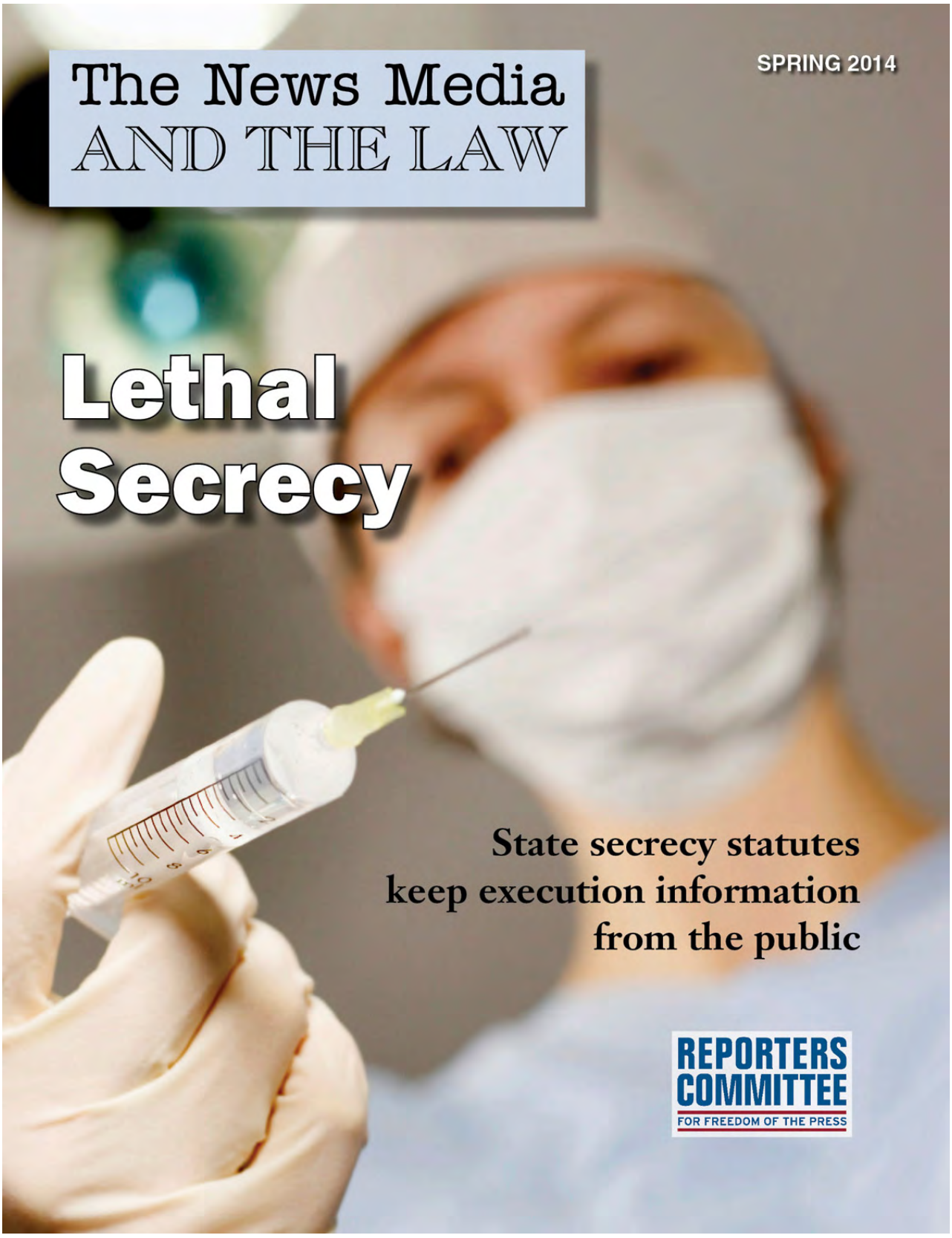

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Lethal Secrecy

State secrecy statutes keep execution information from the public

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Openness in executions

This issue of The News Media & The Law touches on many questions about the future of newsgathering: the cover story looks at the increasing efforts to keep information about executions secret, and others cover escalating fees for FOIA requests, continuing efforts to keep cameras out of the Supreme Court, and the use of hyperlinks in news stories.

Undoubtedly, the most newsworthy issue is the one that ended up on the cover. States that impose the death penalty have found themselves in a quandry, as the drugs they have traditionally used in lethal injections become harder to obtain, primarily due to European restrictions on exports of the drugs for such purposes. As our story reports, the consequences are real: executions do not appear to be going well, with some prisoners remaining conscious and talking of a burning pain when the execution is already underway.

The issue we're covering, however, is not about whether the death penalty is right or wrong, or whether and how executions should be performed. Instead, it is about the fact that these questions have become a clear matter of public interest, no matter which political position one takes, and there is no doubt that the public has the right to know what's going on and what is being done in its name.

If the "compounding pharmacies" that have replaced the European drug companies are not making the same drugs, the public needs to know whether the replacements are humane and effective. If the particular pharmacy has had health issues before, the continued use of that facility is relevant to the public and needs to be revealed.

Some of the answers to these questions will bolster arguments of those who believe the death penalty -- even lethal injections, which have replaced gas chambers, electric chairs and even firing squads as a more humane way to execute a prisoner -- will always constitute "cruel and unusual" punishment. Other answers may support the other side, leading some to conclude that the system works. Either way, the information should be released.

That is why the Reporters Committee has sought the release of much of this information through open records laws, and why, when those requests are denied, we will take the matter to court. In Missouri, we filed a lawsuit with a local reporter and the state ACLU chapter in mid-May to extract some of this information from the prison system. And as denials continue elsewhere, more suits will follow.

Transparency should always be the objective, particularly when a lives are literally on the line.

Lethal Secrecy

State secrecy statutes keep execution information from the public

By Michael Rooney

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After months of fighting for information about the drugs Oklahoma intended to use to kill them, Clayton Lockett, a man convicted of murdering a 19-year-old woman in 1999, and Charles Warner, on death row for raping and murdering an 11-month-old in 1997, were scheduled for execution April 29. It was to be the first double-execution in the state of Oklahoma in 80 years.

Due to the state's secrecy statute prohibiting the disclosure of information about execution drugs, the pair was unsuccessful in their attempts to learn what would be used to execute them, despite an initial favorable ruling from the highest court in the state of Oklahoma.

Lockett was to be executed first, followed by Warner two hours later. On April 29, Lockett was declared unconscious 10 minutes after midazolam, the first of the state's untested three-drug protocol was administered. Three minutes later, however, he began breathing heavily, struggling, speaking unintelligibly and straining to lift his head. The second two drugs in the protocol had begun to enter his body.

The execution was halted 27 minutes after the first drug was administered due to Lockett's obvious distress, but Lockett later died of a massive heart attack.

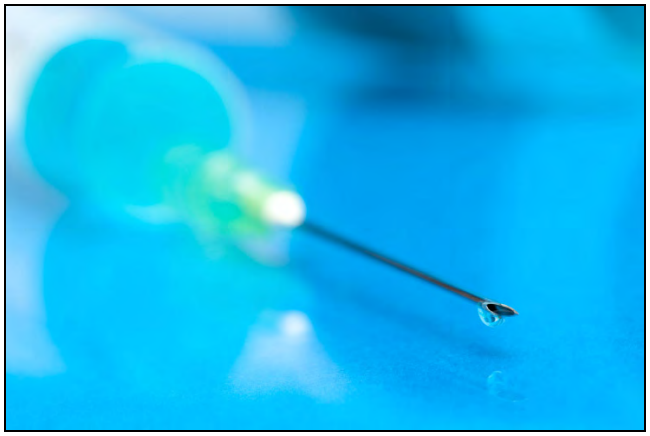
Oklahoma Governor Mary Fallin stayed Warner's execution pending a review of the state's lethal injection protocol.

Earlier this year in Ohio, the 24-minute execution of Dennis McGuire, who exhibited many of the same reactions as Lockett, led to a myriad of public information

requests by death row inmates as to the type and source of the drugs with which they were to be executed.

Among those requests were those made by Lockett and Warner.

However, the U.S. Supreme Court has consistently declined to review cases involving death row inmates' right of access to information regarding the drugs that states will use to execute them. Specifically, inmates are seeking information disclosing the identity of the drug manufacturers, as well as any other information that could help track the states' purchase of the drugs.



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Inmates say they need to know whether the drugs have been tested and whether they are expired in order to know whether they will perform their function safely and with minimal pain. Open government advocates argue there should also be a public right of access to the information under state freedom of information laws.

These cases are not unique. Journalists across the country are beginning to seek greater access to states' lethal injection protocols and further information about the manufacture and supply of lethal injection drugs. Meanwhile, inmates are pursuing public information requests seeking similar information in order to pursue claims against cruel and unusual punishment.

The legal arguments

Recently, these cases have mostly been argued on grounds that denial of the information violates inmates' Eighth Amendment rights against cruel and unusual punishment, by risking pain and suffering due to the use of untested drugs that may not be efficient, and inmates' Fourteenth Amendment right of due process, by not giving inmates enough information to exercise their appeal rights.

However, in addition to challenges on Eighth and Fourteenth Amendment grounds, plaintiffs are arguing that they have a right to the information under freedom of information laws. Such laws give the public access to a broad range of government records. Further, plaintiffs have argued that an implicit First Amendment right of access to this information exists, as the First Amendment is largely premised on the right to informed public discussion of public affairs.

"Courts are viewing this as an Eighth or Fourteenth Amendment issue and they're not dealing with it as a First Amendment issue. But it's a First Amendment issue both for the person being executed as well as for the general public; for instance, for the press," said Muhammad Faridi, an expert on lethal injection right of access issues who represented one of the death row inmates in a case in Missouri on these issues earlier this year.

But state governments say there are important justifications for secrecy in this context. States fear that if they are required to reveal the identities of the

pharmacies supplying execution drugs that those pharmacies will come under attack from the public, through social backlash or even physical harm. States also justify the secrecy statutes by claiming that if the identities were revealed, the backlash might be so severe that the pharmacies would decide against producing the drugs.

Rationed drugs and new protocols

The recent trend in formal requests for this information comes as states are turning to new sources for execution drugs and are trying to protect those providers from public scrutiny. Many pharmacies that previously provided drugs used in executions are no longer willing to supply state and federal departments of corrections if the products will be used for lethal injections.

In the past, lethal injections were carried out using a three-drug protocol. First, a general anesthetic such as sodium thiopental was used to sedate the inmate. Then a muscle paralytic was used to immobilize the inmate, followed by potassium chloride to stop the heart. Death would occur, on average, 10 to 12 minutes after the initial administration of the sodium thiopental.

Changes in Europe

Traditionally, prisons obtained these drugs from pharmaceutical companies in Europe. However, in December of 2010, the United Kingdom banned sodium thiopental exportation to the United States after the companies discovered that supplies of the drug exported to the United States were being used for capital punishment.

Further, in July 2011, pentobarbital, a drug often used as a muscle paralytic and a powerful anticonvulsant, was also subject to tight restrictions after its Danish patent-holding company, Lundbeck, refused to continue selling the drug to any U.S. prison that carried out executions.

Finally, the European Union instituted a ban on exportation to the United States of any drugs or medical products used for capital punishment. The ban is a part of the European Union Torture Regulation, which states that "the Union disapproves of capital punishment in all circumstances and works towards its universal abolition."

Domestic drug sources

After this ban, states were left with quickly expiring drugs and no other source from which to obtain them. This led departments of corrections to examine alternatives to the previous three-drug protocol, including two-drug or single-drug options, as well as the use of compounding pharmacies to acquire the needed drugs.

Compounding pharmacies process and combine medical ingredients to produce drugs based on the specific needs of the patient. Compounding pharmacies may also use this process to recreate existing chemical compounds for general medical use, instead of for a specific patient.

The approximately 56,000 compounding pharmacies in the county are regulated and licensed by the state in which they operate, like other pharmacies. However, accreditation is not mandatory and inspection protocols are much less rigorous than

other pharmacies. Pharmacies that only compound drugs based on singular, individual prescriptions are also not required to obtain Food and Drug Administration approval, and are exclusively under state pharmacy regulation. This has led to concerns that lack of oversight will lead to substandard drugs that could produce unknown results in patients, including death row inmates.

These alternatives to which the departments of corrections have turned and the concerns they have raised have led to right-of-access lawsuits by inmates seeking information regarding the identity of drug manufacturers.

“The states’ inability to get the drugs from Europe has been the biggest driver in lethal injection cases and has resulted in right-of-access claims,” Faridi said. “If there wasn’t a drug shortage . . . and [states] didn’t need to use compounding pharmacies for these drugs, we wouldn’t have these claims.”

Lockett, the inmate from Oklahoma, likely received a compounded version of Midazolam, the sedative used as the first drug in Oklahoma’s protocol. It is not clear whether a lack of testing on the drug or an insufficient dose was responsible for the difficulty at his execution.

In McGuire’s case in Ohio, the state used Midazolam from Hospira, a U.S. company that produced several drugs in Europe and stopped importing those drugs to the United States under the E.U. ban. Hospira has since denounced the use of its drugs in executions and reiterated that it only sells drugs to prisons for medical treatment, not for lethal injections.

In McGuire’s case, the issues during his execution appeared to be dosage problems, not problems related to compounding. In addition to withholding the sources of execution drugs, many states have declined to make public information regarding dosage levels they intend to use in executions.

Critics of secrecy laws, as well as attorneys arguing for pharmacy disclosure, cite the limited regulation of compounding pharmacies and dosage levels as evidence of the risk that incorrectly prepared drugs could cause pain and suffering during the execution.

Secrecy statutes

One of the main concerns of states seeking to protect drug suppliers' identities is the possibility that death penalty opponents might pressure those pharmacies to stop producing and supplying the drugs used for execution. Their concern is heightened since foreign suppliers have stopped supplying to prisons and, in some cases, stopped producing drugs all together.

In denying requests for information regarding the identity of drug and medical suppliers involved in executions, many states rely on existing exceptions to their public information acts, such as protections for individuals’ physical safety, certain law enforcement and prosecutorial information, and information related to “biological agents or toxins.” However, some states are implementing new "secrecy statutes" that specifically shield the identities of members of the execution team, including the supplying pharmacies.

Significant debate exists regarding the protections that the compounding pharmacies enjoy under these statutes.

“The identity of the executioner has always been kept secret and there is good reason for that,” Faridi said. However, he added that there is no history for concealing the identity of the drug supplier. That has been a more recent development in response to the limited availability of the drugs and concerns that companies will stop selling to departments of corrections if there is public pressure to do so.

Five states in particular illustrate different ways state governments are seeking to block the dissemination of information regarding the identity of drug and medical suppliers used in executions.

Specific protections for suppliers

Oklahoma is home to arguably the most controversial secrecy statute. The statute protects against public information requests that would disclose the “identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution.”

Further, the statute bars public access to this information by exempting it from other provisions in state law guaranteeing public access to information. The secrecy statute explicitly states that, “the purchase of drugs, medical supplies or medical equipment necessary to carry out the execution shall not be subject to the provisions of The Oklahoma Central Purchasing Act.”

The Oklahoma Central Purchasing Act is the state’s law governing the expenditure of government funds. One provision of the act makes public all “records of the State Purchasing Director pertaining to any acquisition, contract, transfer, negotiations, order, or rejection.” This statute would require disclosure of all information related to the purchase of drugs used in executions, yet the secrecy statute explicitly exempts this information from required disclosure.

“This is all aimed at making sure no one can find out the identity of the pharmacy,” said Joey Senat, a media law professor at Oklahoma State University. “The Purchasing Act provision is just an extension of that goal.”

However, Senat said that the Purchasing Act provision was just a small part of the problem.

“It’s not just about the inmates. Whether you are against the death penalty or you are for it, this is being done on our behalf,” he said, emphasizing that the public has a vested interest in having access to the information Oklahoma’s secrecy statute protects.

Oklahoma has asserted that its secrecy statute also extends to pharmacies from which the drugs are obtained.

However, on March 26 of this year, in Lockett v. Evans, where Lockett and Warner sought disclosure of the drug supplier, a state judge ruled the secrecy statute unconstitutional.

In its opinion, the court held that nondisclosure of the information was a "violation of due process because access to the courts has been denied."

Susanna Gattoni, attorney for both Lockett and Warner, was pleased with the ruling.

"I don't understand why execution, which is the most severe type of punishment we have in the United States, needs to be secret," she said. "To me, that's something that should be transparent automatically."

Despite that ruling and temporary stays of execution that followed, the Oklahoma Supreme Court ultimately found no constitutional violation, and Lockett's execution proceeded without either inmate being informed of the process the state intended to use. Warner's execution is now stayed for six months while the state investigates what went wrong in Lockett's.

Missouri is also embroiled in controversy regarding its secrecy statute. The statute protects from disclosure the "identities of members of the execution team, as defined in the execution protocol of the department of corrections."

In July 2012, the Missouri Department of Corrections amended its lethal injection protocol to define the execution team as "contracted medical personnel and department employees."

On Oct. 22, 2013, MDOC announced that the department had "added a compounding pharmacy to its execution team" and that "[t]he compounding pharmacy will be responsible for providing pentobarbital for executions carried out under the new protocol." The memo also served as notice that Missouri was moving to a one-drug execution protocol similar to that used in Oklahoma's controversial January 2014 execution of Michael Lee Wilson, whose last words were "I feel my whole body burning."

Due to the language of the state secrecy statute, the decision to include the pharmacy that provides the pentobarbital as part of the execution team would shield its identity from the public.

This state secrecy statute was challenged in federal court in Zink v. Lombardi. The district court only permitted the inmates' claims to proceed on Eighth Amendment, not First Amendment or freedom of information, grounds. Nonetheless, the court still found that the Eighth Amendment required Missouri to release the information.

Missouri appealed the district court's ruling to the U.S. Court of Appeals for the Eighth Circuit, whose review was also limited to the inmates' Eighth Amendment argument. The Eighth Circuit ruled that the information the inmates sought was not relevant to their cruel and unusual punishment claim, and therefore the state did not have to release it. The court went on to vacate the lower court's order of disclosure.

The inmates sought review of the Eighth Circuit's decision from the U.S. Supreme Court. On April 7, the Court declined to review the case.

However, prior to the petition for writ, the inmates filed an amended complaint in district court to assert new claims. In the amended complaint, the inmates asserted a right to the information based on due process grounds, as well as First Amendment

right-of-access grounds.

The litigation is currently ongoing. Six inmates have been executed in Missouri, all seemingly without incident, under the October 2013 protocols.

Georgia's secrecy statute shields from disclosure any "identifying information of any person or entity who participates in or administers the execution of a death sentence."

Notably, the statute also shields from public access "identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence."

Amended in 2013, the language of the statute is particularly unique in its reference to compounding. Only one other state explicitly references compounding in its secrecy statute, and Missouri is the only state that has addressed the procedure in its lethal injection protocol.

In early July 2013, Georgia inmate Warren Lee Hill filed a request with the Georgia Department of Corrections for access to documents concerning the details of the drugs the state planned to use in his execution, including, among other details, the "manufacturer, individuals or entities in the chain of supply, prescriber, compounding pharmacy, or pharmacist responsible for making the drugs."

After receiving heavily redacted documents that failed to disclose the manufacturer of the drug to be used in his execution, Hill filed a complaint with the court to identify the compounding pharmacy set to supply the drug.

The July 12 complaint argued that it would be "impossible for Mr. Hill to determine whether the drugs that will be used by the Department of Corrections to execute him are counterfeit, expired, or tainted in some way likely to cause him grave harm or suffering during his execution."

Hill argued that Georgia's secrecy statute violated his Fourteenth Amendment due process rights. He further reasoned that the denial of access heavily restricted his ability to make a proper Eighth Amendment claim against cruel and unusual punishment.

The state, however, argued that the secrecy statute must remain in place to protect the supply of lethal injection drugs and to protect companies and their employees from harassment.

Agreeing with Hill, a state superior court issued a preliminary injunction staying the execution, ruling that the state's secrecy statute was unconstitutional, though not on First Amendment grounds.

The court went further, though, speaking to the First Amendment implications of the state's statute. It discussed a First Amendment claim not only as it related to Hill's specific right of access, but also as it related to the general public's right of access.

"While it is the case that [company employees] should be free from harassment, the court must weigh the rights of those individuals against the rights of the condemned

inmate as well as the public to know where and how these drugs are produced," the court said. "It is clear to the court that such information is essential to the determination of the efficacy and potency of lethal injection drugs."

The Georgia Supreme Court has now taken up the case and heard oral arguments on February 17.

Applying more general statutes to executions

The Louisiana secrecy statute protects the identities of people who participate "either directly or indirectly" in an execution. However, the statute does not explicitly shield the identities of pharmacies or pharmacists from public information requests.

After a change in the state's lethal injection protocol, Louisiana inmate Christopher Sepulvado challenged the state's reliance on its secrecy statutes in federal court arguing that by withholding the information, Louisiana was violating his due process rights.

A federal district court sided with Sepulvado and ruled that fundamental fairness required "the inmate be given meaningful and adequate notice of how his rights have been affected by the changes in the execution protocol."

The district court ordered the state to release the information and granted Sepulvado a stay of execution.

Six months later, the U.S. Court of Appeals for the Fifth Circuit reversed the lower court's ruling and vacated the stay of execution, finding "[t]here is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol."

Sepulvado petitioned the U.S. Supreme Court for review of the Fifth Circuit's decision, but the Court declined to review the case on April 7.

In May 2014, the Louisiana legislature has moved a step closer to clarifying the state's secrecy law and keeping more information from public view. If the bill, which is now before the full state House of Representatives, becomes law, it will exempt from public view "identifying information of any person or entity that manufactures, compounds, prescribes, dispenses, supplies, or administers the drugs or supplies utilized in an execution."

By contrast, Texas does not have a specific secrecy statute protecting the identity of the execution team or pharmacies involved in the manufacturing or supplying of lethal injection drugs.

Instead, the state has historically declined requests for that information through other exemptions to public information laws. Generally, the state asserts that it is does not have to provide information where there is a risk of physical harm to those whose identities would be disclosed. By extension, Texas argues that there is a risk that pharmacies involved in creating execution drugs might come under public attack if their identities were known.

However, on three occasions between 2010 and 2012, the Texas attorney general has indicated that information identifying the manufacturer or supplier of lethal injection drugs is public information and the state should release it upon request.

These three attorney general opinions specifically rejected assertions that the state could withhold the information under exemptions for physical safety and "highly intimate and embarrassing information." The decisions also rejected the state's claim that because the communications were between government lawyers, disclosure should be blocked on attorney-client privilege grounds.

"As you have failed to demonstrate the information meets the . . . test for privacy, we find the drug quantities, expiration dates, last dates of purchase, and supplier names at issue are not confidential under common-law privacy and the department may not withhold this information," the attorney general's office found in a 2010 decision compelling disclosure and rejecting the argument that drug and supplier information did not qualify as highly embarrassing information.

However, when Texas inmates Tommy Lynn Sells and Ramiro Hernandez requested information similar to that sought in the three attorney general decisions, the Department of Criminal Justice again refused to release the information.

After a legal battle in both Texas state and federal courts, and despite Sells receiving a stay of execution only several hours earlier, the Fifth Circuit ruled that the information Sells and Hernandez sought was not public information. The court relied on its previous decision in the Louisiana Sepulvado case to reiterate its ruling that there is no due process violation in a state's denying access to this information.

Sells petitioned the Supreme Court for review, but the Court declined to hear the last-minute appeal. Sells was executed the following day.

Following the Supreme Court's denial of Sells' petition for review, Hernandez declined to appeal his own case. The state executed him on April 9.

Requiring transparency

While many state and federal courts appear to reject challenges to states' secrecy statutes, a federal court in Arizona recently struck down Arizona's secrecy statute, and did so explicitly on First Amendment grounds.

This is the first time a court used the First Amendment to invalidate a secrecy statute.

In Schad v. Brewer, the state argued it was permitted to keep secret the source and nature of execution drugs based on the state's secrecy statute and a "legitimate interest in protecting its drug sources from public attack."

In the state's opposition to the request for a temporary restraining order, it relied on a dissenting opinion from a federal appellate case, Landrigan v. Brewer, to support its reasoning. The dissent found that "certainly Arizona has a legitimate interest in avoiding a public attack on its private drug manufacturing sources."

However, the court in Arizona disagreed with the state and ordered Arizona to make

public information including the identity of the manufacturer of the drug, as well as information that could lead to identifying the drug supplier.

In coming to this conclusion, the court cited a "well-settled right of access to governmental proceedings [that] is premised on 'the common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'"

Thus, the court reasoned that the state's argument for concealment was superseded by a First Amendment right of citizens to access information about public affairs so that they are able to participate in informed debate.

"The public must have reliable information about the lethal-injection drugs themselves in order to judge the propriety of the particular means used to carry out an execution," the judge wrote. "There is a First Amendment right of access to information about the means used to carry out an execution."

While the Arizona inmates were successful on their right-of-access claims, they were nonetheless executed as scheduled. Because the executions were carried out, the state of Arizona did not appeal the district court's First Amendment decision.

However, Jeff Zick, lead attorney for the state in the case, told The Arizona Republic that if the state's secrecy statute is challenged again, the state will fight it to the U.S. Supreme Court.

While no executions have taken place in Arizona since the executions of the plaintiffs in Schad, Zick went on to say that the state is now in possession of midazolam and hydromorphone, the same two-drug cocktail used to execute McGuire in Ohio.

Next steps

On May 15, the Reporters Committee for Freedom of the Press, the ACLU of Missouri and six media organizations filed two lawsuits in Missouri making open records challenges to the state's withholding of information about the labs and pharmacies that make and test lethal execution drugs.

The Reporters Committee, joined by the ACLU and a reporter from St. Louis Public Radio, argued that those companies do not qualify as "members of the execution team," and therefore the state must release their names pursuant to the state Sunshine Law. The Associated Press, Guardian US, The Kansas City Star, The Springfield News-Leader and The St. Louis Post-Dispatch made similar claims, and also alleged that there is a First Amendment right of access to information about executions, and that the state's law violates that right.

The states' desire to protect the identities of pharmacies which provide lethal injection drugs and other related information is well documented in their secrecy statutes. However, in light of the mishandled executions of McGuire in Ohio, and Lockett in Oklahoma, the right-to-access supporters' attempts to overcome the secrecy statutes are not going to go away any time soon, a fact indirectly acknowledged by Oklahoma Governor Mary Fallin.

"No execution should take place in Oklahoma until there has been a full investigation

into Clayton Lockett's death, including an independent autopsy and full transparency surrounding the drugs and the process of administering them," Fallin said in a statement.

Paying for public access

FOI fees add up for journalists trying to explain government activities

By Emily Grannis

iStock.com

Public records are fundamental to understanding how the government works, and officials typically acknowledge that people are entitled to them as a matter of right. But when government offices can charge requesters for finding, copying and redacting the records, those costs can add up to more than an individual journalist or member of the public can afford.

Two trends in freedom of information fees should be particularly worrisome to journalists: first, at the federal level, there has been a move toward granting fewer waivers for "representatives of the news media," in part because agencies are having trouble defining who qualifies as news media. At the state level, journalists are facing efforts to discourage requests by government offices that impose exorbitant fees as barriers. The founder of one FOIA-oriented news site, for example, said that while many requests may result in $25-50 bills, agencies sometimes quote requesters fees in the tens or even hundreds of thousands of dollars for public records.

The federal news media waiver

The federal Freedom of Information Act allows the government to charge members of the news media only for copying or duplication costs, not for the time spent searching for the records or reviewing them for possible exempt material. Public interest requesters also get reduced fees. Under FOIA, only commercial requesters – people or companies looking to further their financial interests through FOIA requests – are supposed to pay full price.

The problem has become defining "representative of the news media," and while to a certain extent, the rise of online and independent media outlets has caused some difficulty, independent journalists aren't the only ones being denied waivers.

When the FOIA request site MuckRock asked several branches of the military for their commercial requester lists (the list of entities the agencies found do not qualify for news media fee waivers), the lists included the Associated Press, The New York

Times, The Wall Street Journal, Forbes Magazine, ABC News, CBS News and NBC News.

“A lot of the complaints I’ve seen have been from some more traditional, smaller newspapers,” said Michael Morisy, one of MuckRock’s founders, adding that he has seen pushback at both the federal and local levels against granting fee waivers.

Compounding these problems is the fact that most agencies are using a definition of “news media” that is almost 30 years old. When Congress first inserted the news media fee waiver into FOIA, it left defining that phrase to the Office of Management and Budget, which defined “representative of the news media” as someone working “for an entity that is organized and operated to publish or broadcast news to the public.” That “for an entity” requirement has stuck.

“Too often FOIA officers rely on a narrow definition native to 1966 but outdated in 2013,” Shawn Musgrave wrote in a MuckRock article last June. “As gatekeepers of government documents, FOIA and its custodians must adapt along with technology. Transparency is not static.”

Congress tried to do away with that requirement in 2007 when it passed a revised FOIA fee waiver provision and specifically said that “alternative media shall be considered news-media entities.”

“The OPEN Government Act will protect the public's right to know, by ensuring that anyone who gathers information to inform the public, including freelance journalist and bloggers, may seek a fee waiver when they request information under FOIA,” Sen. Patrick Leahy (D-Vt.) said when the 2007 amendment passed. “The bill ensures that federal agencies will not automatically exclude Internet blogs and other Web-based forms of media when deciding whether to waive FOIA fees. In addition, the bill also clarifies that the definition of news media . . . includes free newspapers and individuals performing a media function who do not necessarily have a prior history of publication.”

Dennis McDougal, who spent 15 years reporting for The Los Angeles Times before becoming an author and freelance journalist, said he has made thousands of FOIA requests over the course of his career, but his news media credentials were first questioned when he stepped back from working full time for the Times and began working on a book.

“They did demand to know whether or not I was requesting these files in my capacity as a reporter for the Times or in my capacity as an author,” McDougal said.

Although the government relented in that case when McDougal could point to his Times position, he has run into more of a problem recently as he worked on his twelfth book. This time, the Drug Enforcement Agency told McDougal he did not qualify for a news media fee waiver because he did not meet their definition of “working journalist.” McDougal appealed the decision and asked the agency to explain how they defined “working journalist.”

“They came back with their specious notion that a working journalist was anyone who was on staff at one of the old line newspapers or networks,” he said. “They make

these arbitrary pronouncements without any backing whatsoever . . . . It doesn't make any difference whether you are a card-carrying member of CBS or you're Joe Blow from Kokomo who has put up his own website the day before yesterday. It should make no difference whatsoever."

The DEA told McDougal that he didn't not qualify for the waiver because as an author, he was making the request to further his own commercial interests, an argument he points out doesn't clearly distinguish him from traditional news media entities.

"Are you telling me that the New York Times and the Sulzbergers are not in it for a profit? They're doing this out of the goodness of their hearts? Why would you do that? Why would anyone do that?" McDougal said. "The flaw in their logic is as clear as the quarterly profit margins of CBS News."

The DEA did not respond to a request for comment.

McDougal now has a lawyer and is still challenging the DEA's determination.

His example, along with MuckRock's work and a series of court rulings denying news media fee waivers on the grounds that outlets cannot show enough subscribers or are not established enough yet in the media world, are threatening the spirit of FOIA, say open government attorneys.

"Because processing of requests has become so expensive, it is cost prohibitive and it basically takes all the thrust out of FOIA," said Matthew Schafer, an attorney at Levine Sullivan Koch and Schultz in Washington, D.C. "You're talking about thousands and thousands of dollars. When you look at an independent journalist, no independent journalist is going to be able to afford to do one [request], let alone 10, 20 or 30."

Government agencies have expressed concern that expanding the definition of news media will enable anyone to claim that status and cut down on necessary FOIA fees.

"Such an expansion of the definition of 'representative of the news media' would have severe fiscal and other practical consequences for the executive branch," wrote Acting Assistant Attorney General Richard Hertling in a statement to Congress about the 2007 OPEN Government Act.

Schafer said that alone is not a good enough reason to limit the news media fee waiver.

"These fee waiver provisions are the means to the ends of FOIA and they're the means because they make FOIA affordable for those people whose main purpose is to disseminate information about the government to the people," he said. "It doesn't seem that broadly interpreting 'representative of the news media' would somehow frustrate FOIA. Now, it may create an accounting problem for the government, but that's a policy decision that Congress has made a choice on, and it's not the executive branch's prerogative to deny bona fide independent journalists' requests for fee waivers where Congress obviously intended that they get those fee waivers."

Schafer suggests that journalists asking for a fee waiver make sure they stick to the

criteria courts and agencies have set out, even though those criteria may be outdated. Journalists should include in their waiver request their publication history, average page views on their online stories, what type of project they're working on and what types other information they intend to include in the story.

State agencies turn to fees that discourage requesters

MuckRock's Morisy said one of his biggest concerns with FOI laws right now is the tendency for bad policies to spread from agency to agency.

"Just like news can go viral, bad practices and lack of transparency can go viral," he said. "We've found that in numerous instances where if one agency finds a new trick, they're very happy to share that with someone else . . . So when one agency says, 'Hey, I found one way to deal with this,' . . . we're seeing that spread very quickly at the local and federal level."

Morisy said state FOI fees have stayed relatively constant since the recession hit, but that state and local agencies have continued to be "creative" with their fee estimates and have been more public with their complaints about frequent requesters.

"I think agencies are starting to play that card a little more publicly," he said. "A lot of towns come out and single out requesters as being particularly burdensome . . . I think they're trying to play on the public sympathy toward public budgets."

All 50 states and the District of Columbia allow agencies to charge some fees for compliance with freedom of information laws. The most common fees are for copying the records (whether on paper or electronically), but some states also allow for search fees, staff time and the cost of redacting records to be billed to the requester.

Reporters in Florida, Maine, Massachusetts, Texas and Wisconsin have all seen how quickly those costs can add up. They have faced fees ranging from $192 for copies of emails from 10 government employees in Wisconsin, to $200,000 for records of parking tickets and citizen complaints in Massachusetts.

Even within a state, charges for information can vary widely from city to city. Muckrock's Musgrave found in Massachusetts, for example, that records on police salary and overtime pay came free in Boston and Watertown, and for $15 in Lawrence and Brookline, but would cost $780 in Sommerville.

Todd Wallack, a reporter for the Boston Globe who frequently seeks information under the Massachusetts open records act, said the Massachusetts statute makes it particularly hard to appeal fees and allows agencies to charge for every step of the records production process.

"At times, agencies have literally cited estimates of more than $100,000 to find records," he said. "For instance, it's hard to get copies of email, because state and local governments will say, 'Gosh, we're going to have to have a person search through all the email, then we're going to have to go through and redact all that email, and we're going to charge you an hourly fee for a lawyer and an IT person, not a low-level clerk, to do that'... And there's no ability to challenge those fees."

Wallack explained that getting hit with a $100,000 public records bill is effectively a denial for any reporter, and added that even a bill for several hundreds of dollars can be the equivalent of a denial for a freelancer or someone at a small publication.

“Not every person filing a public records request has as much clout as the Boston Globe does in Massachusetts, so the little guy is at an even bigger disadvantage,” he said. “As proud as I am of the work that we do at the Boston Globe, there’s a lot of good information that can be found by smaller media organizations and citizen journalists, and I feel we’re all at a loss when we can’t get access to basic public information at a price that we can afford.”

Although Wallack said he does appeal a few fee decisions each year, he generally tries to find alternative ways to get the records he needs.

“Often I’ll go to different agencies” for the same record, he explained. “Sometimes I will complain to a higher-up and go higher and higher up the chain. Sometimes we write about it. Sometimes we threaten to write about it and before we write about it, suddenly the records are available.”

And at least once, Wallack had to design his own computer program to collect information from a state website and compile it into a useable format. He had asked for a list of state board members, and instead of providing one comprehensive list, the state had referred him to a website where board members were listed on 730 different committee lists.

“So I ended up writing a program that downloaded all those 730 different lists and pulled that data so I could analyze it,” he said. “It was a good exercise.”

Wallack said he knows that the high cost of public records leads a lot of requesters to give up or narrow their requests, and he said that is unfortunate.

“The reason we’re in this is to do good journalism,” he said. “It’s great to interview people and talk to people, but that’s only part of the story. It’s also important to look at the written documentation and see what agencies are actually doing and how they’re operating.”

One newspaper in North Carolina seemed to echo Wallack’s concerns about discouraging requesters when it realized in December that a local housing authority wanted more than $56,500 to respond to a request for email correspondence.

“Hefty charges for obtaining public information that should be readily available . . . discourage people from asking,” the Star News wrote in an editorial in March. “If that is not the explicit intent, it certainly has that effect.”

The governor in North Carolina is now fighting accusations from the state’s attorney general that high fees might violate the state’s public records law. In January, Attorney General Roy Cooper wrote to Gov. Pat McCrory to criticize the governor for allowing agencies to impose a “special service charge” on FOI requests. The policies allow for charging up to $54 per hour after the first half hour of staff time spent on a request.

“I believe these policies violate the spirit and perhaps the legislative intent of the

North Carolina Public Records Act," Cooper wrote. "I urge you and your administration to review and reconsider these policies . . . The people are poorly served by barriers to obtain information they already own."

The governor's office responded to Cooper by reaffirming its commitment to transparency and taking issue with the attorney general's interpretation of the statute's purpose.

"This administration is committed to transparency, open government and broad access to public records," wrote Robert Stephens, general counsel to the governor on Feb. 7. "It was neither the legislative intent nor the spirit of the public records law to expect taxpayers to subsidize large, time consuming and expensive public records requests that we so frequently receive."

Some states, though, are moving to rein in FOI fees. In Colorado, for example, Rep. Joe Salazar and Sen. John Kefalas introduced bills that would have limited processing fees, which had risen to $190 per hour in some parts of the state. The bill, which Gov. John Hickenlooper signed into law May 2, sets the limit at $30 per hour, with requesters getting the first hour of search time free. Agencies are also required to post their fee policies online or somewhere else easily accessible to the public.

"[The law] provides certainty for the public – for citizens who want to access public records, who have a right to access public records," Kefalas said. "There's been a lot of variation and that's what we're trying to address . . . This is good policy that will ultimately help the citizens to be able to access public records."

Other resources:

Federal Open Government Guide: Federal Open Government Guide

Open Government Guide: Open Government Guide

Federal FOIA Appeals Guide: Challenging Fees

The basics: Using freedom of information laws

A primer for those just starting to use open records laws

By Emily Grannis

Freedom of information laws are invaluable resources to reporters covering any beat. The laws provide access to a wide range of government documents, from budgets to emails, and contracts to crime reports.

There are two ways to incorporate freedom of information materials into your reporting: start with the documents, or start with the story.

When you start with the documents, think about which government records might be interesting to see or might contain information that will build a story. Then request them.

Starting with the story can push your coverage to new insights. Think about how the documents can beef up your story. Public records are great sources and are always on the record. Having the records when you start interviewing human sources also gives you better ammunition and makes your story stronger overall.

Documents received from FOI requests have led to countless important stories, including revelations that the federal government turned down millions in international aid after Hurricane Katrina; a troubling lack of transparency about Medicare inspections of health care facilities; trends in thefts by TSA agents at airports; and the FBI's practice of allowing informants to break the law.

As helpful as FOI laws can be in these types of stories, the process of requesting records can also be tedious and frustrating. Denials are common, and often government agencies fail to respond in a timely fashion. When that happens, it is important to follow up with the agency.

When an agency fails to respond at all, first reach out informally to check on the status of your request. Call or email – or do both – to initiate a dialogue with the agency. At this stage, it is also useful to know your state's law on required response times for FOI requests. States incorporate those rules with varying levels of specificity, but it can be helpful to remind an agency of its statutory obligations.

If the agency continues to be unresponsive or denies your FOI request, the next step is an administrative appeal, if that is available. All federal agencies have administrative appeal procedures but most states do not. If you can appeal to the agency or to your state attorney general, be sure to follow the procedure carefully. It

is your best chance at finding a resolution while avoiding court, but it will also position you better for litigation if that becomes necessary.

If your efforts at informal discussions and formal administrative appeals fail, the last recourse is to sue the government for the records – an expensive, time-consuming and by-no-means guaranteed-successful last resort.

Despite the sometimes difficult process, making FOI requests is still worthwhile. The FOI process can open new lines of communication between agencies and the media, it can be the catalyst for crucial revelations and, ultimately, it can lead to a better-informed public. Records requests can also provide the basis for engaging multimedia packages and graphics to more thoroughly explain issues.

To keep a spotlight on FOI, for better or worse, it is important to include the records requests made for your stories and whether those requests were successful. As the ultimate watchdog of government officials, the public needs to know whether agencies are complying with records requests or whether reform – legislative or elective – is needed, and whether the system is working.

Holding out against cameras at the high court

As Justices remain skeptical of camera access, spectators stand in the rain and hope

By Jamie Schuman

News Media & The Law photo by Jamie Schuman

Spectators line up outside the Supreme Court hoping to get one of the seats in the courtroom.

It was pouring rain the last day the Supreme Court heard oral argument this spring, but that didn't stop James Armstrong from waiting in a line more than 50-yards long to try to get a seat in the courtroom.

He wanted to see the case, a patent dispute, but braving the elements was the only way to do so because the Supreme Court does not televise oral arguments.

Umbrella in hand and in town from California, Armstrong questioned this policy.

"Justice should be done in the open," he said.

As other courts have increasingly let in cameras, open-government advocates have heightened calls for the Supreme Court to do so too. The justices, however, remain opposed to the idea.

When a group of media and legal organizations known as the Coalition for Court Transparency petitioned Chief Justice John Roberts in March to start televising arguments, the Court's press office sent a curt reply: "There are no plans to change the Court's current practices." (The Reporters Committee is a member of the coalition.)

Over the years, justices have given many reasons for banning cameras. Among them: the Court needs to preserve its tradition; people will not understand the function of oral arguments; the media will use embarrassing sound bites; and cameras will encourage showboating.

But many Supreme Court reporters and lawyers who study the topic say these justifications are flimsy at best. The benefits of broadcasting arguments, they say, far outweigh the risks.

"There's a real hunger out there from people to know more about the Supreme Court and the justices," said Ariane de Vogue, Supreme Court correspondent for ABC News. "I think it would be a marvelous educational opportunity."

News Media & The Law photo by Jamie Schuman

Members of the media wait for the litigants to appear after oral arguments.

Cameras not allowed

In addition to not permitting cameras, the Court waits until the Friday after each argument to release audio recordings. Before 2010, it only provided audio from a given term's hearings at the start of the next term. The Court has made exceptions and released same-day audio for about 25 high-profile cases since 2000, but has provided that service far less frequently since the 2010 rule change.

Audio recordings of opinion announcements are not available until the fall after cases are decided, a policy that famously contributed to some news outlets initially misreporting the healthcare rulings in 2012.

Though anyone can get same-day written transcripts of oral arguments and opinion announcements, the delay in releasing audio recordings and the failure to release video is out-of-sync with the realities of the media industry.

"If the news happens on Wednesday, you want to hear [the justices] on Wednesday," de Vogue said.

De Vogue said that on the rare days that the Court provided same-day audio, she used clips in her television reports and got positive feedback from viewers.

"I think people really like to hear the voices of the justices," she said.

An institution steeped in tradition

The Supreme Court's camera policy is somewhat of an anomaly. Every state supreme court allows cameras, and so do the highest courts in Canada, the United Kingdom and Australia. The U.S. Court of Appeals for the Ninth Circuit began live streaming oral arguments this winter. In 2010, about 15 federal district courts began videotaping proceedings through a pilot program launched by the Judicial Conference, which oversees the federal judiciary except for the Supreme Court. C-SPAN has long televised Congressional hearings.

The Supreme Court, meanwhile, gives lawyers who argue there a quill pen and still uses elevator operators in its building, said Jerry Goldman, director of the Oyez Project at Chicago-Kent College of Law at the Illinois Institute of Technology.

"It's just uncomfortable with change," said Goldman, whose website catalogs oral argument audio. "They're always in the caboose."

Sonja West, a media law professor at the University of Georgia School of Law, explained that the justices may be so reluctant to lift the camera ban because they fear breaking a system that they see as working well.

"They feel very much like the guardians of a very important institution," said West, who wrote about the Court's camera policy in the Brigham Young University Law Review.

Tradition is so important to the Court, West said, because public respect is a key source of its power. Unlike Congress and the President, the justices do not control the nation's finances or military.

But Eric Segall, a constitutional law professor at Georgia State University, argues that the justices should not treat themselves differently from other government officials. As is true for other branches, the presumption should be for transparency, he said. The Court should have the burden of proving why cameras should not be allowed, and not the other way around.

"This is a public hearing," Segall said. "It's open to the public. It's material. It's relevant, and people want to televise it. We should be allowed to see it."

Some journalists who cover the Court and professors who study it say reasons the justices have given for denying camera access – such as public misunderstanding, misleading reporting and participant grandstanding – do not overcome the presumption of openness.

"We have three branches of government," Dahlia Lithwick, who covers the Supreme Court for Slate, said about camera access. "Two of them are totally transparent, and one of them is completely secret, and that's a problem."

Access Myth #1: The Public Just Won't Understand

Some justices have said they oppose cameras because they think people may not understand oral arguments or their role in the outcome of the case. Justice Antonin Scalia once remarked that the complexity of the law "is why the University of Chicago Law Review is not sold at the 7-Eleven."

Justice Sonia Sotomayor told a reporter that arguments should not be televised in part because most viewers "don't take the time to appreciate what the Court is doing."

One worry is that the public will overestimate the impact of lawyers' oral advocacy skills on decisions in cases, and underestimate the role that briefs play. Another is that people will not realize that justices play devil's advocate when they ask certain questions.

To Segall, this view has it backwards. Broadcasts of arguments would help the public learn about the Court's operations, he said.

"The more we see Justice [Antonin] Scalia being obnoxious, the more we see Justice [Anthony] Kennedy acting like a law professor, the more we see Justice [Clarence] Thomas sitting there and doing nothing, the more we have insight into the people

who work for us," Segall said.

Shannon Bream, who covers the Court for Fox News, agreed that broadcasts would help people understand the work of the justices.

"It gives much more nuance to their concerns, their questions, [and] their positions," she said.

And Armstrong, waiting in the rain to see the patent case, Limelight Networks, Inc. v. Akamai Technologies, Inc., thought public confusion was no reason to ban cameras.

"A lot of the stuff they argue might be esoteric and it might be arcane, but it should still be open," he said.

Access Myth #2: The Jon Stewart Effect

Justices also have warned that if video is available, journalists will take quotes from hearings out of context and use them as sound bites on the evening news.

Justice Kennedy once said he does not want the Court to become part of "the national entertainment network." And Justice Scalia told the Senate Judiciary Committee, "[F]or every ten people who sat through our proceedings gavel to gavel, there would be 10,000 who would see nothing but a thirty-second takeout from one of the proceedings, which I guarantee you would not be representative of what we do."

To NBC News justice correspondent Pete Williams, any worries about journalists using snippets are baseless. Reporters already use short quotes from oral arguments in their stories, and mass confusion has not ensued, he said at a Reporters Committee panel on Supreme Court transparency last October.

Lithwick said video would make coverage of the Court more truthful.

"One way to get it right is to not have middlemen, not have us interpreting and shading and editorializing," she said. "If you put out video, I think the argument can be made that it's not distorting what the Court does; it's actually making it clear."

Even if reporters get the story wrong, Segall said, that's no reason to keep cameras out. "We don't censor speech because it's possibly misleading," he said. "We ask for more speech."

Some commentators argue that concerns about sound bites are less about how mainstream reporters will use clips and more about what late-night comedians will do with them.

"I think they fear being made fun of by Jon Stewart on 'The Daily Show,'" Williams said at the Reporters Committee panel.

But Stewart has found ways to mock the justices even without video or timely audio. In a piece on campaign-finance case McCutcheon v. Federal Election Commission that also touched on the cameras issue, the comedian showed fake courtroom

sketches of conservative justices sitting in a hot tub full of money and of liberal justices smoking a hookah. He then quipped, “Apparently, the only thing so corrosive to the process that it can never be allowed to exert its unholy influence upon our sacred democratic institutions is transparency.”

Access Myth #3: Showboating for the cameras

Some justices have also cited grandstanding as a reason for not wanting cameras. The worry is that lawyers will act out for the televised audience or that the justices themselves will change their behavior.

But the experience in the 50 state high courts shows that this result has not materialized, West said. Most attorneys forget that they are being filmed, she said, and, even without cameras, Supreme Court advocates already are acutely aware that they are on a big stage.

At the Reporters Committee fall panel, Ohio Supreme Court Chief Justice Maureen O’Connor said that, in the ten years that her court has broadcast oral arguments live, an attorney turned to the camera and acknowledged the outside audience only one time. After a justice admonished the lawyer, he quickly stopped the behavior, O’Connor said.

“Over my dead body”

Former Justice David Souter told Congress in 1996, "the day you see a camera come into our courtroom, it’s going to roll over my dead body."

Though many open-government advocates are confident that the Court will allow cameras one day, they don’t necessarily expect that day to come soon.

Bills on the matter have fallen flat in Congress. New appointees – such as Justices Elena Kagan and Sotomayor – have shown support for cameras during their confirmation hearings, but have changed their minds after joining the bench.

Some access proponents have suggested that the justices adopt intermediate steps – such as same-day audio or live audio – as a test-run before allowing cameras.

“They don’t have to jump in the deep end right from the beginning,” West said.

The Coalition for Court Transparency, in its March letter, asked the Court to consider releasing same-day audio – which would still be timely for newscasts – if it rejected live video.

Even if the Court continues to oppose cameras, a recent security breach shows that the technology can find a way into the courtroom anyway. An audience-member snuck a camera through security for a February oral argument, and posted a two-minute clip of the hearing on YouTube.

As cameras become smaller and harder to detect, the Court should realize the wisdom of reforming access policies on its own terms, West said.

Bream, of Fox News, is optimistic that the Court will televise arguments someday. As

technology advances and new generations of justices become more comfortable with it, “it’s only a matter of time,” she said.

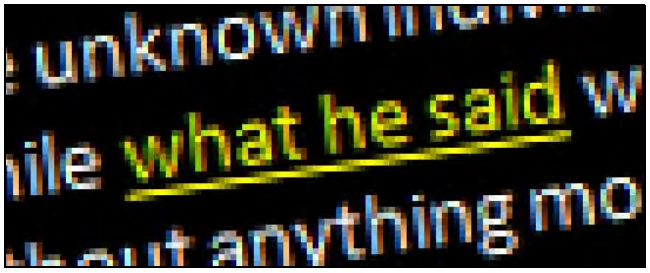
Until that time, people who want to see arguments and who don’t have a special connection to the Court have only one option: line up early in the morning (or a few days earlier for blockbuster cases) for one of the 250 or so public seats -- although even that many are rarely made available by the Court.

Kieran McCarthy, a law student who did just that to hear the patent case on that rainy late April day, suggested a modest reform for the justices. “If they could put up a bus shelter for us, it might be nice in the rain,” he said.

Rethinking hyperlinking

Linking to source material can help journalists in defamation lawsuits

By Cindy Gierhart



Media scholars have noted for years that news outlets lag significantly behind blogs in their use of hyperlinks. But recent court cases suggest that news media may want to increase their use of hyperlinks as a way of defending against defamation lawsuits.

Three scenarios demonstrate ways that hyperlinks have helped media defendants.

Scenario #1: Facts supporting an opinion

Suppose a blogger writes, "I think the mayor is a thief." Even though it begins with "I think" and sounds like an opinion, it is followed by an assertion of fact. Standing alone, that statement could be defamatory. But if the writer provided hyperlinks to accurate accounts on which the writer based this conclusion, then the statement may be considered "pure opinion" and not defamation.

If readers are presented with a series of facts (either written in the story itself or via hyperlinks), they can follow how the writer developed the opinion – and readers can use the facts presented to form their own conclusions. An opinion, even though it's based on facts, cannot be proven true or false, and thus cannot be defamatory. Without supporting facts, the reader is forced to take the writer at his or her word, which is the same as stating a fact.

A federal district court in California came to the same conclusion as far back as 1999. In Nicosia v. De Rooy, Diane De Rooy alleged on her website that Gerald Nicosia embezzled money from the estate of Jack Kerouac's daughter. The court ruled that she sufficiently disclosed the underlying facts behind her claim by hyperlinking to other articles she wrote on her website.

"These [hyperlinked] articles were at least as connected to the news group posting as the back page of a newspaper is connected to the front," the court wrote, and therefore they should be considered facts she disclosed to support her claim.

New York courts have confronted this issue at least three times since 2011. For example, in Silvercorp Metals Inc. v Anthion Management LLC, a silver producer sued over Internet postings that called into the question the quality of its ore and

accused the company of having "questionable" customers and overvalued stock. The court ruled that the statement about the ore having "low silver content" was protected opinion because it was accompanied by hyperlinks to lab reports that backed it up. Also, the comment about "questionable" customers was opinion because the posting provided documents explaining that the customer in question could not be found at a given address. (The other two cases are Seldon v. Compass Restaurant and Sandals Resort International v. Google).

This do not mean you can say whatever you want so long as you add hyperlinks. The linked resources must support your statement and provide a basis for your opinion.

It is best to explain the underlying facts within the text of your article and not rely solely on hyperlinks. Links can break, or you could find yourself in a court that doesn't recognize the importance of hyperlinks. But adding hyperlinks as a precaution or as additional information certainly couldn't hurt.

Scenario #2: Piggybacking on another's fair report privilege

The "fair report privilege" is a legal defense to defamation. It provides immunity from liability – even if the statement turns out to be false – so long as you obtained the information from an official public document or statement by a public official, you cited the document or official as your source, and you fairly and accurately relayed the information from the source.

For example, in court documents, a soon-to-be-ex-wife accuses her famed politician husband of having an affair. A newspaper reporter accurately and fairly reports on the accusation, citing the court records. A blogger then writes that "allegations of an affair surface." The blogger does not mention the court documents, but he hyperlinks to the original news story. The husband, in fact, did not have an affair. The statement was false.

Traditionally, the first reporter would be covered by the fair report privilege because she cited court documents, but the blogger – without disclosing that his information came from public documents – would not be protected by the privilege.

A federal court in New York recently grappled with this issue in Adelson v. Harris. In Adelson, the National Jewish Democratic Council (NJDC) wrote on its website that "reports surfaced" that Sheldon Adelson "'personally approved' of prostitution in his Macau casinos." The phrase "personally approved" was hyperlinked to an Associated Press story, which quoted a court document in which a former casino executive accused Adelson of approving of prostitution at the casino.

Because the Associated Press story was protected by the fair report privilege (even if the allegation was false), the court ruled that the NJDC was also protected by the privilege because it linked to the AP story. (The case is currently on appeal.)

The court praised the use of hyperlinks as a modern-day footnote – only better because readers have immediate access to sources with a single click instead of having to trudge to a library to look them up.

"It is true, of course, that shielding defendants who hyperlink to their sources makes it more difficult to redress defamation in cyberspace," the court wrote. But that's a

good thing. “It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits,” the court wrote.

There are a few limitations to this defense, however.

First, not all states recognize a fair report privilege, and those that do vary as to what documents or statements are covered by the privilege.

Second, Adelson was decided by a federal court in New York interpreting Nevada law. Another court interpreting another state’s law might rule differently. It is best to always attribute your information directly to the public document or official from which you obtained the information and only rely on the hyperlinking defense as a backup.

Scenario #3: Providing context

When determining whether a statement is defamatory, a court will look at the context in which it was written, trying to put itself in the reader’s shoes. The court will consider the statement in relation to the headline, the photographs, the location of the article (on the front page versus the editorial page), the tone of the piece, and so on. Hyperlinks – and the sites to which they lead – can be considered part of the context surrounding an allegedly defamatory statement.

This is probably the least-tested of the three scenarios. The federal district court in Washington, D.C., addressed it in a very limited manner in Boley v. Atlantic Monthly Group. In Boley, a writer for The Atlantic magazine referred to George Boley, a former Liberian public official, as a “warlord.” In determining whether Boley was a limited purpose public figure (which would make defamation harder to prove), the court looked at the context in which the writer called Boley a warlord.

The writer hyperlinked to an earlier story he wrote, which explained in detail Boley’s role in the Liberian Civil War. The court ruled that, in the context of the Liberian Civil War – the context in which the writer was clearly referring, because of the hyperlink – Boley was a limited purpose public figure.

Potential pitfalls to hyperlinking

Republishing defamatory statements. If the content to which I link helps me disprove defamation, can the reverse be true? Can linking to a defamatory statement make me liable for it? Probably not.

Not many realize that you can be liable for defamation simply by repeating, or “republishing,” a defamatory statement. Yet courts seem to agree that linking to someone else’s defamatory statement does not mean that you “adopt” that statement as your own or “republish” it.

In Vazquez v. Buhl, NBCUniversal posted a link to an article written by Teri Buhl, described by NBCUniversal as a “veteran financial reporter,” and then included this introduction before the link: “I don’t want to steal Buhl’s thunder, so click on her report for the big reveal.” A man then sued Buhl for defamation, and he sued NBCUniversal, claiming it republished the allegedly defamatory statement.

The Connecticut trial court ruled that NBCUniversal could not be held liable for defamation.

“Even though NBCUniversal’s actions might have increased readership of the defamatory statements,” the court wrote, “its actions do not amount to either the creation or development of the allegedly defamatory statement which it did not author or even edit.” (Although the court called them "defamatory statements," the suit against Buhl had previously been dismissed.)

As Micah Ratner, attorney for The Atlantic in Boley v. Atlantic Monthly Group, explained, “You’re not republishing what you’re referencing; you’re pointing your reader to it.”

In a string of related cases, courts have also found that hyperlinking does not equal “republishing” for statute-of-limitations purposes. In New York, for example, if you don’t sue someone for defamation within a year, you lose your chance.

In Haefner v. New York Media, someone missed the one-year statute of limitations but tried to argue that, because New York Magazine hyperlinked to the allegedly defamatory article within the past year, the hyperlinking restarted the clock and kept the claim alive.

The court disagreed. Hyperlinking does not republish the defamatory content, the court ruled, so it does give rise to a new defamation claim each time a new hyperlink appears.

Similarly, in Pearson Education, Inc. v. Ishayev, a federal court in New York found that sending an email with a hyperlink to a website guilty of copyright infringement does not itself constitute copyright infringement.

“A hyperlink . . . is the digital equivalent of giving the recipient driving directions to another website on the Internet. A hyperlink does not itself contain any substantive content,” the court wrote.

Of course, a few court opinions do not equate a universal rule. But if these decisions are any indication, it seems writers can hyperlink without fear that the link will bind them to the same liability as the site to which they link.

Knowledge of falsity. If you are accused of defaming a public figure, the public figure must prove in court that you acted with “actual malice,” that is, that you knew the statement was false and printed it anyway or that you acted with “reckless disregard” for the truth.

Therefore, the argument could be made that if you make a false statement and then link to a document that contains contrary information, you could be accused of having known the statement was false, proving actual malice.

Ratner thinks this would be a hard argument to make.

“It would be a pretty extreme case where that would lead to liability,” Ratner said.

Recently a Texas court held that a statement was not defamatory even when it

linked to documents directly opposing the statement.

In Rehak Creative Services v. Witt, a political candidate accused her rival of rewarding his supporters with government contracts. One of the companies listed as receiving preferential treatment sued the writer, arguing that her statements were so clearly false that even the documents she hyperlinked to disproved her statements.

The hyperlinks led to documents showing the company was awarded its first three contracts before it contributed to the campaign, that someone other than the candidate approved the contracts, and that it competed at market or below-market rates.

The Texas appellate court said, even if the linked documents "unmistakably show 'the exact opposite'" of what the writer stated, they would serve as a signal to the reader that the writer's statements were merely exaggerations or "politically flavored hyperbole."

Without the hyperlinks, her statements might have been actionable. But with the hyperlinks, readers could compare the writer's statements against the documents and see that her statements must be speculation.

Generally, "linking is more likely to be helpful than hurtful," Ratner said.

Link rot. One final limitation to hyperlinking is the potential for "link rot," or broken links. This happens when the content you link to has been removed or assigned a different URL. If you rely on the information in hyperlinks to save you from a defamation claim, and readers cannot access that information, then the hyperlinks likely will not help.

Therefore, it is probably best to include whatever information you can in the body of your article. For example, cite directly to a public document to be protected by the fair report privilege, and disclose the facts supporting a potentially damaging statement, so that you can defend it as opinion in court, if it comes to that.

But if there is one thing all of these cases have shown: it doesn't hurt to hyperlink.

Anatomy of a Brief: Scholz v. Boston Herald

A detailed look at a recent Reporters Committee amicus brief

By Cindy Gierhart

In early May, the Reporters Committee filed a friend-of-the-court brief with the highest court in Massachusetts, weighing in on a central tenet of libel law: opinion.

"Opinion" has a broad meaning in libel law

"Opinion" in libel law can encompass more types of speech than the traditional "opinions" you might think of in everyday speech.

In one sense, opinion in libel law can mean exactly what you think. For example, a columnist writes on the editorial pages of the newspaper that she thinks the city council made a bad decision or laments that the city's new billboards look gaudy.

These statements are protected because, frankly, people are allowed to have opinions. They cannot be "wrong" because they cannot be proven false.

A second type of opinion doesn't actually seem like an opinion at all. It is perhaps better described as a conclusion, speculation, or conjecture. This type of "opinion" in libel law appears where a writer gives a set of facts and then draws a conclusion from them or offers speculation as to what those facts mean.

That is the type of opinion at issue in Scholz v. Boston Herald.

The facts of the case

The Boston Herald published a series of articles following the suicide of Brad Delp, lead singer of the band Boston, in which reporters interviewed Delp's ex-wife, friends, and others, attempting to discern why Delp took his own life. Tom Scholz, Delp's bandmate, sued the Boston Herald, believing the articles defamed him by insinuating that Scholz was the reason Delp ultimately decided to take his own life.

In its first article, the Herald wrote that "the cops were not told why [Brad Delp] took his life," establishing at the outset that the reason for his suicide is unknown. Gayle Fee & Laura Raposa, Suicide Confirmed in Delp's Death, Boston Herald, Mar. 15, 2007. The article then delves into possible motivations for why Delp may have taken his own life. Id. First, it notes the

conjecture of “friends” who said his “constant need to help and please people . . . may have driven him to despair.” Id. (emphasis added). Then it discusses the “bitter break-up” of the band Boston and how Delp was “pulled from both sides by divided loyalties.” Id. The article describes band member and plaintiff Tom Scholz as being on one side, other band members on the opposite side, and Delp in the middle. Id. The article quotes an “insider” as saying Delp and Scholz were “the best of friends,” yet Delp’s family did not invite Scholz to the private funeral service for Delp. Id. The article also quotes a “close pal” as saying Delp “was a sad character,” “didn’t think highly of himself,” and “was always self-deprecating.” Id.

. . .

The Herald’s second article quotes Delp’s ex-wife, Micki Delp, as saying Delp was upset because his longtime friend Fran Cosmo was “disinvited” from the summer tour and that Delp would “hurt himself before he would hurt somebody else.” Gayle Fee & Laura Raposa, Pal’s Snub Made Delp Do It: Boston Rocker’s Ex-Wife Speaks, Boston Herald, Mar. 16, 2007. The article then quotes Scholz as saying the decision to disinvite Cosmo was not final, that it was a group decision to rehearse without Cosmo, and that Delp was not upset about it. Id. Additionally, the article quotes Delp’s suicide notes, in which Delp wrote, “I am a lonely soul,” “I take complete and sole responsibility for my present situation,” and that he had “lost my desire to live.” Id. It also quotes police reports saying Delp “had been depressed for some time.” Id. Finally, the article discloses that Micki Delp’s sister is married to one of the bandmates supposedly at odds with Scholz, alerting readers to any potential bias Micki Delp may have had in making her statements. See id.

The law on opinion

The law on opinion boils down to two primary rules: (1) If it is impossible to prove a statement is false, it cannot be defamatory, and (2) if a reader could not reasonably believe the statement is claiming to be a fact, the statement cannot be defamatory.

[T]he Court in Milkovich actually reaffirmed two broad principles relating to protection of opinion in libel law. The first is that “a statement on matters of public concern must be provable as false before there can be liability,” a rule from Hepps. Milkovich, 497 U.S. at 19-20 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986)). The second is that a statement is not defamatory if it “cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual,” a rule derived from what the Court termed the “Bresler–Letter Carriers–Falwell line of cases.” Milkovich, 497 U.S. at 19-20. Bresler and Letter Carriers held that the use of the words “blackmail” and “traitor,” respectively, were merely “rhetorical hyperbole” used in the “loose, figurative sense,” and no reader would interpret them as implying a criminal offense. See Greenbelt Cooperative Pub. Ass’n v.

Bresler, 398 U.S. 6, 14 (1970); Nat'l Ass'n Letter Carriers v. Austin, 418 U.S. 264, 284 (1974). The Court in Falwell held that a parody claiming Jerry Falwell had sex with his mother in an outhouse was protected as satire – even if "outrageous" and "offensive" – because readers would understand the parody was not stating facts about Falwell. Hustler Magazine v. Falwell, 485 U.S. 46, 53, 55 (1988).

. . .

Included in statements that cannot "reasonably be interpreted as stating actual facts" are opinions based on disclosed, nondefamatory facts. The majority in Milkovich did not squarely address this subset of opinion doctrine, but the First Circuit has held, and this Court has agreed, that the U.S. Supreme Court reaffirmed that "statements clearly recognizable as pure opinion because their factual premises are revealed" are not actionable, as they cannot be understood as stating "actual facts." Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 731 n.13 (1st Cir. 1992); Lyons v. Globe Newspaper Co., 415 Mass. 258, 266-67 (1993) (citing Phantom Touring, 953 F.2d at 731 n.13).

. . .

A statement on matters of public concern is not actionable if it cannot be proved false. Milkovich, 497 U.S. at 19-20 (citing Hepps, 475 U.S. 767). The plaintiff bears the burden of proving falsity. Hepps, 475 U.S. at 776. The U.S. Supreme Court has recognized that placing this burden on plaintiffs would result in the protection of some false speech because it was not provably false. Id. at 778. However, the Court was willing to accept that risk, because the "First Amendment requires that we protect some falsehood in order to protect speech that matters." Id.

Analysis of the case

The Reporters Committee argued in its brief that the Boston Herald is not liable for defamation because (1) the statements cannot be proven false and (2) a reasonable reader would not believe the statements were asserting facts.

Here, Scholz cannot prove "there was no possibility, however slight" that Delp may have committed suicide because of tensions between Scholz and other bandmates. As the lower court rightfully held, "Delp's final mental state is truly unknowable; it can never be objectively verified." Scholz, 31 Mass. L. Rep. 315, 2013 Mass. Super. LEXIS 83 at *2. Perhaps his decision to commit suicide was caused by a combination of multiple factors, including being caught having concealed a camera in his fiancée's sister's bedroom, struggling to keep the peace in a fractured band, learning that his friend may not tour with them, and suffering from a generally depressive mental state. See id. at *4-7.1 It is impossible for Scholz to prove that his actions did

not, in any way, contribute to Delp's decision to take his life. Delp himself may not have been able to pinpoint the exact moments that ultimately led to his breaking point. To say that tensions between Scholz and other bandmates could not possibly have been one of those moments leading to Delp's death is unprovable. See Nat'l Ass'n of Gov't Emps. v. BUCI Television, Inc., 118 F. Supp. 2d 126, 131 (D. Mass. 2000) ("[T]he interpretation of another's motive does not reasonably lend itself to objective proof or disproof . . . .").

> 1 The incident with the camera was only disclosed during this litigation and was not known at the time of the articles. See Singer's Last Days Detailed in Court Papers, Boston Globe, May 27, 2012, available at http://bit.ly/1hF500L.

. . .

Taken together, no reader could interpret the suggestion that Delp committed suicide because of his friend's disinvitation from tour as a statement of "actual facts." Surely after being told that police did not know why, that the suicide notes did not reveal why, and that friends could only speculate why Delp committed suicide, readers could not reasonably believe that the writers of a short entertainment-news column were basing their conclusions on facts that readers did not know. Readers would clearly interpret the Herald's statements not as facts but as opinion and conjecture based on disclosed facts.

Why journalists should be allowed to offer their "opinions"

While journalists are primarily known for providing factual accounts of events, issues, and controversies, they also contribute to the public debate by offering perspective and analysis.

As the First Circuit has noted, if writers are not allowed to offer a personal perspective to the facts they present, then they "would hesitate to venture beyond 'dry, colorless descriptions of facts, bereft of analysis or insight." Riley v. Harr, 292 F.3d 282, 290-291 (1st Cir. 2002) (quoting Partington v. Bugliosi, 56 F.3d 1147, 1154 (9th Cir. 1995)). Allowing defamation recovery for statements offering personal perspectives and conjecture would chill the speech of "commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public." Id.; see also Partington v. Bugliosi, 56 F.3d 1147, 1154 (9th Cir. 1995) ("[T]he robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered."). Journalists' core duties extend beyond a recitation of facts. They offer commentary and debate. They pose questions that may not have answers. When the media ask a question that implies an answer, and when that answer is plausible "within the wide range of possibilities, [then that] is precisely why we need

and must permit a free press to ask the question." Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1096 (4th Cir. 1993).

Baseball fans, podcasts, and the First Amendment

This article first appeared in Full Court Press, a blog on sports and the First Amendment by Levine Sullivan Koch & Schulz, LLP. Used with permission.

by Nathan E. Siegel

Last week the blogosphere and Twitter erupted following reports that several podcasts created by fans of Major League Baseball teams had disappeared from iTunes. According to NBC Sports,MLB issued a statement that said the League had notified Apple about podcasts "whose titles and/or thumbnails include infringing uses of trademarks of Major League Baseball and certain Clubs." The fan-led podcasts had titles such as "Rangers Podcast," "Pirates Prospects," "Mets Musings," and even "Bleacher Nation" (about the Cubs).

MLB said it had asked Apple to remove any infringing "trademarks" from the titles or thumbnails, which presumably refers to team names or logos. The League said it did not ask for the podcasts themselves to be taken down, and implied that Apple did that on its own.

Whatever the specifics may have been, most of the commentary criticized MLB for targeting podcasts put together by its fans. But surprisingly little attention was paid to whether, as a legal matter, the titles or thumbnails really did infringe the League's trademarks. The answer for the most part is likely no, because most of those titles would be protected by the First Amendment.

The podcasts themselves are filled with speech and other commentary about Major League clubs. Over the past 25 years, several cases have addressed whether the use of a trademark in a title is protected by the First Amendment.

The key precedent was a lawsuit filed by Ginger Rogers over the title of a Federico Fellini movie called "Ginger and Fred," which was released in 1986. The film was a spoof about a fictional Italian cabaret dancing team who were nicknamed in the film by their fictional fans as "Ginger and Fred." Rogers complained that the title violated her trademark rights in her name, because people would be confused into thinking that she (and Fred Astaire) were behind the film.

But the federal appeals court in New York ruled that even if people might be confused, the title was protected by the First Amendment. The court held that a title of an expressive work is protected unless it (1) "has no artistic relevance to the underlying work whatsoever," or (2) "explicitly misleads as to the source or the content of the work." Because the title "Ginger and Fred" related to the characters in the movie, and it did not explicitly say that Rogers had anything to do with the film, it was constitutionally protected.

Known as the “Rogers test,” several other leading federal appellate courts have followed it to reject trademark claims based on titles. For example, the Danish Band Aqua successfully fended off a lawsuit from Mattel over the title of their 1997 song “Barbie Girl,” which satirized the Barbie phenomenon. On the other hand, the popular duo OutKast lost a controversial decision when they used the title “Rosa Parks” for a song about the group’s return to prominence, not the civil rights movement.

Here, all of the podcast titles would easily pass the first part of the Rogers test because a team’s name is obviously relevant to a podcast about that team. And most of podcasts would likely be protected under the second prong as well. Humorous titles like “It’s About the Yankees, Stupid” do not explicitly suggest official team sponsorship; if anything, it seems doubtful that a title like that would come from the Yankees.

On the other hand, titles such as “Rangers Podcast in Arlington” or “Cubscast” might be moving a little closer to the line, because both sound more like a name that team-sponsored media would use. But even the creators of those podcasts could argue that their titles do not explicitly claim official sponsorship. As for team logos, the same analysis would likely apply, though each thumbnail would need to be evaluated case-by-case.

To be clear, there is nothing wrong with sports leagues and clubs vigilantly policing their trademarks. The sports industry probably has more to lose from knock-off merchandise and other genuine trademark violations than just about any other. But when it comes to pure speech, the First Amendment takes a dim view of the notion that fans are free to speak about their team, but cannot refer to it in a title.

Nathan Siegel regularly represents clients in disputes over intellectual property rights and the First Amendment, including a group of media companies who filed a brief amicus curiae supporting Electronic Arts’ First Amendment defense to trademark claims brought by former NFL All-Star Jim Brown over Madden NFL video games.

Asked and Answered -- FOIA exemption waivers

By Emily Grannis

Q: Can the government withhold information under a FOIA exemption if the same information has already been released?

A: In general, the federal government can withhold any information that falls within one of the nine exemptions to FOIA. However, there are certain situations in which even if an exemption could apply, the government must release the information pursuant to a FOIA request. This type of waiver arises when "the information has officially entered the public domain."

The key word there is officially. The government does not waive its exemption options under FOIA if information becomes public through an unauthorized leak or other illegal disclosure. An "authoritative government official" must have allowed the information to be made public.

In order for the government to have waived exemptions, the scope of the information sought must match the information publicly released. This means that the government doesn't waive its right to withhold material that gets into more specifics than publicly available information does.

Waiver comes up most often in the contexts of information that would fall into a confidential information category, including national security concerns, trade secrets, or documents detailing the deliberative process.

Finally, it is important to note that the requester has the burden of proving the government has waived its exemptions. Practically speaking, that means often the government will claim an exemption, and in the process of a FOIA appeal or lawsuit, the requester must demonstrate that the information had already been made public officially and that its prior release meets three criteria:

(1) That it is as specific as the information previously released;

(2) That it matches the information previously released; and

(3) That the previous disclosure was official and documented.

Other resources:

Federal FOIA Appeals Guide: Federal FOIA Appeals Guide