail DVD; that the sculpture would be visually de-emphasized here, compared to the earlier theatrical version of the film, was reportedly part of the settlement

***Long Kiss Goodnight* Scene Now on Website**

In this unsuccessful copyright infringement action, the company that owns the rights to market the 3 Stooges sued the producers of *The Long Kiss Goodnight*, a popular film that used without permission a 30-second segment of the Stooges’ film, *Disorder in the Court*, as one scene’s visual background. ([Click Here](#) to see the scene.)

The court ruled for the defendant corporation, in that the copyright on the Stooges’ film had long since expired. The court opinion indicates, however, that a different case would have been presented— one involving trademark rather than copyright— had the defendant instead been in the business of selling t-shirts with Moe, Larry, and Curly’s pictures on them. See *Comedy III Productions, Inc. v. New Line Cinema*, 200 F. 3d 593 (9th Cir. 2000).

A query for you: Suppose the copyright had not yet expired. Would the facts here have nonetheless supported a ruling in favor of defendants, using instead the notion of an “incidental” or “fortuitous” use? (See p. 263 of the textbook).

What Does a Theatre Director Own?

We all know that a playwright’s finished product is copyrightable. But are there things that a theatre director does that are or should be copyrightable? This is a fairly new controversy in the law. In one often-cited dispute, director Joseph Mantello, who had staged Terrence McNally’s play, *Love! Valor! Compassion!* in New York, claimed that a production in South Florida had usurped over 95% of his work-specific visuals, including choice of music. Even [the opening scene](#), a tableau in which all the actors were posed in front of a doll house that represented the beach house where the play’s action takes place, was used in the later production. The case was settled out of court.⁴⁷ [These two images were not “high resolution” enough to make it into the textbook].

Bees Given a Chance

In 2007 the BeeCeuticals company in Florida sued the producers of *Bee Movie*, alleging, among

⁴⁷ Jesse Green, “Exit, Pursued by a Lawyer,” *New York Times*, January 29, 2006.

other things, that the filmmakers had made unauthorized commercial use of its trademarked phrase, “Give Bees a Chance.” The case was settled out of court. [Click Here](#) to see some of the plaintiffs’ products.

That Alluring Mr. Koons

On page 246-9 of the text, we are introduced to visual artist Jeff Koons, who is frequently a defendant in copyright infringement suits. Here Koons used feet in bejeweled sandals from an *Allure* magazine spread by photographer Andrea Blanch as one of four pairs of legs—the second from the left— in his painting, “Niagara.” A panel of the Second Circuit Court of Appeals held that Koons’ painting was a protected fair use of Blanch’s work. See *Blanch v. Koons*, 467 F. 3d 244 (2nd Cir. 2007). [Click Here](#) to see the Blanch photo (top image) and the Koons painting (bottom image).

CHAPTER 7

Sad to Report, but Bullying Pays

One commonality between federal and state freedom of information and open meetings laws is that requestors have varying and limited legal options when government agencies deny their requests. A natural question arises, then— is it wiser to present a tough, no-nonsense front from the outset (so as to suggest you won’t hesitate to sue, if need be), or should you appear cooperative and open to compromise? In an intriguing field study, Professor David Cullier from the University of Arizona sent threatening or cooperative cover letters seeking specific information covered by state law to police chiefs. A disturbing 42% of chiefs of police did not reply at all, in seeming violation of state law. Of those chiefs who did reply, far more provided the requested records when confronting a threatening as compared to a polite letter.⁴⁸

That’s for the NSA to Know and You to (Not) Find Out

In Chapter Seven (see p. 298) mention is made of the Glomar response to FOIA requests, in which an agency claims that to even tell you whether it has the records you seek would itself result in serious harm. The Supreme Court has never embraced or rejected the idea of such Glomar responses; it is a creature of common law created by the individual federal circuits. And in the last days of 2009 the Second Circuit Court of Appeals for the first time accepted an agency’s right to issue a Glomar response.

⁴⁸David Cuillier, “Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws,” 15 *Communication Law and Policy* 203 (2010). A second study seeking information from school districts about employee contracts yielded consistent but less dramatic results.

The agency was the National Security Agency. Plaintiffs were law professors and other attorneys representing detainees in Guantanamo who had made an FOIA request to ascertain whether the federal government had been intercepting their conversations with their clients. The suggestion was not an outlandish one, given that the government had been forced to admit that it had created an elaborate system of warrant-less surveillance of questionable constitutionality.

Does it make sense to apply a Glomar response to a program the existence of which had already been made public? According to Judge Cabranes, NSA could still use a Glomar response, because whether or not these specific individual detainees had been surveillance targets was still worth keeping secret, lest terrorists learn some of the intricacies and limitations of the government's intelligence gathering methods. The court declined plaintiffs' invitation to perform an *in camera* inspection of relevant classified documents, having concluded the government's affidavits in support of its Glomar response were sufficient.⁴⁹

Your Phone Company Has Feelings, Too

Exemption 7 to the Freedom of Information Act (see pp. 306-7) is actually an amalgam of several law enforcement-related exemptions. Frequently invoked is Exemption 7-C, which covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." Now, the FOIA never defines "personal." But elsewhere in the Act, we learn that a "person" is "an individual, partnership, corporation, association, or public or private organization." The question thus arises, can something beyond an individual— say, a corporation— suffer "an unwarranted invasion of privacy?"

Interestingly, the Supreme Court has never dealt with the precise issue. But in 2009 the Third Circuit Court of Appeals did, and it found that corporations are capable of experiencing, if that is the right word, invasions of privacy that can trigger Exemption 7C. At issue were documents held by the FCC involving AT&T's admitted overcharging of the government. A trade association of phone companies competing with AT&T sought those documents, and the former "Ma Bell" invoked the Exemption. The appellate court ruled that a corporation can legitimately invoke Exemption 7C, and remanded to a lower court to ascertain whether the privacy interests AT&T feared (again, if that is the right word) were "unwarranted" enough to compel denial of the FOIA request.⁵⁰

Torture Photos

The Second Circuit Court of Appeals has ruled that the Freedom of Information Act requires release of a group of 21 photos held by the Department of Defense's internal investigation unit examining abuses of detainees in Iraq and Afghanistan.⁵¹ The government had

⁴⁹ *Wilner v. National Security Agency*, 2009 U. S. App. LEXIS 28610 (2nd Cir. 2009).

⁵⁰ *AT&T v. FCC*, 582 F. 3d 490 (3rd Cir. 2009).

⁵¹ *ACLU v. Department of Defense*, 543 F. 3d 59 (2nd Cir. 2008).

initially argued that the photos were exempt from disclosure, in furtherance of the detainees' own privacy interests (Exemptions 6 and 7 C), but later added that release of these photos, which had been gathered "for law enforcement purposes" by the Department's internal investigation unit, "could reasonably be expected to endanger the life or physical safety of any individual" (Exemption 7 F). The district court found the government's invoking of detainees' privacy interests incredible, but recognized that the images at issue here could very well be used by the Taliban and others to incite anti-American sentiment and recruit followers who might engage in violent actions against our soldiers. Nonetheless, that same court, in language cited with approval at the appellate level, added that "our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command."

For a time it appeared that the Obama administration would comply with the Second Circuit's ruling without engaging in further appeals. But in the summer of 2009 the administration changed its mind, and appealed the decision to the Supreme Court. In December 2009 the justices vacated the Second Circuit's opinion, sending the case back for further development. A couple of months prior, President Obama signed legislation explicitly granting the Department of Defense to withhold photos depicting the treatment of detainees.

Just Because we *Acted* Like a Federal Agency Doesn't Mean We *Are* One

In 2005 much concern was expressed over a discovery by the White House's "Office of Administration" ("OA") that the Executive Office of the President had lost millions of e-mails that would thus never be revealed to the public. A nonprofit with acronym CREW filed an FOIA request to obtain detailed accounts of the loss or willful destruction of the emails. When their request was not fulfilled to its satisfaction, CREW sued.

The federal district court held that the OA was not a federal agency as defined by relevant FOIA case law, and thus not subject to compelled disclosure of information under the Act. This result was affirmed by the D.C. Circuit Court of Appeals in 2009.⁵²

Writing for the 3-judge panel, Judge Griffith reminds us that the FOIA is not applicable to "the President's immediate personal staff or units in the Executive Office [of the President] whose sole function is to advise and assist the President." The OA is such an entity, Griffith concludes, in that its functions do not include policy-making.

Interestingly, for over some thirty years the Office of Administration seems to have *assumed* that it was covered by FOIA, in that it boasted a long history of complying with official requests for information under the Act, and indeed even published internal regulations as to how best to comport with the FOIA's provisions. Only recently had it begun to consider whether it might be entirely outside the FOIA's scope. This quirky history is interesting, Griffith allowed, but it "is of no moment because . . . past views have no bearing on the legal issue whether a unit is, in fact, an agency subject to FOIA."

⁵²*Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 516 F. 3d 219 (D.C. Cir. 2009).

Open Meeting Laws Unconstitutional?

In a fascinating case from Texas, the Fifth Circuit Court of Appeals has at least hinted that that state's Open Meetings Act (and by implication, those of many other states) might be in violation of the First Amendment.⁵³ Texas's law criminalizes some private communications among public officials when such communications should only take place in open meetings with adequate prior public notice. Misdemeanor penalties can range up to a \$500 fine and 6 months in jail.

Members of the Alpine, Texas City Council were actually indicted for having exchanged email messages "discussing whether to call a council meeting to consider a public contract matter." After the district attorney dropped the case, the affected council members brought a facial challenge to the criminal aspects of the Open Meetings Act, claiming that they were in violation of the First Amendment. Judge Dennis, writing for the appellate panel, concluded that the relevant portions of the Act raise serious enough issues that they must be subject to "strict scrutiny." Dennis sent the case back to the federal district court for this purpose, after providing an elaborate analysis suggesting that, if ordinary government employees enjoy at least some First Amendment rights on the job, so too should the subset of government employees we call public officials.

The case may have far-reaching implications, with the potential for removing much of the "teeth" from open meetings laws nationwide.

American Taliban Papers Kept Private

The Associated Press lost its bid under the FOIA for access to the petition filed by John Phillip Walker Lindh (the "American Taliban") seeking commutation of his 20-year prison sentence.⁵⁴ The court invoked FOI exemptions 6 (Lindh's privacy) and 7 (information gathered for law enforcement purposes, revelation of which would hurt a subject's privacy). As has often been the case in recent years, the court construed narrowly Congress's notion of "public interest" in FOIA balancing to include only information about alleged government misconduct, or "what the government is up to," interests the court did not feel were at stake here.

***Déjà Vu* Does not Prevent Day in Court**

What should happen if the federal agency receiving an FOIA request can legitimately reply, "but we just litigated this a short while back with a different requestor— the exact same documents were sought, access was denied, and the courts uphold our position. Do we really need to go through this again?" Should litigant B have his turn at the wheel, even if A had been turned down? In *Taylor v. Sturgell*,⁵⁵ the U. S. Supreme Court says that a litigant is not automatically precluded from his day in court in an FOIA case simply because the same agency records have previously been sought by a previous, unsuccessful litigant. At issue was an airplane hobbyist who wanted to construct a replica of an antique airplane and who sought the technical documents

⁵³ *Rangra v. Brown*, 566 F. 3d 515 (5th Cir. 2009).

⁵⁴ *Associated Press v. Department of Justice*, 549 F. 3d 62 (2nd Cir. 2008).

⁵⁵ 128 S. Ct. 2161 (2008).

related to the construction of the plane from the FAA. That an earlier litigant had sought the same data in a case a few years earlier did not prevent Mr. Taylor from at least having a chance to argue in federal court against the FAA's refusal to release the data. The case was remanded to a lower court to ascertain whether Taylor was in fact merely working as an agent of the previous requestor.

CHAPTER 8

Open Voir Dire a Defendant's Right

In *Press-Enterprise v. Superior Court* (I) (see pp. 345-7), the Supreme Court held that the voir dire process (questioning of prospective jurors) was presumptively open, but did not indicate what this was because of the accused's Sixth Amendment right to a public trial or to the press's First Amendment rights. That was 1984.

Twenty-five years later, the Court ruled that the defendant's interests in an open voir dire would be sufficient to carry the day.⁵⁶ During the voir dire for Eric Presley's cocaine trafficking trial, his uncle was told he may not sit in the courtroom or wander the halls, that the judge did not want potential witnesses to be crossing paths with potential jurors. While the Supreme Court found this a common and laudable state's interest, the *per curiam* opinion held it was the trial judge's responsibility to come up with a mechanism for furthering that interest while permitting the voir dire proceeding to remain open.

Spitzer Wiretap Application to Stay Sealed

Governor Eliot Spitzer of New York resigned soon after it was revealed that his name was among the clients list of "the Emperors' Club" prostitution ring. The *New York Times* requested to have unsealed the applications that resulted in the wiretaps of the Club. Although successful at the federal district court level, the newspaper in 2009 was denied access by the Second Circuit Court of Appeals.⁵⁷ Using the "experience and logic" test from *Press Enterprise v Superior Court II* (see p. 349), Judge Cabranes found that there is no history ("experience") of openness in such applications for wiretaps, documents created to fulfill the requirements of Title III of the Omnibus Crime Control and Safe Streets Act. The Congressional intent behind that law was clearly to protect the privacy of persons named in or otherwise associated with government-ordered wiretaps, Cabranes found.

The Second Circuit also uses a separate approach to cases seeking access to judicial documents. Sometimes called the "attendance at proceedings" test, the court asks if the

⁵⁶ *Presley v. Georgia*, 130 S. Ct. 721 (2010). It is too early to tell whether *Presley* will result in more open voir dire hearings. Despite Chief Justice Burger's suggestions to trial courts from *Press Enterprise I*, there have been several instances since in which trial judges have succeeded in closing most or all of a voir dire hearing, without being overturned on appeal. See, for example, *United States v. Koubriti*, 252 F. Supp. 2d 424 (E.D. Mich. 2003), and *United States v. Don King Productions*, 140 F.3d 76 (2d Cir. 1998).

⁵⁷ *In the Matter of the Application of the New York Times Company to Unseal Wiretap & Search Warrant Materials*, 577 F. 3d 401 (2nd Cir. 2009).

documents are related to judicial proceedings that themselves are typically open. Since wiretap applications are typically presented to a judge *ex parte* (with only the state, not any potential defendant or suspect represented) and *in camera* (in judge's chambers, out of sight of the public), this approach also was no help to the newspaper.

A matter of perspective— in instances where wiretap evidence leads to actual trial, this kind of civil litigation by the press is unnecessary, in that the wiretap applications are themselves typically revealed in open court. But in this case the four defendants associated with the wiretap evidence had all pled guilty, so there had been no public trial.

Errr... That Should have Been Stricken

Apparently the Florida judiciary has noticed in recent years that their over-reliance on relatively untrained “transcriptionists” rather than actual court reporters has resulted in recording equipment sometimes picking up conversations (such as private “bench conferences” between judge and attorney) that should not become a part of the trial record. So, the state appointed a commission to make recommendations. The commission recommended such things as having court personnel advise attorneys whenever electronic recording equipment is in use, thus putting attorneys on notice that they would be wise to take some responsibility for minimizing the chance of inappropriate recording of conversations (e.g., by stepping away from the microphone at key moments). A particularly controversial recommendation, which was ultimately rejected by the state supreme court in 2009, would have prohibited public dissemination of digital recordings from judicial proceedings in the absence of a judge's authorization.⁵⁸ Such would not be in keeping with Florida's longstanding commitment to open government, the court held.

Narrow Closure Order

A 2009 decision from the Minnesota Supreme Court can't help but remind us of Chief Justice Burger's admonition (from *Press Enterprise v Superior Court I*— see p.346) that closing an entire judicial proceeding to the press and public is overkill, that a more narrowly tailored remedy must be created when needed to preserve “higher values” (“higher,” presumably, than the defendant's right to a public trial, and/or the press's First Amendment interests). The case from Minnesota involved a drive-by shooting, with the defendant appealing his conviction, at least in part because the courtroom was completely closed during the testimony of a key witness. The court ruled, however, that this was a narrowly tailored remedy, in that there was reason to believe that the defendant had managed to intimidate the witness.⁵⁹

Perp Walk Photos Not Deemed Threat to Fair Trial

Nassau County legislator Roger Corbin sought unsuccessfully to enjoin *Newsday* and other media from using images of his arrest in handcuffs on federal tax evasion charges.⁶⁰ Judge Arthur Spatt allowed that Corbin's concerns about the threat posed to his Sixth Amendment

⁵⁸*In re Amendments to the Florida Rules of Judicial Administration*, 13 So. 3d 1044 (Fla. 2009).

⁵⁹*State of Minnesota v. Bobo*, 770 N. W. 2d 129 (Minn. 2009).

⁶⁰*U.S. v. Corbin*, 2009 U.S. Dist. LEXIS 46241 (E.D.N.Y. 2009).

right to a fair trial by sensationalistic use of “perp walk” images were legitimate. But traditional methods of ensuring a fair trial would likely work, should there be a trial, he ruled. Not only would many months pass by before any voir dire would be held, but there are so many millions of potential jurors from which to choose in this heavily populated metropolitan area that the court surely will be able to find an untainted jury pool. [Click Here](#) to see the *Newsday* photo.

David said no, will Sonia say yes?

In a move likely to be more symbolic than substantive (because of clear Separation of Powers issues), the Senate Judiciary Committee in December, 2007 approved a bill that would force the justices of the U. S. Supreme Court to permit cameras into their oral arguments in any case where a majority of the justices are unwilling to go on record voting that such coverage would jeopardize a given litigant’s due process rights. As the *Washington Post* editorialized at about the same time, it is “a travesty” that scores of interested citizens had to camp out overnight in frigid temperatures on the grounds of the Supreme Court building, vying for one of the small number of seats made available to the general public for such important cases as the one involving the rights of detainees at Guantanamo Bay.

The media may take more solace, however, from Justice David Souter’s retirement from the Court and his replacement by Judge Sonia Sotomayor. It was Souter who was seen by most Court watchers as the justice most vehemently opposed to cameras in the courtroom, having once stated that the cameras would roll into the Court only over his dead body.⁶¹

Plea Agreements Revealed

In 2007 a website called WhosaRat.com presented a new controversy surrounding access to judicial documents and information. The site provides often very damning information about the background of witnesses who choose to cooperate with government prosecutors. Clearly such information is of relevance to defense attorneys, who will want to point out the unsavory features of such witnesses’s pasts to impeach their testimony. The same information can also be used to harass or strike out against witnesses in ongoing litigation. The Justice Department wants federal judges to remove information about witnesses’s plea agreements from formal judicial documents.⁶²

Don’t Sketch Me, Bro

The book’s section on TV Cameras in Courts (see pp. 355-358) makes clear that most states give trial judges tremendous discretion in determining whether and how to allow “enhanced” or “electronic” coverage of trials— usually taken to mean TV cameras. Closing the press and/or public as a whole out of a trial is far more serious business, often not only reviewed but overturned by appellate courts. To be sure, TV cameras are rarely allowed in federal courts, but even there, the assumption, backed by decades of case law, is that the press and public have a

⁶¹ “Camera-Shy Justice: The Supreme Court Should be Televised,” *Pittsburgh Post-Gazette*, July 7, 2009, B6 [editorial].

⁶² Adam Liptak, “Web Sites Expose Informants, and Justice Department Raises Flags,” *New York Times*, May 22, 2007, A1.

right to attend trials. In what may have been an isolated incident, a veteran trial sketch artist of some renown by the name of Bill Hennessy, Jr., was told by a panel of the D. C. Circuit Court of Appeals that he must not take out his drawing pad during the December, 2008 oral arguments in a case involving a prisoner at Guantanamo. Apparently there is no formal policy about the admission of sketch artists in federal courts, although their presence has been fairly routine.

AZ Courts Warmer to Visual Coverage?

In marked contrast to the travails of Mr. Hennessy, as described in the above blurb, the Supreme Court of Arizona promulgated a new rule, effective January, 2009, that takes a degree of discretion away from camera-shy trial judges. Before prohibiting media cameras in state courts, trial judges must make “clear, on the record findings” as to why their inclusion will be a danger to some higher value. Moreover, unlike the law in many states, a camera-closure order will generally be appealable to a higher court.

On the other hand, in two high-profile cases— one involving suits by SONY against online file sharing, the other a federal suit against California’s anti- gay marriage Proposition 8— trial court judges’ decisions to permit broadcasting or web-casting of judicial proceedings have been struck down by higher courts.⁶³ We may be reaching a point at which state judges need a good reason to keep cameras out, while federal judges need a good reason to let cameras in.

CHAPTER 9

Still Going After Risen

In a move that disappointed but did not necessarily surprise media rights advocates, the Obama Administration in 2010 renewed a subpoena that had been issued by the Bush Administration to New York Times reporter James Risen. Sought by the government were some of Risen’s sources for his book, *State of War: The Secret History of the CIA and the Bush Administration*.⁶⁴

Crude Outtakes

. Documentary film maker Joe Berlinger was told to turn over at least some of the outtakes from his *Crude: The Real Price of Oil*, requested by Chevron, which was defending itself against civil litigation claiming it had behaved recklessly in contaminating the Amazon.⁶⁵ [Click Here](#) to see a short clip from the film.

⁶³*Hollingsworth v. Perry*, 130 S. Ct. 705 (2010); *in re Sony BMG Music Entertainment*, 564 F. 3d 1 (1st Cir. 2009).

⁶⁴Scott Shane, “Obama Steps Up Prosecution of Leaks to the News Media,” *New York Times*, June 12, 2010, A1.

⁶⁵*In re Application of Chevron Corporation*, 2010 U.S. Dist. LEXIS 51578 (S.D.N.Y. 2010). As this chapter was being prepared, the Second Circuit Court of Appeals agreed that at least limited disclosure was warranted. ORDER, Case 10-1918cv (July 15, 2010).

More Shields in More States

Page 379 reports that Connecticut became in 2006 the “most recent” state to create a reporter shield law. Since then several other states have either passed laws (most recently in Wisconsin, in 2010), or their state courts have created the equivalent of a shield law. Only Wyoming has no provisions created either by the legislature or the judiciary protecting reporters from having to reveal sources.⁶⁶

But Military Rejects Reporter Privilege

We don’t often quote from military courts in this text, but *U.S. v. Wuterich*⁶⁷ demands our attention. Marine Corps Staff Sergeant Frank Wuterich was charged by the military with “dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice” resulting from a tragic incident very much in the news in 2005 in which a group of Marines, after having run over an improvised explosive device, apparently took revenge in a rampage resulting in the deaths of 24 Iraqi civilians— men, women and children. While military investigations were going on, Wuterich tried to clear his name in the court of public opinion by granting an interview to CBS’ *60 Minutes*, which aired in March, 2007. When a court martial was eventually convened, the government issued a subpoena to CBS, demanding the full video of that interview (including outtakes).

When CBS’s motion to quash the subpoena came before the military court of criminal appeals in 2009, the court found that there is no reporters privilege recognized by military law (and indeed that only a few federal circuits, in the aftermath of *Branzburg v. Ohio*, have recognized even a limited privilege under civilian law).⁶⁸

[Click Here](#) to see an excerpt from the interview with Wuterich.

In PA, “Absolute” Means “Absolute”

As chapter 9 tells us (see pp. 379-384), state reporter shield laws vary widely, and are by no means limited to the kinds of protection envisioned under the First Amendment as interpreted most definitively by the Supreme Court in the *Branzburg* case. It is worth noting that the state of Pennsylvania, in 2008, had occasion to re-affirm the vitality of its state shield law.⁶⁹ At issue were libel suits brought against two newspapers by political figures who had been called to testify in front of a grand jury investigating alleged corruption at a local jail. The newspaper articles at issue described the plaintiffs’ grand jury testimony as unhelpful and evasive. Even if the confidential sources for those articles were persons who had been present at the grand jury testimony and who had sworn an oath to keep secret that which they had seen and heard, the

⁶⁶ Larry Margasak, “House Votes Limited Court Protection for Reporters,” *AP Financial Wire*, March 31, 2009.

⁶⁷ 68 M.J. 511 (U. S. Navy-Marine Court of Criminal Appeals 2009).

⁶⁸ *U. S. v. Wuterich*, 68 M.J. 511 (U. S. Navy-Marine Court of Criminal Appeals 2009).

⁶⁹ *Castellani v. The Scranton Times*, 956 A. 2d 937 (Pa. 2008).

newspaper reporters would not have been guilty of any wrongdoing by listening to and publishing those sources' accounts, the state's supreme court ruled.

CHAPTER 10

Anti-Hillary Film Leads to Rewriting of Campaign Finance Doctrines

In January, 2010, the Supreme Court handed down a landmark decision effectively overturning decades worth of case law governing corporate expenditures during political campaigns.⁷⁰ At issue was a full-length film produced by plaintiffs called *Hillary: The Movie*, which the lower court held to be the kind of "electioneering" speech regulated by the McCain-Feingold Act. As you will recall, such speech cannot be placed on TV by corporations (unless they form separate Political Action Committees for that purpose).

The Court agreed that the film could not be construed as anything but an extended admonishment to viewers that they should not vote for Hillary Clinton (at the time seen as favored to win the Democratic Party's nomination for president). Though the film was thus covered by the Act, by a 5-4 majority the Court struck down that portion of McCain-Feingold and other federal laws that restrict independent expenditures by corporations supporting or opposing a candidate for office. The decision thus overturns *Austin v. Michigan Chamber of Commerce*⁷¹, and portions of *McConnell v. Federal Election Commission*.⁷²

Corporations (labor unions too, presumably) need no longer set up separate "political action committees" or PACs when they want to spend money in support of or opposition to a candidate, as long as such expenditures are truly independent of the candidates' own organizations.

There was a certain logic to the long-standing restrictions. That I like a corporation's products does not mean I necessarily support its Board of Directors' political agenda, so corporations should not be able to spend directly from their profits to participate in electoral politics. Writing for a 5-4 majority, however, Justice Kennedy concluded that this reasoning proves a bit too much. After all, not only corporations but individuals too "use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas."

In a section of Kennedy's opinion joined by all justices except Thomas, the Court upholds McCain-Feingold's requirements that corporations and unions disclose on-air their identities within any broadcast "electioneering" messages they sponsor. As Kennedy put it, "the public has an interest in knowing who is speaking about a candidate shortly before an election."

[Click here](#) to see excerpts from "Hillary: The Movie."

⁷⁰ *Citizens United v. Federal Election Commission*, 130 S. Ct. ____ (2010).

⁷¹ 494 U.S. 652 (1990).

⁷² 540 U. S. 93 (2003).

Federal Law no Bar to Maine Action Against “Light” Cigarettes

In a 5-4 ruling handed down in December, 2008,⁷³ the U. S. Supreme Court held that the constitution’s Supremacy Clause (reference was made to the federal Cigarette Labeling and Advertising Act) does not preclude a group of activists in Maine from bringing a suit alleging that tobacco companies were in violation of a state Unfair Trade Practices law in deceptively advertising “light” brands. The suit intended to bring to bear scientific evidence to the effect that smokers tended to smoke more “light” and “low tar” cigarettes and inhale more deeply from them, thus eliminating any possible positive health effects of switching to such brands. Yes, the federal law promises that companies that are in compliance with it shall not be subject to a “requirement or prohibition based on smoking and health” stemming from state law claims. But the plaintiffs’ allegation here was one of fraudulent advertising, which the Court held is not “based on smoking and health.”

More on Light Labeling

In 2010, the Food and Drug Administration sent a well-publicized letter to the Altria Company, expressing displeasure with the company’s seemingly having found a way to avoid at least the spirit of federal law prohibiting further labeling of cigarettes as “light.” Not only was the new labeling of “Marlboro Gold” designed to match the color scheme of the old “Marlboro Lights;” the company also added labeling during the transition period, explicitly alerting customers that “YOUR MARLBORO LIGHTS PACK IS CHANGING. BUT YOUR CIGARETTE STAYS THE SAME,” and advising them, “in the future,” to “ASK FOR ‘MARLBORO IN THE GOLD PACK.’”⁷⁴

Death of *Posadas* Greatly Exaggerated?

Chapter 10 suggests that the *Posadas* case involving casino ads in Puerto Rico is largely an aberration, that the Supreme Court has been distancing itself from the “dangerous goods and services” logic of the case in more recent cases. But a pair of recent federal appellate decisions suggest that advertising regulation of “dangerous” products or services can still be constitutional. In one, student editors at Virginia Tech were disappointed when a Fourth Circuit panel upheld a state regulation that prohibits most advertising for liquor in college newspapers, even where evidence made clear that most readers were over twenty-one.⁷⁵ The second case upheld a Nevada law prohibiting ads for prostitution in any county where the practice is illegal. Even while admitting that the *Posadas* case seems to have been discredited over the years, judges on the Ninth Circuit suggested that prostitution is unique among the usual vices (alcohol, tobacco, and gambling), in that society has numerous laws aimed at discouraging the “commodification” of

⁷³ *Altria Group v. Good*, 129 S. Ct. 538 (2008).

⁷⁴ Letter from Lawrence R. Deyton of the FDA’s Center for Tobacco Products to the Altria Group’s General Counsel, June 17, 2010.

⁷⁵ *Educational Media Company at Virginia Tech v. Swecker*, 602 F. 3d 583 (4th Cir. 2010).

human beings.⁷⁶

New Jersey's Super Lawyers Get Reprieve

The Committee on Attorney Advertising decision from New Jersey described on page 414 has been rejected by the state's Supreme Court, which held that touting that one has been selected a "super attorney" can be acceptable, as long as one also explicitly discloses the methodology that the judges used, and the ad includes a disclaimer to the effect that the state's high court itself had nothing to do with the assessments.⁷⁷

A Bear of an NAD Decision

In 2010 the NAD requested that the folks who make Charmin toilet paper, in future ads, no longer visually "claim" that their product leaves no pieces behind (rather than the more modest textual claim of "fewer" pieces left behind), compared with its competitors' products.⁷⁸ [Click Here](#) to see the commercial at issue in the case.

Not So Sweet

In 2007, the manufacturers of the sweetener Equal sued their counterparts who produce Splenda, alleging that the latter's labeling and advertising claim that the product is "[made from sugar](#)" and [therefore "tastes like sugar"](#) was misleading, in that the cane sugar used by the makers of Splenda is burnt off early in the manufacturing process. The suit was settled out of court just as the case was to be handed to the jury.⁷⁹

Limits on McCain-Feingold' Limits

On pages 442-443 we read that the Supreme Court was to decide in its 2006-2007 term whether to uphold the D. C. Circuit's decision in *Wisconsin Right to Life v. Federal Election Commission* (2006), which had held that key provisions of the Bipartisan Campaign Reform Act of 2002 (popularly known as the McCain-Feingold law) could not be applied to the pro-life nonprofit group's speech. Toward the end of the term, the Court upheld the lower court decision, in a highly fractured 5-4 ruling of its own. The lower court decision, it will be recalled, involved the pro-life group's desire to place ads aimed at mobilizing Wisconsin voters to contact their senators (one of whom happened to be up for re-election at the time), asking them not to filibuster President Bush's judicial nominees. The BCRA forbade use of the names of candidates for federal office in ads placed in an election season. Writing for the majority (portions of his

⁷⁶*Coyote Publishing, Inc. v. Miller*, 598 F. 3d 592 (9th Cir. 2010). The judges alluded to laws against slavery and the selling of our organs, and the practice in many states of refusing to enforce surrogate parent contracts.

⁷⁷New Jersey Court Rules Annotated RPC 7. 1(2010).

⁷⁸NAD RECOMMENDS P&G MODIFY CLAIMS FOR CHARMIN ULTRA STRONG TOILET TISSUE. Press Release, August 10, 2010. <http://www.nadreview.org/DocView.aspx?DocumentID=8135&DocType=1>

⁷⁹James P. Miller, "Bitter Sweets Fight Ended," *Chicago Tribune*, May 12, 2007, C1.

opinion did not command 5 votes, actually), Chief Justice Roberts construed the BCRA so as to apply very narrowly, only to messages “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” In a bit of dicta likely to be very often cited (perhaps as a pithy restatement of the Preferred Position Balancing test described in chapter 2), he added that “where the First Amendment is implicated, the tie goes to the speaker, not the censor.”⁸⁰

Remind Me, *Why* am I Putting This Stuff on My Head?

As mentioned on page 440 of the text, the National Advertising Division, an industry entity of self-regulation, requested in 2006 that the maker of “HeadOn” stop claiming that their product could actually relieve headaches. Thus the manufacturer resorted to the much-parodied (sometimes by its own later ads!) spots that say only [“Head-On: Apply Directly to the Forehead,”](#) never indicating why one should do so.

OOPS

On page 405, the first “No” and “Yes” appearing in the Model of the Central Hudson test were erroneously transposed. If the answer is “Yes” to “Is the ad deceptive or for an illegal product?”, ad can be regulated or prohibited. We go on to the second inquiry only if the answer to the first one is “No.” Elsewhere on the website—under “Power Point Slides” for Chapter 10—“Central Hudson Test”—you can find the corrected Power Point slide.

CHAPTER 11

Naughty Alabamans

While generally beyond the scope of a book on *communication* law, it should be noted that the Supreme Court has never held that the constitution provides a right to enjoy what might be called “sex toys” (and in more delicate times were termed “marital aids”). The Supreme Court of Alabama upheld that state’s law restraining the sale of “sexual devices” as recently as 2010.⁸¹

As a Whole

We know from *Miller v. California* (see pp. 456-7) that allegedly obscene works must be judged “as a whole.” Does this mean that jurors must read the whole book, or watch the whole movie, under consideration? Probably not, according to a 2009 decision from the Fourth Circuit.⁸²

⁸⁰*Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2669 (2007). Technically the 2007 decision was not an outright overturning of the Court’s earlier *McConnell* decision— see 540 U.S. 93 (2003)—several justices suggested that the test embraced by Chief Justice Roberts was so narrow that virtually any campaign advertising would be permitted under it, and that what seemed at the surface to be the distinguishing of a precedent was really its demise.

⁸¹*1560 Montgomery Highway, Inc. v. City of Hoover*, 2010 Ala. LEXIS 40 (2010).

⁸²*U.S. v. Adams*, 2009 U. S. App. LEXIS 16363 (4th Cir. 2009).

Loren Adams challenged his federal obscenity convictions for having transported and distributed such film titles as “Doggie 3 Some,” “Anal Doggie and Horse,” and “Fisting 1.” But the appellate court held it sufficient that the jury had seen “representative scenes” from the films, as well as heard testimony—uncontradicted at trial by Mr. Adams— to the effect that the films consisted primarily of more of the same.

Smut in Words Alone?

A Virginia man previously convicted for receiving child pornography charges faced new charges while out on parole, as he used a computer in a government facility to download and print dozens of Anime cartoons and dozens of emails, many of which depicted or described sexual conduct, sometimes coerced, between children and adults. One of Whorley’s defenses was that obscenity cannot be found anymore in words alone. While many legal commentators have suggested that Americans’ sexual mores have moved in this direction, the Supreme Court has never so held, and the appellate court here upholds Whorley’s conviction against this challenge.⁸³ It also rejects his argument that the Anime cartoons are just that—cartoons— and thus do not depict any *real* persons. A conviction for receiving such materials would seem inconsistent with the Supreme Court’s decisions on “virtual” child pornography. Ah, but this was not a *child* pornography statute, it was an ordinary obscenity statute, already providing defendants with several important constitutional protections (notably the requirements that the material appeal to the prurient interest, and that it lack “serious” value) not available to defendants in kiddie porn cases.

OVERTURNED DECISION

On page 468 we learn of the Eleventh Circuit decision in *U. S. v. Williams*,⁸⁴ overturning a key section of the “PROTECT Act” aimed at virtual child pornography. By a 7-2 vote, however, the Supreme Court in 2008 overturned this ruling, finding the Act constitutional.⁸⁵ Defendant Michael Williams proved a most unsavory poster child for the First Amendment, having been caught in the act of offering online to an undercover federal agent photos of various men molesting his own 4-year-old daughter. As he had at the appellate level, Williams claimed that the Act’s section on “pandering” would criminalize even the false offer of child pornography that in fact does not exist. Justice Scalia’s majority opinion is devoted in large part to a painstaking analysis of the grammar and syntax of the Act. The core holding is much simpler, however: that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.” And as to William’s argument, Scalia pointed out that it is illegal to sell forbidden products, and it is illegal to advertise fraudulently, so surely it can be illegal to fraudulently market banned products.

⁸³ *U. S. v. Whorley*, 550 F. 3d 326(4th Cir. 2008) , petition for en banc hearing denied, 569 F. 3d 211 (4th Cir. 2009).

⁸⁴ 444 F. 3d 1286 (11th Cir. 2006).

⁸⁵ 128 S. Ct. 1830 (2008).

***American Beauty* Scenes Now on Website**

[These excerpts](#) from *American Beauty* were referred to by Justice Kennedy in his *Ashcroft v. Free Speech Coalition* opinion, 535 U.S. 234 (2002), as examples of the kinds of protected speech that would have been criminalized by the Child Pornography Prevention Act of 1996, in particular the section reaching images that even appear to depict children engaged in sexual acts. Kennedy's point, of course, was that actress Mena Suvari was over 18 when she played Kevin Spacey's teen love object, Angela. The case is discussed on pages 467-468 of the textbook.

***Carnal Knowledge* Scene on Website**

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), discussed on page 458 of the textbook, the Supreme Court reversed a Georgia Supreme Court having found the award-winning film, ***Carnal Knowledge***, obscene. Perhaps the most risqué scene was the final one, [shown here](#), in which Jack Nicholson's character cannot achieve sexual climax except by a highly ritualized act of (off-screen) fellatio by call-girl Rita Moreno. The scene is not patently offensive enough to render the film obscene, the Court held.

CHAPTER 12

I just play one on TV

The section on cable television indicates that it is not always clear what rules applicable to broadcast radio and TV stations can constitutionally be applied to cable systems and cable networks. As it turns out, when Senator Fred Thompson somewhat belatedly announced (on Jay Leno's Tonight program) his run for the presidency (he dropped out in January, 2008, after dismal results in the first few primaries and caucuses), NBC announced that it would, in compliance with the Equal Time Rule, shelve any reruns of *Law and Order* in which Thompson appears for the duration of the 2008 campaign. But *Law and Order* is also syndicated on the TNT cable network, which announced that it had no intention of suspending its own use of the series. We will never know what would have happened if a rival candidate were to make a Section 315 claim with the FCC, demanding equal time on the TNT network.⁸⁶

“F*&# this S@#!”

On page 515, I expressed uncertainty as to how PBS stations would deal with the soldiers' blue language in Ken Burns' then-upcoming series, *The War*, about World War II. After we went to press it was learned that PBS would make a sanitized version of the series available to stations that request it.⁸⁷

Of Epithets and Wardrobe Malfunctions

⁸⁶Rodney Ho, “TNT Won't Budge on *Law and Order* Reruns,” *Atlanta Journal-Constitution*, September 1, 2007, 3E

⁸⁷Elizabeth Jensen, “PBS to Distribute Two Versions of Ken Burns Film,” *New York Times*, September 1, 2007, B8.

In *FCC v. Fox TV*⁸⁸ the Supreme Court ruled that the Commission had not acted arbitrarily when it tightened up on broadcast indecency by prohibiting even “fleeting” and “isolated” instances of indecent language. At issue were uses of “the F word” on the Fox network’s live broadcast of the 2002 and 2003 Billboard Music Awards, in which Cher, and Nicole Richie, respectively, were the chief offenders. [Click here](#) to see the offending utterances.

The Supreme Court never reached the First Amendment issues, however. In 2010 the Second Circuit Court of Appeals, on remand from the Supreme Court, held that the Commission’s current regulations governing broadcast indecency are too vague for TV and radio stations to follow.⁸⁹ The court also made mention of an earlier incident involving Bono’s [Bono’s use of a fleeting “fucking.”](#)

Far better known than the Cher and Nicole Richie incidents at issue in *FCC v. Fox TV* was the infamous Janet Jackson “wardrobe malfunction” from the 2004 Super Bowl half-time show, which takes place [at the end of the short video here](#). As the textbook reports (p. 510), the FCC fined CBS \$550,000 for that one incident. The Commission’s action was later reversed by a federal appellate court—*CBS v. FCC*, 535 F. 3d 167 (3rd Cir. 2008). But a few days after the Supreme Court upheld the FCC’s actions with respect to the Cher and Richie incidents on Fox TV, it vacated the Janet Jackson decision and remanded it back to the appellate court with instructions for the court to reconsider its decision “in light of” the *Fox TV* decision.⁹⁰ Most observers suspect that the issue of Ms. Jackson’s exposed nipple will be before the Supreme Court again, this time on the First Amendment merits, in the next couple of years.

FCC’s Anti-Monopoly Rulings Upheld

In 2010 the D.C. Circuit Court of Appeals upheld the FCC’s move to extend for 5 years an earlier prohibition it had enacted forbidding cable companies from engaging in exclusive contracts with individual cable networks such that such networks could not allow themselves to be carried on competing cable systems.⁹¹ A year earlier the court upheld the Commission’s decision to forbid cable and satellite systems from engaging in exclusive contracts with MDU’s (multiple dwelling units), meaning apartment buildings.⁹²

Desperate But Not Indecent

The FCC ruled that this admittedly steamy introduction to ABC’s *Monday Night Football* - in

⁸⁸129 S. Ct. 1800 (2008).

⁸⁹*Fox Television Stations, Inc. v Federal Communications Commission*, 2010 U.S. App. LEXIS 14293 (2nd Cir. 2010). The opinion, if not overturned by the Supreme Court, may prove to be an important one in the history of broadcast regulation, in that it questions the whole logic of treating broadcast TV and radio differently from cable, or the Internet.

⁹⁰129 S. Ct. 2176 (2009).

⁹¹*Cablevision Systems Corporation v. FCC*, 597 F. 3d 1306 (D.D.C. 2010).

⁹²*National Cable & Telecommunications Association v. Federal Communications Commission*, 567 F. 3d 659 (D.C. Cir. 2009).

which *Desperate Housewives* star Nicolette Sheridan attempts to persuade Philadelphia Eagles wide receiver Terrell Owens to skip the game, did not cross the line into indecency.⁹³ [Click Here](#) to see a still photo from the scene. Or, [Click Here](#) to see a YouTube posting of the full video.

CHAPTER 13

FCC Struggles with Net Neutrality

The current FCC Chairman, Julius Genachowski, has made clear his commitment to “net neutrality,” the principle that Internet Service Providers must make equal speeds of transmission to all users. In 2008 the commission formally declared that the “ancillary powers” doctrine (described in chapter 12) permits it to regulate the Internet in furtherance of neutrality. But the D.C. Circuit Court of Appeals held in 2010 that the commission had overstepped its authority.⁹⁴ Since then the commission has made tentative moves toward *directly* regulating the Internet as a “common carrier,” much like the old-fashioned phone company. Most observers predict that the courts will not accept the commission’s arguments, if and when challenged.

She Said She was 18

A 2008 decision from the Fifth Circuit tells us that MySpace is not liable when a girl of 13 misrepresented her age as 18 in order to enter the site, and she later was sexually assaulted by a 19-year old male with whom she had chatted on the site. Section 230 of the Communications Decency Act protects MySpace against such third-party liability. That the company’s age-checking software was clearly faulty did not constitute actionable negligence.⁹⁵

Off Campus Student Web Postings Cause Strife

There have been a number of interesting federal court decisions involving public schools punishing students for off-campus postings of material. Two Third Circuit cases are especially noteworthy. In *Layshock v. Hermitage School District*,⁹⁶ the court held that the school could not sanction a student who has used a private, off-campus computer to create a website mocking the school principal. But in *J.S. v. Blue Mountain School District*,⁹⁷ a different panel of the court held that where a school administration can demonstrate that a student’s postings are likely to disrupt the school, it matters not that the student used only a privately-owned, off campus computer to do posting. The cases were joined together for rehearing en banc, with a decision

⁹³In the Matter of Complaints Against Various Television Station Licensees Regarding the ABC Television Network’s November 15, 2004, Broadcast of “Monday Night Football,” 20 FCC Rcd 5481 (2005).

⁹⁴*Comcast v. FCC*, 600 F. 3d 642 (D.C. Cir. 2010).

⁹⁵*Doe v. MySpace, Inc.*, 528 F. 3d 413 (5th Cir. 2008).

⁹⁶593 F. 3d 249 (3rd Cir. 2010).

⁹⁷593 F. 3d 286 (3rd Cir. 2010).

expected very soon.

OK for Public Library to Filter ALL its Computers

We already know from *U.S. v. American Library Association* (2003– see pp. 572 of the text) that the First Amendment is not offended by Congress’s having decided that libraries who choose to accept certain kinds of government funding must use filters to prevent minors from confronting sexy web sites. More recently, we see that the state of Washington’s constitution is not offended when a public library system decides to keep Internet filters on all its computers, even when adults are using them. Moreover, adult patrons in that town’s system do not have a right to obtain unfettered Internet access. They may only request that a librarian double-check and make a case-by-case determination if a particular web site “should” have been blocked.⁹⁸

A Passive Night Club

As we learn on page 553 of the textbook, the Blue Note night club in NYC sued its namesake in Columbia, Missouri for trademark infringement, but lost, the court in New York having found that it lacked jurisdiction because the Missouri club’s website was too “passive” (e.g., patrons could not buy tickets online) to constitute evidence of the owners’ having done business in New York State. [Click Here](#) to see the two night clubs– Missouri on the left, New York on the right.

But Can You ... *Interact* with that Song?

Internet law seems sometimes to be very much entwined with business models– which industries will be allowed to make a buck, at the expense of which other industries? We know that peer-to-peer music download and sharing services such as the original Napster were of great concern to traditional record companies and stores– why would anyone buy a CD if they can download it for free? But more recently-seen business models seem to create a symbiotic relationship among artists, distributors and fans alike. And in a 2009 decision, the Second Circuit Court of Appeals held that such a structure would be enough to save at least one Internet service from rather odious copyright regulation.⁹⁹

At issue was whether the Internet service known as LAUNCHcast is the kind of “interactive” music service that lets users choose what songs they wish to hear. The question has important financial implications. Such interactive services, under federal law, must pay a fee to each and every owner of the copyright to particular songs. More traditional radio stations need only pay a single, blanket fee, determined by the Copyright Royalty Board.

An exhaustive examination of the complex formulae used by defendant Launch Media persuaded the court that users do not have enough control over what songs they will be exposed to when they visit the LAUNCHcast site to have the site labeled “interactive.” Yes, users “rate” songs and artists, and can even veto specific titles that they especially detest. But on any visit to the site the vast majority of the songs they will hear will not be of their choosing and will not have been previously rated by them. Indeed many of the songs will not even fall into any of the

⁹⁸*Bradburn v. North Central Regional Library*, 231 P. 3d 166 (Wash. 2010).

⁹⁹*Arista Records v. Launch Media*, 578 F. 3d 148 (2nd Cir. 2009).

“genres” of music they had requested when first creating their online profiles. Since users cannot listen only to music they want, the site will never be a market substitute for buying music (CDs, downloads, etc.). Indeed, part of LAUNCHcast’s business model is to ensure that users are exposed to lots of new music, which they are then offered the chance to purchase.
