

newsletter  
on  
**intellectual**  
**freedom**



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## survey shows school web filtering can impede learning

More and more students are bringing personal mobile devices to school, but a new survey from the American Association of School Librarians (AASL) finds that Internet filtering often prevents students from taking advantage of learning's social potential.

School librarians report that web filtering programs have had varied effects in their schools and on school library programs. Fifty-two percent said Internet filters have impeded student research when topics or keyword searches are filtered. Half said web filtering has decreased the number of potential distractions, while 42 percent said it discounts social aspects of learning.

Roughly one-third said Internet filtering has decreased the need for direct supervision, 25 percent said it has prevented continued collaboration outside of face-to-face opportunities, and 23 percent said web filtering allows research curriculum to yield more relevant results.

Many schools let students bring and use their mobile devices, and roughly half of survey respondents said their school has a filtering mechanism in place to control content that students view on their devices.

Of those that do have filtering in place for student devices, 48 percent implement an accompanying acceptable use policy and 47 percent make students log on through school networks. Twenty-nine percent do not allow Internet connectivity on personal devices, and 28 percent limit their use to a classroom teacher's discretion.

Permitted mobile devices include e-readers (53 percent), cell phones (49 percent), laptops (39 percent), MP3 players (36 percent), netbooks (32 percent), and portable game players (16 percent).

The filtering report is a supplement to AASL's 2012 "School Libraries Count!" and included 4,299 responses to 14 questions covering a variety of filtering issues.

All of the respondents said their school or district filters online content. In addition, 94 percent use filtering software, 87 percent have an acceptable use policy, 73 percent supervise students while they use the Internet, 27 percent limit access to the Internet, and 8 percent allow students to access the Internet on a case-by-case basis.

The most popular filtering software is URL-based (70 percent), keyword-based (60 percent), and based on blacklists (47 percent).

A large majority of schools (88 percent) filter content for staff as well as for students. Just more than half (56 percent) use the same level of filtering for staff as they do for

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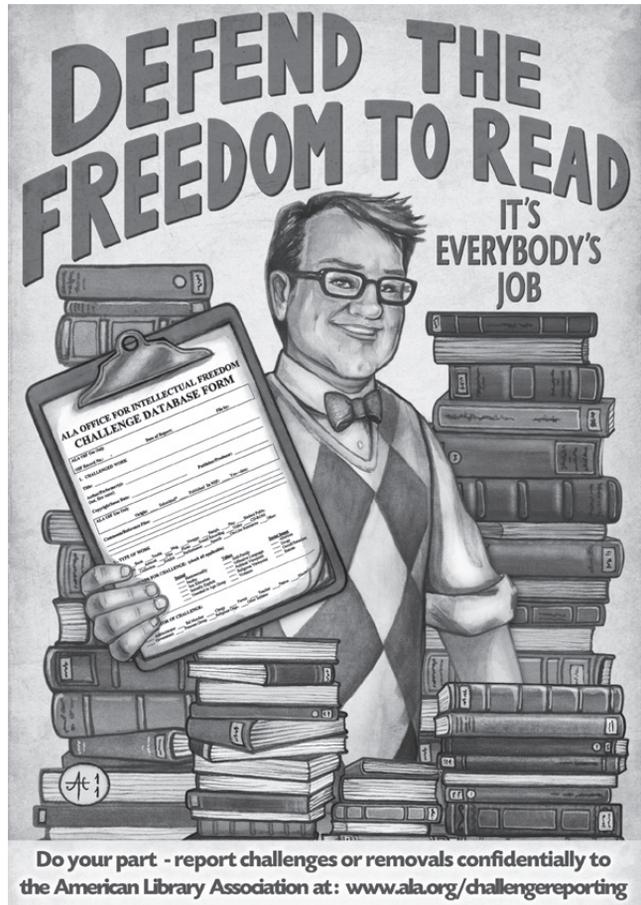
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## as libraries go digital, privacy issues emerge

Colleges share many things on Twitter, but one topic can be risky to broach: the reading habits of library patrons.

Harvard University librarians learned that lesson when they set up Twitter feeds broadcasting titles of books being checked out from campus libraries. It seemed harmless enough—a typical tweet read, “Reconstructing American Law by Bruce A. Ackerman,” with a link to the book’s library catalog entry—but the social-media experiment turned out to be more provocative than library staffers imagined.

Harvard suspended the practice after privacy concerns were raised. Even though the Twitter stream randomized checkout times and did not disclose patrons’ identities, the worry was that someone might somehow use other details to identify the borrowers.

The episode points to an emerging tension as libraries embrace digital services. Historically, libraries have been staunch defenders of patrons’ privacy. Yet to embrace many aspects of the modern Internet, which has grown more social and personalized, libraries will need to “tap into and encourage increased flows of personal information from their patrons,” says the privacy-and-social-media scholar Michael Zimmer.

Millions of people now share what they’re reading through social-networking sites like Facebook, or smaller services including Goodreads and LibraryThing. They’re accustomed to the personalized recommendations that Amazon provides by tracking customers’ buying and browsing habits.

Libraries are following suit. They’re beginning to share data to build tools for recommending and discovering books. They’re lending e-books, even though Amazon monitors reading on Kindles, and they’re enabling reviews and tags in the once-sacred realm of library catalogs.

But as librarians expand digital services, they face “a Faustian bargain,” warned Zimmer, an assistant professor in the School of Information Studies at the University of Wisconsin at Milwaukee. In a forthcoming paper, he writes that librarians may decide that “the benefits of these advanced data-based services outweigh the traditional protection of patron privacy.”

That tradition grows out of a core belief: People should be free to explore ideas without the government or anyone else watching.

In the 1970s and 80s, the FBI tried to figure out what some scholars were studying by enticing library clerks to disclose borrowing and reading habits, said Deborah Caldwell-Stone, deputy director of the Office for Intellectual Freedom at the American Library Association. In response, many states passed laws requiring libraries to keep those data private.

It’s considered “good practice” to purge the records of who borrowed particular materials, she added. “The best way to preserve privacy is not to have a record of what somebody read.”

Now the Web has put privacy in flux, and the lines are fuzzy as to what trade-offs libraries should make. When should data be used? When should the information be shielded?

One option is to use systems that allow patrons to opt in to libraries’ tracking such activities as their previous checkouts.

“The privacy that libraries traditionally have been preserving is not always valued by their patrons, especially in an age of social networking,” said David Weinberger, co-director of the Harvard Library Innovation Lab, which was behind the Twitter experiment. “We have the staunchest defenders of individual privacy in the nation now engaging a set of users who increasingly default to openness and sharing,” he continued. “It’s going to take a while to work that through.”

Other librarians are watching to see how he navigates those changes. Weinberger is a well-known Internet thinker, with a Ph.D. in philosophy and an eclectic résumé. In 2000 he helped write a best-selling book, *The Cluetrain Manifesto: The End of Business as Usual*, which argued that the Web is mostly a “social place,” not a publishing platform. Influenced by Cluetrain, Howard Dean’s campaign hired Weinberger as “senior Internet adviser.”

In 2007, Weinberger published a book of particular interest to librarians, *Everything Is Miscellaneous: The Power of the New Digital Disorder*. The Web upends “the rules of the physical world,” where “everything has its place,” the book said. Information is now “a social asset and should be made public, for anyone to link, organize, and make more valuable.”

Sharing information is one focus of the Library Innovation Lab, which began three years ago as a place to think about the digital future of libraries. One effort, called LibraryCloud, aims to help libraries share a valuable resource: metadata, or information about information. Metadata are important for finding stuff as the amount of information rapidly increases. “The solution to information overload is more information,” Weinberger argues.

Metadata might include a book’s page count; how often it has been checked out; and how frequently it has been checked out by particular types of people, such as undergraduates or faculty members.

In one novel method for generating metadata, the lab equipped some Harvard libraries with “Awesome Boxes.” Someone who checks out an item can return it to the Awesome Box rather than the regular basket, creating a data trail about what library patrons consider great. Items that have been “awesomed” are publicized via Twitter and RSS and may also be built into online book-browsing software

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## studies find wariness over tracking online data, while more companies engage in tracking

As marketers, browser makers and government regulators spar over efforts to let consumers limit custom advertising online, a new study suggests that Americans are largely unaware of what that means and have a strong aversion to being tracked online. A companion study from the same source reports that more companies are tracking online data.

The majority of Americans surveyed by researchers at the Berkeley Center for Law and Technology, which is part of the law school at the University of California, Berkeley, do not want information collected at all about which Web sites they visit, according to the study, which was released at the Amsterdam Privacy Conference October 8.

Most of them said they did not find online advertisements useful. And nearly 90 percent said they had never heard of a proposal by the Federal Trade Commission, known as a “do not track” mechanism, that would let users opt out of having their personal data collected for the purposes of serving tailored advertisements.

The digital advertising industry has resisted efforts to limit behavioral targeting, pointing out that the free content available on the Internet, including social networks, is powered precisely by that kind of advertising.

Browser companies have introduced do-not-track icons for their users, and Microsoft has gone farthest by making it the default setting on its latest version of Internet Explorer.

There is still no agreement on whether a do-not-track button on Web browsers would send a signal that information about a consumer’s browsing history should not be used to tailor advertisements—or should not be collected at all. And it is up to each Web site to honor a consumer’s request or ignore it altogether, because no law requires sites’ compliance with users’ wishes.

The Berkeley survey, financed by a grant from Nokia, presented a series of multiple choice questions on the telephone to 1,230 Internet users in the United States.

The survey asked respondents: “If a ‘do not track’ option were available to you when browsing the Internet, which of the following things would you most want it to do?”

Sixty percent said they prefer regulation to “prevent Web sites from collecting information” about them; twenty percent said such a tool should allow them to block Web sites from serving up ads; and fourteen percent said they would like it to “prevent Web sites from tailoring advertisements” based on sites they had visited. (The remaining six percent said they did not know or declined to answer.)

One in five told the researchers that they believed advertisers were not allowed to track people when they browsed medical sites. Four in 10 did not know or declined to answer, while a third correctly said that they could be

tracked by marketers.

The survey also asked how useful consumers found search and banner advertisements. Two-thirds said they found it “never” or “hardly ever” useful, while thirty percent said “often” or “sometimes.” Eighty-five percent said they “never” or “hardly ever” clicked on an advertisement.

Data mining companies have grown increasingly sophisticated at analyzing consumer behavior both online and offline, through bits of computer code online or loyalty cards and nascent mobile payment options at brick-and-mortar stores. Such data is extremely valuable for advertisers, along with digital platforms like Facebook and Google that survive on advertising dollars.

The authors of the study argued that the Federal Trade Commission’s proposed mechanism was “a modest intervention.”

An industry-supported group, the Information Technology and Innovation Foundation, wrote a vigorous criticism of do-not-track proposals in a blog post last week, arguing that “nontargeted advertising” generated less revenue and that “less revenue means less free content and services for Internet users.”

Another study by the Berkeley Center revealed that the number of trackers collecting data on users’ activities on the most popular Web sites in the United States significantly increased during a five-month period in 2012.

The Berkeley project, called the “Web Privacy Census,” aims to measure online privacy by conducting periodic web crawls and comparing the number of cookies and other types of tracking technology found over time on the most visited sites.

During a test conducted on October 24, researchers encountered cookies on every site included in a list of the one hundred most popular sites compiled by Quantcast, an analytics and audience targeting firm. On those sites, researchers found 6,485 standard cookies in October as compared with 5,795 cookies in May. In both months, third party trackers, not the Web sites themselves, set a majority of those cookies, the report said.

In October and May, cookies placed by DoubleClick, Google’s ad technology service, appeared on the most sites on the top hundred list. ScorecardResearch, an analytics unit of comScore, was the second-most-prevalent tracker, the researchers reported.

The number of cookies on the top 1,000 and 25,000 Web sites also increased significantly, researchers said.

The Berkeley study comes at a time of fierce debate among federal regulators, advertising associations and consumer advocates over how best to regulate online tracking. Marketers advocate self-regulation, allowing consumers who wish to opt out of receiving ads based on data-mining to use an already-established industry program. Some consumer advocates are pushing for federal regulation as well as a “Do Not Track” mechanism that would allow Internet

users to control tracking through settings on their own computer browsers.

Chris Hoofnagle, the director of information privacy programs at the Berkeley center and co-author of the study, said he hoped the data would set a baseline, providing all sides in the debate with empirical information as to the optimum method to regulate tracking.

"I'm hoping that it will inform which approach is the best," Hoofnagle said. "We are not going to be well served unless we measure these trends more rigorously." Reported in: *New York Times*, October 8, November 12. □

## Internet anti-censorship tools overwhelmed by demand

U.S.-funded programs to beat back online censorship are increasingly finding a ready audience in repressive countries, with more than a million people a day using online tools to get past extensive blocking programs and government surveillance.

But the popularity of those initiatives has become a liability. Activists and nonprofit groups say their online circumvention tools, funded by the U.S. government, are being overwhelmed by demand and that there is not enough money to expand capacity. The result: online bottlenecks that have made the tools slow and often inaccessible to users in China, Iran and elsewhere, threatening to derail the Internet freedom agenda championed by the Obama administration.

"Every time we provide them with additional funding, those bottlenecks are alleviated for a time but again fill to capacity in a short period of time," said André Mendes, director of the Office of Technology, Services and Innovation at the Broadcasting Board of Governors (BBG), which funds some of the initiatives. "One could reasonably state that more funding would translate into more traffic and, therefore, more accessibility from behind these firewalls."

The United States spends about \$30 million a year on Internet freedom, in effect funding an asymmetric proxy war against governments that spend billions to regulate the flow of information. The programs have been backed by President Obama, who promoted the initiatives at a town-hall-style meeting in Shanghai three years ago.

The U.S. government funds nonprofit groups and others to develop software that can be downloaded by users in other countries with pervasive censorship. The most widely used tools route Internet traffic through other countries, allowing users to bypass Internet firewalls as well as surveillance.

The task of keeping the Internet free, however, is becoming harder. China's "Great Firewall" has grown more sophisticated in recent years, with the Communist government employing

tens of thousands of monitors to filter content and watch users. Iran, meanwhile, has stepped up its already-substantial censorship efforts amid a mounting economic crisis, instituting new bans on overseas audio and video content and advancing plans for an Iran-only intranet.

The online crackdown is spurring calls from Internet freedom advocates for the Obama administration to step up its own efforts. Many have expressed frustration with what they perceive as slow progress advancing these tools.

"I can't imagine anything more cost-effective or strategic for the United States to do," said Michael Horowitz, former general counsel to the Office of Management and Budget in Ronald Reagan's administration and co-founder of the Twenty First Century Initiative, a group aiming to increase funding for Internet freedom.

"The one thing that's perfectly clear is people in closed-society regimes are the shrewdest people of all about being able to define their own interests and stay in power," he said. "And the Iranians and the Chinese are telling us, as clearly as they can, that their stability in power depends on purifying the Internet."

Horowitz said he wants the BBG—an independent agency that, along with the State Department, funds online circumvention tools—to increase its spending on Internet freedom from its current level of about \$10 million of its \$750 million annual budget, to between \$50 million and \$100 million.

Executives at the BBG said they are sympathetic to such appeals but suggest they are politically infeasible.

The "argument is if you gave \$100 million, you could really be David and Goliath, could blow a big hole and knock the whole whack-a-mole of the Chinese censors down, and all the rest of the bad guys," said Michael P. Meehan, a member of the BBG. "I wouldn't disagree."

But, he said, the agency is already under pressure from Congress to find \$50 million in budget cuts.

Meehan said his frustration is that countries such as China and Iran are clearly willing to spend exponentially more than the United States in what has become a cat-and-mouse chase.

"If we figure out how to breach the Chinese firewall with x dollars, they can spend a hundred times x dollars and divert their resources to figuring out how to plug that hole," he said. "If they're spending to shut one guy down, they'll create a vulnerability somewhere else in the wall for someone else. That's exactly how this battle's going to work."

The most widely used tool to avoid Internet censorship in China and beyond is known as Ultrasurf, but those behind the project say it no longer has the capacity to support demand.

On one day in September alone, for example, more than 770,000 people used the tool to avoid censors—more than half from China or Vietnam, according to data supplied by "Clint," one of the people running the project, who spoke on the condition of anonymity out of concern for the safety of relatives in China.

Ultrasurf's traffic spikes in different countries during times of political turmoil and crisis, as more users struggle to get access to independent information and news—but the tool also crashes when it gets overloaded.

As a result, Ultrasurf has already had to slow down Internet speeds to a crawl, Clint said, and prevent access to video content. Those behind the program have also developed a version for mobile phones—potentially significant given that millions of people in countries with censorship have phones but no computers—but they are unable to launch it because of funding constraints.

Privately, officials say the funding issues are caught up in concerns over politics and security.

Ultrasurf, for example, is backed by thousands of supporters of Falun Gong, a spiritual movement that began in China, and restricts access to content critical of the religious group, making it more difficult for officials to press Congress for money.

Tor, a competing online program that also permits users to avoid detection, has become a useful tool for drug trafficking, child prostitution and other criminal activity. It's a problem that staff members at the Tor project acknowledge, but they say it is, in effect, a cost of doing business for an anti-surveillance tool.

"Criminals are early adopters of technology. As soon as the police learn to monitor one network, criminals find better ways to hide," said Karen Reilly, development director for the Tor project.

"We are being asked to make false choices between victims," Reilly said. "Because of someone who is being abused by a family member in the States, we are asked to shut down anonymity software, leaving the child who posts anti-regime comments on social media vulnerable in a country where rape in prison is officially sanctioned punishment."

Internet freedom activists say part of the challenge in developing online circumvention tools is determining how much to spend now on helping users evade detection vs. how much to spend on more sophisticated projects for the future that could keep pace with censorship technology.

Much of the latter is done under the auspices of Radio Free Asia, in a program led by Dan Meredith, a 30-year-old former journalist and programmer. But his program has only \$3.7 million to spend in the year ahead—down from \$6.7 million last year.

Meredith said that the firewall in China is "actually thin as cheese paper"—at least until censors find new ways to block information. What Meredith wants to do is keep the Internet free for new users—by building "mesh" networks, retooling major sites to automatically dodge crude censorship efforts and more.

But he acknowledges the political sensitivities involved in the effort. "How do I go about trying to increase more awareness and funding from Congress for Internet freedom

without going against some huge political body, or something?" he said.

For Horowitz, the veteran of the Reagan administration, the issue boils down to ideology. Internet freedom, in his view, is the 21st century's Cold War. "We live in a world where walls of electrons are increasingly replacing stone and barbed wire as control mechanisms of dictatorships," he said. Reported in: *Washington Post*, October 21. □

## governments asking Google to provide more data

The number of government requests to Google to hand over user account data is markedly increasing, according to a report published November 13 by Google.

In the first six months of this year, governments around the world made 20,938 requests to Google to provide information on 34,614 accounts, the company said. In the same period in 2011, governments made 15,744 requests on 25,342 accounts, according to company data.

During the first half of 2012, the government of the United States made the majority of the demands, followed by India, Brazil and France. In the United States, in the first half of 2012, for instance, the government made 7,969 requests to Google to hand over information on 16,281 accounts. Google said it fully or partially complied with 90 percent of those requests. In the same time period in the United States in 2011, Google received 5,950 data requests regarding 11,057 accounts.

Requests from government agencies or courts that Google remove certain material from its services for reasons like security concerns or reported defamation are also increasing.

In the first half of 2012, governments globally made 1,791 requests to Google to remove material, compared with 949 in the same time in 2011, according to company data.

Among federal agencies around the world, the communications agency of Turkey was the most prolific petitioner for removal. Among other things, the agency asked Google to remove 426 YouTube videos, Blogger blogs, one search result and one Google document that reportedly criticized the Turkish government, national identity, values or Mustafa Kemal Ataturk, Turkey's first president. Google blocked Turkish users' access to 63 percent of the videos but not the other material.

Among the government petitions in the United States, there were five requests and one court order to remove seven YouTube videos for criticizing local and state government agencies, law enforcement or public officials. Google said it did not comply.

The company began publishing semiannual reports on government requests in early 2010. Reported in: *New York Times*, November 14. □

## — censorship dateline



## libraries

### Kern County, California

Kern County's public libraries will begin blocking public Internet access to online sites that are considered to be obscene, harmful to children or to contain child pornography, under a 2000 law that provides funding for Web access for libraries that filter out such content. All five Kern County supervisors voted October 23 to support the controls. Kern County Library Director Sherry Gomez said adults older than 18 will still be able to access the sites by contacting library staff and requesting that the block be lifted.

By making the change, she said, the library will realize an estimated \$16,000 in savings that would be used to offset increasing costs of being a part of the San Joaquin Valley Library System.

The Children's Internet Protection Act, enacted by Congress in December 2000, required libraries to implement Internet controls and policies before they could become eligible to participate in a program that reduces the cost for communication services and products. Kern County did not participate in the program, Gomez said, and all library users—both adults and minors—had unrestricted access to the Internet using Library Department computers.

Supervisor Ray Watson asked Gomez why the restrictions hadn't been brought forward earlier. "I can't speak for my predecessor," she said. "I'm before you now making this recommendation."

Supervisor Mike Maggard took the explanation further. He said he asked former Library Director Diane Duquette why the county wasn't choosing to comply with the federal

law. "She was very resistant to the idea," Maggard said. He thanked Gomez for bringing a proposal to restrict access to the board without any prompting. Reported in: *Bakersfield Californian*, October 23.

### Kaysville, Utah

A Kaysville parent sued the Davis School District November 13 alleging her children's First Amendment rights were violated by a school committee's decision earlier in the year to remove a book about lesbian mothers from shelves of elementary libraries.

Students can read the picture book, *In Our Mothers' House*, by Patricia Polacco, only if they have a permission slip signed by parents. The policy decision brought applause from parents who felt the story wasn't appropriate for young children and criticism from opponents who believed it was unjustified censorship and hurtful to gay and lesbian families.

Tina Weber, who has three children in the Davis district, is named as the lead—and so far only—adult plaintiff in the class-action complaint filed in Salt Lake City's federal court against the district. The American Civil Liberties Union of Utah is representing Weber in the case. The Utah Library Association, Utah Pride Center, Ogden OUTreach Resource Center, Unitarian Universalist Church of Ogden and Parents, Families and Friends of Lesbians and Gays (PFLAG) are also lending support, said John Mejia, legal director for the ACLU of Utah.

"Students have the right to access books in their library free from the administration's discrimination based on the viewpoint of those books," Mejia said. "Ultimately, we feel this is a question of interpreting the law. The school district has claimed that ... there's a Utah statute that schools can't advocate homosexuality under the health curriculum. The school has taken a public position that the libraries are an extension of the curriculum, and therefore this law would apply to make this book run afoul of the law. We question that interpretation of the law."

Davis spokesman Chris Williams said the district hadn't yet been served with the lawsuit, but added that it stands by the decision to require children to get a permission slip to check out the book.

"I would say the district still feels comfortable with the process it undertook and at no time has any parent's rights been curtailed," Williams said. "Parents still have the opportunity to have their children read the book."

The lawsuit was the latest development in the district's saga involving *In Our Mothers' House*, a picture book about a lesbian couple raising children that was removed from the shelves of grade-school libraries in Davis County last spring after parents voiced concerns about the story's suitability.

The decision to keep the book behind the counter, accessible to children with a permission slip, followed an

April 30 meeting during which a seven-member committee determined the book didn't align with district curriculum standards. The committee, composed of teachers, administrators and parents, voted 6-1 to keep the book off shelves, with Bountiful High librarian Trudena Fager casting the dissenting vote.

Williams said previously the panel's decision was based on a state law that bars school curriculum from advocating homosexuality. Committee members also determined the book was not age-appropriate. The dispute bubbled up in January, when the mother of a kindergartner at Windridge Elementary in Kaysville became upset when her child brought the book home. The mother and her husband took their concerns to elementary school officials, according to Williams.

A committee at the school level decided to move the title—recommended for pupils in kindergarten through second grade—to a section for grades 3 to 6 after determining the book was better suited for older readers, Williams said. That didn't appease the kindergartner's parents, who gathered 25 signatures on a petition to move the discussion to the district level.

The district committee voted in April to place the book behind the counter. Parents who signed the petition were notified of the move in May. Williams said the book was purchased in part because a student who attended Windridge has two mothers and librarians wanted to foster inclusion.

Weber, the lawsuit's plaintiff, said she was disturbed to learn that the book's accessibility had been limited. After hearing about the controversy, she checked out the book to read to her 6-year-old, who was a kindergartner at Windridge last year.

"It's just a sweet story about a mixed family that learns to love each other," said Weber, who contacted the ACLU to see if she could help make a case against the district. Her children are also named as plaintiffs. "As a parent, I believe that it's my role to help them understand certain issues and explain to them our particular values and stances on things," she said. "I don't believe it's for anybody else to tell me how to raise my family. I would just hope to see the book get back on the shelf so all children have access to it."

Mejia said the suit asks the court to order copies of the book be returned to shelves, order a permanent injunction that would bar schools from restricting books based on an interpretation of homosexual themes and make declaratory judgments stating the school district violated students' First Amendment rights in limiting access to the book and that the school erred in citing a Utah statute prohibiting homosexuality in curriculum as the reason to limit access to the book. The plaintiffs also seek \$1 in damages from the district.

The ACLU and Davis School District had conversations about the book before the lawsuit. Williams said he thought the two sides were working toward common ground on the

issue. "My impression is at least we felt good about the meetings," Williams said of discussions between the ACLU and the district. "Apparently they didn't." Reported in: *Salt Lake Tribune*, November 14.

### **Seattle, Washington**

A Seattle area resident is upset that his unsupervised ten-year-old niece was able to check out a sexually explicit yaoi manga from the King County Library System (KCLS) and is asking the library to institute more restrictive circulation policies for all minors as a result.

Travis de Nevers' niece, an avid reader of manga, went into the White Center library branch while her grandmother waited outside and checked out several books, including the boys love title *Hero-Heel 2* by Makoto Tateno. A few days later, de Nevers looked through the book after noticing the publisher's parental advisory label on the cover. Unfamiliar with yaoi manga, he reported being shocked to find images of two men having sex.

In a letter to KCLS Director Bill Ptacek, de Nevers asked that the library "review your check-out practices and make the changes necessary to prevent" children from checking out books like *Hero-Heel 2*. However, the library already has policies in place—including a Parental Responsibility Policy which states:

"Parents and guardians are responsible for their children's behavior, safety and welfare while their children are in the library or on library grounds, which includes their children's access to library materials and electronic resources.

"KCLS strongly recommends that a parent, guardian or other responsible party be present to supervise children ages 12 and younger. KCLS staff is available to assist parents, guardians and their children in the use of the library; however, KCLS staff cannot act 'in loco parentis' (in place of a parent) for children in the library."

KCLS holds four copies of *Hero-Heel 2*, all appropriately shelved in adult nonfiction, but none of them belong to the White Center branch. The barcode and location label from the cover scan that de Nevers provided show that the copy his niece checked out belongs to the Redmond branch, indicating that she may have placed a hold on it in order to have it sent to her local branch. The library's policy makes clear that "staff is not responsible for determining whether materials used by children and teens are 'age appropriate'" but does show a willingness to help parents or guardians take an active interest in their children's reading:

"KCLS encourages parents/guardians to talk to their children and teens about the kinds of materials they think are suitable for borrowing or accessing. If a parent/guardian wishes to limit the number of items their child or teen can check out and/or the level of filtering...assigned to their

cards, they should contact a staff member to have the child or teen's library card appropriately blocked."

Comics, graphic novels, and manga often face challenges from those who think any book with lots of pictures must be for children. That certainly seems to be the case here, as de Nevers expressed surprise that "an anime comic book section is where people go to read porn." While *Hero-Heel 2* likely doesn't qualify as pornography by a strict definition, it is definitely intended for adults, who make up a large part of any library's patron base.

In response to de Nevers' complaint, KCLS Director Bill Ptacek issued a letter strongly defending the presence of such manga in the library's collection and making clear that parents and guardians bear responsibility for setting limits on what materials their children may access. Reported in: [cbl.df.com](http://cbl.df.com), October 16, 17.

## **schools**

### **Fremont, California**

A free book club that will focus on critically acclaimed literature banned by the Fremont school board began October 24 at an Irvington district church.

Since 2008, the five-member board has banned *Bastard Out of Carolina*, a National Book Award nominee about a teenage girl sexually abused by her stepfather, and last year it rejected *Angels in America*, a Pulitzer Prize-winning play about AIDS in the 1980s. In response to the censorship, Mission Peak Unitarian Universalist Congregation hired Teri Hu—a Washington High teacher who tried unsuccessfully to add those books to the school's AP English supplemental reading list—to lead the new monthly club.

The eight-part course is open to the public, including Fremont students, said the Rev. Jeremy Nickel, the church's minister. Copies of the censored books will be on sale at the sessions, and some free copies will be provided to those who cannot afford to purchase them, Nickel said.

The course will ask participants to complete assigned reading that they will discuss at a monthly meeting. "This is about educating the community about what's inside these books," Nickel said.

Nickel, who did not disclose Hu's salary for leading the course, praised the instructor for her persistence regarding the banned books.

She is attempting "to give these young people a chance to wrestle with the full spectrum of humanity in a safe environment, before they are on their own making these decisions in real time, with real consequences," Nickel said. "And equipping them with the moral muscles to make the right decisions is what happens when they explore transforming works ... and then discuss them with their peers, teachers and parents."

Hu—a Fremont Unified School District teacher for the past fifteen years—said she submitted the same books for

approval for about a decade before and experienced no problems. That changed in 2008, when the school board rejected *Bastard Out of Carolina*—even though it had been approved by a district textbook committee. When Hu resubmitted the title in 2009 and 2010, the board rejected it again and passed a rule that books could not be submitted in consecutive years. Last year, she submitted *Angels in America*, which also was not approved.

Despite the repeated rejections, Hu said she will continue submitting them for approval. "It's like they don't want our children to read modern, relevant books," she said. "I am not giving up."

Ivy Wu, a school board member since 2004, said she voted to censor the works because she believes most Fremont parents do not want those mature themes featured in the school curriculum. "I'm not saying social issues should not be taught in classrooms, but these books are too graphic," she said. "It's unsettling for these parents."

Wu said she encourages parents and students to attend the church's monthly course to learn more about the banned books. "It can be done better if it's in a different setting, outside of the classroom," she said. Reported in: *Fremont Argus*, October 23.

### **Brighton, Colorado**

Colorado mother Sarah Timme is upset that her eighth-grade son was assigned to read a short story about a man who hunts humans for sport. Now, she's calling for "The Most Dangerous Game" to be pulled from the classroom.

Timme was reviewing homework for her son, who attends Brighton's Bromley East Charter School, when she came across an assignment that required him to answer questions about the story. The 1924 fictional short story by Richard Connell has been used by English teachers for decades to teach literary concepts like symbols and motifs.

But Timme believes the lesson is inappropriate in light of recent events, particularly that of ten-year-old Jessica Ridgeway, who was reportedly sexually assaulted before being killed by 17-year-old Austin Sigg. Timme says that "The Most Dangerous Game" only serves to encourage school violence, adding that she was "outraged and appalled" by the story and assignment, which were disturbing to both her and her son.

To be sure, Connell's short story has served in schools to teach students the underlying concepts of literature. Study guides available to students online cite the story's major themes as questioning of accepted logic—pointing out the hunter's skewed world perspective—and the irony of humanity—drawing attention to the irony that highly advanced and educated civilizations still kill while at war over land and resources. Other suggested themes include reason versus instinct—forcing a differentiation between

humans and animals based on human logic—and the detrimental effects of war.

In a statement Brighton 27 J School District spokesperson Kevin Denke said while “The Most Dangerous Game” is not in the district’s standard middle school curriculum, the charter school is permitted to create its own lessons. Still, school officials will evaluate the story’s use in language arts classes. Reported in: [huffingtonpost.com](http://huffingtonpost.com), November 5.

### South Lyon, Michigan

A Michigan teacher was suspended for playing her students a song that supports same sex marriage by Seattle rapper Macklemore. The song is called “Same Love,” which follows the struggle of a gay man from birth until his death.

South Lyon eighth grade performing arts teacher Susan Johnson was suspended for three days after playing the song in class. Johnson said she thought her students could learn from it. “This is one of the things in my school that we’re trying to practice and we’re trying to instill in our students is tolerance to diversity,” she said.

One student, who apparently disagreed with the song’s message, reportedly complained to school officials. Johnson said she was told of her suspension that same day. Johnson said the school district informed her she was suspended because the song had controversial content which included homosexuality, religion, political views and a sexual slur. The district also said Johnson should have asked permission to play the song.

Macklemore responded to the controversy on his website.

“I believe that Ms. Johnson getting suspended is completely out of line and unjust. However, I think it’s important for moments like these to be exposed and for us to pay attention and respond. This level of intolerance and fear is still very active in America, but at times is not completely visible. This incident is just one of tens of thousands that have happened across the country where schools have exposed a latent homophobia, preventing safe space for all young people to feel confident in being themselves. It’s clear that Ms. Johnson felt bullying and “gay bashing” were issues that needed to be addressed, and by doing so, was punished.

“I wrote the song ‘Same Love,’ not with the expectation that it would cure homophobia and lead to marriage equality across the US (although that’d be awesome). It was written with the hope that it would facilitate dialogue and through those conversations understanding and empathy would emerge. This incident demonstrates how too often we are quick to silence conversations that must be had. Even if people disagree, there is far more potential for progress when people are vocal and honestly expressing their thoughts about gay rights. When we are silent and avoid the issue, fear and hatred have a far greater life span.

“It’s discouraging that a song about love and civil rights has led to a teacher getting suspended from her job. But that’s where we are at. For those of us who get a pit in our stomach when reading a story like this, it just makes it abundantly clear there is far more work to be done.” Reported in: [king5.com](http://king5.com), November 30.

### Traverse City, Michigan

It never dawned on Heather Campbell that she’d one day work to get a book banned from a school’s curriculum. But Campbell found herself in just that position after she read Jeannette Walls’ memoir *The Glass Castle*, a book assigned to her freshman daughter over the summer as part of the ninth grade honors English course at Traverse City West Senior High School.

Campbell and her husband Jeff complained about *The Glass Castle* to school officials, and the Traverse City Area Public Schools Board of Education was set to weigh in on the matter in December.

“I never thought I would be somewhere where I would have to say—it’s almost like a book-burning—‘please take this off the reading list,’” said Campbell, of Traverse City. “I just think we need to use some common sense when it comes to our kids.”

The memoir recounts the author’s experience growing up in a dysfunctional family with an alcoholic father and a mother who suffered from mental illness. It includes explicit language and references to child molestation, adolescent sexual exploits and violence.

On November 20, the school board’s Curriculum Committee upheld a recommendation to remove the book from student study programs. That recommendation originated with a separate committee that was formed to address the Campbells’ complaint, a step required by district policy.

The Campbells asked the committee to ban the book from ninth, tenth and eleventh grade curriculums. “We believe there is no purpose reasonable to warrant exposing young students to this resource,” the Campbells’ written complaint stated.

Mohr said the district assigned *The Glass Castle* as summer reading because “the Teacher Steering Committee felt it would be of high interest to students.”

Parent Jo Clark, a member of the committee, read the book before it was assigned to students and said it offers more than just an engaging story. “It’s a book about overcoming the most incredible obstacles in your life,” Clark said. “It is a book about forgiveness. I think the book had a lot of great, resonating things.” Clark plans to have her freshman son, who is transferring into the honors English course, read the book.

She acknowledged that not all ninth graders may be ready for the book, but decided her son is mature enough for the material. She also said other parents typically don’t

have that option when a book is assigned as mandatory summer reading.

Heather Campbell agreed. She likely would not have taken issue with *The Glass Castle*, if the district offered an alternative summer reading choice. Mohr said instructors cannot teach to multiple summer reading assignments once students return to class in the fall.

Mohr's committee in October decided to recommend the book's removal from the freshman curriculum, according to a memo she wrote to TCAPS Superintendent Steve Cousins. The Campbells don't think the recommendation to remove the book from ninth grade reading lists went far enough. Jeff Campbell called it a "minimalist action," in an email to Mohr.

Cousins replied in an email the district could not remove the book from the tenth and eleventh grade reading lists because it was not on those lists to begin with. "(Board Curriculum Committee members) have not recommended *The Glass Castle* for later on in high school," Cousins wrote. "I don't anticipate that they will." Reported in: *Traverse City Record-Eagle*, December 4.

### **Guilford County, North Carolina**

Parents of students in the Guilford County school system are protesting a book they say is sexually explicit, violently graphic and morally corrupt. Lisa Reid, the organizer of the protest, came across *The Handmaid's Tale*, by Margaret Atwood, while researching a note about "mature content" on some of her son's summer reading list.

"When I pulled up the summer reading assignment for my son and saw this label, it gave me pause," she said. Reid says she wants the book banned by Guilford County Schools. "I was not happy with what I found because I did not find anything inspirational, anything to help our young people," she explained.

*The Handmaid's Tale* is required reading for a Page High School International Baccalaureate class. It's also optional reading for AP reading courses at Grimsley High school.

"My issue is not only with specific books, my issue is that Guilford County sets standards," Reid said.

In just a month a couple thousand parents signed her petition against the book. Catherine Barnette, one of those parents, said she signed on to the petition because she was floored by the explicit details in the book. "It's extremely graphic and sexually explicit. There is a sex scene that involves three people."

Marcia Curtis and daughter Tracey Keaton said they are bothered by passages that seem to denigrate Christians and Christianity. "Why would you put books like that in front of children? Why do it?" she exclaimed.

The school district said none of estimated 2,200 parents who are protesting had formally brought their concerns to their attention. Jocelyn Becoats, the Chief Curriculum

Officer says if they had, their children could opt out of the reading.

"Obviously there's a major concern about this book," she said. "But what I would suggest that parents go through and follow the policy and procedure that's outlined in our district's policy."

Reid countered that the process set up to challenge a book doesn't work, and she prefers to have a larger discussion about the book selection process. The parents say they won't stop until they see change. Reported in: *digtriad.com*, October 25.

### **Grandview Heights, Ohio**

Any other year, students needed a signed form from their parents to read the book. If they got that, they would meet after school to discuss the novel with their teacher in small groups. But when a long-term substitute this year saw copies of the 1999 novel *The Perks of Being a Wallflower* on the classroom bookshelf, he figured it was a good fit for the freshman lesson on coming-of-age stories.

The whole class began reading it at Grandview Heights High School. And then came the emails.

"I am sickened by the pornographic details in this book," one parent wrote to a member of the school board, citing a two-page passage narrating a date-rape scene. "I think it would be a good book without those details."

Another parent sent the principal a similar message, saying it "haunts me" that 14-year-old students would read and visualize the book.

The book tells the tale of a high-school freshman who at first doesn't quite fit in. Written by author Stephen Chbosky, the book also deals with drugs, alcohol, sex, homosexuality and abuse.

"This is one of the books that has, honestly, the most reasons that people come up with for challenging it," said Angela Maycock, assistant director of the American Library Association's Office for Intellectual Freedom.

In response to the complaints in Grandview Heights, Superintendent Ed O'Reilly sent a letter to all parents of freshmen, saying he would revamp how the district approves reading lists. But students were far enough into the book that he let them read on.

That's when O'Reilly said things got a bit out of hand. Someone claiming to be an anonymous student — school officials think it was an adult — emailed parents, lamenting that "two parents could complain to the school board president and have the book banned."

"What's next? *Fahrenheit 451*?" the email said.

The same person started a Facebook page to spread the word against censorship. Parents threw in support. Then they sent more emails.

O'Reilly received more emails in support of the book than those opposed to it, and he explained that the school never

banned the book. Students are almost finished with it now.

"It's not a question of censorship, but what's appropriate for different grade levels," O'Reilly said. "We're not banning books. We're not in that business."

Many parents say early teens should read the book, even the parts dealing with date rape, drugs, alcohol, child abuse and suicide. "Unfortunately it is a part of life," parent Barbara Cheney said. "You can't shelter everyone from everything."

In fact, since 2010, state law has required schools to discuss dating violence as part of the curriculum. "Adolescents need to talk about things that sometimes make us uncomfortable," parent Sherry Daniel said.

O'Reilly agreed, but doesn't know whether those talks should be in English class, about that book. Next month administrators will create a rubric to help decide which books should be read and in what grade.

But will freshmen next year read the Chbosky book? He doesn't know. Reported in: *Columbus Dispatch*, December 5.

### **Emmaus, Pennsylvania**

East Penn school officials still have not completed their review of challenges to two books on the Emmaus High School summer reading list. "We are in step one of the process, and when that concludes I will let the [school] board know what the resolution is," Superintendent Thomas Seidenberger told school directors in late October.

Several parents complained about the content in Curtis Sittenfeld's *Prep* and Tom Wolfe's *The Electric Kool-Aid Acid Test*, and formal complaints brought by one parent prompted the school district review. Megan Slifka wants the school district to reconsider both books, saying that both have objectionable sexual content and that there is nothing good about either book.

Seidenberger said the district could come to a resolution either through an informal consultation and subsequent agreement that assuages the concerns, or it could form a committee for further investigation of the books in question. Seidenberger said an initial meeting with Slifka was "very positive."

Meanwhile, Seidenberger clarified previous information he discussed about previous book challenges, saying that while *Prep* had once been challenged that *The Electric Kool-Aid Acid Test* had not.

Following a 2011 complaint about *Prep*, a ten-person committee recommended that the book be removed from the Eyer Middle School library. At the time, the committee decided to keep *Prep* in the high school library and on a summer reading list for ninth grade students, but it recommended providing more information about the book for parents and students choosing whether to read the book.

Another book, *A Heartbreaking Work of Staggering Genius*, by Dave Eggers, was officially challenged in late 2008 and into 2009 due to references made to Jesus, as well

as concerns over language used in the memoir. The book has remained on the district's summer reading list.

Board President Charles Ballard said that for as long as the district has had a policy in place allowing for book challenges, there have only been two challenges including this most recent one against *Prep* and *The Electric Kool Aid Acid Test*.

*Prep*, the story of a girl from Indiana who goes to a boarding school in New England, is among several books on the summer reading list for general education and some students entering ninth grade. Wolfe's nonfiction account of author Ken Kesey's drug-induced bus journey across the country is on the tenth-grade list for general education and college-prep students. Reported in: *Morning Call*, October 25.

### **Austin, Texas**

Ten scheduled performances of "And Then Came Tango," a play based on the real-life story of two male Chinstrap penguins who raised a chick at New York's Central Park Zoo, have been canceled at Austin-based elementary schools, with some officials questioning the age-appropriateness of the subject matter.

"The subject matter communicated in the play is a topic that the [Austin Independent School District] believes should be examined by parents/guardians who will discuss with their elementary school age children at a time deemed appropriate by the parents/guardians," Greg Goodman, the fine arts director of the AISD, is quoted as saying.

Among those to praise the Austin Independent School District's decision was Jonathan Saenz, president of the conservative Texas Values group. "We define marriage very clearly in the state of Texas," he said. "So if you have a play that tries to push and promote a different marriage definition, which is clearly illegal, it leads students to ask questions about it, and it leads to the discussion of sex."

Still, playwright Emily Freeman, who is a graduate student in the theater department at the University of Texas, said "And Then Came Tango" simply extends "the definition of family...beyond normative representations."

Freeman added: "Family is an entire colony of penguins, a young girl and her single mom, a zookeeper and the animals he tends, and two male penguins and their adopted egg. As these family structures are threatened in the play, we learn the power of voicing your opinions and standing up for your beliefs, no matter how old you are." Reported in: [huffingtonpost.com](http://huffingtonpost.com), November 12.

## **student press**

### **Menasha, Minnesota**

Students and parents are upset at a Minnesota high school that won't let the school's yearbook include a

memorial page for a suicide victim or allow a senior to include her daughter in her senior picture.

Students and administrators at Menagha High School have been battling with two separate issues relating to content in the school's yearbook. The small town school's issues become public earlier this month after a student shared her frustration with a local TV station.

Students say administrators aren't listening to what they want to put in the yearbook; administrators say they've tried to make compromises. Parents of students involved brought the issue to the Menagha school board.

The issue began when Stephanie Myers approached the yearbook adviser and asked if her self-submitted photo could be with her daughter. She was turned down because the adviser said it would promote teen pregnancy, said Caroline Nickerson, Myers' aunt and guardian. At Myers' request, the adviser then asked the school principal and was told no, Myers said.

The yearbook doesn't have guidelines for what can or cannot be included in the self-submitted photo, said Tayler Simi, a sophomore on the yearbook staff. All seniors can submit a photo for inclusion. In the past, the school has allowed some photos with props, but never people or pets.

The senior photos are about the senior only, said Mary Klamm, the Menagha school district's superintendent. The school had a request for a picture of a student with a gun a few years back but did not allow it, she said.

After Myers told people that her photo wasn't allowed, students began expressing concern that a memorial page for their classmate who committed suicide wouldn't be included in the yearbook, either, Simi said. Kyle Kenyon committed suicide in January but would have been a senior this year.

The yearbook adviser told students in the yearbook class in the spring that there would not be a memorial page, Klamm said. Students in the yearbook class this semester wanted to discuss reconsidering that decision, but were afraid to bring it up, Simi said.

Simi and Myers originally planned a sit-in to protest the exclusion of Myers' photo and had about 50 to 100 students who were going to sit in the hallways, not talk and not go to class, Myers said. When the school heard about the planned protest, the principal called Simi and told her she would be suspended if the protest happened, Simi said.

Klamm said the students wouldn't have been suspended, but that they would have received unexcused absences and zeros on any work that would've been handed in that day.

After Simi and Myers cancelled the protest, another student decided to start a petition, the contents of which have been disputed. Klamm and Myers said the student-submitted petition was only about the teen mom's senior picture. Simi said she signed a piece of lined paper and was told the "petition" was only about the memorial page.

Some students came forward after the petition was

submitted and said they did not feel comfortable signing it, Klamm said. Because of that, the principal decided to keep the petition when the students asked for it back.

Some students were scared about having signed the petition because of a rumor that they would not be able to walk at graduation if they signed the petition, Simi said. Klamm said this was not the case and students would be allowed to walk. She didn't know where the rumor began, but said it didn't come from the school's administrators or teachers.

After the students' internal efforts failed, Simi said she decided to share their story publicly. She knew there was only a month before the deadline to get the memorial page and Myers' picture in the yearbook and decided to contact a local TV station on their Facebook page in order to get the student's voices heard.

After she posted on the page, Klamm called Simi's mother and said Simi would need to meet with the school counselor about Simi's statements to the station. Later, Simi's father was told that she would no longer be able to do the morning announcements because of "untruths" she told the TV station. The family says it was never told what was untrue.

Klamm said the school has honored Kenyon's memory and was still considering other ways to honor him without harming other students when the media got involved. The school said no to the idea of a memorial page because they did not want to promote suicide as a way for students to gain attention, she said.

One idea includes putting pictures of Kenyon in the senior slideshow shown at graduation every year, Klamm said. The school also offered counseling to students after Kenyon's death, and his class created a memory book themselves last spring with pictures and stories about Kenyon.

The senior class takes a picture outside every year to go in the yearbook. This year they took two, one of which was in front of Kenyon's truck. Klamm said the seniors can choose to use the picture in front of Kenyon's truck, but the truck will not be identified as his in the yearbook.

Many are still frustrated and feel that's not enough, said Patricia Samuelson, a parent of a high school student who was close to Kenyon.

"They want their voice to be heard, and they want to have a say in what's in their yearbook," Samuelson said. She believes not including a memorial page is disrespectful, and said parents decided to get involved because their students felt like they had no voice in the matter.

"Every child deserves to be remembered in the high school yearbook regardless of cause of death," she said. "This community and the administration seems to be in the dark as far as what's allowed or not allowed."

A mom of three high school students, Vernone Anderson, said she didn't think the school's reasoning was justified. "There shouldn't be an approved list of how to die," Anderson said. "Nobody wishes that he had committed

suicide and nobody wishes for it to ever happen again. We're not trying to glamorize it, we just want to use it as a learning experience, as a teaching tool."

The school's policy came from several sources of research that suggest memorializing a suicide could affect a child emotionally and this was the best practice, Klamm said. A crisis team developed the school district's crisis management plans last fall. The policy was never written down, but the group agreed not to memorialize suicides, she said. The school doesn't have a policy explaining what can or cannot be put in the yearbook.

Discussing suicide is healthy and important, said Adam Goldstein, an attorney with the Student Press Law Center. The school could hypothetically censor the memorial page though.

"When there isn't a policy in place, hypothetically you could censor content for any legitimate educational reason and hypothetically you could argue that freshman are too immature to handle suicide, but I don't think you could have a categorical subject veto on any topic," he said.

There is an appropriate way to handle any topic, Goldstein said. "If Sesame Street can explain to kindergartners the concept of death, then it is objectively untrue there is no pedagogically sound way to discuss suicide," Goldstein said.

There are potential legal ramifications with the school's policy, Goldstein said. In the 1988 Supreme Court ruling in *Hazelwood School District v. Kuhlmeier*, the court said schools could censor an official non-forum publication, as long as it was for legitimate educational reasons.

"But the word legitimate is an important part of that," Goldstein said. "So the school's core argument here seems to be, our legitimate educational reason is discussions about suicides of any nature encourage copycats."

Kenyon's mother planned to speak to the school board on behalf of the group of parents and students in support of the memorial page, Samuelson said. Samuelson said the group was considering presenting two Change.org petitions, one for Kenyon's memorial page and one for the Myers' picture.

Before the meeting, Klamm said the school plans to talk with the parents about alternatives. In Myers' case, she would be allowed to buy a senior memory space in the back of the book at either one-eighth or one-quarter of a page and include a picture of her daughter, Klamm said. Reported in: splc.org, October 19.

## university

### Boone, North Carolina

Jammie Price, a tenured professor of sociology at Appalachian State University, was suspended from teaching in March shortly after she showed a documentary

about pornography in class, spoke critically about the way colleges treat minority athletes, and announced that she was backing a campus protest that charged the university with failing to adequately investigate allegations of sexual assaults by athletes. Price was also ordered to agree to a two-year "professional development plan" related to the views of administrators that she had made the classroom hostile for some students, and in particular for athletes who complained about her.

In October, a faculty committee assigned to investigate the matter found that the university had violated Price's rights to due process and that imposing sanctions on her would violate her academic freedom. While the committee questioned Price's judgment in how she showed the documentary (not the choice of film itself), the panel said that she should not be required to submit to a two-year plan for change. On November 21, Chancellor Kenneth E. Peacock announced that he was rejecting the faculty review, and that he planned to order Price to agree to the development plan—a move that she believes gives her the choice of being punished for exercising her free speech in the classroom or risking dismissal.

Peacock also said that he rejected the faculty committee's findings that the suspension—lifted pending the faculty review—violated her due process rights.

Price faced a series of student complaints in the spring about her teaching in an introductory sociology course. Two athletes first complained that she had made comments that suggested hostility toward athletes. Price has maintained that they didn't understand her comments, which were about the way many colleges focus more on the athletic than the academic success of minority students. Further, she criticized a university investigation into sexual assault allegations involving athletes, Price said, stressing that she didn't comment on all athletes. The university responded to these complaints by moving the athletes into a separate section so they would not be taught by Price.

Then other students—and the mother of a student—complained that Price showed the documentary *The Price of Pleasure: Pornography, Sexuality and Relationships* in class. The film is a critical documentary about pornography, and has been used in many sociology courses, but it contains some footage that is more explicit than at least some of Price's students expected.

As detailed in the faculty committee's report, the complaints about the documentary prompted an administration investigation that found Price "appears to be consistently confrontational, belittling, angry, critical, and destructive of the potential for a valuable educational experience for her students. Whether or not students felt demeaned or harassed based on their race, sex, political affiliation, status as an athlete, or status as an Appalachian student, there is a

(continued on page 35)

## from the bench



## U.S. Supreme Court

The U.S. Supreme Court heard oral arguments October 29 in a key copyright-infringement case, with justices asking pointed questions about the resale and reuse of protected works. Many of the questions homed in on possible consequences for individual buyers as well as libraries and other institutions, but did not suggest which way the court was leaning.

The outcome of the lawsuit, *Kirtsaeng v. John Wiley & Sons* has significant implications for publishers, academic libraries, and almost anyone who resells, lends, or displays copyrighted material made and bought outside the United States. The case centers on a dispute over textbooks produced by Wiley for foreign markets but imported to the United States and resold without the publisher's permission.

Supap Kirtsaeng, a Thai national, came to study at Cornell University in 1997. As a student there and later at the University of Southern California, Kirtsaeng had family members and friends at home buy and send him textbooks, which he turned around and resold here. Wiley sued him in 2008 for copyright infringement. In his defense, Kirtsaeng invoked the first-sale doctrine. That pillar of U.S. copyright law holds that someone who buys a copyrighted work has the right to use or resell it without asking for permission. Used-book stores operate on this principle, for instance.

The justices heard arguments from both sides about whether the first-sale doctrine applies to foreign-made books and other works controlled by U.S. rights holders. The lawyers debated interpretations of Section 109 of the 1976 Copyright Act, which says the first-sale doctrine applies to copyrighted goods "lawfully made under this title."

Kirtsaeng's lead lawyer, E. Joshua Rosenkranz, told the

justices they faced "a stark choice" between two competing definitions of what "lawfully made" means. "We've got to first read what Congress wrote," he said, noting that "lawfully made under this title" could mean items manufactured abroad as well as in the United States.

Justice Ruth Bader Ginsburg responded that, according to his argument, goods sold anywhere should be subject to distribution control everywhere. That "runs against the distribution regime" that prevails around the world, she suggested.

Justice Elena Kagan took a notably active role in the questioning. She had recused herself in an earlier case, *Costco v. Omega*, in which the justices considered whether the first-sale doctrine applied to foreign-made works sold in the United States. The court split, 4 to 4, in that case, leaving intact a lower court's ruling but leaving the big question undecided.

Observers of *Kirtsaeng v. Wiley* look to Justice Kagan's vote to be pivotal this time. It was hard to tell from her questions, however, which way she might be leaning in the case. For instance, addressing the issue of how the phrase "lawfully made" should be interpreted, Justice Kagan told Wiley's lead lawyer, Theodore B. Olson, "I can kind of see it both ways."

Justice Stephen G. Breyer challenged the lawyers repeatedly about "all the horrors"—the worst-case scenarios laid out in briefs filed on behalf of Kirtsaeng by library and museum groups, booksellers, Internet companies, and others who resell, lend, or display works purchased elsewhere. Justice Breyer also wondered about individual people. Say a man picked up a book overseas and wanted to give it to his wife when he got home. Would that be illegal because the book had been imported without the permission of the copyright holder?

In an exchange with Olson, Justice Breyer asked about specific "horrors." Suppose "you are the lawyer for a university library, and your client comes to you and says, 'My God, I just read the Supreme Court opinion. It says that we can't start selling these old books or lending them,'" he told Olson. "What, as their lawyer, do you tell them?"

Olson replied that specific facts apply in each scenario and that "there are other defenses, including fair use," beyond the first-sale doctrine. When we're talking about Picassos in museum collections or books in suitcases, Olson replied, "we're not talking about this case." As for the worst-case scenarios, we've been talking about them for thirty years, he said.

Chief Justice John G. Roberts Jr. asked Olson whether any of the uses Justice Breyer had listed were fair use. "If your position is right," he told the lawyer, "it seems unlikely to me" that a court would say they counted as fair use.

Malcolm Stewart, deputy solicitor general, argued for the United States on behalf of Wiley. Justice Samuel A. Alito Jr. asked him which would be worse—having the market for copyrighted works broken up, as Wiley fears, or enabling the worst-case scenarios outlined by Kirtsaeng's

side. Stewart said the worst-case scenarios were more fearsome but had not come to pass. Wiley has argued all along that libraries and museums, among others, are protected by specific exemptions in copyright law for educational, scholarly, and personal use of copyrighted material made and purchased outside the United States.

A ruling in the case is expected by the end of the court's term, in June. Reported in: *Chronicle of Higher Education* online, October 29.

The Supreme Court has refused to overturn legal immunity for telecom carriers that allegedly participated with a U.S. National Security Agency surveillance program during the last decade.

The Court, without comment, declined October 9 to review a December 2011 appeals court decision upholding legal immunity for AT&T in its effort to assist the NSA to monitor telephone calls and Internet communications following the September 11, 2001, terrorist attacks on the U.S.

The Electronic Frontier Foundation filed the class-action lawsuit, *Hepting v. AT&T*, in 2006. Congress in 2008 gave telecom carriers legal immunity for participating in the NSA program, and the EFF appealed a June 2009 dismissal of the case to the Ninth Circuit Court of Appeals, but the appeals court let the immunity stand.

The EFF and other civil liberties groups accused AT&T of participating in an illegal surveillance program run by the NSA. Officials with former President George W. Bush's administration defended the program, saying it was necessary to fight terrorism.

"Evidence in the case includes undisputed evidence provided by former AT&T telecommunications technician Mark Klein showing AT&T has routed copies of Internet traffic to a secret room in San Francisco controlled by the NSA," the EFF said on an information page about the case.

EFF said it was disappointed in the Supreme Court's decision. The decision "lets the telecommunications companies off the hook for betraying their customers' trust and handing their communications and communications records to the NSA without a warrant," Cindy Cohn, EFF's legal director, said.

The EFF has another case, *Jewel v. NSA*, moving forward, Cohn noted. "The government still claims that this massive program of surveillance of Americans is a state secret, but after eleven years and multiple congressional reports, public admissions and media coverage, the only place that this program hasn't been seriously considered is in the courts—to determine whether it's legal or constitutional," she said. "We look forward to rectifying that." Reported in: *techhive.com*, October 10.

Just three weeks after the Court rejected the EFF's lawsuit, the justices took the historic step of hearing a related post-September 11 spying case

The Supreme Court entertained oral arguments October 29 in *Clapper v. Amnesty International* on whether it should

halt a legal challenge to a once-secret warrantless surveillance program targeting Americans' communications, a program that Congress eventually legalized in 2008.

The hearing marked the first time the Supreme Court has reviewed any case touching on the eavesdropping program that was secretly employed by the President George W. Bush administration in the wake of the September 11, 2001 terror attacks, and largely codified into law years later.

Judging by the high court's deference to Congress in general and how it killed the EFF spy case, warrantless spying is expected to continue unabated for years, and possibly forever.

University of Baltimore legal scholar Garrett Epps in an October 28 blog post in the *Atlantic* asked in a headline whether "Big Brother is the New Normal?"

"Whatever the court decides," Epps concluded, "Big Brother will still be watching. Big Brother may be watching you right now, and you may never know," he said. "Since 9/11, our national life has changed forever. Surveillance is the new normal."

Before the justices is the same law that immunized the telecommunications firms. This time, however, another section of the FISA Amendments Act is at issue. The act, subject to a challenge by the American Civil Liberties Union and others, authorizes the government to electronically eavesdrop on Americans' phone calls and e-mails without a probable-cause warrant so long as one of the parties to the communication is believed to be outside the United States. Communications may be intercepted "to acquire foreign intelligence information."

The FISA Amendments Act generally requires the Foreign Intelligence Surveillance Act Court, a secret tribunal set up in the wake of President Richard M. Nixon-era eavesdropping, to rubber-stamp terror-related electronic surveillance requests. The government does not have to identify the target or facility to be monitored. It can begin surveillance a week before making the request, and the surveillance can continue during the appeals process if, in a rare case, the secret FISA court rejects the surveillance application.

Yet none of these details are even before the Supreme Court. Instead, the fight is about something much simpler. The Obama administration argues that the ACLU and a host of other groups don't have the legal standing to even bring a challenge.

A lower court agreed, ruling the ACLU, Amnesty International, Global Fund for Women, Global Rights, Human Rights Watch, International Criminal Defence Attorneys Association, *The Nation* magazine, PEN American Center, Service Employees International Union and other plaintiffs did not have standing to bring the case because they could not demonstrate that they were subject to the eavesdropping.

The groups appealed to the U.S. Court of Appeals for the Second Circuit, arguing that they often work with overseas

dissidents who might be targets of the National Security Agency program. Instead of speaking with those people on the phone or through e-mails, the groups asserted that they have had to make expensive overseas trips in a bid to maintain attorney-client confidentiality. The plaintiffs, some of them journalists, also claim the 2008 legislation chills their speech, and violates their Fourth Amendment privacy rights.

Without ruling on the merits of the case, the appeals court agreed with the plaintiffs last year that they have ample reason to fear the surveillance program, and thus have legal standing to pursue their claim.

That's what this case before the justices is all about, whether a lawsuit can be brought at all. The courts are years away, if ever, of entertaining the constitutional merits of the law in question. So the spying will continue unabated no matter how the Supreme Court decides.

The spying law expires at the end of the year, if Congress fails to re-authorize it. But that's not likely to happen. "It's conventional wisdom that they are going to re-authorize," Alex Abdo, an ACLU attorney who argued before the justices October 29.

The House and a Senate committee have approved competing bills that renew the spy powers for between three and five years. But on the Senate side, Sen. Ron Wyden (D-OR) has stepped in to stop the bill because the government refuses to say how often the spy powers are being used to spy on Americans. Wyden asked the Obama administration a year ago for that information.

The administration replied that it was "not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the FAA."

Wyden has barred the Senate from a routine vote using a little-used legislative power—called a hold—to block lawmakers from taking a procedural consent vote. Instead, he demands a floor debate that can draw out the approval process indefinitely via the filibuster.

But not even Wyden's opposition is likely to prevent renewal of the legislation. A Wyden spokeswoman has said the senator would be willing to agree to a "short term" extension of the measure, instead of seeing the spy powers lapse, in a bid to give lawmakers more time to reach a deal.

Even if the justices side with the ACLU, that does not necessarily mean the constitutionality of the FISA Amendments Act would be litigated—ever. The lawsuit would return to New York federal court, where the Obama administration likely would play its trump card: an assertion of the powerful state secrets privilege that lets the executive branch effectively kill lawsuits by claiming they threaten to expose national security secrets.

The courts tend to defer to such claims. But in a rare exception in 2008, a San Francisco federal judge refused to throw out a wiretapping lawsuit against AT&T under the state

secrets privilege. The AT&T lawsuit was later killed anyway.

The government accidentally sent two American attorneys for an Islamic group called Al-Haramain proof they'd been spied on—it was ruled inadmissible. They then proved using open source info that the government spied on them without warrants, and won a small amount of money and lawyers fees. An appeals court then tossed that verdict, saying that the wiretapping law as designed by Congress doesn't actually let citizens sue the government for damages for violating the law. Reported in: wired.com, October 29.

The U.S. Supreme Court declined November 26 to hear an appeal of a controversial Illinois law prohibiting people from recording police officers on the job.

By passing on the issue, the justices left in place a federal appeals court ruling that found that the state's anti-eavesdropping law violates free-speech rights when used against people who audiotape police officers. A temporary injunction issued after that June ruling effectively barred Cook County State's Attorney Anita Alvarez from prosecuting anyone under the current statute.

Immediately following the high court ruling, the American Civil Liberties Union, which brought the lawsuit against Alvarez, asked a federal judge hearing the case to make the injunction permanent, said Harvey Grossman, legal director of the ACLU of Illinois.

Grossman said he expected that a permanent injunction would set a precedent across Illinois that effectively cripples enforcement of the law. Alvarez's office will be given a deadline to respond to the ACLU request, but Sally Daly, a spokeswoman for Alvarez, said a high court ruling in the case could have provided "prosecutors across Illinois with legal clarification and guidance with respect to the constitutionality and enforcement" of the statute.

Illinois' eavesdropping law is one of the harshest in the country, making audio recording of a law enforcement officer—even while on duty and in public—a felony punishable by up to fifteen years in prison.

Public debate over the law had been simmering since last year. In August 2011, a Cook County jury acquitted a woman who had been charged with recording Chicago police internal affairs investigators she believed were trying to dissuade her from filing a sexual harassment complaint against a patrol officer.

Judges in Cook and Crawford counties later declared the law unconstitutional, and the McLean County state's attorney cited flaws in the law when he dropped charges in February against a man accused of recording an officer during a traffic stop.

Alvarez argued that allowing the recording of police would discourage civilians from speaking candidly to officers and could cause problems securing crime scenes or conducting sensitive investigations. But a federal appeals panel ruled that the law "restricts far more speech than necessary to protect legitimate privacy interests." Reported in:

*Chicago Tribune*, November 26.

Two researchers who were involved in interviewing former combatants in the Irish Troubles for a Boston College oral history project have won a stay of a federal appeals court order that one of the interviews should be turned over to the British government.

Supreme Court Justice Stephen Breyer ruled October 17 that the order from the U.S. Court of Appeals for the First Circuit in Boston should be stayed, while the researchers prepare a writ of certiorari, seeking a Supreme Court hearing of their case. Breyer set a deadline for the request of November 16.

The order was stayed until then. It will also be stayed while the court considers the researchers' request. If the court doesn't agree to hear their case, the stay will expire. If the court agrees to hear their case, then the order will be stayed until the court issues a ruling on the case, Breyer's order said.

Ed Moloney and Anthony McIntyre vowed in August that they would take their case to the Supreme Court after the Boston appeals court decided not to rehear—or have the full court hear—the case. A three-judge panel of the appeals court had previously rejected their appeal in July.

The Supreme Court order was “significant in the sense that it keeps alive the chance of getting Supreme Court review. ... At least they're alive to fight another day. That's really what it says,” said Jonathan Albano, one of the attorneys representing Moloney and McIntyre.

On behalf of unidentified law enforcement officials in the United Kingdom, federal prosecutors have issued subpoenas seeking information related to a 1972 slaying in which the Irish Republican Army has admitted involvement. The subpoenas were issued under a Mutual Legal Assistance Treaty between the United States and Britain.

But the Belfast Project, the goal of which was to document the Troubles, a decades-long period of violence, promised both Irish republican and British loyalist former combatants that their statements would not be released until their deaths. The project began in 2001 and interviews were recorded between 2001 and 2006.

The order by Breyer blocked a subpoena for an interview with former IRA member Dolours Price. Boston College, meanwhile, continues a separate legal battle in appeals court over a second set of subpoenas seeking other interviews, said Albano. Albano said Moloney and McIntyre want the right to object to both sets of subpoenas. Reported in: *Boston Globe*, October 17.

## libraries

### New York, New York

Academic libraries' indexing of digitized works counts as fair use. So declared the federal judge overseeing a major copyright-infringement lawsuit brought in 2011 by the Authors Guild against the HathiTrust digital repository and

its university partners.

At stake was the uses the libraries could make of millions of scanned books. “I cannot imagine a definition of fair use that would not encompass the transformative uses” made by the defendants, Judge Harold Baer, of the U.S. District Court in New York, wrote in a ruling issued October 10.

James Grimmelmann, a professor of law at New York Law School, observed on his blog, *The Laboratorium*: “The opinion doesn't even make it seem like a close case. On every substantive copyright issue, HathiTrust won.”

Judge Baer's key holding was: “I cannot imagine a definition of fair use that would not encompass the transformative uses made by [HDL] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.”

Judge Baer's ruling not only allows HathiTrust to continue serving scholars and the print disabled, but it also provides helpful guidance on how future library services can comply with copyright law.

The HathiTrust Digital Library is operated by a consortium of universities, including the University of Michigan, the University of California, the University of Wisconsin, Indiana University, and Cornell University. Many of the ten million digital volumes in HDL were provided by Google in exchange for the universities' allowing Google to scan books in their collections for the Google Library Project. The Library Project is the subject of two separate cases, one of which settled last Fall (see *Newsletter*, November 2012, p. 233).

HDL is used in three ways: full-text searches; preservation; and access for people with print disabilities. HathiTrust was sued by the Authors Guild (AG) and several other authors' associations in 2011.

Judge Baer cited the two amicus briefs that the Library Copyright Alliance (LCA), which includes the American Library Association, filed in the case. First, when rejecting the Authors Guild's contention that the library exceptions in section 108 somehow limit the fair use privilege in section 107, Judge Baer stated that the LCA brief “further convince[s] me that fair use is available as a defense for the Defendants.” Then, when balancing the fair use factors, Judge Baer observed that the LCA brief “further confirm[s] that the underlying rationale of copyright law is enhanced” by the HDL.

Judge Baer made numerous holdings:

- An association does not have standing under the Copyright Act to bring infringement suits on behalf of its members.
- As noted above, the library specific exceptions in section 108 do not restrict the availability to libraries of fair use under section 107.
- The creation of a search index is a transformative use

under the first fair use factor: “The use to which the works in HDL are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material.”

- The use of digital copies to facilitate access for the print-disabled is also transformative. Because print-disabled persons are not a significant potential market for publishers, providing them with access is not the intended use of the original work.
- The Guild failed to show that HDL created any security risks that threatened its market.
- The Guild’s suggestion that HDL undermines existing and emerging licensing opportunities is “conjecture.”
- The goals of copyright to promote the progress of science are better served by allowing HDL’s use than by preventing it.
- The University of Michigan is an authorized entity under the Chafee Amendment, because it has “a primary mission” to provide access for print-disabled individuals.
- The Americans with Disabilities Act “requires that libraries of educational institutions . . . reproduce and distribute their collections to print-disabled individuals.”

The decision came on the heels of a similarly disappointing decision for copyright holders in a landmark infringement case involving electronic reserves at libraries in Georgia State University (see *Newsletter*, July 2012, p. 166); and a second defeat in another copyright case involving online video streaming at the University of California at Los Angeles (see page 20).

Last May three academic presses, acting as proxies for the Association of American Publishers and the Copyright Clearance Center, saw 95 percent of their infringement claims against Georgia State dismissed by a circuit court judge, although the publishers plan to appeal. And the Association for Information and Media Equipment, a trade group representing educational film companies, had a lawsuit against UCLA over unlicensed video streaming thrown out for a second time.

Peter Decherney, an associate professor of cinema studies, English, and communication at the University of Pennsylvania, said that taken together the three cases mark an historic moment for the definition of fair use in a world where educational materials are increasingly digital.

Decherney, an historian of copyright litigation, said that the HathiTrust, Georgia State and UCLA cases do not quite have the historic significance of the so-called “Betamax case” of 1984, which essentially made it legal to tape television programs and which Decherney called the “Magna Carta” of the analog era. Nevertheless they do “signal a real shift in attitudes about fair use in the digital age,” said Decherney.

“I think at some point these [cases] will be considered a

similar landmark and watershed,” he said.

The Michigan library formed the HathiTrust with several other universities after Google scanned their print books and left them with a collection of digital copies. The guild sued HathiTrust and its partners, objecting to the libraries’ decision to make limited use of its holdings—such as making digital book copies available to disabled students and allowing researchers to search the full digital texts for keywords—without paying for permission. Authors and publishers said such practices would essentially deprive them of potential sales.

Protecting the rights of disabled students appeared to play a crucial role in the judge’s decision. He praised the defense’s articulation of the plight of blind scholars as “eloquent” while dismissing the plaintiffs’ emphasis that only 32 disabled students had actually used the HathiTrust—perhaps not enough to justify the maintenance of ten million unlicensed digital copies.

“This argument overlooks the fact that it is minorities such as this that Congress sought to protect through enactments like the ADA,” wrote Baer. The process of providing a disabled student with a digital copy that can be easily read by assistive software is much less arduous and time-consuming than procuring a hacked-and-scanned copy through a university’s office for disabled student services, he said.

The judge’s other key opinion was that using the digital copies to power a discovery tool that queries the full texts of all the works in the database was sufficiently “transformative” as to qualify it for exemption under the fair use provision. Reported in: *ALA Washington Office District Dispatch*, October 10; *Chronicle of Higher Education* online, October 10; *insidehighered.com*, October 12.

## **schools**

### **Lee’s Summit, Missouri**

The U.S. Court of Appeals for the Eighth Circuit has found that students who built a website with provocative content are not protected by the First Amendment and can be punished for their postings. A three-judge panel found that the students’ site contained sexist and racist comments that led to disruptive behavior at their high school in Lee’s Summit.

Steven and Sean Wilson created a website called NorthPress in 2011, offering commentary about Lee’s Summit North High School. Though they claimed the site was intended to be viewed by just a handful of friends, word spread, and the boys were suspended.

In 1969, the U.S. Supreme Court found in *Tinker v. Des Moines Independent Community School District* that though students have free speech rights in public schools, there is no protection for speech that could potentially cause a “substantial disruption.”

The Wilsons' case is noteworthy because it involves off-campus speech. The appellate court concluded that the Tinker guidelines applied because the brothers intended that NorthPress be read by students. In concluding that the Wilsons could be punished, Judge Michael Malloy noted "the location from which the Wilsons spoke may be less important than the district court's finding; that the posts were directed at Lee Summit North."

Other federal courts have grappled with similar issues. In decisions concerning off-campus speech in the Second and Fourth circuits, courts found sufficient disruption to rule in favor of public schools. A Third Circuit case found in favor of a student because there was no evidence of substantial disruption.

It was little surprise, then, that the Eighth Circuit also based its decision on a finding of substantial disruption. In fact, two teachers had testified that the posts had created the most disruptive day they had ever seen in their teaching careers. A court will give that kind of testimony significant weight.

But in an age when social media and digital distribution are key elements of news reporting, such situations raise the question of whether a student journalist could be punished for posting accurate negative reports about his public school.

How about a highly critical but civilly worded critique of a principal? What about an accurate report about a teacher's inappropriate off-campus conduct? The content would be directed at a school and would certainly create a potentially disruptive buzz, but that kind of reporting would also be consistent with a free press' role in monitoring public officials. Current case law suggests that the student could nonetheless be punished.

Often these cases set a low bar for "substantial disruption." These cases almost never involve violence, just concerns about an overly loud or distracted student body. Similarly, analyses of the offending student speech zero in on the profane or insulting, with very little consideration of the publication as a whole. Reported in: [firstamendment-center.org](http://firstamendment-center.org), October 18.

## universities

### Los Angeles, California

A federal judge in California has for the second time thrown out a lawsuit that accused the University of California at Los Angeles of violating copyright law by streaming videos online.

Judge Consuelo B. Marshall of the U.S. District Court in Los Angeles had previously dismissed the lawsuit in October 2011, but she allowed the plaintiffs, Ambrose Video Publishing Inc. and the Association for Information Media and Equipment, a trade group, to file a second amended complaint. In a ruling issued November 20 she rejected the second amended complaint.

The plaintiffs contended that UCLA had acted illegally in copying DVD's of Shakespeare plays acquired from Ambrose and streaming them online for faculty and students to use in courses. UCLA argued that streaming the videos was permissible under the fair-use principle, which can allow reproductions for teaching, and the Teach Act, which allows limited use of copyrighted materials for online education.

In her ruling, Judge Marshall said the plaintiffs had failed to provide adequate support for their infringement claim. The ruling hinges largely on findings that the plaintiffs lacked standing and that the defendants had sovereign or qualified immunity. But in a section of the ruling, Judge Marshall also considered four factors relating to the fair-use arguments.

One of those factors weighed in favor of not finding fair use, she wrote, "because the entire works were streamed, not just portions." But, on balance, she wrote, "the court concludes that there is, at a minimum, ambiguity as to whether defendants' streaming constitutes fair use." She added: "Notably, no court has considered whether streaming videos only to students enrolled in a class constitutes fair use, which reinforces the ambiguity of the law in this area."

A lawyer for the defendants, who include the Regents of the University of California and several individuals, said the ruling was "a complete victory." The lawyer, R. James Slaughter, said the ruling "confirms what UCLA has long believed: that streaming previously purchased video content over its intranet for educational purposes is not a copyright violation or a violation of any contract." Reported in: *Chronicle of Higher Education* online, November 26.

### Eugene, Oregon

A sharply divided federal appeals court refused October 18 to reconsider a March ruling that revived a lawsuit by a former graduate student against the University of Oregon. And the dissenting judges on the appeals court say that the refusal could endanger academic freedom and leave faculty members vulnerable to litigious graduate students.

The lawsuit charges that the university illegally retaliated against the graduate student after she complained of gender discrimination against female doctoral students in her program. The merits of the case have not been argued, but the full U.S. Court of Appeals for the Ninth Circuit refused to rehear the March decision by a three-judge panel of the court to keep the lawsuit alive.

The seven dissenting judges of the full appeals court said the three-judge panel's ruling was dangerous because it set too low a bar in terms of evidence that the plaintiff had to present to prevent a dismissal of the suit. Further, the dissenting judges said that the decision essentially treated the graduate student and her dissertation adviser

as any other employee and employer. And the dissenting judges said that this failed to recognize important characteristics of higher education, and graduate school in particular.

In cases where an appeals court declines to hear an appeal, there isn't necessarily a full statement of the rationale—and the court of appeals majority simply stated a motion to reconsider the panel's ruling failed to attract a majority of the non-recused judges. The dissent, in contrast, was a full argument about the case.

The case dates to the collapse of Monica Emeldi's Ph.D. ambitions at Oregon in 2007. Her original dissertation adviser went on a sabbatical and recommended another faculty member to serve in his place. Emeldi then had disagreements with her new adviser, and also complained to the university about the treatment of female graduate students. She was unable to finish her dissertation when her new adviser withdrew from that role, and fifteen other faculty members turned down her requests to take his place.

Emeldi's lawsuit maintains that she lost her chance at completing her dissertation when she couldn't assemble a committee—and that she was turned down in retaliation for her complaints about the treatment of female graduate students. The university has maintained that faculty members didn't retaliate and had legitimate disagreements with her about her work. Further, Oregon maintains that there were two faculty members who were willing to serve on a dissertation committee—and had appropriate levels of expertise—who weren't approached by Emeldi.

The three-judge panel's ruling in March (which was on a 2-to-1 vote) noted that the university might well win the case in a full trial. The decision said that Emeldi's theories were based on "ample circumstantial evidence" of causation between her complaints and the subsequent rebuffs she received from faculty members.

But it went on to say that the university had evidence—backed by e-mail trails—to back its version of events. Further, the decision said that some of Emeldi's statement had been "inconsistent," and that she had admitted in a deposition that some of her thoughts on the case amounted to her "speculating." Still, however, the two judges in that majority decision said that there was enough evidence from Emeldi to justify letting a jury decide.

In dissent, the seven justices who wanted to hear the case said that keeping the lawsuit alive "jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors. Plaintiffs will now cite Emeldi in droves to fight off summary judgment: We may not have any evidence, but it's enough under Emeldi. Defendants will go straight to trial or their checkbooks—because summary judgment will be out of reach in the Ninth Circuit."

And the dissent said that was particularly a problem in the context of graduate education. "The relationship

between professor and Ph.D. student requires both parties to engage in candid, searing analysis of each other and each other's ideas. Methodology, philosophy and personality often lead to intractable disputes and, when they do, the professor must be free to walk away without fear of a frivolous discrimination suit," the dissent said.

"[T]he panel overlooks the critical differences between academia and the outside world. It applies the law so loosely that one of the laxest interpretations of the pleading standard is now planted squarely in academia, just where the pleading standard should be highest," the dissent added. "If this ill-considered precedent stands, professors will have to think twice before giving honest evaluations of their students for fear that disgruntled students may haul them into court. This is a loss for professors and students and for society, which depends on their creative ferment."

Ada Meloy, general counsel for the American Council on Education, said that "I agree with the dissenters who object to proceeding to trial in this case, and agree that it will be very harmful if such attenuated cases in the graduate school context are forced to go to trial—or to be settled."

Randy Geller, general counsel of the University of Oregon, said "We will evaluate the decision, including the dissent signed by seven Ninth Circuit judges, and determine whether to seek additional appellate review." Reported in: [insidehighered.com](http://insidehighered.com), October 18.

## church and state

### Santa Monica, California

A Los Angeles federal judge has dismissed a Christian group's lawsuit to force suburban Santa Monica to reopen spaces in a city park to private displays, including Christmas nativity scenes. U.S. District Court Judge Audrey Collins issued her ruling November 29 after earlier denying an injunction sought by the Santa Monica Nativity Scenes Committee.

Christmastime nativity scenes had been erected in Palisades Park for decades. Last year, atheists overwhelmed the city's auction process for display sites, winning 18 of 21 slots and triggering a bitter dispute. The city then banned private, unattended displays at the park.

An attorney for the group said he plans to appeal the ruling. Reported in: *San Francisco Chronicle*, November 30.

## Internet

### San Diego, California

A teenager who was put on probation for molesting a 2-year-old, and restraining a 13-year-old, still can't have his rights to use social media taken away, a California state appeals court ruled.

The 15-year-old defendant, whose first name is given as Andre, was found guilty of holding the 13-year-old's arms while he ground his pelvis against her; and of touching the toddler's genitals. He was put on parole with a variety of conditions, including some relating to his use of computers.

Some of those computer-related conditions were unconstitutional, however, a panel of appeals court judges ruled in November. Andre's probation would have prohibited all computer use "unless supervised by a responsible adult over the age of 21 who is aware that the minor is on probation and of his charges." He was also banned from using "a computer for any purpose other than school related assignments," had to always be supervised while using a computer, and was barred from using Twitter or having "a MySpace page, a Facebook page, or any other similar page."

Those restrictions went too far, wrote the appeals judge. Andre still has a First Amendment right to use the Internet; and any restrictions on his use have to be tailored to the crime—and his crimes had nothing to do with the Internet at all. "Absent any connection between Andre's criminal history and the blanket Internet ban, there is no support for the People's claim that it is properly related to future criminality." The trial court was ordered to modify the terms of probation, especially regarding use of social media and the blanket computer ban. Reported in: arstechnica.com, November 8.

### **San Francisco, California**

On November 6, voters in California overwhelmingly approved Proposition 35, which ratcheted up penalties for those convicted of sex crimes, including human trafficking. The proposition included a provision requiring registered sex offenders to disclose to law enforcement all of their Internet connections and online identities.

On November 7, two of the 73,900 registered sex offenders in the state who would be affected by the law filed a lawsuit in San Francisco challenging the constitutionality of these provisions. The two plaintiffs argued that forcing them to expose their online identities would violate their First Amendment right to speak anonymously. Their appeal is supported by the American Civil Liberties Union of Northern California and the Electronic Frontier Foundation.

Later that day Judge Thelton Henderson granted a temporary restraining order barring the law from going into effect until he had time to consider the plaintiffs' constitutional arguments.

The two plaintiffs filed their lawsuit anonymously. One is a 75-year-old Alameda resident who committed a crime in 1986 that did not involve computers or the Internet. For more than a decade, he "operated two websites that provided sex offenders with information about registration requirements and recovery resources." It "provided an

anonymous online forum for sex offenders to discuss their recovery with other sex offenders."

The second plaintiff was convicted of two offenses in 1993—again having nothing to do with the Internet. He "anonymously maintains [a] blog that discusses matters of public concern." He has fled the state to avoid being subject to the Internet-related provisions of Proposition 35.

Both plaintiffs argue that their ability to express themselves candidly online would be undermined if they were compelled to disclose their online identities to law enforcement. They contend that the proposition approved by California voters is "overbroad because it criminalizes constitutionally protected anonymous speech but is not narrowly tailored because it restricts far too much anonymous speech by too many speakers, and allows the information to be used for too many purposes." That, they argue, violates the First Amendment because sex offenders could be prevented from engaging in anonymous online communication "even if it pertains to news, politics, and professional activity, and could not possibly be used to commit a crime."

Additionally, they argue that the law is "impossibly vague" because it leaves it unclear whether it applies to, for example, "connecting to a wireless network at a coffee shop or hotel, renting a car equipped with an Internet-connected navigation system, creating an account on a new service with the same user name as that used on a different service, or buying something from an online retailer that allows customer reviews, such as Amazon.com." The ACLU points out that the First Amendment requires restrictions on speech to be clearly defined.

Most importantly, the plaintiffs contend that the proposition "violates registrants' associational rights by potentially compelling disclosure of their participation in online forums organized by political and other groups and by compelling disclosure of the identity of other registrants with whom they discuss political issues."

"The Court finds that Plaintiffs have raised serious questions about whether the challenged sections of [Proposition 35] violate their First Amendment right to free speech and other constitutional rights," wrote Judge Henderson in his November 7 order. He put the measure on hold while the plaintiffs and the State of California prepare their arguments about its constitutionality. Reported in: arstechnica.com, November 8.

## **privacy**

### **San Francisco, California**

A federal judge has ordered the Justice Department to disclose more information about its so-called "Going Dark" program, an initiative to extend its ability to wiretap virtually all forms of electronic communications.

The ruling by U.S. District Court Judge Richard Seeborg of San Francisco concerns the Communications Assistance for Law Enforcement Act, or CALEA. Passed in 1994, the law initially ordered phone companies to make their systems conform to a wiretap standard for real-time surveillance. The Federal Communications Commission extended CALEA in 2005 to apply to broadband providers like ISPs and colleges, but services like Google Talk, Skype or Facebook and encrypted enterprise Blackberry communications are not covered.

The FBI has long clamored that these other communication services would become havens for criminals and that the feds would be left unable to surveil them, even though documents show that the FBI's wiretapping system is robust and advanced.

Little is known about the "Going Dark" program, though the FBI's 2011 proposal to require backdoors in encryption found no backers in the White House. The FBI has never publicly reported a single instance in the last five years where encryption has prevented them from getting at the plaintext of messages.

The Electronic Frontier Foundation sought information about the "Going Dark" program, via a Freedom of Information Act claim with the Justice Department, amid concerns that the Federal Bureau of Investigation is trying to expand backdoors into these and other services. Law enforcement officials privately complain they are running into cases where criminals are using online communication tools that aren't wiretap-able in real-time, because the provider had not built in that capability or was not required to build the backdoor.

Among other things, the FOIA claims sought documents concerning "any communications or discussions with the operators of communications systems or networks (including, but not limited to, those providing encrypted communications, social networking, and peer-to-peer messaging services), or with equipment manufacturers and vendors, concerning technical difficulties the DOJ has encountered in conducting authorized electronic surveillance."

The government, however, has withheld the bulk of relevant information on the topic, a move the judge said was wrong. The government claimed the material it did not forward to the EFF—some 2,000 pages in all—was "non-responsive" or outside the scope of what the EFF was seeking.

Seeborg was not buying it.

"The government is directed to conduct a further review of the materials previously withheld as non-responsive. In conducting such review, the presumption should be that information located on the same page, or in close proximity to undisputedly responsive material is likely to qualify as information that in 'any sense sheds light on, amplifies, or enlarges upon' the plainly responsive material, and that it should therefore be produced, absent an applicable exemption," he wrote.

Jennifer Lynch, an EFF attorney on the case, said the documents the government did turn over don't say much at all. "I don't think they provide much information that we don't already know," she said. "We know the Justice Department and especially the FBI say they can't get access to data they are entitled to under electronic surveillance laws because some providers are not forced to comply with CALEA."

Judge Seeborg did not set a timeline for the government to comply. Reported in: [wired.com](http://wired.com), November 2.

### Charleston, South Carolina

In a case decided October 10, the South Carolina Supreme Court ruled that accessing someone's online e-mail without their permission doesn't violate the 1986-era Stored Communications Act (SCA). Though they differed in their reasoning, the justices were unanimous in ruling that e-mail stored in the cloud (like Gmail or Yahoo Mail) does not meet the definition of electronic storage as written in the statute.

This new decision creates a split with existing case law (*Theofel v. Farey-Jones*) as decided in a 2004 case decided by the U.S. Court of Appeals for the Ninth Circuit. That decision found that an e-mail message that was received, read, and left on a server (rather than being deleted) did constitute storage "for purposes of backup protection," and therefore was also defined as being kept in "electronic storage."

Legal scholars point to this judicial split as yet another reason why the Supreme Court (and/or Congress) should take up the issue of the Stored Communications Act.

"This [South Carolina] decision is more evidence of how intractable and inconsistent our statutory electronic surveillance regime has become," Woodrow Hartzog, a professor at the Cumberland School of Law at Samford University, said. "All of the discussions regarding backups, temporary copies, and the read/unread distinction seem to have very little to do with the way that most people perceive their use of e-mail. Ultimately, this problem is likely best resolved by the legislature, but the specifics of a politically palatable update to the SCA have yet to be fully agreed upon."

Hertzog pointed out though, that in a case like this, there could still be federal liability under the Computer Fraud and Abuse Act.

Under the SCA, police can go after anyone's e-mail so long as its deemed to be "relevant to an investigation," which is a low legal threshold. The logic, at the time, was that prior to webmail with large amounts of online storage, everyone had to download their e-mail—so, if you hadn't bothered to actually download your e-mail, it was deemed to have been effectively abandoned.

The South Carolina case, known as *Jennings v. Jennings*,

involves a woman (Gail Jennings) who suspected her husband (Lee Jennings) was cheating on her. The wife's daughter-in-law (Holly Broome) managed to access Lee's e-mail by correctly guessing his security questions, and obtained messages between him and his paramour. Broome shared those messages with Gail's divorce attorney, and her private investigator that she had hired for the purpose of advancing her own divorce case.

Lee Jennings sued his wife, her attorney, and her investigator, under several laws, including the Stored Communications Act, which only allows for a civil suit if the e-mails that were accessed without authorization were in "electronic storage."

The district court granted summary judgment in favor of the defendants on all claims—a decision that was then overturned on appeal. The Supreme Court of South Carolina has now reversed that decision, albeit for varying reasons.

The United States Code defines "electronic storage" under the SCA as: "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for the purposes of backup protection of such communication."

Because the definition of "electronic storage" has two components, the storage clause (A), and a purpose clause (B), Justices Hearn and Kittredge found that because Jennings had no other copies of his e-mail (they only existed through the Yahoo e-mail online interface), they could not have possibly been a backup.

"We decline to hold that retaining an opened e-mail constitutes storing it for backup protection under the Act," the two judges wrote. "The ordinary meaning of the word 'backup' is 'one that serves as a substitute or support.' Thus, Congress's use of 'backup' necessarily presupposes the existence of another copy to which this e-mail would serve as a substitute or support. We see no reason to deviate from the plain, everyday meaning of the word 'backup,' and conclude that as the single copy of the communication, Jennings' e-mails could not have been stored for backup protection."

Chief Justice Jean Hoefler Toal, with Justice Donald Beatty concurring, ruled that the e-mails were not a backup, because they were not created by the ISP for the purpose of actually creating a duplicate file. "In my view, electronic storage refers only to temporary storage, made in the course of transmission, by an ECS provider, and to backups of such intermediate communications," Justice Toal wrote. "Under this interpretation, if an e-mail has been received by a recipient's service provider but has not yet been opened by the recipient, it is in electronic storage."

The fifth justice, Costa Pleicones, agreed in his opinion. However, he articulated a distinct definition between the

relationships of the two clauses in question here. "I view these two types of storage as necessarily distinct from one another: one is temporary and incidental to transmission; the other is a secondary copy created for backup purposes by the service provider," he wrote.

"Therefore, an e-mail is protected if it falls under the definition of either subsection (A) or (B). It does not end the inquiry to find that the e-mails at issue were not in temporary storage during the course of transmission (subsection (A)). Accordingly, because the e-mails in this case were also not copies made by Jennings's service provider for purposes of backup (subsection (B)), they were not protected by the SCA. I therefore concur in result."

While this case deals with a fairly narrow subsection of the SCA—what constitutes electronic storage—it's yet another example that the Stored Communications Act needs more judicial review at the very least, and possibly an entire overhaul.

"This is an issue that really calls out for U.S. Supreme Court review," writes Orin Kerr, a privacy expert and professor of law at George Washington University. "Internet providers often have a national customer base. A provider in one state or circuit can have millions of customers in any other state or circuit. Given the national customer base, any disagreement among lower courts causes major headaches: ISPs don't know which rule to follow. Making matters even more worrisome, it's not at all clear whether the legal standard should be based on where the litigation arises or where the ISP is located. *United States v. Weaver*, nicely raised the problem: If the rights concerning records held by an ISP in California are litigated in Illinois, *Weaver* held, the Illinois court is not bound by the interpretation of the Ninth Circuit. Under that approach, the privacy protection varies based on where the litigation arises, which can be almost anywhere. That kind of dynamic creates a strong need for a uniform reading of the statute." Reported in: arstechnica.com, October 11.

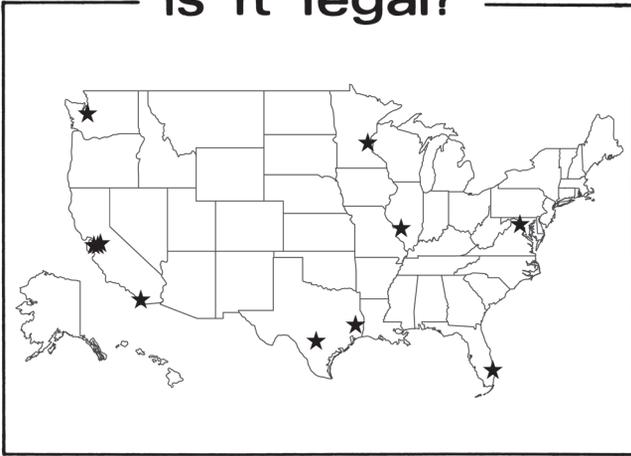
### **Corpus Christi, Texas**

A judge in Corpus Christi is raising questions about whether investigators are giving courts enough details on technological tools that let them get data on all the cellphones in an area, including those of innocent people. In two cases, Magistrate Judge Brian Owsley rejected federal requests to allow the warrantless use of "stingrays" and "cell tower dumps," two different tools that are used for cellphone tracking. The judge said the government should apply for warrants in the cases, but the attorneys had instead applied for lesser court orders.

Among the judge's biggest concerns: that the agents and U.S. attorneys making the requests didn't provide details on

*(continued on page 37)*

## is it legal?



### **schools**

#### **Granite City, Illinois**

Ten students were suspended from a southern Illinois high school in October because of their tweets. The disciplinary action raises significant questions about how much student speech a public school can control.

The initial suspensions stemmed from a single tweet from a student in Granite City who used a crude acronym to describe the sexual appeal of a female teacher. A handful of friends following the student's feed retweeted the message. As with countless conversations along similar lines at high schools everywhere, the students enjoyed their shared joke and nothing more came of it.

That changed when the school administration was alerted to the tweet. That led to five-day suspensions for the tweeter and those who retweeted it.

The school then raised the ante, scouring Twitter for inappropriate comments by students. They came across a couple of other comments about teachers and one from a student who joked that she should bomb the school so that she wouldn't have to attend. Three of her friends retweeted the message. Suspensions followed for all of the students.

Can a public school punish a student for comments posted off-campus on Facebook or Twitter? Federal courts have differed on this question, but have consistently embraced two legal principles: 1. Students have free-speech rights, both in school and off-campus. 2. Public schools can punish that free speech if it poses a substantial threat of a disruption to the school.

In this case, there was no disruption until the school decided to step in proactively to punish the students. A sophomoric tweet about an attractive teacher would have gone unnoticed. Of course, the joke about bombing the

school merited more attention. That obviously warranted a conversation and counseling, and possibly disciplinary action.

In its defense, the school cites a student handbook alerting students to behave responsibly on social media, saying they should know the rules. But schools also need to follow the rules, including not overreaching, seeking out potentially offensive remarks and suspending students from publicly funded schools. Reported in: [firstamendmentcenter.org](http://firstamendmentcenter.org), October 30.

#### **Kountze, Texas**

In a barrage of e-mails, telephone calls and letters to his office, Kevin Weldon has been called some of the worst things a Christian man in a predominantly Christian town can be called: un-Christian, and even anti-Christian.

"I've been in this business a long, long time," said Weldon, the superintendent of the 1,300-student school district in Kountze, northeast of Houston. "People that know me know how I am. Even though I got those things, I'm going to be honest with you, this may sound very flippant, but it just went in one ear and out the other."

Weldon is in a position that few superintendents in small-town Texas have found themselves: taking a stand on religious expression that has put him at odds with the majority of his students and his neighbors, not to mention the governor and the attorney general.

After consulting with lawyers, Weldon banned the district's cheerleaders from putting Bible verses on the banners they hoist at the beginning of football games, out of concern that the signs were unlawful and amounted to school-sanctioned religious expression. A group of cheerleaders and their parents sued Weldon and the district, prompting a legal battle that has outraged and inspired Christians across the country. In mid-October a judge issued a temporary injunction, barring the district from prohibiting the banners for the rest of the football season while the case proceeds to trial.

Weldon, a Protestant and former football coach, said he supports the cheerleaders and their message, but feels he must uphold the law. Though he has taken a stand that pleases the Anti-Defamation League and the Freedom From Religion Foundation, he is not their ally. Though his action upset the Liberty Institute, a Christian legal group representing the cheerleaders, he is not their opponent. He is caught somewhere in between.

"He made the decision against the popular prevailing sentiment, and he's been reviled for it," Weldon's lawyer, Thomas P. Brandt, told the judge. "He has stood, though, solidly in favor of not what he personally wants, but what he perceives the law requires."

Weldon has had to defend his decision even as Gov. Rick Perry, Attorney General Greg Abbott and scores of students, parents and others have criticized the district's ban on the

signs and registered their dismay and disgust in subtle and not-so-subtle ways. The marquee outside the First Baptist Church quoted Acts 5:29: “We must obey God rather than men.” Steve Stockman, a born-again Christian and former congressman running for re-election in the area, suggested that Weldon’s job was on the line.

“Banning religion is a direct assault on our founding principles,” Stockman said in a statement. “This is East Texas, not San Francisco. The superintendent can either overturn his ban on religion, or pack his bags.”

Not everyone has been so harsh. Rebekah Richardson, 17, a Kountze High School cheerleader, said: “We understand that he’s in a hard situation.”

Weldon said that overall, people in Kountze have treated him respectfully. He has attended the football games without incident, watching the Kountze Lions burst through the very banners (“But thanks be to God, which gives us victory through our Lord Jesus Christ,” one read) at issue in the lawsuit. “It’s a great small town, and they’re just standing up for what they truly believe in,” he said. “You can’t fault people for that.”

In a heavily wooded part of the state called the Big Thicket, Kountze is an old-fashioned town of 2,100 with a history of religious tolerance. In the early 1990s, residents elected their first black mayor, Charles Bilal, a Muslim. The majority white, Christian voters made Bilal the first Muslim mayor in the United States. His granddaughter, Nahissaa Bilal, 17, a Christian, is a plaintiff in the lawsuit.

Weldon is a relative newcomer to Kountze, arriving in 2011 to lead the district, which has only four schools. With his white-haired crew-cut and burly frame, he resembled not a former coach but a former linebacker, and though his critics claim he has cowered to blue-state liberals, his office décor seemed decidedly red, with the head of the biggest deer he ever shot while hunting mounted in a corner.

The cheerleaders’ case centers on whether the banners amount to private speech protected by state and federal law, or government-sponsored speech that can be regulated and censored. Lawyers for the students argued that because the cheerleaders created the messages after school without guidance or financial assistance from administrators, their banners were private speech. District lawyers said the banners were in no way akin to someone waving a John 3:16 sign in the stands and could be regulated, because the cheerleaders were school representatives.

The case began when the district received a letter from the Freedom From Religion Foundation, a Wisconsin-based group of atheists and agnostics. The letter, written on behalf of an anonymous resident who had attended a game, called the cheerleaders’ banners unconstitutional. Weldon said he contacted lawyers for the district and for the Texas Association of School Boards. Both advised him to prohibit the signs. The advice stemmed from a Supreme Court ruling in *Santa Fe Independent School District v. Doe*, which

established that prayers led by students at high school football games were unconstitutional.

“Myself and the board have said all along that we do not have a problem with the kids doing what they’re doing,” Weldon said. “We’re not hostile against any type of religion, but we also want to make sure as a school district that we’re following the law.”

In a state where courtroom battles over public expressions of Christianity are routine, the cheerleaders’ case has been unusual. In other disputes, local officials have been on the same side as state leaders, or they have taken neutral stands. In 2001, after Perry prompted criticism by bowing his head and saying “Amen” as a pastor led a prayer at an East Texas public school, the superintendent there tried to stay out of the issue. “I’m not going to question the governor,” the superintendent in Palestine, Jerry Mayo, said at the time.

But in Kountze, Weldon has ended up aligned, albeit reluctantly, with the out-of-state atheist group that first complained about the banners. Many in town thought the two sides would settle the lawsuit. The negotiations stalled, and the case proceeded at the Hardin County Courthouse.

Weldon had to testify, answering questions about whether he harbored a hostility toward Christianity or the Bible. He said in court, under questioning by a lawyer for the cheerleaders, David Starnes, that his directive violated a school policy that allowed students to express their religious viewpoints at nongraduation events. And Weldon had to watch while his lawyer cross-examined two nervous students, one of whom was a 16-year-old cheerleader who cried on the stand.

Afterward, Weldon sought out the two students. The defendant had a message for the plaintiffs. He told them he was proud of them. Reported in: *New York Times*, October 21.

### **San Antonio, Texas**

A Texas high school student was suspended for refusing to wear a student ID card implanted with a radio-frequency identification chip.

Northside Independent School District in San Antonio began issuing the RFID-chip-laden student-body cards when the semester began in the fall. The ID badge has a bar code associated with a student’s Social Security number, and the RFID chip monitors pupils’ movements on campus, from when they arrive until when they leave.

Radio-frequency identification devices are a daily part of the electronic age—found in passports, and library and payment cards. Eventually they’re expected to replace bar-code labels on consumer goods. Now schools across the nation are slowly adopting them as well.

The suspended student, sophomore Andrea Hernandez, was notified by the Northside Independent School District in San Antonio that she won’t be able to continue attending

John Jay High School unless she wears the badge around her neck, which she has been refusing to do. The district said the girl, who objects on privacy and religious grounds, would have to attend another high school in the district that does not yet employ the RFID tags.

The Rutherford Institute said it would go to court and try to nullify the district's decision. The institute said that the district's stated purpose for the program—to enhance their coffers—is “fundamentally disturbing.”

“There is something fundamentally disturbing about this school district's insistence on steamrolling students into complying with programs that have nothing whatsoever to do with academic priorities and everything to do with fattening school coffers,” said John Whitehead, the institute's president.

Like most state-financed schools, the district's budget is tied to average daily attendance. If a student is not in his seat during morning roll call, the district doesn't receive daily funding for that pupil because the school has no way of knowing for sure if the student is there. But with the RFID tracking, students not at their desk but tracked on campus are counted as being in school that day, and the district receives its daily allotment for that student.

Tagging school children with RFID chips is uncommon, but not new. A federally funded preschool in Richmond, California, began embedding RFID chips in students' clothing in 2010. And an elementary school outside of Sacramento, California, scrubbed a plan in 2005 amid a parental uproar. A Houston, Texas, school district began using the chips to monitor students on thirteen campuses in 2004 for the same reasons the Northside Independent School District implemented the program. Northside is mulling adopting the program for its other 110 schools.

The Hernandez family, which is Christian, told InfoWars that the sophomore is declining to wear the badge because it signifies Satan, or the Mark of the Beast warning in Revelations 13: 16-18.

The district, in a letter to the family, said it would allow her to continue attending the magnet school with “the battery and chip removed.” But the girl's father, Steve Hernandez, said the district told him that the offer came on the condition that he must “agree to stop criticizing the program and publicly support it,” a proposition the father said he could not stomach. Reported in: wired.com, November 21.

## colleges and universities

### San Diego, California

The University of San Diego has rescinded an invitation to a British theologian who had been asked to spend several weeks at the Roman Catholic university as a visiting fellow because of her views on social issues, including her public support for gay marriage.

Tina Beattie, director of the Digby Stuart Research Center for Catholic Studies at Roehampton University, a public university in London, had been invited to be a visiting fellow at the university's Center for Catholic Thought and Culture. The invitation—which included a speech at a prayer breakfast and a lecture as part of a university series—was challenged by the Cardinal Newman Society, a group that seeks to hold Catholic colleges and universities accountable for activity on campus that it considers un-Catholic. Three days later, the university's president, Mary E. Lyons, disinvited Beattie.

Beattie, a practicing Catholic, has published extensively on gender issues and the church; the Newman Society, in a blog post attacking the University of San Diego for inviting her, quoted from several of those works. It highlighted passages that appeared to question whether life begins at conception and one that seemed to compare the celebration of Mass to sexual intercourse.

Those passages were taken out of context in a way that offended her, Beattie wrote in a detailed explanation of her theological views posted on her own blog; on the words quoted by the Cardinal Newman Society, she said that the first was meant to consider how far the Catholic church should push legal restrictions on abortions on those who did not share the Catholic faith (she is personally pro-life); the second was part of a sustained critique of another theologian, who had written about Catholic worship in what she found were highly—and unacceptably—sexual terms.

Challenges from the Newman Society, which issues many such posts every month criticizing Catholic institutions, are hardly unusual (and the University of San Diego has been a target many times). But three days after the blog post appeared, Lyons rescinded Beattie's invitation.

“In light of the contradiction between the mission of the Center and your own public stances as a Catholic theologian, I regretfully rescind the invitation that had been extended to you,” Lyons wrote in a letter that Beattie posted online. She arrived at the decision, she said, after “great and thoughtful consideration.”

Other Catholic blogs had targeted Beattie, the theologian wrote on her blog, after she signed a letter to *The Times of London* in August saying that Catholics could, in good conscience, support legal, civil marriage for same-sex couples. (Fellow signatories, 27 in all, included six priests.) But she planned to stay away from controversial subjects in San Diego, she wrote, “with a broad audience in mind, and with a desire not to create problems for my hosts by provoking controversy in the currently febrile atmosphere of American Catholic politics.”

Disinvitations are not unheard-of at Catholic colleges; Anna Maria College, in the most recent and widely known case, uninvited Victoria Kennedy, widow of the Senator Ted

Kennedy, as a commencement speaker in the spring under pressure from its local bishop.

“The cancellation of my visit is not the most important issue in all this,” Beattie wrote on her blog. “The real issues are academic freedom, the vocation of lay theologians in relation to the official magisterium, and the power of a hostile minority of bloggers.”

The decision roused opposition among the university’s faculty. On December 6, the University Senate, by an overwhelming majority, passed a resolution criticizing Lyons. It read in part:

“Resolved, That, despite the President’s actions, the Senate reaffirms the faculty’s resolute commitment to the principles of academic freedom and shared governance, in accordance with existing USD policies, and to the university’s mission; and

“Resolved, That the Senate finds President Lyons’ decision to rescind the invitation to Dr. Beattie and her evolving justifications for this action to be incompatible with the principles of academic freedom and shared governance, and inconsistent with the mission of the university; and

“Resolved, That the university administration should strictly abide by the principles of academic freedom, shared governance and diversity as defined in existing university policies and as understood in the spirit of this resolution.” Reported in: [insidehighered.com](http://insidehighered.com), November 2.

### Washington, D.C.

Anyone seeking records from a college or university in the past several decades has undoubtedly had his or her quest for information made more complicated, or even impossible, by a 1974 federal law, the Family Educational Rights and Privacy Act (FERPA). At Butler University, campus police declined to provide a newspaper with a copy of a report about a fight involving a pellet gun. In September, Hudson Valley Community College refused to release an incident report involving a member of the Student Senate who was arrested for threatening another student with a knife.

In both of those cases, and in hundreds more each year, the institutions erred in invoking that law as a basis for denying a records request, according to the Student Press Law Center. The use of FERPA to restrict access to information that should be made public has become so widespread, the center says, that this fall it started two online campaigns, FERPA Fact and Break FERPA, to highlight what it views as colleges’ abuses of the privacy law.

The Student Press Law Center, a nonprofit organization that provides guidance and legal counsel to student journalists, has long argued, along with other open-government advocates, that while FERPA is well-intentioned—it’s meant to protect the privacy of students’ educational records—the way the law has been interpreted and applied

enables colleges to use it as a catchall excuse to conceal information they wish to keep secret.

The U.S. Department of Education has taken steps to clarify a college’s obligations under FERPA, in some cases changing the rules. But Frank D. LoMonte, executive director of the Student Press Law Center, says that such reforms have fallen short, and that colleges are still misapplying the law.

A case at the University of Iowa sparked the center’s push for reform, he said. In July, the Iowa Supreme Court ruled against a newspaper that was seeking redacted records related to an alleged sexual assault by Hawkeye football players. The court ruled that even though the two players had been publicly charged, and their identities were widely known, the university could still withhold the records if it believed that the newspaper knew the identity of the students.

“That was the point where, to us, the FERPA train went completely off the rails,” LoMonte said. The intent of the statute was to prevent the release of students’ private information, but the ruling in the Iowa case, he argues, exposed FERPA as an impediment to students’ seeing how a public university investigated two sexual assaults.

The center’s FERPA Fact site rates how well a college applies FERPA in a specific situation. The scale, indicated by the use of one to three photos of Secretary of Education Arne Duncan, assesses the legitimacy of an institution’s claim of FERPA protection.

For example, Southeast Missouri State University recently sent a letter to students, faculty, and staff suggesting that they “keep in mind the restrictions” of FERPA if they talk with news reporters about a former student who had been arrested for plotting terrorism. The problem? FERPA creates no such obligation for students (unless they are also employed by the college), who are free to speak about their experiences with their peers. That earned the university a triple Duncan-head from FERPA Fact, indicating an egregious misapplication of the law.

Other cases are less clear-cut. The law center doled out only a double Duncan-head—denoting “a questionable use of FERPA”—to a Wilmington, North Carolina, high school after it declined to identify the age and grade level of a student who gave birth in a school restroom. Typically such directory information is not protected by FERPA, but it’s a gray area, the law center said, because it was tied to the fact of her having given birth.

Another part of the campaign, called Break FERPA, is meant to uncover hypocrisy in colleges’ interpretations of FERPA on their own campuses. The site asks volunteers to “fight back” against FERPA-based denials of requests for information by seeking all of their own educational records from their colleges.

FERPA requires that students be able to inspect and challenge the content of their records, LoMonte explained. But many institutions have been so overly broad in defining what constitutes an “educational record,” in order to shield the

information from public view, he says, that it would be nearly impossible for them to comply with the individual requests.

For example, an institution that erroneously defines a student's postings on a student-government e-mail list as FERPA-protected would, for consistency, have to search through countless e-mails in order to comply with that student's request to inspect his own records.

The point is to show how onerous such a task would be, and to therefore illustrate how far the college overreached in declaring those records FERPA-protected in the first place.

The Student Press Law Center's primary goal in mounting the two efforts, LoMonte said, is to call policy makers' attention to the problems with FERPA. But the campaigns are also about shining a light on individual institutions that misinterpret the law, he adds.

"Since so many schools are using FERPA to further their public-relations, image-protection interests, we want, in a small way, to make the abuse of FERPA a black mark on their public image," he said. "We want people to feel there are public-relations consequences to the frivolous use of FERPA." Reported in: *Chronicle of Higher Education* online, November 26.

## e-publishing

### Seattle, Washington

An Amazon Kindle user has had her account wiped and all her paid-for books deleted by Amazon without warning or explanation.

The Norwegian woman, identified only as Linn on media commentator Martin Bekkelund's blog, approached Amazon when she realized her Kindle had been wiped. She was informed by a customer relations executive that her account had been closed, all open orders had been cancelled and all her content had been removed, but has been unable to find out why.

The move, which will shock ebook fans, highlights the power digital rights management (DRM) offers blue-chip companies. DRM is used by hardware manufacturers and publishers to limit the use of digital content once it has been purchased by consumers; in Amazon's case, it means the company can prevent you from reading content you have bought at the Kindle store on a rival device.

Linn was told by Amazon: "We have found your account is directly related to another which has been previously closed for abuse of our policies. As such, your Amazon.co.uk account has been closed and any open orders have been cancelled. Please understand that the closure of an account is a permanent action. Any subsequent accounts that are opened will be closed as well. Thank you for your understanding with our decision."

When Linn queried to which "directly related" account Amazon was referring, what had happened, and whether

there was anything she could do to get her access reinstated, the online giant replied by saying it was "unable to provide detailed information" and reiterated her account would not be reopened.

In its final email to her, it added: "We regret that we have not been able to address your concerns to your satisfaction. Unfortunately, we will not be able to offer any additional insight or action on these matters. We wish you luck in locating a retailer better able to meet your needs and will not be able to offer any additional insight or action on these matters."

Bekkelun wrote: "This shows the very worst of DRM. If the retailer, in this case Amazon, thinks you're a crook, they will throw you out and take away everything that you bought. And if you disagree, you're totally outlawed. With DRM, you don't buy and own books, you merely rent them for as long as the retailer finds it convenient."

Andy Boxall of Digital Trends said: "Amazon in turn uses the Digital Millennium Copyright Act to take your books and privileges away if it finds you've been naughty."

According to Amazon's Kindle Store terms of use, "Kindle content is licensed, not sold." Should you attempt to break the DRM security block or transfer your purchase to another device, Amazon may legally "revoke your access to the Kindle Store and the Kindle Content without refund of any fees."

Technology writer Cory Doctorow suggested "the policy violation that Linn stands accused of is using a friend's UK address to buy Amazon UK English Kindle books from Norway". Under Amazon's rules, this type of action is barred, as the publisher seeks to control what content is read in which territory of the world.

In 2009, Amazon was forced to apologize for deleting books written by George Orwell from customers' Kindle devices without their knowledge following a rights issue (the books were added to its Kindle store by a third-party who did not have the rights to them). Company founder Jeff Bezos said the move was "stupid" and "thoughtless."

After word of Linn's story circulated in the press, Amazon posted the following statement on its customer forum: "We would like to clarify our policy on this topic. Account status should not affect any customer's ability to access their library. If any customer has trouble accessing their content, he or she should contact customer service for help." Reported in: *The Guardian*, October 22.

## press freedom

### Miami, Florida

A jury acquitted a Florida photojournalist who was arrested on January 31, 2012 while documenting the eviction of Occupy Miami protesters. The police accused Carlos Miller, author of a popular blog about the rights of photojournalists, of disobeying a lawful police order to clear the

area. But another journalist testified he had been standing nearby without incident.

After Miller's arrest, the police confiscated his camera and deleted some of his footage, including video documenting his encounter with the police. That may prove to be an expensive mistake. Miller was able to recover the footage, which proved helpful in winning his acquittal. He says his next step will be to file a lawsuit charging that the deletion of the footage violated his constitutional rights.

The one-day trial occurred November 7. In an interview the next day, Miller said that the prosecution accused him of "being antagonistic to police because I was questioning their orders." However, he said, "that's what I do. I know my rights. I know the law."

During the trial, Miller's attorney, Santiago Lavandera, admitted that Miller used some coarse language with the police officers at one point during the evening. But he stressed that it wasn't the job of a journalist to meekly obey police orders.

"When you're a journalist, your job is to investigate," Lavandera told the jury, "not to be led by your hand where the police want you to see, so they can hide what they don't want you to see. As long as you are acting within the law, as Mr. Miller was, you have the right to demand and say, 'no, I'm not moving, I have the right to be here. This is a public sidewalk, I have the right to be here.'"

Miller said the jury deliberated for only about half an hour before returning a verdict of "not guilty." He said his case was helped by the footage he recovered from his camera. That footage clearly showed that there were other journalists nearby when he was arrested.

One of them was *Miami Herald* reporter Glenn Garvin, who testified in the trial. When Garvin saw Miller being arrested by Officer Nancy Perez, "he immediately thought he was going to get arrested, so he asked Nancy Perez if it was alright for him to be standing there and she said, yes, he was under no threat of getting arrested."

There's a history of confrontations between Miller and the police, and Miller said the police had singled him out for that reason. An e-mail disclosed during the trial showed the police had been monitoring Miller's Facebook page and had sent out a notice warning officers in charge of evicting the Occupy Miami protestors that Miller was planning to cover the process.

Now that Miller doesn't have a jail sentence hanging over his head, he's planning to turn the tables on the Miami-Dade Police Department. He plans to file a lawsuit arguing the deletion of his footage by the police violated his constitutional rights. According to Miller, such incidents are disturbingly common around the country. As camera-equipped cell phones have proliferated, ordinary Americans have increasingly used the devices to document how police officers do their jobs. And he said he heard of numerous incidents in which the police confiscate these devices and delete potentially embarrassing footage.

Miller said most victims don't stand up for their rights in court. In many cases, people are happy simply to have the police drop the charges against them. But Miller isn't so easily cowed. If Miller files his lawsuit, he will join a handful of other plaintiffs who have gone to court to vindicate their rights to record the activities of police officers. Judges in Massachusetts and Illinois have held it unconstitutional to arrest people for recording the activities of police. A Baltimore man has sued the police for deleting his footage from his cell phone. The Obama administration filed a brief in the case arguing that deleting such footage violates the Fourth Amendment.

Miller points out that if an ordinary citizen deleted footage relevant to an alleged crime, he could be charged with destruction of evidence, a felony. He believes that police officers should also be held accountable when they seize cameras and delete footage. Reported in: arstechnica.com, November 8.

## privacy

### Cupertino, California

Apple is asking California's highest court to rule that a state law limiting data collection by merchants who accept credit cards doesn't apply to online retailers. Imposing the Song-Beverly Act's requirements on Web retailers "threatens to produce unintended and absurd results," Apple argues in its legal papers. The 21-year-old privacy law bans retailers from requesting and storing the street addresses of consumers who pay by credit card.

Apple argues that it doesn't make sense to apply the Song-Beverly law to online retailers, given that they can't verify identity by asking for a photo or comparing an in-store signature to the one on a card.

The matter stems from a potential class-action lawsuit against Apple filed last year by David Krescent. He alleges that Apple violated California's law by requiring him to provide his address when he purchased media from the company. Krescent says the law should apply regardless of whether consumers make purchases in person or on the Web. "The purpose of the Act is to prevent merchants from overreaching in their personal information requests," he said in court papers.

He argued that even though the law should be interpreted broadly, it was enacted before online commerce became common. "The Legislature could have limited the Act, and could have stated the Act does not apply to any transaction where the merchant does not actually physically obtain the credit card...yet the Legislature deliberately chose not to do so," he wrote.

But Apple claims that online retailers need to be able to collect personal data from customers for security purposes. "Unfortunately, computer criminals can engage in online

credit card fraud on a vast automated scale, requiring even greater vigilance and verification than in person-to-person transactions,” the company wrote.

“Unlike brick-and-mortar transactions, the only effective means that an online e-retailer has to prevent fraud is to ask the customer for personal identification information that a fraudster would have difficulty obtaining, namely, the cardholder’s billing address and telephone number,” it added.

Apple isn’t the only online company facing suit for allegedly violating the law. Cases also are pending against Ticketmaster and eHarmony. The California Supreme Court is holding off on a decision in those matters until it rules on the Apple case. Reported in: *Online Media Daily*, November 5.

### **Menlo Park, California**

Two consumer watchdogs are urging Facebook founder and Chief Executive Mark Zuckerberg to back off proposed changes to its policies that they say would curb the rights of its billion-plus users and make more personal information available to advertisers without users’ explicit consent in violation of a privacy settlement with the Federal Trade Commission.

In a letter sent to Zuckerberg November 26 the groups asked Facebook to be “responsive to the rights of Facebook users to control their personal information and to participate in the governance of Facebook.”

European regulators also said that they expect Facebook to give European users the right to accept or reject whether they want to share their personal information with Facebook affiliates such as photo-sharing service Instagram.

Facebook informed users the previous week that it planned to do away with its system that allows users to vote on — and strike down—changes to its policies and terms of services if the policy change receives more than 7,000 comments and more than 30 percent of users take part in the vote. In addition, Facebook said it would no longer let users control who could message them on the service, and would instead set up new filters to help users manage their messages.

Most controversial to privacy watchdogs: Facebook’s plans to begin sharing users’ data between its own services and affiliates, most notably Instagram, which it bought earlier in 2012 for about \$715 million. Google was on the receiving end of a similar reaction last January when it said it would combine users’ personal information from all of its services including search, email, the Google+ social network and video-sharing site YouTube. Regulators and privacy groups warned at the time that the policy change invaded users’ privacy and put them at greater risk for hackers and identity thieves.

“As our company grows, we acquire businesses that become a legal part of our organization. Those companies

sometimes operate as affiliates. We wanted to clarify that we will share information with our affiliates and vice versa, both to help improve our services and theirs, and to take advantage of storage efficiencies,” Facebook spokesman Andrew Noyes said in an emailed statement.

But Marc Rotenberg, executive director of the Electronic Privacy Information Center, and Jeffrey Chester, executive director of the Center for Digital Democracy, allege that the proposed changes invade the privacy of Facebook users and “implicate” the terms of the privacy settlement Facebook reached with the FTC.

In April 2012, Facebook settled allegations that it deceived consumers and forced them to share more personal information than they intended. The company agreed to twenty years of independent audits of its privacy practices. Under the settlement, Facebook must get users’ consent for changes to its privacy settings.

“The settlement prohibits Facebook from misrepresenting the extent to which it maintains the privacy or security of covered information. Additionally, prior to any sharing of users’ personal information with a third party, Facebook must make a clear and prominent disclosure and obtain the affirmative express consent of its users,” Rotenberg and Chester wrote in the letter to Zuckerberg.

Rotenberg and Chester sent a copy of the letter to the FTC and said they plan to file a complaint with the FTC if Facebook is not “responsive.”

Irish regulators are also scrutinizing the proposed changes. Facebook is overseen by Irish data protection authorities in the European Union. Facebook Ireland provides service to users outside the U.S. and Canada.

“We have sought and received clarifications on a number of aspects and have outlined our position in relation to what consent will be required for aspects of the policy,” Gary T. Davis, Ireland’s deputy data protection commissioner, wrote. “We expect the proposed data use policy to be modified to take account of these issues.”

Noyes said Facebook is in “regular contact” with Irish regulators “to ensure that we maintain high standards of transparency in respect of our policies and practices. We expect to maintain a continuous dialogue with the Irish DPC as our service evolves.”

The changes could help Facebook—after a rocky debut as a publicly traded company—win back favor with investors. The giant social network is looking to reverse a sharp slowdown in revenue growth. The stock has declined more than 30 percent since its initial public stock offering in May.

Facebook, Google and other companies are under greater scrutiny for how they handle personal information. Consumers are handing over more and more personal information, yet privacy watchdogs say they have less and less say over what companies do with it.

Facebook downplayed the significance of eliminating its 4-year-old voting system, saying it has simply outgrown it.

Instead of having users cast a ballot, Facebook said it would rely on other means of giving them a voice in changes to the service such as an “Ask the Chief Privacy Officer” question-and-answer forum on its website. Privacy groups said scrapping the voting system “raises questions about Facebook’s willingness to take seriously the participation of Facebook users.”

Rotenberg had a hand in crafting the system that allows Facebook users to vote on changes. The original idea came out of a class he teaches at Georgetown University. “We hope Mark Zuckerberg will do the right thing. The proposed change to the privacy policy is not fair to users. It’s their data, not Facebook’s,” Rotenberg said.

Facebook notified users about the proposed policy changes and provided a seven-day window for public comments. Comments quickly exceeded the 7,000 needed to trigger a vote. Reported in: *Los Angeles Times*, November 26.

### **Mountain View, California**

The privacy policies of Google and other tech firms could allow them to mine personal data held by government agencies that use cloud-based e-mail, database and document services, an industry group warned.

The group, SafeGov.org, a consortium of industry experts promoting safe government use of cloud services, raised the concern as Google has sought to defuse controversy over changes to its privacy policy that allow for more extensive tracking of consumers.

SafeGov.org first highlighted this issue in January after Google announced plans to consolidate its privacy policy across more than sixty services, including Gmail and YouTube, allowing tracking of users as they move among those sites. The group recently renewed its call for greater safeguards after European data-protection commissioners in October identified significant legal shortcomings in the policy and called for changes.

Google officials say the changes to its privacy policy do not affect the bundle of productivity software it sells to governments, which are governed by contractual provisions.

Privacy groups have long expressed concern about how companies gather and use personal information for targeting ads or other commercial purposes. Safegov.org favors the creation of privacy policies written specifically to prohibit data mining when government agencies use cloud-based services from Google and others.

“The privacy policy as written gives them unlimited ability to mine [data] as they see fit,” said Jeff Gould of SafeGov.org, an IT consultant. (His clients include Microsoft, which also is one of 17 corporate “partners” of SafeGov.org and a competing provider of cloud-based services to governments.)

Google officials said their contracts with government entities include rules on how data may be used. “As always,

Google will maintain our enterprise customers’ data in compliance with the confidentiality and security obligations provided to their domain,” said Amit Singh, vice president of Google Enterprise, in a statement, repeating a comment made in January.

Those contracts with government entities can be public documents, though agencies sometimes do not make their specific terms, such as privacy policies, easily available.

The federal government has pushed in recent years to move data to cloud-based services, which officials say are cheaper and more reliable. The General Services Administration has taken a leading role in that effort, moving its employees to Gmail and adopting other services from the company.

The agency’s contract with Google has a privacy policy that’s more restrictive than offered to ordinary consumers and guarantees the security of data, said spokesman Dan Cruz. “GSA assesses compliance through control testing and periodic audits,” he said.

SafeGov.org says its concerns extend to state and local governments, as well as schools and other public institutions. “It’s just not appropriate to have data mining,” Gould said. “If they’re not doing that, then let them say that.” Reported in: *Washington Post*, November 1.

## **defamation**

### **Minneapolis, Minnesota**

A Minnesota doctor took offense when a patient’s son posted critical remarks about him on some rate-your-doctor websites, including a comment by a nurse who purportedly called the physician “a real tool.” So Dr. David McKee sued the son for defamation. The Duluth neurologist’s improbable case has advanced all the way to the Minnesota Supreme Court, which is weighing whether the lawsuit should go to trial.

“His reputation is at stake. He does not want to be a target for false and malicious remarks,” said his lawyer, Marshall Tanick.

McKee’s case highlights the tension that sometimes develops on websites such as Yelp and Angie’s List when the free speech rights of patients and their families clash with the desire of doctors, lawyers and other professionals to protect their reputations.

“Patients now have power to affect their businesses in ways they never had,” said Eric Goldman, a professor at the Santa Clara University School of Law who studies the issue. Health care providers are “evolving how to deal with patient feedback, but they’re still in the process of learning how to do that.”

Most online reviews never provoke any response, and successful challenges to negative reviews are rare.

*(continued on page 38)*

## success stories



### libraries

#### Rocklin, California

A book that was briefly banned at Rocklin High School will remain in the library following the release of a district committee's report November 1. The Rocklin Unified committee was charged with reviewing a mother's request to remove Stephen King's *Different Seasons* from the high school library because of what the parent said was a graphic rape scene in the book.

Rocklin High School formed a committee at the beginning of the school year to review the book and determine whether it was appropriate. That committee voted to remove the book, prompting the lone dissenter, Rocklin High student Amanda Wong, to take her concerns about censorship to the school district.

Rocklin Unified Superintendent Kevin Brown overturned the high school committee's decision in October, saying the call should have been made by a committee of districtwide representatives. Brown said that the districtwide committee's findings to allow the book were final, although "if the complaining party wishes to appeal the findings, they can take it to the next level and it goes to the (school) board."

"The committee, in looking at a broader scope and having more time to reflect on the concerns of the parent and do more research, came to a conclusion that I certainly support and I know the board will as well," Brown said.

Wong said she was relieved and excited to know the book would remain in the library. "I was overwhelmed by the support I got in the community, even from people I didn't know," Wong said. "It was inspiring."

The district committee was made up of two principals, a librarian, a district director, two English teachers and a

Whitney High School student. Reported in: *Sacramento Bee*, November 2.

#### Brentwood, Missouri

Trustees for the Brentwood Public Library held a special meeting October 22 and voted to keep *Uncle Bobby's Wedding* in its children's collection. The trustees met at the library after posting meeting notices and voted unanimously to retain the picture book, reported Library Director Vicki Woods.

The library was responding to a written challenge from a Brentwood resident, who did not like the book's subject matter. *Uncle Bobby's Wedding* is a picture book involving a young guinea pig and her beloved uncle, who is going to marry. The marriage involves a male partner, but the niece's concern is more about whether her uncle will still have time for her.

The library sent the resident a letter signed by board President Sheila Lenkman: "The Brentwood Library Board of Trustees had an emergency meeting on Monday, October 22, 2012, and all nine members were present. We had a long and thoughtful discussion, reviewing your comments on the Request for Reconsideration form for *Uncle Bobby's Wedding*, Vicki Woods' reply to you, the conversation from last week's meeting, and our Board Policies regarding the reconsideration process. The Library has not had a book challenged in many years, and none in the time of the current administration. We wanted to make sure that attention was taken to following procedure and policies of the Library. In the end, with all due respect, we have decided to keep the book in the collection.

"We sincerely apologize for any misunderstanding regarding rescheduling of meetings, and any publicity that has resulted from this process. The Library Board invites feedback from our library patrons and our Library Board meetings are open to the public. We hope that you and your family will continue to patronize the Brentwood Public Library." Reported in: *St. Louis Post-Dispatch*, October 25.

### schools

#### Knoxville, Tennessee

After a parent complaint about a controversial book, school officials at Hardin Valley Academy have decided to keep the book in the curriculum. In August, parent Sam Lee asked the school to remove *Robocalypse* from the required reading list for "inappropriate language," saying he was upset that his son was being forced to read the book.

School officials assembled a seven-person committee to review the book. The committee consisted of four educators, two parents and a STEM (Science, Technology, Engineering, Math) academy student. After meeting twice

to discuss the book, the committee ruled in late September that the book should remain in the curriculum, but said that a disclaimer should be offered to parents about the violence and mature language.

“The decision was based on the fact that the novel enhances the STEM curriculum, an alternate read was and will continue to be provided, the book won an Alex Award from the American Library Association and the author’s ability to reach reluctant readers through the work,” said Hardin Valley Academy Principal Sallee Reynolds, in a written statement.

Reynolds went on to say that she did not like how much strong language was used in the book, but felt the committee ultimately made the right decision. “The enthusiasm and maturity with which our STEM students have discussed this book with their teachers has been impressive,” she said.

Lee said he plans to appeal the ruling. Reported in: *wate.com*, October 10. □

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*survey shows...from page 1)*

students, and 73 percent use the same level of filtering for all grade levels.

When it comes to what content is filtered, respondents indicated:

- Social network sites (88 percent)
- Instant messaging or online chatting (74 percent)
- Gaming (69 percent)
- Video services such as YouTube or SchoolTube (66 percent)
- Personal eMail accounts (41 percent)
- Peer-to-peer file sharing (40 percent)
- File transfer protocol used to download large files (32 percent)
- Newsgroups (17 percent)
- Professional development tools such as eBinders and Google Docs (9 percent)

Most often, the decision to “unblock” a site is made at the district level (68 percent), and it is made less frequently at the building level (17 percent). Thirty-five percent of librarians said their requests to unblock sites take between one and two days, while 27 percent said such a request is answered immediately or within a few hours. Seventeen percent said it takes more than two days, but less than a week, to unblock a site, and 20 percent said it takes more than a week to block a site. Reported in: *eSchool News*, November 27. □

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*as libraries go digital...from page 3)*

in the future.

Until now, a lot of metadata have been inaccessible. The idea behind the LibraryCloud software is that, by gathering metadata from different libraries, developers could use them to build new services. Weinberger called it “an attempt to make available everything that libraries know.”

In another project now being developed, StackLife, Weinberger’s group offers a flavor of how you can use some of what libraries know. StackLife is library-browsing software that guides patrons to relevant works in part by looking at how the university community has used them. Say you’re searching for a book. Clicking on it in StackLife displays the volume on a virtual shelf, next to other texts sorted by call number. The software color-codes books by what it calls ShelfRank, a measure of their importance to the community. That’s judged by things like how many libraries own the book and how often it’s checked out or put on reserve.

The traditional library catalog “doesn’t reflect the usage of the community at all,” said Kim Dulin, also a co-director of the lab. StackLife changes that. It visually pops out works that are core to their fields, Weinberger said, showing what members of the Harvard community have “demonstrated through their actions are important.”

But while Amazon tracks your every move, privacy concerns prevent Weinberger’s team from collecting some key data. It doesn’t track books borrowed together, for example. You could imagine using such data to suggest other books checked out with a given title. For instance, it could be helpful to know that patrons who checked out Darwin’s *On the Origin of Species* also borrowed a particular book of commentary about it.

So what’s the potential danger of data on books checked out together? Weinberger offered a silly example that makes the general point. Say somebody checks out *How to Blow up Federal Office Buildings*, along with a repair manual for 1957 DeSotos. There’s only one person on campus who owns that vehicle. “That would be a pretty good indicator that maybe the FBI wants to pay a call,” Weinberger said.

A British library project goes further down the recommendation route. At the University of Huddersfield, the library mines historical circulation data to generate an Amazon-style “people who borrowed this book also borrowed these books” catalog feature. The effort dates to 2005, when library staff began thinking about how they might use the two million transaction records in their database. Their recommendations draw on anonymized and aggregated data, said Dave Pattern, library-systems manager.

“We’re not interested in what one student borrows—we’re interested in finding the common borrowing patterns of lots of students,” he explained. “In particular, we want

to try and ensure that books borrowed for personal reasons would never appear as a recommendation. So we've drawn a line in the sand, and we need to see a specific borrowing pattern repeated by several students before it will appear as a recommendation."

Other libraries are turning to vendors to add some Web 2.0 gloss.

One such company is LibraryThing. Tim Spalding, who had dropped out of a Ph.D. program in Greek and Latin, started LibraryThing in 2005 as a pet project to catalog his books. To his surprise, it became an online sensation, with 1.5 million members cataloging, discussing, and reviewing their books, too. Academic departments use the site to organize their books. Members have submitted more than 91 million book labels, called tags.

In other words, Spalding oversees a megarepository of book data. So he started to sell it. Libraries pay his company to enhance their catalogs with Amazon-like book suggestions from the LibraryThing database, plus reviews and tags.

Tags can be useful browsing tools because librarians don't know what books mean to individual readers. And it can take years for categories to make it into the Library of Congress system. Sociobiology, for instance, existed for about a decade before the Library of Congress realized it was a field, Spalding said.

It was initially seen as "a radical idea," he recalled, "that you would put regular, unwashed people commenting on books in the library catalog, which is the locus of truth and fact." Yet he now has four hundred library customers, roughly one-third of them academic libraries.

Libraries that contract with Spalding's company soup up their catalogs with data largely generated by LibraryThing's ordinary users, not their own patrons. But another vendor arrangement does pay close attention to library users' reading habits, raising further concerns about privacy.

Under a change that began last year, Kindle owners can borrow books from libraries via an e-book distributor called OverDrive, which signed a deal with Amazon to offer the service. But as a result, the American Library Association's Caldwell-Stone began getting complaints that patrons were receiving marketing messages from Amazon. Those messages would say that a library patron's loan period was about to expire. Would they like to buy the borrowed book, complete with any notations they had made?

"It was clear that they were collecting and keeping a lot more information about individual users and their reading habits than what libraries traditionally do," she said. Amazon requires patrons to log in and is "keeping track of what they read."

Several universities have contracted with OverDrive to offer e-book lending, including Yale University, McGill University, and the University of Pittsburgh. Todd Gilman, Yale's librarian for literature in English, acknowledged that

Amazon knows which books library patrons borrow, but he points out that those borrowers already own a Kindle and maintain a relationship with Amazon. The choice is up to them. If patrons have concerns, Gilman said, "they shouldn't read on devices that require them to log in to third-party vendor Web sites like Amazon."

"It's not like the library is giving out information to anybody," he said. Reported in: *Chronicle of Higher Education* online, November 5. □

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*censorship dateline...from page 14)*

consistent pattern of Dr. Price making students feel uncomfortable." As a result the university suspended Price, and the provost, Lori Gonzalez, then said that Price's criticisms of the university (such as comments about an "allegedly racist environment" and about athletes) were unprofessional, and that Price needed to develop a two-year professional development plan to deal with these shortcomings.

Price's appeal of the finding led the to the faculty report, part of the grievance process at the university.

The report concluded that Price deserved a hearing before being suspended, and rejected the administration's response that suspension did not constitute a serious enough sanction to merit a hearing.

Further, the report defended Price's right to talk about issues related to athletics, higher education and race—even when those comments include criticism of the university. "In teaching race and ethnicity, Prof. Rice discusses race in the context of higher education and student athletics. In doing so, she does not paint a pretty picture, and it intentionally hits home with many students," the faculty report says. "Even if her illustrations are critical of Appalachian, that is legitimate sociology. Teaching about the intersections of race and higher education and athletics is a legitimate topic for a sociology class. It is a legitimate argument in the field that student athletes receive special privileges.... In fact, ASU athletes do receive special privileges."

The panel also noted that the initial complaints by athletes received speedier consideration than is the norm, and that every effort was made to immediately make the athletes happy, rather than—as the panel suggested should have happened—to bring the athletes and Price together to try to work things out informally. "It is ironic that a case—initiated at least in part by Prof. Price's assertion that student athletes get preferential treatment—became an object demonstration that student athletes do, in fact, get preferential treatment."

As to the documentary on pornography, the report found that Price used "poor judgment" in showing it without talking about why she was doing so, or warning students

about its graphic nature. But the report found that this was a matter for discussion within the department, and not for a university sanction of requiring a teaching improvement plan for the next two years. The report found no problem with using the documentary in class.

Price said that she didn't discuss the documentary in the class she gave it because there was no time, and that she did discuss it at the next course meeting. She also said she had to promise—as a condition of having her teaching suspension lifted—that she would seek prior approval for any video material and that, as a result, she has not used any.

In a letter to Price, the chancellor said he disagreed with the various findings of the faculty review committee. He cited the findings about the poor judgment in the way Price showed the documentary to say that the panel's conclusions were "inconsistent" with the evidence. He also said that administrators needed to be able to suspend faculty members without hearings so that they can investigate serious complaints.

Price said that she felt vindicated by the faculty report, and distressed by the chancellor's rejection of its findings. Of the latter, she said, "this speaks to the lack of checks and balances on power here."

If she does not agree to undergo the teaching development plan that the chancellor wants, Price said, she expects to be fired. What will she do? "I know in my heart and mind that I didn't create a hostile learning environment for anyone, and I can't allow myself to be labeled that way," she said. "But I also have two children, so I don't know." Reported in: [insidehighered.com](http://insidehighered.com), November 26.

## Twitter

### Berlin, Germany

Twitter waded into potentially perilous territory October 18 when it blocked users in Germany from access to the account of a neo-Nazi group that is banned by the German government.

The move was the first time that Twitter acted on a policy known as "country-withheld content," announced in January, in which it may block an account at the request of a government. But the company cracked open the gates to a complex new era in which it will increasingly have to referee legal challenges to the deluge of posts that has made the site so popular.

The company said the goal was to balance freedom of expression with compliance with local laws. "Never want to withhold content; good to have tools to do it narrowly & transparently," Alexander Macgillivray, the company's chief lawyer, wrote on Twitter.

A German spokesman for the company confirmed in an

e-mail that it was the first time the policy had been used, although Twitter does not as a matter of policy announce government requests to block an account. In a "transparency report" issued earlier in 2012, the company said it had received six such requests but had not, for reasons it did not specify, acted upon them.

Uwe Schünemann, the interior minister for the state of Lower Saxony, where the neo-Nazi group is based, applauded the decision to block the Twitter feed, calling it in a statement "an important step."

Twitter neither shut down the group's account nor deleted the group's posts. It blocked them for users only in Germany, who see a message that reads "Blocked" and "This account has been withheld in Germany," along with a link to more information about the policy.

The decision to block the German feed was a relatively easy one, given that the group is banned and that the use of Nazi symbols and slogans can be criminally prosecuted. The more difficult question is how broadly and under what rules the policy will be applied by a company with users around the world.

Twitter employees are not combing through the hundreds of millions of messages posted each day searching for offensive material, but are responding only to government requests, beholden to free-expression laws in the countries in which it operates. That makes the company potentially subject to manipulation by authoritarian governments, rights advocates say.

"Where it really will be dangerous is in repressive regimes where Twitter is a very important means of communication between political dissenters, and where laws are interpreted by people who would interpret them in a politically biased fashion," said Svetlana Mintcheva, the director of programs at the National Coalition Against Censorship in New York. "What, for instance, if the president of Belarus decides to suppress the tweets of a theater company which is critical of him?"

Authoritarian governments may wish to stifle the voices of dissidents just as ardently as German officials hope to silence the extreme right. In some countries, religious leaders may seek to prohibit messages they deem to be blasphemous.

Twitter is far from alone in negotiating these rules. Both Facebook and YouTube, owned by Google, complied with requests from German officials to take down content associated with the neo-Nazi group, a spokesman for the Interior Ministry in Lower Saxony said. Facebook and Google have long scoured content for keywords that suggest illegal material.

In September, Google blocked access in some countries to a video on YouTube that mocked the Prophet Muhammad and touched off violent protests. The company has a policy of removing what it deems to be hate speech.

Twitter was sharply criticized over the summer after it

suspended the account of a British journalist who wrote harshly about the Olympic broadcasts of NBC, a corporate sponsor. Twitter reinstated the account and apologized. The episode highlighted the tensions that Twitter faces as it tries to make money without alienating fans, who see the site as a public commons.

Twitter's decision on the neo-Nazi group generated little controversy in Germany. In part because of its Nazi past, Germany has a different approach to free speech than that of the United States, where the First Amendment provides broad protections. People with expertise in far-right groups in Germany often point out that their Web sites are hosted on servers in the United States.

The authorities in Lower Saxony banned the neo-Nazi group, Besseres Hannover, or Better Hanover, in September. Schünemann, the interior minister, said members of the group used "Pied Piper methods" to lure young people into their orbit, including distributing a right-wing magazine outside schools. They harassed, threatened and even attacked migrants, and were suspected of sending right-wing messages to a government official of Turkish background.

On the day the group was banned, September 25, the police searched 27 locations, confiscating computers, cellphones, two handguns, a machete and a flag with a swastika on it. On the same day, the police sent a letter to Twitter requesting that it shut down the group's account, under the name @hannoverticker.

As part of an effort at transparency, the company posted the German request online. Twitter users outside Germany can still view the group's more than 1,000 posts, many of which are about government suppression and the influence of financial institutions like Goldman Sachs. Many of the messages include links to the group's blog, which has been shut down.

Not everyone was pleased with Twitter's decision. "Anyone with a little knowledge can get around it with a proxy server," said Stephan Porada, who writes about the Internet for the German online magazine *Netzwelt*. Porada said that he was against the spread of neo-Nazi propaganda but that he was concerned that the blocking of users and messages could grow.

Jillian C. York, director for international freedom of expression at the Electronic Frontier Foundation, a civil liberties group, said: "It's not a great thing, but it's a way of minimizing censorship. It's better for Twitter if they can keep countries happy without having to take the whole thing down."

Blocking the neo-Nazi group, though, may have only brought it more attention. Besseres Hannover had posted no new messages after it was banned, but someone from the group returned to Twitter and wrote in English, "Look at this regime: They gossip viciously about china and russia but noone about them! freedom for #germany!" The feed also gained more than two hundred followers over the course of the day. Reported in: *New York Times*,

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*from the bench...from page 24)*

how the tools worked or would be used—and even seemed to have trouble explaining the technology.

"Without such an understanding, they cannot appreciate the constitutional implications of their requests," Magistrate Judge Brian Owsley wrote in a September order, adding the government was essentially asking him to allow "a very broad and invasive search affecting likely hundreds of individuals in violation of the Fourth Amendment."

The Department of Justice said it was reviewing the Texas decisions, which came in cases involving drug trafficking and an unspecified crime in which the suspect took the victim's cellphone when he left the scene.

The September ruling involved requests for "cell tower dumps"—information on all the cellphones in range of a given tower for a certain period. Judge Owsley said that, among other things, there was "no discussion about what the government intends to do with all of the data related to innocent people."

An earlier opinion, also by Judge Owsley, denied a request for the warrantless use of a so-called "stingray," a portable device that acts as a fake cell tower and can gather data on nearby cellphones or locate a single phone even if it isn't making a call. Stingray equipment can be carried by hand or mounted on vehicles or even drones.

It's rare for such technology to be mentioned in public cases. Requests for court orders allowing use of the tools are typically made under seal. But a separate case in Arizona also raises questions about the amount of information judges need to make decisions about the technology. In that case, federal agents used a stingray to locate a broadband card, a device that lets a computer connect to the Internet through a cellphone network. Prosecutors say the card, which was in an apartment, was being used as part of a large tax-fraud scheme.

Civil liberties groups are raising questions about the government's arguments in the case, and in particular the court orders the agents got before using the stingray. The Justice Department says it got a warrant to use the device. One of the orders—which were unsealed recently after a request by the American Civil Liberties Union—indeed includes a finding of "probable cause," the standard for search warrants that is typically defined as reasonable belief, based on factual evidence, that a crime has been committed.

But the order doesn't describe a stingray and doesn't order the federal agents to do anything; instead, it is directed at the cellphone service provider, ordering the company to provide "information, facilities and technical assistance" to help agents locate the broadband card.

The U.S. attorneys in the case argue that the orders were “standard,” indicating that judges approving them know what is being requested. But the ACLU and the Electronic Frontier Foundation filed a “friend of the court” brief in the case arguing that the vague language rendered the warrant invalid.

“The government withheld information that it was using a stingray, how it works at all and that it affects third parties,” said Linda Lye, an ACLU attorney. “This is the sort of information a judge has to know in order to issue a warrant.”

Why write an application for a court order that doesn’t make everything crystal clear? There are several possible reasons.

For one, cell tower dumps and stingrays are considered sensitive law enforcement tools, and the government has been wary of disclosing too much information about them. Another issue is that laws on electronic tracking were written before these tools were in use. The government argues that, if the technology isn’t being used to capture the content of a call, it falls into a category that doesn’t require a full search warrant.

But the new tools don’t match up precisely with earlier definitions and can gather more data than the other technology could—meaning the standard applications don’t necessarily provide a complete picture of the technology.

“With more information, the magistrate might have imposed protections and limitations,” Lye said. “Under the Constitution that’s for the court to decide.”

In the Texas cases, Judge Owsley held hearings to determine what devices were being used. Ultimately, he wrote that stingrays and cell tower dumps did not fall within the categories of tools that Congress has said can be used without a warrant.

According to Judge Owsley’s order, the U.S. attorney in the stingray case said the application was based on a standard model approved by the Department of Justice and indicated he would give the judge more examples of law supporting the application. But that memo, Judge Owsley wrote, was never provided to the court. Reported in: *Wall Street Journal*, October 22. □

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*is it legal? ...from page 32)*

Americans are legally entitled to express opinions, as long as they don’t knowingly make false statements.

At issue are six of Dennis Laurion’s statements, including the account of the nurse’s name-calling. McKee and his attorney say the unnamed nurse doesn’t exist and that Laurion invented her to hide behind. Laurion maintains she is real, but he can’t recall her name.

In arguments before the court in September, Laurion attorney John Kelly said his client’s statements were

legally protected opinion that conveyed dismay over how McKee treated Laurion’s father, who had suffered a stroke. The posts described a single visit that lasted ten to fifteen minutes. The review said McKee seemed upset that after Laurion’s father had been moved from intensive care to a regular hospital room, the doctor “had to spend time finding out if you transferred or died.” Laurion also complained that McKee treated them brusquely and was insensitive to the family’s concerns about the patient being seen in public in a gown that gaped open in the back.

In an interview, Kelly said nothing Laurion posted was defamatory—a false statement that harms a person’s reputation. The court is expected to rule on the case sometime in the next few months.

Lawsuits over professional reviews are uncommon in part because most patients write positive reviews, Goldman said. And many states have passed laws that block the kind of lawsuits that are filed mainly to scare someone into shutting up on matters of public concern. Known as “strategic lawsuits against public participation,” those complaints are often forbidden by broad laws that protect criticism even if it’s wrong, Goldman said.

When health care providers do sue, they rarely succeed. Of 28 such lawsuits that Goldman tracked, sixteen had been dismissed and six settled. The others were pending. One notable exception was a Maine case in which a chiropractor sued a former patient for postings on Facebook and websites that accused him of sexually assaulting her. The courts concluded she probably fabricated her story. In June, a judge ruled that the chiropractor could legally attach \$100,000 worth of the patient’s property to his claim as security pending further proceedings in the case.

Yelp says reviewers are well within their rights to express opinions and relate their experiences. Spokeswoman Kristen Whisenand said the company discourages professionals from using what she called the “nuclear option” of suing over a negative review. She said they rarely succeed and wind up drawing more attention to the review they dislike.

Angie Hicks, co-founder of Angie’s List, said people shouldn’t be afraid to post honest opinions about health care or other services. “Everyone has the right to free speech,” Hicks said. “The key here is giving your honest opinion. Honesty is your best defense. Truth is your best defense.”

Jeff Hermes, director of the Citizens Media Law Project at Harvard University’s Berkman Center for Internet and Society, said people who want to post critical reviews should think about whether they can back up their statements.

Goldman advises reviewers to remember that they are still taking a risk anytime they criticize someone in a public forum. “The reality is that we bet our house every time that we post content online,” he said. Reported in: Associated Press, October 26. □

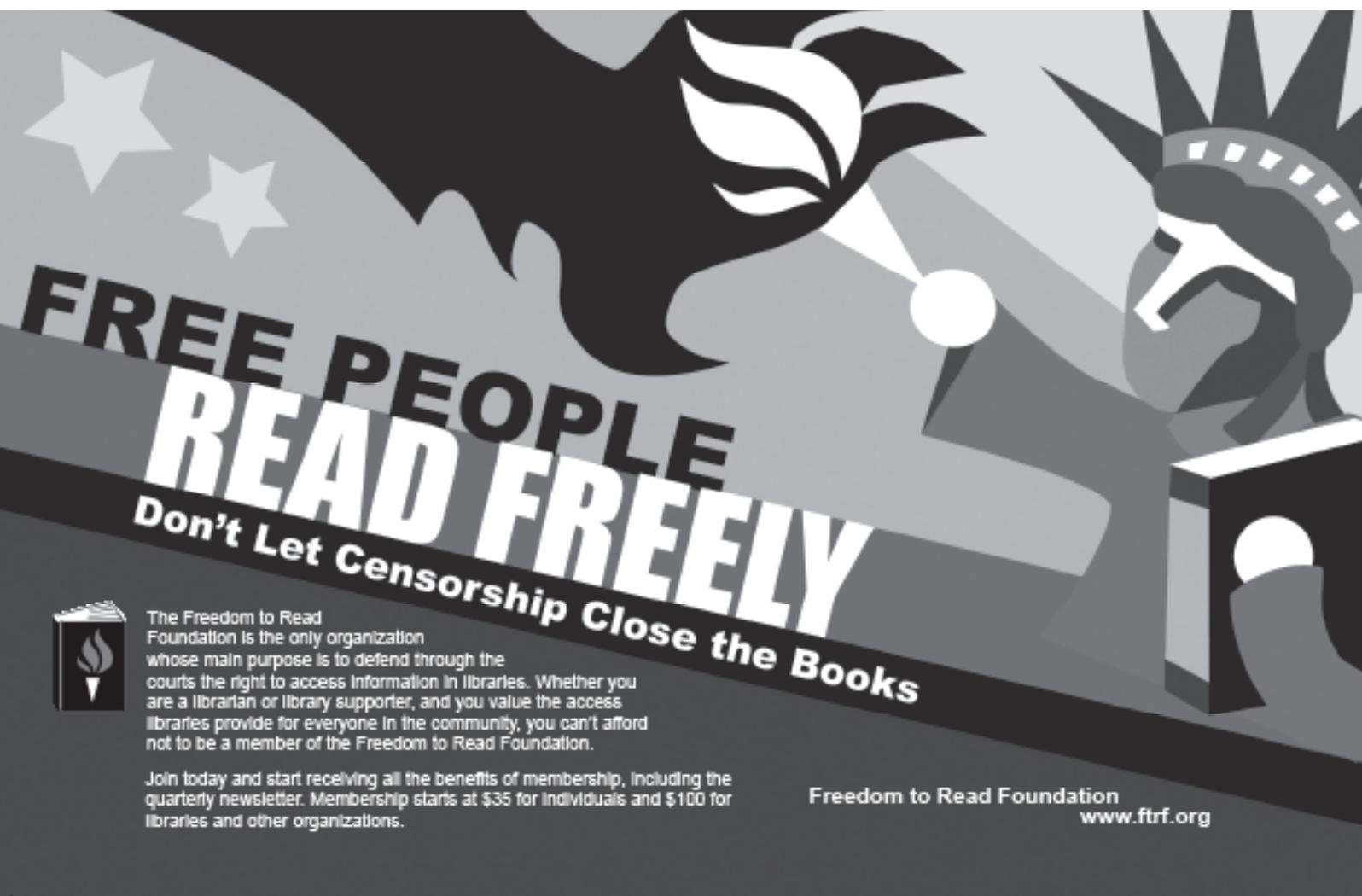
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