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April 11, 2024

Dear Seminar Participant:

Welcome to the 36th annual Media and the Law Seminar in Kansas City!

We are pleased once again to bring together attorneys, journalists, media professionals, students, and members of the public to the Intercontinental on the Plaza to discuss the latest issues and trends in media law.

Our program this year explores how news organizations, their lawyers, and their insurance companies should respond to the wide variety of threats facing the profession, including overzealous law enforcement agencies, foreign governments, and Artificial Intelligence (AI) in a variety of contexts, including defamation, copyright, and legal ethics.

The pages that follow include links to materials that are available online. We invite you to visit those resources to download or otherwise access the available content. A copy of this document is available at <https://law.ku.edu/media-law-seminar>.

On behalf of the University of Kansas School of Law and the Kansas City Metropolitan Bar Association Media Law Committee, we again welcome you to this year's seminar and look forward to spending a worthwhile couple of days together.

Sincerely,

Katie Studt
Planning Committee Chair
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Maxwell E. Kautsch
Program Chair
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CLE Materials

(also available at <https://law.ku.edu/media-law-seminar>)

Thursday, April 11

Managing Risk in the Age of AI: Market Trends and Insurance Considerations.....1

Friday, April 12

Artificially Infringing? The Copyright Implications of Generative AI Tools5

Clear and Present Danger: Managing International Reporters and Staff.....8

(Ethics) - Back to Basics: Avoiding AI's Ethical Pitfalls.....11

Too Hot to Handle? Defending Speech in the Face of Government Censorship.....16

AI Awry: Defamation for Bots Gone Wrong.....22

Journalists on the Front Lines: Overcoming Risks to Reporters.....25

Bonus Session:

Managing Risk in the Age of AI: Market Trends and Insurance Considerations

Moderator

Will Durkee, senior cyber advisor
AXIS Insurance
Annapolis, MD

Panelists

Patrick McNally, Esquire
Octillo Law Firm
Washington D.C.

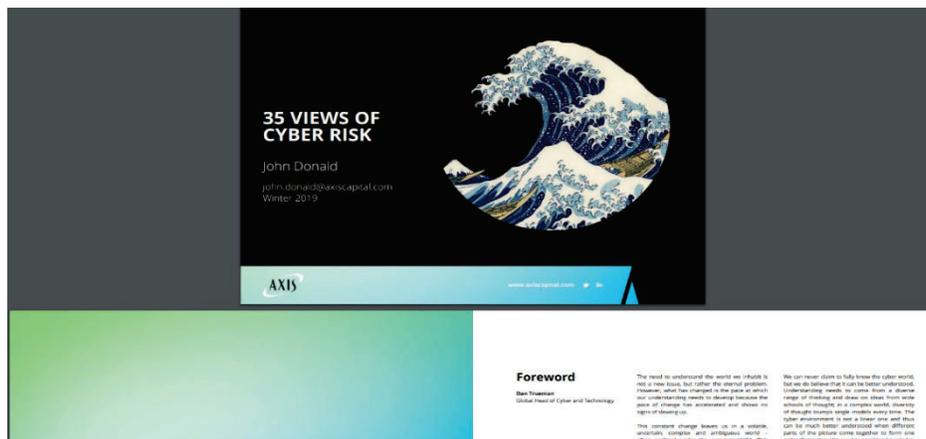
Karthik Ramakrishnan, founder
Armilla AI
Toronto, Canada

JJ Thompson, founder
Spektrum
Indianapolis, IN

Artificial intelligence and machine learning has seen an exponential increase in its sophistication and adoption, transforming the way we communicate and transact business as the technology infiltrates almost every market and industry faster than ever before – yet many still don't understand how it works, nor can anyone begin to identify all the various ways it can impact and influence our daily lives. The myriad of AI technologies can be used both from an offensive and defensive posture – requiring a delicate balance that businesses, cybersecurity experts, legislators and numerous other interests across the globe are increasingly recognizing but have still to determine. In this panel, we'll hear from AI technology innovators and cyber breach counsel on the market opportunities and security challenges that AI poses, particularly for media organizations and journalists, as well as emerging insurance risk considerations, as this next wave of technology continues to expand.

CLE Materials

- *35 View of Cyber Risk*, Axis Insurance



Slideshow featuring a host of topics relevant to cyber insurance professionals and attorneys, including a summary of the history of cyberattacks, a rundown of threat actors from nation states to bots, and the evolution of a cyber claim. Complete slides available at https://www.axiscapital.com/docs/default-source/resources/35-views-of-cyber-risk.pdf?sfvrsn=286bbd13_4; image reprinted here with author’s permission)

- *The murmuration of the starlings, 35 views of cyber risk, part 2, 2022*, Axis Insurance



Slideshow featuring a 2022 update to topics relevant to cyber insurance professionals and attorneys. Complete slides available at <https://axis.turtl.co/story/axis-35-views-of-cyber-risk-part-2/page/2>; image reprinted here with author’s permission)

- ***Merck & Co., Inc. v. Ace American Ins. Company (2023)***, retrieved from <https://casetext.com/case/merck-co-v-ace-am-ins-co-1>.

Issue: Does the “War Exclusion” apply to cyberattacks carried out by foreign actors?

Short answer: No, under the terms applicable provision in a case before the Superior Court of New Jersey, Appellate Division.

Long answer:

In 2017, “a malware known as NotPetya infected [pharmaceutical giant] Merck’s computer and network systems.” *Merck & Co., Inc. v. Ace American Insurance Company*, Superior Court of New Jersey, Appellate Division, 475 N.J.Super. 420, 427, 293 A.3d 535, 539 (May 1, 2023).

There, “threat actors gained access to [a third party] vendor’s source code and software update distribution infrastructure for the [third party application]. Using this access, the threat actors built backdoors into [application] software updates that allowed for the threat actors to access customer systems using [application] software. Using these backdoors, the threat actors established a command and control infrastructure capable of sending, receiving, and executing code on the networks of companies using [application] software without detection through anti-virus or other malware detection tools or sensors.”

Merck filed a \$1.4 billion claim on its insurance policy. But the insurance company denied the claim. See, e.g., Voreacos, D., Chiglinsky, K., and Griffin, R. *Merck Cyberattack's \$1.3 Billion Question: Was It an Act of War?*, Bloomberg, Dec. 2, 2019, retrieved from <https://www.bloomberg.com/news/features/2019-12-03/merck-cyberattack-s-1-3-billion-question-was-it-an-act-of-war>.

At issue was the policy's "hostile/warlike action" exclusion, which provided that the policy "does not insure" for:

"Loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending, or expected attack:

(a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval, or air forces;

(b) or by military, naval, or air forces;

(c) or by an agent of such government, power, authority, or forces."

Merck & Co., Inc., 475 N.J.Super. at 427, 293 A.3d at 539 (May 1, 2023), retrieved from <https://casetext.com/case/merck-co-v-ace-am-ins-co-1>.

The trial court "analyzed the applicable contract-interpretation legal principles and case law" and held that Merck had every right to anticipate that the exclusion applied only to traditional forms of warfare....Accordingly, the [c]ourt [found] that the exclusion is not applicable under the facts presented." *Id.*, 475 N.J.Super. at 430, 293 A.3d at 541 (citing trial court opinion); see also, e.g., Sagonowsky, E. *Merck scores a win in \$1.4B insurance fight over devastating cyberattack*, Fierce Pharma, January 20, 2022, retrieved from <https://www.fiercepharma.com/pharma/merck-scores-a-win-1-4b-insurance-fight-over-devastating-cyberattack>.

The appellate court affirmed, holding that "the plain language of the exclusion did not include a cyberattack on a non-military company that provided accounting software for commercial purposes to non-military consumers, regardless of whether the attack was instigated by a private actor or a 'government or sovereign power.'" *Id.*, 475 N.J.Super. at 438, 293 A.3d at 546. The appellate court's ruling affirmed the district court.

Then, "just before oral arguments began at the New Jersey Supreme Court," the parties announced a settlement in January of 2024 for \$700 million. Reddick, J. *Merck settles with insurers who denied \$700 million NotPetya claim*, The Record, January 5, 2024, retrieved from <https://therecord.media/merck-insurance-settlement-notpetya>; see also Ebert, A. *Merck \$1.4 Billion Cyberhack Settlement Ends 'Warlike' Act Claim*, Bloomberg, Jan. 4, 2023, retrieved from <https://news.bloomberglaw.com/litigation/merck-1-4-billion-cyberhack-settlement-ends-warlike-act-claim>.

Going forward

In the aftermath of the settlement, commentators wonder whether a cyberattack could “ever be considered an ‘attack’ under the international laws of war?” Kaplan, K. *Merck Insurance Settlement Leaves Debate over Cyberwar and Cyberinsurance Unsettled*, Ropes & Gray, January 12, 2024, retrieved from <https://www.ropesdataphiles.com/2024/01/merck-insurance-settlement-leaves-debate-over-cyberwar-and-cyberinsurance-unsettled/>; see also, e.g., Ebeck, A. et al. *How Merck Settlement Can Inform Cyberinsurance Approach*, Law 360, January 25, 2024, retrieved from <https://www.law360.com/articles/1789590/how-merck-settlement-can-inform-cyberinsurance-approach>.

• **Lloyd’s Market Bulletin**, *State backed cyber-attack exclusions*, August 16, 2022, retrieved from <https://assets.lloyds.com/media/35926dc8-c885-497b-aed8-6d2f87c1415d/Y5381%20Market%20Bulletin%20-%20Cyber-attack%20exclusions.pdf>.

Summary

About eight months after the trial court’s ruling in *Merck*, Lloyd’s “caused an industrywide deep breath to occur when it gave the insurance industry a heads-up via a Market Bulletin that outlined four exclusions from cyber insurance policies the company would expect to see going forward as of March 31, 2023.” Burgess, C. *Mondelez and Zurich’s NotPetya cyber-attack insurance settlement leaves behind no legal precedent*, CSO Online, retrieved from <https://www.csoonline.com/article/574013/mondelez-and-zurich-s-notpetya-cyber-attack-insurance-settlement-leaves-behind-no-legal-precedent.html#:~:text=The%20presiding%20judge%20ruled%20that,needed%20and%20industry%20adjustment%20required>. “Those exclusions involving “state-backed cyberattacks” must:

1. Exclude losses arising from a war (whether declared or not), where the policy does not have a separate war exclusion
2. (Subject to 3) exclude losses arising from state backed cyber-attacks that significantly impair the ability of a state to function or that significantly impair the security capabilities of a state
3. Be clear as to whether cover excludes computer systems that are located outside any state which is affected in the manner outlined in 2(a) & (b) above, by the state-backed cyberattack.
4. Set out a robust basis by which the parties agree on how any state-backed cyberattack will be attributed to one or more states.
5. Ensure all key terms are clearly defined.”

Id., citing Market Bulletin p. 2.

Panel 1:

Artificially Infringing? The Copyright Implications of Generative AI Tools

Moderator

Karen Shatzkin, media lawyer
New York, NY

Panelists

Andrew Bridges, emeritus partner
Fenwick & West LLP
San Francisco, CA

David Graff, vice president of trust & safety
Google
New York, NY

Scott Sholder, partner
Cowan, DeBaets, Abrahams & Sheppard LLP
New York, NY

As generative AI tools become more popular, questions have arisen regarding how the tools have incorporated creative works protected under U.S. intellectual property law. In 2023, authors, journalists and artists filed numerous class action suits against companies that rolled out their generative-AI tools, raising unprecedented questions about the use of copyrighted material in training AI-models and the potential for copyrighted materials to appear in the output of AI models.

CLE Materials

- *Protecting Digital Content Online in the New Wild West of Generative AI and the Blockchain*, Scott J. Sholder, THE LICENSING JOURNAL, Vol. 43, No. 8, August 2023 (reprinted in full with author's permission as Appendix A to the written copy of this document)
- *Perfect 10, Inc. v. Amazon.Com, Inc.*, 487 F.3d 701, 508 F.3d 1146 (9th Cir. 2007), retrieved from <https://casetext.com/case/perfect-10-inc-v-amazoncom-inc-1>
- *Authors Guild v. Google, Inc.*, 804 F.3d 202, 116 U.S.P.Q.2d (BNA) 1423 (2d Cir. 2015), retrieved from <https://casetext.com/case/guild-v-google-inc-1>
- *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 209 L. Ed. 2d 311 (2021), retrieved from <https://casetext.com/case/google-llc-v-oracle-am-inc-4>
- *Andy Warhol Found. for the Visual Arts v. GoldSmith*, 143 S. Ct. 1258, 215 L. Ed. 2d 473 (2023), retrieved from <https://casetext.com/case/andy-warhol-found-for-the-visual-arts-v-goldsmith>
- Shatzkin, K., & Cohen, D. (2023). *PICTURE THIS: Applying the Fair Use Doctrine to Documentary Films after Google/Oracle and Warhol*. UCLA Entertainment Law Review, 30(1), retrieved from <https://escholarship.org/uc/item/4cj0r474>

● From *Tremblay, et al. v. OpenAI, et al.*, Case No. 3:23-cv-03223-AMO (Feb. 12, N.D. Cal.), a putative class action copyright case filed on behalf of several authors alleging that ChatGPT's owner, OpenAI, infringed on plaintiffs' copyrights by using plaintiffs' works to train ChatGPT.

- [Complaint](#) (June 28, 2023)
 - Poritz, I. *OpenAI Legal Troubles Mount With Suit Over AI Training on Novels*, Bloomberglaw.com, June 29, 2023, retrieved from <https://news.bloomberglaw.com/ip-law/openai-facing-another-copyright-suit-over-ai-training-on-novels>
- [Defendants' Motion to Dismiss](#) (August 28, 2023)
- [Plaintiffs' Opposition to Motion to Dismiss](#) (Sept. 27, 2023)
- [Defendants' Reply Brief](#) (Oct. 11, 2023)
- [Plaintiffs' Motion to Enjoin](#) (Feb. 8, 2024)
- [Order Granting in Part and Denying in Part the Motions to Dismiss](#) (Feb. 12, 2024)
 - “[T]he court tossed out the majority of the plaintiffs’ copyright and unfair competition-centric claims, but granted them the opportunity to amend their complaints to take another swing at OpenAI in the closely-watched case.” *OpenAI Nabs Partial Win in Latest Round of Authors’ Copyright Lawsuit*, thefashionlaw.com, Feb. 14, 2024, retrieved from <https://www.thefashionlaw.com/openai-nabs-partial-win-in-latest-round-of-authors-copyright-lawsuit/>
- [Defendants' Opposition to Motion to Enjoin](#) (Feb. 22, 2024)
- [Plaintiffs' Reply in Support of Motion to Enjoin](#) (Feb. 29, 2024)
- [Order Denying Motion to Enjoin](#) (March 1, 2024)

● From *Authors Guild v. OpenAI Inc.* (1:23-cv-08292) (S.D.N.Y.) (panelist Scott Sholder is one of the plaintiffs' lawyers in this case).

“The Authors Guild and 17 authors filed a class-action suit against OpenAI in the Southern District of New York for copyright infringement of their works of fiction on behalf of a class of fiction writers whose works have been used to train GPT.” The Authors Guild, September 20, 2023, retrieved from <https://authorsguild.org/news/ag-and-authors-file-class-action-suit-against-openai/>

- [First Amended Complaint](#) (Dec. 5, 2023)
- [Defendant Microsoft's Answer](#) (Feb. 16, 2024)
- [Defendant OpenAI's Answer](#) (Feb. 16, 2024)
- [Defendant Microsoft's conditional opposition to motion to intervene, dismiss, or transfer](#) (Feb. 26, 2024)
- [Tremblay plaintiffs' reply in support of motion to dismiss, stay, or transfer](#) (March 4, 2024)
- [Motion for Leave To File Sur-Reply in Opposition to Motions To Intervene and Dismiss, Stay, or Transfer Author Actions](#) (March 12, 2024)

- From *NY Times v. Microsoft Corporation, et al.*, Case 1:23-cv-11195-SHS (S.D.N.Y)

“The *Times* contends that OpenAI and Microsoft’s AI tools (i.e., Open AI’s ChatGPT and Microsoft’s Bing Chat) were built “by copying and using millions of The Times’s copyrighted news articles, in-depth investigations, opinion pieces, reviews, how-to guides, and more.” Ain, D. and Zhao, A. *A Sign of the Times: Copyright Lawsuit Filed Against Microsoft and Open AI by The New York Times*, Jan. 4, 2024, Reavis Page Jump, retrieved from https://rpjlaw.com/a-sign-of-the-times-copyright-lawsuit-filed-against-microsoft-and-open-ai-by-the-new-york-times/?utm_source=mondaq&utm_medium=syndication&utm_term=intellectual-property&utm_content=articleoriginal&utm_campaign=article

- [Complaint](#) (Dec. 27, 2023)
 - [Defendant Microsoft’s conditional opposition to motion to intervene, dismiss, or transfer](#) (Feb. 26, 2024)
 - [Plaintiff’s opposition to motion to intervene and dismiss, stay, or transfer by the Tremblay plaintiffs](#) (March 1, 2024)
 - [Defendant Microsoft’s Memorandum in Support of Partial Dismissal](#) (March 4, 2024)
 - [The California plaintiffs’ reply to the NY Times opposition to the California plaintiffs’ motion to intervene, dismiss, stay, or transfer](#) (March 8, 2024)
 - [The parties’ Rule 26\(f\) discovery plan report](#) (March 8, 2024)
 - [NY Times Opposition to Dismissal](#) (March 11, 2024)
- Google’s AI Opportunity Agenda (panelist David Graff had a role in drafting it), retrieved from https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/AI_Opportunity_Agenda.pdf

Panel 2:

Clear and Present Danger: Managing International Reporters and Staff

Moderator

Chad Milton, principal
Media Risk Consultants LLC
Prairie Village, KS

Panelists

Jacob Goldstein, vice president & associate general counsel
Dow Jones / The Wall Street Journal
New York, NY

Katharine Larsen, deputy general counsel, litigation
Reuters News
New York, NY

James A. McLaughlin, deputy general counsel & director of government affairs
The Washington Post
Washington, D.C.

According to Reporters Without Borders, in 2023, 38 journalists and two media workers have been killed, and 489 journalists and 20 media workers have been detained globally. The ongoing conflicts in Eastern Europe and the Middle East have proven especially dangerous for journalists, with many, including Wall Street Journal reporter Evan Gershkovich, being targeted by anti-press regimes for merely doing their jobs. All too often, the media organizations' in-house attorneys are closely involved in the efforts to protect their employees in the field, requiring them to work tirelessly to remove journalists and their families from dangerous war zones or liberate wrongly-detained reporters from prison.

CLE Materials

- The Freelance Journalist Safety Principles, *The ACOS Alliance (A Culture Of Safety Alliance)*, retrieved from <https://www.acosalliance.org/the-principles>

“In a time of journalistic peril, news organizations and journalists must work together to protect themselves and their vital role in global society. All ACOS signatories endorse The Freelance Journalist Safety Principles. They represent a first step in a long-term campaign to convince news organizations and freelance journalists to adopt these standards globally and embed a culture of safety within their everyday working practices.” ACOS Alliance, <https://www.acosalliance.org/introduction-to-the-principles>

- YZ (a pseudonym) v The Age Company Limited [2019] VCC 148 (22 February 2019), retrieved from https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2019/148.html?context=1;query=defamation;mask_path=

“A landmark ruling by an Australian court is expected to have international consequences for newsrooms, with media companies on notice they face large compensation claims if they fail to take care of journalists who regularly cover traumatic events.” *Media companies on notice over traumatised journalists after landmark court decision*, The Conversation, March 5, 2019, retrieved from <https://theconversation.com/media-companies-on-notice-over-traumatised-journalists-after-landmark-court-decision-112766>

- O’Donnell, L. *What happened to Afghanistan’s journalists after the government collapsed*, COLUMBIA JOURNALISM REVIEW, March 17, 2022, retrieved from <https://www.cjr.org/analysis/afghanistan-journalists-taliban.php#:~>

- Yeginsu, C. *Report on Providing Safe Refuge to Journalists at Risk*, International Bar Association, retrieved from <https://www.ibanet.org/Safe-Refuge-report-launch-2020>

- *Journalist casualties in the Israel-Gaza war*, Committee to Protect Journalists, retrieved from <https://cpj.org/2024/03/journalist-casualties-in-the-israel-gaza-conflict/>

“CPJ’s most recent and preliminary account of journalist deaths in the war.” *Id.*

- *Journalists briefly detained in Moscow at protest by soldiers’ wives*, Reuters, February 3, 2024, retrieved from [https://www.reuters.com/world/europe/dozens-detained-moscow-rally-russian-soldiers-wives-rights-group-2024-02-03/#:~:text=MOSCOW%2C%20Feb%20%20\(Reuters\),Ukraine%2C%20a%20Reuters%20witness%20said.](https://www.reuters.com/world/europe/dozens-detained-moscow-rally-russian-soldiers-wives-rights-group-2024-02-03/#:~:text=MOSCOW%2C%20Feb%20%20(Reuters),Ukraine%2C%20a%20Reuters%20witness%20said.)

- *Rezaian v. Islamic Republic of Iran*, 422 F. Supp. 3d 164 (D.D.C. 2019), retrieved from <https://casetext.com/case/rezaian-v-islamic-republic-of-iran>. The lawsuit arising from the suffering of a *Washington Post* journalist and his family after 544 days as an Iranian hostage.

- Gambrell, J. *US judge awards \$180M to Post reporter held by Iran*, AP, November 23, 2019, retrieved from <https://apnews.com/article/925cf15e76b54250982ccce6465f69de>
- *Rezaian v. Islamic Republic of Iran*, Case No. 1:16-cv-1960 (D.D.C.), Complaint (2016), retrieved from <https://www.courthousenews.com/wp-content/uploads/2019/01/Rezaian-v-Iran.pdf>

- S.712--116th Congress (2019-2020) Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act, retrieved from <https://www.congress.gov/bill/116th-congress/senate-bill/712/text>

“Named in honor of former FBI agent Robert Levinson, whose unlawful detention by the Iranian regime is recognized as the longest-held hostage in American history, the bipartisan legislation bolsters U.S. government resources to bring back Americans held hostage or unlawfully detained abroad.” Senate Approves Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act, June 16, 2020, retrieved from <https://www.foreign.senate.gov/press/dem/release/senate-approves-robert-levinson-hostage-recovery-and-hostage-taking-accountability-act>

- *Timeline - Reuters journalists detained in Myanmar*, Reuters, Aug. 26, 2018, retrieved from <https://www.reuters.com/article/idUSKCN1LB011/>
- Gupta, G. *News Leaders Around the World Pledge Support for Journalists in Gaza*, NEW YORK TIMES, March 1, 2024, retrieved from <https://www.nytimes.com/2024/03/01/world/middleeast/israel-gaza-journalists-news-organizations.html>
- *37 Journalists and Media Workers Killed in Ukraine between 1992 and 2024*, Committee to Protect Journalist, retrieved from https://cpj.org/data/killed/europe/ukraine/?status=Killed&motiveConfirmed%5B%5D=Confirmed&motiveUnconfirmed%5B%5D=Unconfirmed&type%5B%5D=Journalist&type%5B%5D=Media%20Worker&cc_fips%5B%5D=UP&start_year=1992&end_year=2024&group_by=location
- Simmons, A. *Russian Court Upholds Detention of WSJ Reporter Evan Gershkovich*, WALL STREET JOURNAL, February 20, 2024, retrieved from <https://www.wsj.com/world/russia/russian-court-upholds-detention-of-wsj-reporter-evan-gershkovich-aaff0d4b>
- Alter, C. *The Fight to Free Evan Gershkovich*, TIME, March 7, 2024, retrieved from <https://time.com/6852858/evan-gershkovich-cover-story/>
- *Evan Gershkovich: Updates on the WSJ Reporter Detained in Russia*, THE WALL STREET JOURNAL, retrieved from <https://www.wsj.com/news/evan-gershkovich>
- *Statement by President Biden on the Ten-Year Anniversary of Austin Tice’s Captivity*, August 10, 2022, retrieved from <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/10/statement-by-president-biden-on-the-ten-year-anniversary-of-austin-tices-captivity/>
- Smith, S. *Austin Tice Has Been Held Hostage Longer Than Any American Journalist Ever. His Texas Family Is Still Fighting for His Return*, Texas Monthly, September 2022, retrieved from <https://www.texasmonthly.com/news-politics/fight-to-free-austin-tice-hostage-syria/>
- *About Us*, Office of the Special Presidential Envoy for Hostage Affairs, retrieved from <https://www.state.gov/about-us-special-presidential-envoy-for-hostage-affairs/>

Panel 3:

(Ethics) - Back to Basics: Avoiding AI's Ethical Pitfalls

Moderator

Bruce Johnson, media lawyer and partner
Davis Wright Tremaine, LLP
Seattle, WA

Panelists

Tedrick A. Housh III, CIPP/US, CIPP/E
Lathrop, GPM
Kansas City, MO

Najarian R. Peters

Associate Professor of Law, University of Kansas School of Law
Linda D. Ferrell and Richard C. Tombari Honors Faculty Fellow
Faculty Associate, Berkman Klein Center for Internet and Society, Harvard University

Emerging technologies prone to producing provably false statements are proliferating our increasingly polarized world. Although issues such as “supervising” generative AI’s contributions to legal briefs and understanding the role social media bots play in influencing public opinion present new challenges, lawyers’ ethical obligations to perform due diligence and speak truthfully haven’t changed.

CLE Materials

- Presentation related to the relationship between Artificial Intelligence (AI) and Legal Ethics, Bruce Johnson, Bruce Johnson, Davis Wright Tremaine, LLP, available at <https://law.ku.edu/media-law-seminar>
- Nicole Yamane, *Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands*, Georgetown Journal of Legal Ethics (2020), retrieved from <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2020/09/GT-GJLE200038.pdf>
- INDIVIDUAL PRACTICES IN CIVIL CASES, Paragraph 8(F), Arun Subramanian, United States District Judge, S.D.N.Y, Rev. July 29, 2023, retrieved from https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf

Use of ChatGPT and Other Tools. Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research

conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.

- *Proposed Advisory Opinion on Lawyers' and Law Firms' Use of Generative Artificial Intelligence*, The Florida Bar, Oct. 13, 2023, retrieved from <https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-on-lawyers-and-law-firms-use-of-generative-artificial-intelligence/>

Issues addressed include “[w]hether a lawyer is required to supervise generative AI and other similar large language model-based technology pursuant to the standard applicable to non-lawyer assistants.”

- Filings related to AI-generated fake legal cases in *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC) (S.D.N.Y.) beginning in May, 2023
 - Order to Show Case, May 4, 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/050423-order-to-show-case-SDNY-RE-sanctions-for-ChatGPT.pdf>
 - Affidavit of Steven A. Schwartz, unsealed on June 8, 2023 (Doc. 32, Attachment 1), retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/schwartz-affidavit.pdf>
 - “[A]ffiant has never utilized Chat GPT as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that is content could be false.” *Id.*, paragraph 11.
 - Schwartz told that court “that he was ‘mortified’ upon learning about the false cases, and when he used the tool he]did not understand it was not a search engine, but a generative language-processing tool.” Bohannon, M. *Lawyer Used ChatGPT In Court—And Cited Fake Cases. A Judge Is Considering Sanctions*, Forbes, June 8, 2023, retrieved from <https://www.forbes.com/sites/mollybohannon/2023/06/08/lawyer-used-chatgpt-in-court-and-cited-fake-cases-a-judge-is-considering-sanctions/?sh=384f1c227c7f>
 - Order (lawyer ordered to pay \$5,000 in sanctions), June 22, 2023, retrieved from <https://casetext.com/case/mata-v-avianca-inc-2>
 - Van Voris, B. *Phony ChatGPT Brief Leads to \$5,000 Fine for NY Lawyers*, Bloomberglaw.com, June 22, 2023, retrieved from <https://news.bloomberglaw.com/business-and-practice/chatgpt-phony-legal-filing-case-gets-lawyers-a-5-000-fine>
- Hise, B. and Dao, J. *Ethical considerations in the use of AI*, Reuters, Oct. 2, 2023, retrieved from <https://www.reuters.com/legal/legalindustry/ethical-considerations-use-ai-2023-10-02/>

- The “use of AI in research, document drafting and other work product presents a number of ethical issues for lawyers to consider as they contemplate how the use of AI may benefit their practices.” *Id.*
- Filings related to AI-generated fake legal cases in *United States v. Michael Cohen*, Case No. 1:18-cr-00602, (S.D. New York) beginning in December, 2023
 - Order to Show Cause, Dec. 12, 2023 (Doc. 96)
 - Barker, H. *Michael Cohen Lawyer Ordered to Explain Nonsense Case Citations*, Bloomberg Law, Dec. 13, 2023, retrieved from <https://news.bloomberglaw.com/white-collar-and-criminal-law/michael-cohen-lawyer-ordered-to-explain-nonsense-case-citations>
 - Of three nonexistence citations cited by U.S. District Judge Jesse M. Furman, one of “[them]—supposedly to a Second Circuit case—refers to a Fourth Circuit decision that has nothing to do with supervised release. Another citation corresponds to a decision of the Board of Veterans Appeals. The third cite, meanwhile, ‘appears to correspond to nothing at all,’ Furman said.” *Id.*
 - Order, Dec. 29, 2023 (Doc. 102)
 - Cohen Declaration, Dec. 29, 2023 (Doc. 104)
 - “As a non-lawyer, I have not kept up with emerging trends (and related risks) in legal technology and did not realize that Google Bard was a generative text service that, like Chat-GPT, could show citations and descriptions that looked real but actually were not. Instead, I understood it to be a super-charged search engine and had repeatedly used it in other contexts to (successfully) find accurate information online.”
 - *Michael Cohen says he unwittingly sent AI-generated fake legal cases to his attorney*, Associated Press, Dec. 30, 2023, retrieved from <https://www.npr.org/2023/12/30/1222273745/michael-cohen-ai-fake-legal-cases>
 - Letter from Cohen attorneys, Jan. 3, 2024 (Doc. 105)
 - “[Cohen’s attorney] apologized to U.S. District Judge Jesse Furman for citing the made-up cases and said he took responsibility. Cohen said last week that he inadvertently created the cases using the AI program Google Bard and provided them to Schwartz.” Thomas, D. *Michael Cohen’s lawyer asks court to spare sanctions over made-up cases*, Reuters, Jan. 3, 2024, retrieved from <https://www.reuters.com/legal/legalindustry/michael-cohens-lawyer-asks-court-spare-sanctions-over-made-up-cases-2024-01-04/>
 - Reply Declaration, Jan 3, 2024 (Doc. 106)
 - Letter from AI services company, Jan. 4, 2024 (Doc. 107)
 - According to service provider of platform generating fake cases, Cohen’s errors were a result of using a previous version of “Google Bard, which has already been updated and improved significantly.” *Id.*

● Volekh, E. *Dear Court: "I Am GPT-4 ..."*, Reason.com, Dec. 28, 2023, retrieved from <https://reason.com/volokh/2023/12/28/dear-court-i-am-gpt-4/>

- In a supplement to a self-represented appellant's brief in *Shaver v. Whittier Place Condominiums Homeowners Ass'n, Inc.* (10th Cir. filed Aug. 4, 2023), the appellant told the Clerk of the 10th Circuit that ChatGPT4 "will be assisting Mr. Shaver, the prose plaintiff, in this case." *Id.*

● Notice of Proposed Amendment to 5TH CIR. R. 32.3 (comments accepted through Jan. 4, 2024), retrieved from <https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6>

"[A]ny use of generative AI must be disclosed to the court, and require a certification of review and human approval of AI-generated citations and analysis." Smith, J. *Proposed Fifth Circuit Ruling puts Generative AI Into Focus*, January 8, 2024, Everlaw, retrieved from <https://www.everlaw.com/blog/ai-and-law/proposed-fifth-circuit-ruling-puts-generative-ai-into-focus/#:~:text=The%20Fifth%20Circuit%20Court%20of,AI%2Dgenerated%20citations%20and%20analysis.>

● *Park v. Kim*, No. 22-2057 (2d Cir. Jan. 30, 2024; attorney cited fake cases) retrieved from <https://cases.justia.com/federal/appellate-courts/ca2/22-2057/22-2057-2024-01-30.pdf?ts=1706626850>

- *Deception Inspection: Attorney Faces Discipline for Citing Fake Law*, jdsupra.com, Feb. 8, 2024, retrieved from <https://www.jdsupra.com/legalnews/deception-inspection-attorney-faces-3502755/>
 - "The US Court of Appeals for the Second Circuit referred an attorney for potential further disciplinary measures after the attorney cited a nonexistent case created by ChatGPT." *Id.*

● On February 22, 2024, the court in *J. G. et al v. New York City Department of Education*, 1:23-cv-00959 (S.D. N.Y.), ruled on prevailing plaintiff argument that requested hourly rates were supported "by feedback" from ChatGPT.

Judge: the firm "is well advised to excise references to ChatGPT from future fee applications." From pages 16 and 17 of the order (citing *Mata* and *Park*):

The Cuddy Law Firm also states that its requested hourly rates are supported by feedback it received from the artificial intelligence tool "ChatGPT-4."

In fairness, the Cuddy Law Firm does not predominantly rely on ChatGPT-4 in advocating for these billing rates. It instead presents ChatGPT-4 as a "cross-check" supporting the problematic sources above. As such, the Court need not dwell at length on this point.

It suffices to say that the Cuddy Law Firm's invocation of ChatGPT as support for its aggressive fee bid is utterly and unusually unpersuasive. As the firm should have

appreciated, treating ChatGPT's conclusions as a useful gauge of the reasonable billing rate for the work of a lawyer with a particular background carrying out a bespoke assignment for a client in a niche practice area was misbegotten at the jump.

In two recent cases, courts in the Second Circuit have reproved counsel for relying on ChatGPT, where ChatGPT proved unable to distinguish between real and fictitious case citations. In *Mata v. Avianca, Inc.*, Judge Castel sanctioned lawyers who "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT." And in *Park v. Kim*, the Second Circuit referred an attorney to the Circuit's Grievance Panel for further investigation after finding that her brief relied on "non-existent authority" generated by ChatGPT.

In claiming here that ChatGPT supports the fee award it urges, the Cuddy Law Firm does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent, canvassed below, in which courts in this District and Circuit have rejected as excessive the billing rates the Cuddy Law Firm urges for its timekeepers.

The Court therefore rejects out of hand ChatGPT's conclusions as to the appropriate billing rates here. Barring a paradigm shift in the reliability of this tool, the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications.

J.G. v. N.Y. City Dep't of Ed. (S.D.N.Y. Feb. 22, 2024), retrieved from <https://storage.courtlistener.com/recap/gov.uscourts.nysd.593463/gov.uscourts.nysd.593463.32.0.pdf>

Panel 4:

Too Hot to Handle? Defending Speech in the Face of Government Censorship

Moderator

Lyndsey Wajert, associate
Vedder Price
Chicago, IL

Panelists

Vera Eidelman, staff attorney
ACLU
New York, NY

Jennifer Jones
Knight First Amendment Institute
New York, NY

Darpana Sheth, vice president of litigation
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Government censorship of speech is in no way a new phenomenon, but amid divided opinions on what constitutes dangerous, extreme or “unprotected” speech, cases involving government efforts to control or silence speech seem to be on the rise. From state actors policing speech in schools to state legislatures passing laws aimed at social media companies, from efforts by local officials to quell protests to efforts by prisons to restrict the communication of people who are incarcerated, threats to First Amendment rights touch all areas of today’s society. This panel will feature commentary and perspectives from the attorneys at the forefront of the fights against these threats.

CLE Materials

- *National Rifle Association v. Vullo*, U.S. Supreme Court No. 22-842, petition for a writ of certiorari filed February 7, 2023. There, petitioner and amici argue that the “New York state regulator’s attempts to blacklist a nonprofit advocacy group and deny it access to financial services because of its controversial viewpoint” violates the First Amendment. *Court Cases: National Rifle Association v. Vullo*, American Civil Liberties Union, retrieved from <https://www.aclu.org/cases/national-rifle-association-v-vullo>
- Brief in Opposition, *National Rifle Association v. Vullo*, U.S. Supreme Court No. 22-842, June 23, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-842/269717/20230623154635287_22-842%20Brief%20in%20Opposition%20Final.pdf
- Brief for Petitioners, *National Rifle Association v. Vullo*, Case No. 22-842, Jan. 9, 2024, retrieved from 22-842 https://www.supremecourt.gov/DocketPDF/22/22-842/295309/20240109155536456_22-842%20NRA%20v%20Vullo%20Brief%20for%20Petitioner%20NRA.pdf

- Amicus Brief in Support of Petitioner and Reversal, Foundation for Individual Freedom and Expression, *National Rifle Association v. Vullo*, No. 22-842, Jan. 16, 2024, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-842/295795/20240116135218488_22-842_Amicus%20Brief.pdf
- *A.B.O. Comix v. San Mateo County*, Case No.: 3:23-CV-1865-JSC (N.D. Cal), amended complaint filed May 24, 2023
 - Amended Complaint, *A.B.O. Comix v. San Mateo County*, Case No.: 3:23-CV-1865-JSC (N.D. Cal), May 24, 2023, retrieved from <https://knightcolumbia.org/documents/ph3w1d3kh4>
 - Jones, J. *In a victory for free speech, lawsuit challenging mail digitization in jails will move forward*, Knight First Amendment Institute at Columbia University, February 26, 2024 retrieved from <https://knightcolumbia.org/blog/in-a-victory-for-free-speech-lawsuit-challenging-mail-digitization-in-jails-will-move-forward>

“A California Superior Court recently rejected an attempt to dispose of a lawsuit challenging San Mateo County’s policy of destroying and digitizing physical mail sent to people incarcerated in its jails. The ruling is a major victory for free speech in California, where nearly 200,000 incarcerated people rely on physical mail to stay connected to their loved ones on the outside.” *Id.*
- *Moody v. NetChoice, LLC*, U.S. Supreme Court Case No. 22-277, petition for a writ of certiorari filed Sept. 21, 2022; *NetChoice, LLC v. Paxton*, U.S. Supreme Court Case Nos. 22-555, petition for a writ of certiorari filed Dec. 15, 2022.
 - There, the Supreme Court “is about to review a constitutional challenge to two unprecedented and very complicated laws regulating social media. The laws were enacted by Texas and Florida in order to counter ‘censorship’ and alleged anti-conservative bias of major Internet platforms like Facebook or YouTube. Both laws have “must-carry” rules that restrict platforms’ ability to moderate content under their preferred editorial policies, and “transparency” rules including requirements for platforms to notify users when their posts have been moderated.”
 - The Center for Internet and Society, [*FAQs About the Netchoice Cases at the Supreme Court, Part 1*](#), January 28, 2024
 - Reply Brief for Petitioner, *Moody v. NetChoice*, U.S. Supreme Court Case No. 22-277, Nov. 23, 2022, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-277/247320/20221123092809902_Netchoice%20v.%20Moody%20Cert%20Reply%20v.f.pdf
 - “The Eleventh Circuit invalidated under the First Amendment portions of Florida’s law, S.B. 7072, that seek to prevent social-media companies from unfairly silencing the speech of others. Florida’s question presented appropriately

focuses this Court’s review on whether that decision is correct.” *Id.* at p. 1 (internal referenced omitted).

- Petition for Certiorari, *NetChoice, LLC v. Paxton*, U.S. Supreme Court Case Nos. 22-555, Dec. 15, 2022, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-555/250049/20221215134834644_NetChoice_Petition%20for%20Writ%20of%20Certiorari.pdf
 - “The Fifth Circuit’s divided 2-1 ruling conflicts directly with the unanimous decision of the Eleventh Circuit Court of Appeals in *NetChoice v. Moody*, creating a stark circuit split.

“In *Moody*, the Eleventh Circuit held that (1) websites, platforms, and apps have First Amendment rights; (2) those rights include the right to editorial discretion; (3) editorial discretion protects content moderation; (4) laws that infringe those rights are unconstitutional; and (5) websites like Facebook.com, YouTube.com, Etsy.com, and others are not common carriers.” *NetChoice Asks the U.S. Supreme Court to Reject Texas’s Social Media Law*, retrieved from <https://netchoice.org/netchoice-asks-the-u-s-supreme-court-to-reject-texas-social-media-law/>
- Response to petition for certiorari from respondent Ken Paxton, Attorney General of Texas, *NetChoice LLC v. Paxton*, No. 22-555, December 20, 2022, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-555/250458/20221220134031114_317861_Brief.pdf
 - After the 5th Circuit upheld Texas’s social media regulatory law, the state framed the issues as “1. Whether States may, consistent with the First Amendment, forbid dominant communications companies from denying users equal, nondiscriminatory access to the media in which modern communication often occurs. 2. Whether States may, consistent with the First Amendment, require dominant social-media platforms to provide truthful, factual information to users about various aspects of their services.” *Id.* at 1.
- Amicus Brief, Reporters Committee for Freedom of the Press and the ACLU, *Moody v. NetChoice*, U.S. Supreme Court Case Nos. 22-277 and 22-555, Dec. 5, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-277/292351/20231205170151755_RCFP%20-%20NetChoice%20v.%20Paxton%20for%20Filing%20PDF-A.pdf
 - “The First Amendment protects the exercise of editorial discretion on social media platforms. By mandating viewpoint neutrality — as defined by the government — Texas’s law improperly interferes with constitutionally protected editorial choices and decision-making of platforms.” *NetChoice v. Paxton*, Position paper, RCFP, retrieved from <https://www.rcfp.org/briefs-comments/netchoice-v-paxton/>

- Amicus Brief, Foundation for Individual Freedom and Expression, *Moody v. NetChoice*, U.S. Supreme Court Case Nos. 22-277 and 22-555, Dec. 6, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-277/292470/20231206154412053_22-555%20-%2022-277%20Amicus%20Brief.pdf
- Amicus Brief, Knight First Amendment Institute, *Moody v. NetChoice*, U.S. Supreme Court Case Nos. 22-277, Dec. 7, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-277/292702/20231207153216894_%20Amicus%20Brief%20of%20Knight%20First%20Amendment%20Institute.pdf
- *Mckesson v. Doe*, U.S. Supreme Court No. 22-272, petition for a writ of certiorari filed Oct. 5, 2023. “If people can sue demonstrators for the unlawful acts of others, it will deter all but the hardiest Americans from exercising their rights to assemble and demonstrate.” Case Overview, *Mckesson v. Doe*, FIRE, retrieved from <https://www.thefire.org/cases/deray-mckesson-v-john-doe>
- Petition for a writ of certiorari, *Mckesson v. Doe*, U.S. Supreme Court No. 22-272, Oct. 5, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/23/23-373/284271/20231005143924647_Mckesson%20v%20Doe%20Petition%20for%20a%20Writ%20of%20Certiorari.pdf
 - “[T]wo of the Fifth Circuit’s judges effectively eliminated the First Amendment right to organize a protest in a case known as *Doe v. Mckesson*.” Millhiser, I. *A new Supreme Court case threatens to take away your right to protest*, Vox.com, Jan. 24, 2024, retrieved from <https://www.vox.com/scotus/2024/1/24/24042823/supreme-court-protest-mckesson-doe-fifth-circuit-first-amendment>
- Respondent’s Brief in Opposition, *Mckesson v. Doe*, U.S. Supreme Court No. 22-272, Jan. 3, 2024, retrieved from https://www.supremecourt.gov/DocketPDF/23/23-373/294770/20240103135859749_44669%20pdf%20Grodner.pdf
- Amicus Brief in Support of Petitioner and Reversal, *Mckesson v. Doe*, U.S. Supreme Court No. 22-272, Nov. 9, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/23/23-373/289267/20231109143649711_23-373_Amicus%20Brief.pdf
- *Missouri v. Biden*, No. 23-30445 (5th Cir. 2023), retrieved from <https://cases.justia.com/federal/appellate-courts/ca5/23-30445/23-30445-2023-10-03.pdf?ts=1696375826>
 - “By coercing social media platforms “via urgent, uncompromising demands” into censoring users who voiced dissenting or disfavored views, officials from the White House, the Surgeon General’s office, the Centers for Disease Control and Prevention, and the Federal Bureau of Investigation likely violated the First Amendment.” FIRE

statement on Fifth Circuit’s decision in *Missouri v. Biden*, September 9, 2023, retrieved from <https://www.thefire.org/news/fire-statement-fifth-circuits-decision-missouri-v-biden>

- *Murthy v. Missouri* (originally filed as *Missouri v. Biden*), U.S. Supreme Court No. 23-411, petition for a writ of certiorari filed September 14, 2023.
 - Brief for Petitioners, *Murthy v. Missouri* (originally filed as *Missouri v. Biden*), U.S. Supreme Court No. 23-411, Dec. 19, 2023 retrieved from https://www.supremecourt.gov/DocketPDF/23/23-411/293780/20231219192259919_23-411ts%20Murthy.pdf
 - The case originated in May 2022, when “the attorneys general of Missouri and Louisiana, along with a number of private plaintiffs, filed a lawsuit in the U.S. District Court for the Western District of Louisiana alleging that federal government officials violated the First Amendment by ‘coercing’ or ‘significantly encouraging’ social media companies to remove or demote content from their platforms.” *Court Case Tracker: Murthy v. Missouri*, Brennan Center for Justice, retrieved from <https://www.brennancenter.org/our-work/court-cases/murthy-v-missouri-formerly-missouri-v-biden>
 - Amicus Brief, Knight First Amendment Institute in support of neither party, *Murthy v. Missouri* (originally filed as *Missouri v. Biden*), U.S. Supreme Court No. 23-411, Dec. 22, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/23/23-411/294120/20231222121422782_KFAI%20amicus%20brief%20in%20Murthy%20v.%20Missouri.pdf
 - Brief of Respondents, *Murthy v. Missouri* (originally filed as *Missouri v. Biden*), U.S. Supreme Court No. 23-411, Feb. 2, 2024, retrieved from https://www.supremecourt.gov/DocketPDF/23/23-411/299644/20240202144405984_2024-02-02%20-%20Murthy%20v.%20Missouri%20-%20Brief%20of%20Respondents%20-%20Final%20with%20Tables.pdf
 - Amicus Brief, Foundation for Individual Rights and Expression, *Murthy v. Missouri* (originally filed as *Missouri v. Biden*), U.S. Supreme Court No. 23-411, Feb. 9, 2024, retrieved from https://www.supremecourt.gov/DocketPDF/23/23-373/289267/20231109143649711_23-373_Amicus%20Brief.pdf
- Amicus Brief, Foundation for Individual Rights and Expression, *O’Connor-Ratcliff v. Garnier*, U.S. Supreme Court No. 22-324, August 15, 2023, retrieved from <https://www.scotusblog.com/case-files/cases/oconnor-ratcliff-v-garnier/>

Court is considering under what circumstances “public officials who block their critics on their personal social media accounts are acting on behalf of the government and therefore can be held liable for violating the First Amendment.” Howe, A. *Justices weigh rules for when public officials can block critics on social media*, SCOTUSblog, Oct. 31, 2023,

retrieved from <https://www.scotusblog.com/2023/10/justices-weigh-rules-for-when-public-officials-can-block-critics-on-social-media/>

- From *Lindke v. Freed*, U.S. Supreme Court Case No. 22-611
 - Lindke v. Freed: *Can a Public Official Block Individuals from Their Social Media Page?* American Bar Association, December 14, 2023, retrieved from https://www.americanbar.org/groups/public_education/publications/preview_home/lindke-v-freed/#:~:text=Lindke%20posted%20his%20criticisms%20in,violated%20his%20First%20Amendment%20rights.
 - Amicus Brief, Foundation for Individual Rights and Expression, *Lindke v. Freed*, U.S. Supreme Court Case No. 22-611, June 30, 2023, retrieved from https://www.supremecourt.gov/DocketPDF/22/22-611/270204/20230630145059071_22-611%20Amicus%20Brief.pdf
 - “Government officials and agencies use social media extensively to communicate with constituents, provide important public notices, and debate key policy and political issues. These are vital spaces for public discourse, and in order to protect the public’s right to engage with each other and with government representatives, the Court should adopt a functional approach to the state action test that asks when a social media account is used in furtherance of government duties.” Amicus Brief, *Lindke v. Freed*, *Knight First Amendment Institute*, retrieved from <https://knightcolumbia.org/cases/lindke-v-freed>
 - *Lindke v. Freed*, U.S. Supreme Court Case No. 22-611 (March 15, 2024), retrieved from https://www.supremecourt.gov/opinions/23pdf/22-611_ap6c.pdf
 - “The Supreme Court on Friday ruled that public officials who post about topics relating to their work on their personal social media accounts are acting on behalf of the government, and therefore can be held liable for violating the First Amendment when they block their critics, only when they have the power to speak on behalf of the state and are actually exercising that power.” SCOTUS Blog, March 15, 2024, retrieved from <https://www.scotusblog.com/2024/03/public-officials-can-be-held-liable-for-blocking-critics-on-social-media/>

Panel 5:

AI Awry: Defamation for Bots Gone Wrong

Moderators

Jean-Paul Jassy, Attorney
Jassy Vick Carolan LLP
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Kevin Vick, Attorney
Jassy Vick Carolan LLP
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Panelists

Clay Calvert, Professor Emeritus
University of Florida, College of Law, Professor Emeritus
University of Florida College of Journalism and Communications,
Brechtner Eminent Scholar Emeritus
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Lyrissa Barnett Lidsky
Professor and former Dean of University of Missouri School of Law
University of Florida, College of Law,
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Gainesville, FL

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John Monroe Law PC
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What does the widespread adoption and use of Artificial Intelligence (AI) like ChatGPT mean for defamation law? Philip Dick famously asked “Do Androids Dream of Electric Sheep?” in his novel inspiring the motion picture Blade Runner. Our esteemed group of legal experts will explore questions such as “Does AI ‘hallucinate’ and can it knowingly publish falsehoods or act with reckless disregard to truth and falsity?”

We’ll look at the intersection of AI and defamation law and the questions raised for familiar legal frameworks. We’ll take an element-by-element approach analyzing who might be liable—and what defenses might be available—when plaintiffs complain about content created by AI or in which AI at least plays some role in creation.

CLE Materials

- Clay Calvert. *Defamation Law and Generative AI: Who Bears Responsibility for Falsities?*, American Enterprise Institute, August 22, 2023, retrieved from <https://www.aei.org/technology-and-innovation/defamation-law-and-generative-ai-who-bears-responsibility-for-falsities/>

- Lyrisa Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. of Free Speech L. 79 (2023), retrieved from <https://www.journaloffreespeechlaw.org/lidsky.pdf>
- Lyrisa Lidsky, *Untangling Defamation Law: Guideposts for Reform*, 88 MO. L. REV. (2023), retrieved from <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4622&context=mlr>
- *Artificial Intelligence, Defamation, and New Speech Frontiers*, National Constitution Center, June 8, 2023, retrieved from https://constitutioncenter.org/media/files/WTP_AI_and_Free_Speech_Transcript.pdf
- From *Walters v. OpenAI*, No. 23-A-04860-2 (Ga. Super. Ct., Gwinnett Cnty.), complaint filed June 5, 2023 and *Walters v. OpenAI*, No. 23-cv-03122 (N.D. Ga.) complaint filed July 14, 2023
 - There, “Mark Walters, host of Armed America Radio, claimed in his lawsuit that ChatGPT produced the text of a made-up legal complaint accusing him of embezzling money from the Second Amendment Foundation. Walters said he has never been accused of embezzlement or worked for the group.”
 - Poritz, I. *OpenAI Fails to Escape First Defamation Suit From Radio Host*, Bloomberglaw.com, January 16, 2024, retrieved from <https://news.bloomberglaw.com/ip-law/openai-fails-to-escape-first-defamation-suit-from-radio-host>
 - See also Spangler, T. *Radio Host Sues OpenAI for Defamation, Alleging ChatGPT Chatbot Invented False Legal Accusations About Him*, Variety, Jun. 8, 2023, retrieved from <https://variety.com/2023/digital/news/openai-chatgpt-defamation-lawsuit-radio-host-1235637166/>
 - Complaint, *Walters v. OpenAI, L.L.C.*, Gwinnett County, June 5, 2023, retrieved from <https://www.courthousenews.com/wp-content/uploads/2023/06/walters-openai-complaint-gwinnett-county.pdf>
 - Defendant's Memo in Support of Motion to Dismiss, *Walters v. OpenAI*, No. 23-cv-03122 (N.D. Ga.), July 21, 2023, <https://storage.courtlistener.com/recap/gov.uscourts.gand.318259/gov.uscourts.gand.318259.12.1.pdf>
 - Plaintiff's Opposition to Defendant's Motion to Dismiss Amended Complaint, *Walters v. OpenAI*, No. 23-cv-03122 (N.D. Ga.), Oct. 16, 2023, retrieved from <https://cdn.arstechnica.net/wp-content/uploads/2024/01/Walters-v-OpenAI-Response-in-Opposition-to-Motion-to-Dismiss-10-16-2023.pdf>
 - Defendant’s Motion to Dismiss Amended Complaint, Gwinnett County, Nov. 1, 2023, retrieved from <https://reason.com/wp-content/uploads/2024/01/WaltersvOpenAIStateMTD.pdf>

- Plaintiff's Opposition to Defendant's Third Motion to Dismiss, Gwinnett County, Nov. 30, 2023, retrieved from <https://reason.com/wp-content/uploads/2024/01/WaltersvOpenAIStateMTDResponse.pdf>
- [Order](#), Gwinnett County, Jan. 11, 2024
 - Maher, J. *OpenAI Must Face Defamation Suit From Ga. Radio Host*, Law360, Jan. 12, 2024, retrieved from <https://www.law360.com/pulse/articles/1785594/openai-must-face-defamation-suit-from-ga-radio-host>

Panel 6:

Journalists on the Front Lines: Overcoming Risks to Reporters

Moderator

Sigmund D. Schutz, partner
Preti, Flaherty, Beliveau & Pachios, Chartered, LLP
Portland, ME

Panelists

Lauren Chooljian
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Concord, NH

Eric Meyer, publisher
Marion County Record
Marion, KS

For decades, it was unusual for reporters to even be issued a subpoena to testify in court, let alone be subjected to the intrusiveness of a search warrant. But in the last few months of 2023, law enforcement has executed unfounded search warrants on a Kansas newspaper, prosecuted Alabama journalists for reporting the contents of public records and issued citations in Illinois to a reporter for asking public officials questions about matters of public concern.

Making matters worse, media outlets are under threat not only from the government, but also from private actors angry about being held accountable. From the specious defamation case filed against NHPR for its award-winning reporting about the perpetrator of sexual assault to the criminal charges against the vandals who retaliated against the station for broadcasting that story, from an inexplicable order to turn over NHPR's reporting materials to a judge, to an unwarranted search and seizure of a Kansas newsroom and the incredible fallout as officials pass the buck, the members of this panel are uniquely situated to educate the audience about the threats journalists face and, more importantly, the steps they have taken to survive and thrive in the face of danger.

CLE Materials

- Chooljian, L. *He built New Hampshire's largest addiction treatment network. Now, he faces accusations of sexual misconduct*, New Hampshire Public Radio, March 22, 2022, retrieved from <https://www.nhpr.org/2022-03-22/eric-spofford-granite-recovery-center-nh-sexual-misconduct>

“The story reported on allegations of sexual misconduct and abuse against a prominent leader in New Hampshire's addiction recovery community. This story has been further explored in The 13th Step podcast from NHPR's Document team.” *NHPR honored with 2 National Murrow Awards*, New Hampshire Public Radio, August 22, 2023, retrieved from <https://www.nhpr.org/inside-nhpr/2023-08-22/nhpr-honored-with-2-national-murrow-awards>

- New Hampshire Public Radio, 13th Step Podcast, retrieved from <https://www.13thsteppodcast.org/>

“How did he get away with it? That question led investigative reporter Lauren Chooljian on a journey into the American addiction treatment industry. She found a longstanding – and long tolerated – culture of sexual misconduct. A phenomenon people in the recovery world call ‘the 13th step.’” *Id.*

- Defamation case against NHPR based on broadcast and article from March 22, 2022
 - Bookman, T. *Former New Hampshire drug recovery leader sues NHPR for defamation*, New Hampshire Public Radio, Sept. 21, 2023, retrieved from <https://www.nhpr.org/nh-news/2022-09-21/former-new-hampshire-drug-recovery-leader-sues-nhpr-for-defamation>
 - Order on Motions to Dismiss, *Spofford v. New Hampshire Public Radio et al.*, Rockingham County Superior Court, New Hampshire, April 17, 2023, retrieved from <https://npr.brightspotcdn.com/18/e0/7d1e386a4505bddfc32cd261ec2d/218-2022-cv-00803-82.pdf>
 - The judge “wrote that nothing presented by Spofford in the lawsuit was ‘fatal to the credibility of NHPR’s sources’ and therefore failed to rise to the level of actual malice, the legal standard used for proving a media outlet defamed a public figure.” Bookman, T. *Judge dismisses defamation suit against NHPR filed by New Hampshire drug recovery leader*, New Hampshire Public Radio, April 18, 2023, retrieved from <https://www.nhpr.org/nh-news/2023-04-18/judge-dismisses-defamation-suit-against-nhpr-filed-by-new-hampshire-drug-recovery-leader>
 - Despite dismissal, the threat of liability returned.
 - Order on Motion for Limited Discovery, *Spofford v. New Hampshire Public Radio et al.*, Rockingham County Superior Court, New Hampshire, May 31 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/2023-05-30-ORDER-on-Motion-for-Limited-Discovery.pdf>
 - “Less than two months after dismissing a defamation lawsuit filed by the founder of a chain of substance misuse recovery centers, a Superior Court judge is now ordering New Hampshire Public Radio to turn over certain transcripts and notes to determine if they contain evidence of malice.” Bookman, T. *Judge orders NHPR to turn over unpublished reporter material in defamation lawsuit*, New Hampshire Public Radio, June 1, 2023, retrieved from <https://www.nhpr.org/nh-news/2023-06-01/judge-orders-nhpr-to-turn-over-unpublished-reporter-material-in-defamation-lawsuit>
 - NHPR fought the revival of the case.
 - NHPR Defendants’ Motion to Vacate or Modify the Court's Discovery Order, *Spofford v. New Hampshire Public Radio et al.*, Rockingham County Superior

Court, New Hampshire June 21, 2023, retrieved from <https://media.wbur.org/wp/2023/09/2023-06-21-NHPR-Motion-to-Vacate-or-Modify-Discovery-Order-Exhibits-A-B-4.pdf>

- Finally, the case was resolved in NHPR’s favor, but only after it “was forced to turn over more than 2,800 pages of material. Spofford was not allowed to see the material sent to the court for review.” Scalese, R. *Judge finds 'no evidence' of malice in NHPR journalist's notes on sexual misconduct story*, WBUR, December 13, 2023, retrieved from <https://www.wbur.org/news/2023/12/13/judge-finds-no-evidence-of-malice-in-nhpr-journalists-notes-on-sexual-misconduct-story>
 - Order Following In Camera Review, *Spofford v. New Hampshire Public Radio et al.*, Rockingham County Superior Court, New Hampshire, Dec. 12, 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/2023-12-13-ORDER-Following-in-Camera-Review.pdf>
- Vandalism in response to March 22, 2022 NHPR broadcast and article resulting in federal criminal charges and convictions
 - Photos of 2022 vandalism committed against Lauren Chooljian and her family (reprinted in full with photographer’s permission as Appendix B to the written copy of this document). **WARNING:** These images contain depictions of hate speech. They have been included to help illustrate the severity of the threat.
 - Enrich, D. *A Reporter Investigated Sexual Misconduct. Then the Attacks Began*, THE NEW YORK TIMES, June 6, 2023, retrieved from <https://www.nytimes.com/2023/06/06/business/media/eric-spofford-new-hampshire-public-radio.html>
 - “After publishing an exposé, journalists in New Hampshire faced broken windows, vulgar graffiti and a legal brawl, with important First Amendment implications.” *Id.*
 - Complaint, *United States v. Cokerline et al.*, June 15, 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/2023-06-15-cockerline-complaint.pdf>
 - *Four New Hampshire Men Charged in Connection with the Stalking of Two Journalists*, United States Attorney’s Office, District of Massachusetts, Sept. 8, 2023, retrieved from <https://www.justice.gov/usao-ma/pr/four-new-hampshire-men-charged-connection-stalking-two-journalists>
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- Gruver, D. “SEIZED ... but not silenced: KBI takes over, MARION COUNTY RECORD, August 16, 2023, retrieved from <https://marionrecord.com/direct/seized-but-not-silenced-kbi-takes-over+5448kbi+5345495a45442e2e2e425554204e4f542053494c454e4345443a204b42492074616b6573206f7665723c212d2d2d2d3e?>



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- Newsroom raid of *Marion County Record*, August 11, 2023
 - Smith, S. et al., *Police stage 'chilling' raid on Marion County newspaper, seizing computers, records and cellphones*, KANSAS REFLECTOR, Aug. 11, 2023, retrieved from

<https://kansasreflector.com/2023/08/11/police-stage-chilling-raid-on-marion-county-newspaper-seizing-computers-records-and-cellphones/>

- Warrant to search *Marion County Record*, August 11, 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/01-Warrant-with-Return-and-Property-Receipt-MN-2023-MR-65.pdf>
- Letter from attorney for *Marion County Record* publisher, Eric Meyer, to Marion Police Chief Gideon Cody, August 13, 2023, retrieved from <https://s3.documentcloud.org/documents/23909293/cody-ltr-8-13-23.pdf>
 - Meyer’s attorney, Bernie Rhodes, began the letter by advising Cody that Rhodes was “writing to offer you an opportunity to mitigate my client’s damages from the illegal searches you personally authorized, directed and conducted” on August 11, 2023.” *Id.*
- Motion and Order to Release Evidence Seized, *In Re Search Warrants*, Marion County District Court, August 16, 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/05-Motion-and-Order-to-Release-Evidence-Seized-081623.pdf>
 - Statement by Marion County Attorney, August 16, 2023, retrieved from <http://kautschlaw.com/wp-content/uploads/2024/03/06-Marion-County-Attorney-statement-081623.pdf>
 - “I have come to the conclusion that insufficient evidence exists to establish a legally sufficient nexus between this alleged crime and the places searched and the items seized.” *Id.*
 - But one item subject to the order was “not included when authorities were ordered to return the items last week....’I wake up every day, and there’s a new constitutional violation that has occurred,” said Bernie Rhodes, the attorney representing the *Record*. *Attorney for Marion Co. Record orders seized item’s return, says data was cloned*, KWCH, August 25, 2024, retrieved from <https://www.kwch.com/2023/08/25/marion-co-records-attorney-orders-flash-drives-return-says-data-was-cloned-seized-items/>
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 - *Marion County Record*, retrieved from <https://kansasreflector.com/wp-content/uploads/2023/08/Marion-County-Record-Affidavit.pdf>
 - Eric Meyer’s home, retrieved from <https://kansasreflector.com/wp-content/uploads/2023/08/Meyer-Home-Affidavit.pdf>
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 - “[T]rying to determine exactly which charges the affidavit contemplates is daunting.” *Id.*
- Complaint, *Gruver v. Cody*, Case 6:23-cv-01179-DDC-BGS (D. Kan.), filed August 30, 2023, retrieved from <https://s3.documentcloud.org/documents/23932839/gruver-v-cody-marion-county-record-raid-complaint.pdf>
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 - Answer, *Gruver v. Cody*, Case 6:23-cv-01179-DDC-BGS (D. Kan.), filed Oct. 4, 2023, <https://s3.documentcloud.org/documents/24017954/gruver-v-cody-chiefs-response.pdf>
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 - Hanna, J. and Vancleave, M. *Things to know about the resignation of a Kansas police chief who led a raid on a small newspaper*, ASSOCIATED PRESS, Oct. 3, 2023, retrieved from <https://apnews.com/article/kansas-newspaper-raid-police-chief-resigns-e4ddf5a06defbb702bc23650827e53fd>
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