

Tweeting the Police Scanner:

The Rediscovered Liabilities

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Abstract

This article examines First Amendment issues that might arise when professional or citizen journalists use Twitter to spread information obtained from “police scanner” transmissions. It addresses confusion concerning the practice’s legality and illustrates potential risks. It concludes by arguing that “scanner tweeting” should be done sparingly and under guidelines that minimize the spread of flawed information, reduce the risk of a potential defamation lawsuit, and promote the safety of emergency personnel, the public, and media.

I. Introduction

On September 16, 2010, a writer for *The Baltimore Sun* illustrated the journalistic trend to push the “social media” envelope by using Twitter to relay police information he heard on a radio scanner.¹ Social media blog Lost Remote.com lauded reporter Justin Fenton for using “tweets” to break news of a murder-suicide at Johns Hopkins Hospital,² while accusing police of twice releasing erroneous information to media through conventional means.³ Yet blog founder Cory Bergman⁴ also posed a pivotal question – one that for decades has sparked newsroom debate and burns anew thanks in part to Fenton’s initiative: Should journalists report – or “tweet” – information gleaned from public safety radio traffic during breaking news events?⁵

Using an abundance of caution, many conventional news outlets – as well as their online counterparts⁶ – steer clear of using scanner traffic as a cited source in their reports. One reason is that such information is often crude, piecemeal, or inaccurate. Much of it arises just as authorities arrive at a scene and are still trying to assess the situation. Another is the difficulty of attributing information to a voice, even if one knows which channels an emergency response agency uses. Nor does radio traffic always clarify the role that sources play in an event, or the disposition of their information. Is it primary information from a commander at the center of a standoff, or secondary information from a rookie officer at a roadblock a half-mile away?

¹ Justin Fenton, *Hearing on scanner: someone may have been shot inside Hopkins Hospital ...* [sic], Twitter.com (Sept. 16, 2010, 10:20 AM), http://twitter.com/justin_fenton (last visited Nov. 7, 2010).

² Cory Bergman, *Tweeting the scanner from a breaking story*, Lost Remote.com (Sept. 16, 2010), <http://www.lostremote.com/2010/09/16/tweeting-the-scanner-from-a-breaking-story>, (last visited Nov. 7, 2010).

³ Id.

⁴ Bergman is also listed as one of four contributors to Lost Remote.com.

⁵ Id.

⁶ Id.; Rachele Matherne, *Live Tweeting Police Scanners*, SixEstate Communications (Sept. 21, 2010), <http://sixestate.com/real-time-communication/live-tweeting-police-scanners/>, (last visited Nov. 7, 2010).

Still another deterrent to sourcing radio traffic has been confusion over the legality of publicly disseminating such information.⁷ Yet the main concern has been liability. Unless care is taken to ensure that information is accurate – and sometimes despite such efforts – news outlets can become vulnerable to pitfalls that range from embarrassment and credibility loss to the costs or negative outcomes of libel or slander litigation.

Although lawsuits with libel, privacy and related claims are declining – only five verdicts were issued in 2007, a record low since 1980⁸ – the costs of defending such cases makes defamation “one of the most important issues in the law of public communication.”⁹ Since 1980, settlements were reached in 13.2 percent of cases, averaging \$2.5 million with a median of \$325,000.¹⁰ Out of 557 trial verdicts over the same period, media defendants “fully won” 55.9 percent of cases, compared to 19.5 percent for plaintiffs.¹¹ Plaintiffs saw final awards that averaged \$556,000, with a median of \$100,000.¹² Yet some examples of defense costs range from \$93,000 – a sum recently accrued by celebrity blogger Perez Hilton in a case that was dismissed¹³ -- to more than \$10 million spent by *Consumer Reports* when it was sued by Isuzu Motors Ltd. over a 1995 story critical of the company’s Trooper sport-utility vehicle.¹⁴

⁷ Lindsay C. Blanton III, *Legality of RadioReference Live Audio Broadcasts and Archives*, RadioReference.com (May 13, 2010), <http://forums.radioreference.com/live-audio-administration/180762-legality-radioreference-live-audio-broadcasts-archives.html>, (last visited Nov. 11, 2010).

⁸ *Annual Study Sees Lowest Number of Media Verdicts Since 1980*, Media Law Resource Center, http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2008_Bulletin_No_1_.htm, (last visited Nov. 11, 2010); Decisions in four cases favored the defendants. A fifth case favored the plaintiff, while a sixth ended in a mistrial.

⁹ Kent R. Middleton & William E. Lee, *The Law of Public Communication* 95, (7th ed. 2010).

¹⁰ *Annual Study*, supra note 8. Settlements involved 75 out of 769 cases tracked by the MLRC.

¹¹ *Id.*

¹² *Id.*

¹³ *Ronson v. Lavandeira*, Citizen Law Media Project (Sept. 10, 2007), <http://www.citmedialaw.org/threats/ronson-v-lavandeira>, (last visited Nov. 12, 2010). Hilton’s actual name is Mario Lavandeira.

¹⁴ Molly Ivins, *Free Speech: Going, Going ...* AlterNet (Aug. 19, 2005), <http://www.alternet.org/story/24293/>, (last visited Nov. 12, 2010).

This article offers an overview and analysis of the aforementioned legal issues brought to bear in the scanner-tweeting debate. It first addresses the legality of tweeting scanner traffic and identifies a weakness in the law that leaves this issue less than fully resolved. Then it illustrates – some of the risks that media professionals or citizen journalists may unwittingly encounter if they choose to divulge scanner traffic online.

Because of Twitter’s brief existence, thus far there are few – if any – direct legal precedents from which to draw insight. As a result, this article takes what is arguably the “next best” approach. It examines select federal cases that are: a). closely applicable to a potential scanner-tweeting case, and b). provide a variety of outcomes that persons who electronically relay scanner traffic may want to consider. The cases chosen involve situations in which media or private citizens – “stand-ins” for tweeters in this exercise – disclosed other types of information specifically obtained using a police scanner.¹⁵ These “other types” of information – which serve as “stand-ins” for police, fire, or other similar traffic – involve the interception and recording of private wireless phone calls. Of course, such practices are generally illegal. Yet the pertinent issue for these purposes is how the courts treated the content in terms of First Amendment protection – regardless of whether the content was legally divulged or not.

The article concludes by arguing that tweeting public safety radio traffic – while probably legal and often beneficial – should be done sparingly and under pre-set guidelines designed to minimize the spread of flawed information and avoid compromising the safety of emergency personnel, the public, and media. If followed, such precautions should lessen the need – if not the likelihood – for an aggrieved party to seek legal recourse for alleged defamation.

¹⁵ For this reason, cases such as *Landmark Communications v. Virginia*, *Florida Star v. B.J.F.*, and *Smith v. Daily Mail* were not relied upon for this initial examination. In *Landmark*, a journalist was physically present at a proceeding in which the information in question was revealed. In *Florida Star*, a newspaper gained access to the information at issue through a document placed in a police department’s press room. In *Smith*, scanner traffic only led journalists to the scene of a news event; the information at issue was obtained by interviewing sources at the scene.

II. Background

On September 17, 2010, the *Sun* reported in its online edition that Paul Warren Pardus shot a doctor at Johns Hopkins Hospital.¹⁶ He then retreated to a room, fatally shot his 84-year-old mother, then used the handgun to take his own life.¹⁷ The scene at one of the nation's most prestigious medical centers was treated as a standoff for more than three hours, drawing global media attention before a police robot found the bodies.¹⁸ According to subsequent reports, Pardus was upset with the doctor over an unsuccessful surgery that left his mother paralyzed.¹⁹

Readers who followed Fenton's Twitter account learned many of those details in near-real time the day before. More than two dozen "tweets" – short messages of 140 characters or less – were sent,²⁰ beginning with a dispatch time-stamped at 10:20 a.m.: "Hearing on scanner: someone may have been shot inside Hopkins Hopsital²¹ ... officers asking for supervisors, officers on roof."²²

Many subsequent tweets relayed crucial and accurate information to the public. Some carried disclaimers such as "unconfirmed"²³ or "on scanner."²⁴ Others lacked such disclaimers or any visible attribution. One warned hospital occupants to lock their doors and stay in their rooms "until all clear is announced."²⁵ Another noted that the suspect had yet to be captured.²⁶

Additional tweets cited a source who said "man was disgruntled about mother's spine surgery,

¹⁶ Justin Fenton, Erica L. Green & Raven L. Hill, *Police: Man upset over mother's care at Hopkins kills her, himself*, *The Baltimore Sun* (Sept. 17, 2010), http://articles.baltimoresun.com/2010-09-17/news/bs-md-ci-shooting-hopkins-20100916_1_mother-hospital-staff-east-baltimore, (last visited Nov. 12, 2010).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Justin Fenton, *Get short, timely messages from Justin Fenton*, *Twitter.com*, http://twitter.com/justin_fenton, (last visited Nov. 13, 2010).

²¹ Hospital is misspelled in the message.

²² Fenton, *supra* note 21.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

shot her doctor,”²⁷ followed by a re-tweeted message from an *Associated Press* reporter that “confirms the name of the doctor wounded . . . Dr. David B. Cohen.”²⁸

There were inaccuracies as well. One tweet reported “police have shot the shooter.”²⁹ It was quickly refuted by another dispatch: “I’m told suspect shot himself and his mother. Police did not shoot him.”³⁰ Before Pardus was identified as the shooter, this message was sent: “Here’s out³¹ story, which has and will be updated. Shooter identified as Warren Davis, 50.”³² An attributed correction promptly followed: “Police now saying shooter’s name is NOT Warren Davis, that’s the name the hospital knew him as but they are unsure true identity.”³³

Such exchanges are the norm in most newsrooms as reporters and editors try to separate fact from fiction. Before social media such as Twitter began their assault on daily or twice-daily news cycles, these conversations usually occurred out of the public eye. Journalists often had time to “clean up” reports and correct errors before they were printed or aired. Even wire services – which file breaking news in short, successive takes that correct previous errors – had the luxury of filing several such takes before deadline arrived for their news outlet clients.

Now people who follow journalists’ tweets – for better or worse – not only witness newsgathering firsthand, they see erroneous information almost as quickly as journalists do. With a button click, they can propagate inaccuracies by re-tweeting them before journalists can make corrections – and not necessarily feel obligated to forward the correction as well. While this informational “need for speed” can move critical and perhaps life-saving intelligence almost instantly, it poses the disadvantage of doing the same for information that is potentially harmful

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ “Out” is likely misspelled and should be “our”.

³² Id.

³³ Id.

or defamatory. Such information does not have to be textual; it can be visual as well. During the hospital standoff, a Twitpic posted by Fenton of a police sniper³⁴ prompted debate over whether the photo could have tipped a tech-savvy gunman to the sniper's position.³⁵

III: Is it legal?

Beyond apprehension about the accuracy of information radioed by emergency responders or other public agencies, confusion has long existed concerning whether those who monitor such traffic can legally disclose the contents to others. Often relying on hearsay, editors routinely caution young reporters against such practices, citing potential illegality. Yet when journalists seek more definitive answers, the results are often disappointing.

Consider this passage from a 1995 aeronautical frequency directory,³⁶ which warns that Section 605 of the Communications Act of 1934 “may apply”³⁷ to all of the stations and frequencies it lists. The directory goes on to state that federal law prohibits the “use of, or disclosure to any person of the contents of the communications monitored”³⁸ and counsels readers to “obtain a copy of this law in order to become fully aware of its meaning.”³⁹

When journalism textbooks address the subject, the approach is often vague. In a discussion of the Electronic Communications Privacy Act (ECPA), a media law book published in 2010⁴⁰ notes that the statute – also called The Wiretap Act⁴¹ – “prohibits the unauthorized interception of electronic communication while the communication is in transit or electronic

³⁴ Justin Fenton, *A sniper set up outside*, Twitpic.com, <http://twitpic.com/2ozsib>, (last visited on Nov. 13, 2010).

³⁵ *Id.*

³⁶ Aeronautical Frequency Directory, preface, (Robert A. Coburn ed., 3rd ed. 1995).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* The preface also notes that some local laws may also prohibit “interfering with police and emergency vehicles and activities.”

⁴⁰ Robert Trager et. al., *The Law of Journalism & Mass Communication* 326 (2010).

⁴¹ *Id.*

storage”⁴² and that “consent of either the sender or the recipient of this kind of communication is considered authorization for interception.”⁴³ Although the passage falls under a subhead titled “Broadcasting Recorded Telephone Calls,”⁴⁴ its wording – though it addresses private communication – could easily be construed to mean any type of wireless communication.

A closer look at provisions concerning the lawful use of electronic transmissions under the Communications Act [which includes EPCA] reveals the key differences in how public and private channels are regulated. As a starting point, no person “receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception.”⁴⁵ However, a preface⁴⁶ to those rules exempts communications monitored through systems that are “readily accessible to the general public.”⁴⁷ In most cases, this separates public signals that are legally accessible from private signals, which are not. Such exemptions include:

- Any station “that relates to ships, aircraft, vehicles, or persons in distress;”⁴⁸
- Any “governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;”⁴⁹
- Stations allocated to amateur, citizens band, or general mobile radio services;⁵⁰
- Any “marine or aeronautical communications system.”⁵¹

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ 47 U.S.C. § 605 (a) (LEXIS 2010).

⁴⁶ Id.

⁴⁷ 18 U.S.C. § 2511 (2)(g)(i)(LEXIS 2010).

⁴⁸ Id (2)(g)(ii)(I).

⁴⁹ Id (2)(g)(ii)(II).

⁵⁰ Id (2)(g)(ii)(III).

Given that equipment designed to receive such communications is widely sold in electronics stores, it seems reasonable to assume that public safety traffic heard on radio scanners qualifies as “readily accessible” to the public. But there is additional language that further defines what is deemed “readily accessible.”⁵² Such communications are not:

- Scrambled or encrypted;⁵³
- Sent through modulations withheld from the public to protect privacy;⁵⁴
- Sent as a subcarrier or other “signal subsidiary” to a radio transmission;⁵⁵
- Sent over communication systems provided by a common carrier,⁵⁶ or;
- Transmitted through other specialized means specified by FCC rules.⁵⁷

Those provisions seem to establish the legality of intercepting those communications that are permitted by law. Yet uncertainties remain – despite the specificity offered by 18 U.S.C. 2511 – about whether communications by police, fire and other public safety agencies⁵⁸ can legally be divulged or published. Under general provisions of the Communications Act,⁵⁹ prohibition of such activity does not apply to “receiving, divulging, publishing, or utilizing”

⁵¹ Id (2)(g)(ii)(IV).

⁵² 18 U.S.C. § 2510 (16)(LEXIS 2010).

⁵³ Id (16)(A).

⁵⁴ Id (16)(B).

⁵⁵ Id (16)(C).

⁵⁶ Id (16)(D). An exception to this provision is tone-only paging system communications. The term “common carrier” typically applies to telecom providers such as AT&T and Verizon, as well as cable and satellite providers, and smaller regional carriers.

⁵⁷ Id (16)(E). This provision refers to three parts within Title 47 of the Code of Federal Regulations, in which FCC rules and regulations are codified. Part 25 involves satellite communications. Part 74 involves “experimental radio, auxiliary, special broadcast and other program distributional services.” Part 94 is currently listed as “reserved” by the FCC. However, its key elements were transferred in 1996 to Part 101, which deals with fixed microwave service. For more information, see http://wireless.fcc.gov/index.htm?job=rules_and_regulations and <http://wireless.fcc.gov/services/index.htm?job=about&id=microwave>.

⁵⁸ 18 U.S.C. § 2511(2)(g)(ii)(II).

⁵⁹ 47 U.S.C. § 605 (a).

contents of radio communication⁶⁰ sent for purposes that correspond to most of the exceptions listed under 18 U.S.C. 2511.⁶¹

Notably absent in this part of the law⁶² are the exceptions that refer to public safety systems “including police and fire, readily accessible to the general public” and marine or aeronautical communications.⁶³ Given such ambiguity, a clarification of the Communications Act on this issue seems in order -- especially given the proliferation of technology that allows professional and citizen journalists to instantly disseminate all forms of communications.

IV: Potential liabilities

Beyond any lingering statutory questions, much of the risk incurred by tweeting scanner traffic mirrors traditional concerns that media face in disseminating information that may prove defamatory, inflammatory, or otherwise objectionable – not to mention the cost of defending any litigation that may arise.

Given the novelty of Twitter and traditional reluctance to use police scanner traffic as a reportable news source, case law involving both is predictably sparse. Given this obstacle, one way to explore how content from a “tweet gone wild” may present problems for the “tweeter” is to look at prior federal cases in which media or private citizens – “stand-ins” for tweeters in this exercise – divulged other types of information gleaned from a police scanner. These cases involve the interception and recording of private wireless phone calls, a practice that is generally illegal. But the pertinent issue is how courts regard content – whether it was legally divulged or not – in terms of First Amendment protection.

⁶⁰ Id.

⁶¹ 18 U.S.C. § 2511 (2)(g)(i)(ii)(I,III)

⁶² Supra note 58.

⁶³ Id; 18 U.S.C. § 2511(2)(g)(ii)(II)(IV)

Bartnicki v. Vopper: One oft-cited example is *Bartnicki v. Vopper*.⁶⁴ Initially, the central issue was whether a radio talk-show host acted properly in airing a taped, private cell phone conversation received by mail in which officials for a teacher's union threatened violence against school board members.⁶⁵ As mentioned previously, intercepting a cellular call is unlawful,⁶⁶ as is disclosing its contents when it is known or suspected the conversation was obtained illegally.⁶⁷ But the decision by the U.S. Supreme Court ultimately hinged on whether such laws were an unreasonable barrier to First Amendment protection of freedom of speech.⁶⁸

In a 6-3 decision, the high court affirmed the lower court's ruling that the anti-wiretap statutes hindered First Amendment-protected speech.⁶⁹ Justice Stevens wrote for the majority that speech concerning a long-running labor dispute between the teachers union and the school district was of sufficient public concern that it outweighed the illegality of how the speech was obtained.⁷⁰ In a dissenting opinion, Justice Rehnquist argued that the court's decision "diminishes, rather than enhances" the First Amendment by "chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day."⁷¹

What applications could this have for someone who tweets scanner traffic? If the tweeted information carries sufficient public importance, the tweeter likely enjoys First Amendment protection – whether the information was divulged legally or not. Because the information was truthful, potential defamation was not a factor. Beyond that, *Bartnicki* offers little additional insight. Persons who tweet scanner traffic are directly involved in divulging information,

⁶⁴ *Bartnicki v. Vopper*, 532 U.S. 514, (2001).

⁶⁵ *Id.* at 519.

⁶⁶ 18 U.S.C. § 2511 (1)(a).

⁶⁷ *Id.* (1)(c).

⁶⁸ *Bartnicki* at 517.

⁶⁹ *Id.* at 521-522.

⁷⁰ *Id.* at 534.

⁷¹ *Id.* at 542.

whereas Vopper was determined to be a “safe” distance from his unknown source. Although the call was illegally intercepted and recorded, Vopper was not found culpable because he had no knowledge or role in such actions⁷² and there was “no empirical evidence” to show that “prohibition against disclosures reduces the number of illegal interceptions.”⁷³

Boehner v. McDermott: Another frequently cited case is *Boehner v. McDermott*,⁷⁴ a circuitous tale of political intrigue involving John Boehner [R-Ohio] and James McDermott [D-Wash.], both current members of the U.S. House of Representatives.^{75;76} Both were House members in 1996 as well, when a Florida couple, John and Alice Martin, used a police radio scanner to intercept a private conference call involving Boehner and then-House Speaker Newt Gingrich [R-Ga.].⁷⁷ Gingrich was under investigation by the House Ethics Committee, while Boehner chaired the House Republican Conference.⁷⁸ McDermott was the lead Democrat on the ethics committee.⁷⁹ The Martins recorded a conversation in which Gingrich and Boehner discussed an expected ethics committee announcement of Gingrich agreeing to accept a reprimand and to pay a fine if the committee promised not to hold a hearing.⁸⁰

The tape became a political “hot potato.” The first stop was an office for then-U.S. Rep Karen Thurman [D-Fla.],⁸¹ where the Martins presented it in a sealed envelope.⁸² Following legal

⁷² Id at 525.

⁷³ Id at 530-531.

⁷⁴ *Boehner v. McDermott*, 484 F.3d 573, (D.C. Cir. 2007), cert. denied, *McDermott v. Boehner*, 2007 U.S. 12832 (2007).

⁷⁵ John Boehner 8th District of Ohio, <http://johnboehner.house.gov/> (last visited Nov. 25, 2010).

⁷⁶ Congressman Jim McDermott, <http://mcdermott.house.gov/> (last visited Nov. 25, 2010).

⁷⁷ *Boehner* at 575.

⁷⁸ Id.

⁷⁹ Id at 576.

⁸⁰ Id at 575.

⁸¹ Thurman served Florida’s 5th Congressional District from 1993 to 2003 and currently chairs Florida’s Democratic Party. See Florida Democrats, Your Party Chair, http://www.fladems.com/content/your_party_chair (last visited Nov. 25, 2010).

⁸² *Boehner* at 575.

advice, Thurman and her staff suggested that the tape be given to the ethics committee.⁸³ The couple then delivered it to McDermott's office. In an attached letter, the Martins described what led to the delivery and added: "We also understand that we will be granted immunity."⁸⁴

McDermott listened to the tape, then called two reporters who also listened to it⁸⁵ and later wrote about its contents.⁸⁶ The Martins later identified McDermott as the committee member who accepted the tape.⁸⁷ He sent copies to the committee, then resigned from the panel.⁸⁸ Committee chair Nancy Johnson [R-Conn.]⁸⁹ sent the tape to the Justice Department.⁹⁰

The Martins' immunity bid fell through. Unlike *Bartnicki* – where the defendant had no role in the illegal interception⁹¹ and obtained the tapes lawfully "though the information itself was intercepted unlawfully by someone else"⁹² – the Martins were prosecuted for intercepting a cell phone call and fined \$500.⁹³ As for McDermott, his actions *again* became a central focus for the deciding court. Was he guilty of intentionally disclosing an illegally intercepted call?⁹⁴ Or was that his First Amendment right, though he sat on the ethics committee?⁹⁵

Why "again?" In 1999, the U.S. Court of Appeals for the District of Columbia Circuit initially ruled that McDermott had no First Amendment right to disclose the tape.⁹⁶ But the U.S.

⁸³ Id at 575-576.

⁸⁴ Id at 576.

⁸⁵ Id.

⁸⁶ Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1, A20; Jeanne Cummings, *Gingrich Ethics Case: Panel Trusted His Motives, Gingrich Told GOP Allies*, Atlanta J.-Const., Jan. 11, 1997, at 6A.

⁸⁷ Boehner at 577.

⁸⁸ Id.

⁸⁹ Women in Congress, Nancy R. Johnson, <http://womenincongress.house.gov/member-profiles/profile.html?intID=120> (last visited on Nov. 26, 2010).

⁹⁰ Boehner at 577.

⁹¹ *Bartnicki*, supra note 71.

⁹² Id.

⁹³ Boehner at 577.

⁹⁴ Id; 18 U.S.C. § 2511 (1)(c).

⁹⁵ Boehner at 577.

⁹⁶ Id at 575.

Supreme Court vacated the decision and returned it for reconsideration in light of *Bartnicki*.⁹⁷ The appeals court kicked it down to the U.S. District Court for the D.C. Circuit. Its summary judgment favored Boehner, awarding him \$60,000 in statutory and punitive damages.⁹⁸ The appeals court vacated that decision and reheard the case *en banc*.⁹⁹

Most of the nine-member panel ruled against McDermott, finding that *Bartnicki* had “little to say”¹⁰⁰ on the matter. Unlike *Bartnicki*, where “private citizens who did not occupy positions of trust” disclosed the tape, McDermott fell under a committee rule that barred the disclosure of evidence without its authorization.¹⁰¹ In the court’s affirming opinion, Circuit Judge Randolph wrote that the rules were reasonable and “raise no First Amendment concerns.”¹⁰² McDermott argued he did not breach the rules because the tape was unsolicited and came from an outside source.¹⁰³ But Randolph noted that an investigative subcommittee also found the tape’s disclosure “inconsistent with the spirit” of its rules and that McDermott failed to meet his committee obligations.¹⁰⁴

In a concurring opinion, Circuit Judge Griffith wrote that had McDermott not violated those rules, he would have found the tape’s disclosure protected by the First Amendment.¹⁰⁵ In a dissenting opinion joined by three other judges and partly by a fourth, Circuit Judge Sentelle wrote that denying McDermott’s First Amendment protection “because he violated the ‘spirit’ of

⁹⁷ *Id.*

⁹⁸ *Id.* The award also included “reasonable court costs and fees.”

⁹⁹ *Id.*

¹⁰⁰ *Boehner* at 579. The specific rule cited was House Ethics Committee Rule 9.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Boehner* at 580.

¹⁰⁴ *Id.*

¹⁰⁵ *Boehner* at 581.

a rule” disregards a “well-established principle that vague restrictions on speech are impermissible because of their chilling effect” and amounts to ‘discriminatory enforcement.’”¹⁰⁶

For those who tweet scanner traffic, what are the implications of this case? Again, defamation was not a factor, as the information was truthful. Yet unlike *Bartnicki*, where divulging information of sufficient public import enjoyed First Amendment safeguards, it was denied in *Boehner* because violations of federal law and congressional rules were found to supersede the information’s public importance. Based on this outcome, one may conclude that if “other rules” beyond legally or illegally divulging scanner traffic are broken, it can harm one’s chances of First Amendment shielding. *Boehner* also shows that judicial views on First Amendment protection are hardly set in stone. Had “other rules” not come into play, Griffith’s opinion in *Boehner* acknowledged a case for First Amendment protection. Sentelle argued for it outright. Yet Randolph, who wrote the majority opinion, found no First Amendment concerns.

Quigley v. Rosenthal: Tensions between suburban Denver families fanned the flames behind *Quigley v. Rosenthal, et. al.*¹⁰⁷ Another case linked to *Bartnicki*, it was the involvement of an advocacy group – and distorted information from phone calls recorded by one of the families – that spawned the issues addressed by the U.S. Tenth Circuit Court of Appeals.

Soon after the Aronsons moved near the Quigleys in August 1994, relations began to erode. Obscenities flew, the Aronsons’ dog terrorized the street and vehicles driven by Candice Aronson made threatening maneuvers against one of the Quigleys.¹⁰⁸ After one such incident, the Aronsons used a police scanner to intercept a cordless phone call between Dorothy Quigley and a friend.¹⁰⁹ The conversation included references to setting one of Aronson’s kids afire,

¹⁰⁶ *Boehner* at 590.

¹⁰⁷ *Quigley v. Rosenthal*, 327 F.3d 1044, (10th Cir. 2003), cert. denied, 2004 U.S. 1808 (2004).

¹⁰⁸ *Quigley* at 1048-1049.

¹⁰⁹ *Id.*

pretending to be “Klu Klux Klan”¹¹⁰ members and taping an oven door on the Aronson’s house as a Holocaust reference before they acknowledged that their conversation was “sick, sick, sick.”¹¹¹

The Aronsons contacted the Anti-Defamation League [ADL] to report that the Quigleys were engaging in anti-Semitic behavior.¹¹² Discussions took place on whether intercepting and recording the calls was legal and – though some facts were disputed – the Aronsons received some legal advice to continue.¹¹³ On the Aronsons’ behalf, the ADL filed a civil suit against the Quigleys.¹¹⁴ Yet “at no time” did the ADL or attorneys on its behalf check the background of either family or their dispute.¹¹⁵ When ADL’s Denver director, Saul Rosenthal, drafted comments for a news conference, it was “uncontroverted” he never listened to tapes or transcripts of those calls, or spoke to the families or others about the dispute.¹¹⁶

Eventually, a criminal case against the Quigleys was also filed.¹¹⁷ But it was soon determined that phone calls were merely “venting” and “sick humor.”¹¹⁸ The criminal case was dropped after the Quigleys sued the district attorney,¹¹⁹ with the prosecutor issuing letters of apology.¹²⁰ But for the Quigleys, who also sued the Aronsons, Rosenthal and the ADL, the damage was done. Within days of the news conference, they received hate mail, suspicious

¹¹⁰ The group’s actual name is Ku Klux Klan.

¹¹¹ Id at 1049-1050.

¹¹² Id at 1051.

¹¹³ Id at 1051-1052; Id at 1062-1063. It should be noted that the effective date when federal law began prohibiting the interception and use of cordless phone conversations was October 25, 1994. This was in the midst of when the Aronsons were intercepting the Quigley’s conversations – some before the date and others afterward.

¹¹⁴ Id at 1052.

¹¹⁵ Id.

¹¹⁶ Id at 1053.

¹¹⁷ Id at 1055.

¹¹⁸ Id at 1056.

¹¹⁹ Id.

¹²⁰ Id.

packages and a box of dog feces.¹²¹ Letters were sent to William Quigley’s employer, United Artists, threatening to boycott theaters unless he was fired.¹²² The Quigleys were denounced by their own priest and they often shopped in other towns for fear of being recognized.¹²³ They even hired guards to watch their home and accompany Dorothy Quigley when she shopped.¹²⁴

The lawsuits continued to flow – this time from the Aronsons – who sued two of their attorneys on allegations of failing “to fully inform” them about ADL ties that “might pose a conflict of interest.”¹²⁵ A financial settlement was reached with the Quigleys and Aronsons,¹²⁶ but the Quigleys’ claims against Rosenthal and the ADL went unresolved. The case went to jury trial in April 2000 before the U.S. District Court for the District of Colorado, with the jury favoring the Quigleys on five of six claims:¹²⁷

- Defamation stemming from on news conference statements;
- Defamation stemming from on a radio show appearance;
- False light privacy invasion based on the news conference and radio show;
- Invasion of privacy by intrusion based on phone call intercepts [ADL only];
- Violating The Wiretap Act¹²⁸ based on phone call intercepts [ADL only];¹²⁹

William Quigley was awarded net damages exceeding \$6.5 million, while Dorothy Quigley was granted net damages of more than \$3.1 million.¹³⁰ Rosenthal and the ADL appealed

¹²¹ Id at 1055.

¹²² Id.

¹²³ Id at 1055-1056.

¹²⁴ Id at 1056.

¹²⁵ Id at 1057.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ 18 U.S.C. § 2511 (1)(d).

¹²⁹ Quigley at 1057.

¹³⁰ Id.

on numerous arguments, but the U.S. Tenth Circuit Court of Appeals unanimously¹³¹ reversed the lower court on only two claims, neither of which affected the damage awards.¹³² Among many arguments, Rosenthal and the ADL said that even if they violated The Wiretap Act by “using” intercepted calls, they had First Amendment protection as in *Bartnicki*.¹³³ The court found that, unlike *Bartnicki*, the Quigleys’ intercepted phone calls were not a public concern¹³⁴ and even if they were, the defendants erroneously portrayed them.¹³⁵ In addition, Rosenthal and the ADL knew the Aronsons were recording calls, while the *Bartnicki* defendants did not.¹³⁶

What can a scanner tweeter take from this case? Quite simply, the odds of having First Amendment protection drop rapidly when the information disclosed is inaccurate and involves private rather than public matters. In this case, defamation played a major role in the outcome and it likely would have regardless of the legality of divulging certain types of information.

Peavy v. WFAA-TV Inc.: Set in a Dallas neighborhood, this case also centered on a neighborly dispute. This time, television station WFAA and investigative reporter Robert Riggs become involved¹³⁷ and shoddy legal work only made matters worse. It all started with concerns that Charles and Wilma Harman had in December 1994 about neighbor Carver Dan Peavy, a Dallas public schools trustee.¹³⁸ Peavy controlled insurance purchases for school employees and

¹³¹ Circuit Judge Hartz concurred in part and dissented in part. Among several points of contention, he argued that punitive damages related to the defendant’s violation of The Wiretap Act should be reversed because the act does not elaborate which circumstances merit such awards.

¹³² *Id* at 1073-1074. In reversing the invasion of privacy by intrusion claim, Circuit Judge Briscoe wrote that “use” of an intercepted phone call is not intrusion because once interception occurs, subsequent ‘use’ of the conversations cannot result in additional intrusion. The false light privacy invasion claim was dropped because the Colorado Supreme Court ceased to recognize this as a viable tort.

¹³³ *Id* at 1066.

¹³⁴ *Id* at 1067.

¹³⁵ *Id*.

¹³⁶ *Id*.

¹³⁷ *Peavy v. WFAA-TV. Inc. and Riggs*, 221 F.3d 158, (5th Cir. 2000), cert. denied, 2001 U.S. 4006 (2001).

¹³⁸ *Id* at 163-164.

often had disputes with the Harmans.¹³⁹ One of his friends and business associates was insurance agent Eugene Oliver, once convicted as a murder accomplice.¹⁴⁰

After purchasing a police scanner, Harman heard and later began to record conversations by Peavy that he interpreted as a threat to his safety and corruption involving school business.¹⁴¹ Harman contacted WFAA, resulting in Riggs visiting his home and listening¹⁴² to the recordings. Harman began to supply Riggs with copies of the tapes.¹⁴³ So the tapes' authenticity could not be challenged, Riggs cautioned him not to turn the recorder off and on during conversation and not to edit the tapes.¹⁴⁴ Riggs also was assured by WFAA counsel in January 1995 that such recording such conversations was legal and that WFAA could legally accept and broadcast the tapes¹⁴⁵ – even though The Wiretap Act was amended to make such acts illegal weeks before Riggs met Harman.¹⁴⁶ Upon learning the error, counsel opined that the First Amendment took precedence over wiretap laws and that the station could still use the tapes because it obtained them legally.¹⁴⁷

Although WFAA returned the original tapes to Harman, Harman continued to intercept Peavy's calls until the FBI seized his scanner in October 1995.¹⁴⁸ Harman eventually pleaded guilty to violating The Wiretap Act and paid a \$5,000 fine.¹⁴⁹ Meanwhile, WFAA and Riggs continued to investigate Peavy through other means and in mid-1995, aired three stories on

¹³⁹ Id.

¹⁴⁰ Id at 163.

¹⁴¹ Id at 164.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id at 165.

¹⁴⁶ Id.

¹⁴⁷ Id.

¹⁴⁸ Id at 166.

¹⁴⁹ Id.

Peavy's dealings.¹⁵⁰ A district court later found that those stories relied on "disclosed" portions of the tapes in violation of federal and state wiretap laws.¹⁵¹ Peavy and Oliver were indicted on bribery and other charges related to Dallas school business but later acquitted.¹⁵² The Peavy family later sued WFAA and Riggs.¹⁵³ Despite findings that WFAA and Riggs violated wiretap laws, the judge awarded them summary judgment because the liability for their conduct would violate the First Amendment.¹⁵⁴

Neither side proved happy with the ruling. WFAA and Riggs held that The Wiretap Act was vague, overly broad – and as such unconstitutional – and that they did not illegally "use" or "disclose" the intercepted phone calls.¹⁵⁵ The Peavys argued that the district court erred by finding WFAA and Riggs did not "procure" or "obtain" Harman's interceptions, that the First Amendment shields them from liability, and by denying the Peavys' motion to suppress contents of the intercepted calls.¹⁵⁶ To resolve the constitutionality of The Wiretap Act, the U.S. Fifth Circuit Court of Appeals reviewed the case *de novo*.¹⁵⁷

The appeals court's resolution proved complex. It rejected claims that The Wiretap Act was unconstitutional.¹⁵⁸ It vacated the lower court finding that parts of the Peavys' calls were "disclosed" in news broadcasts,¹⁵⁹ but affirmed the ruling that WFAA and Riggs – in violation of state and federal wiretap laws – "used" and "disclosed" the calls' contents for purposes other

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* Carver Dan Peavy and Sally Peavy were the named plaintiffs in the appeals court case. The named defendants were WFAA and Riggs. For pretrial purposes, separate actions filed by the Olivers against WFAA, Riggs and Charles Harman, and by the Peavys against Charles and Wilma Harman, were consolidated.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 167.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 193. As part of that finding, the court cited Riggs' testimony that WFAA counsel "missed the new legislation" that banned the interception of cell phone calls.

¹⁵⁹ *Id.* at 194. Also vacated were the Peavys' state law claims of civil conspiracy and that WFAA and Riggs "obtained" the Harmans' services.

than TV broadcasts.¹⁶⁰ It also vacated the finding that WFAA and Riggs did not procure the Harmans to intercept the calls.¹⁶¹ In addition, the appeals court reversed the district court's finding that the First Amendment precludes civil liability for "use" and "disclosure,"¹⁶² as well as how the court examined those issues.¹⁶³ Finally, the case was remanded to district court for further resolution.¹⁶⁴

What is the takeaway from this case for scanner tweeters? It is the knowledge – based on the appeals court's reversal – that even First Amendment protection of free speech may not provide automatic protection from civil liability. When viewed in concert with the other cases this paper examines, *Peavy* also reinforces the notion that when persons directly intercept communications and divulge their contents – which a scanner tweeter does as a matter of course – it puts them on the front line of any potential liability that may arise. Put another way, it has often been said of media libel cases that truth is one's best defense.¹⁶⁵ Yet as the cases in this paper demonstrate, one would be ill-advised to rely upon truth as one's only defense.

¹⁶⁰ Id. The use outside of TV broadcasts occurred in district court when WFAA and Riggs were allowed to use the tapes as "evidence to attack the Peavy's character and defend against their state law claims, as well as to support their affirmative defenses." The appeals court also affirmed the lower court ruling to dismiss the Peavy's damage claims under federal wiretap laws for "procuring" the Harmans to intercept the calls.

¹⁶¹ Id. The appeals court notes this is "a separate issue from the correct dismissal of the [Peavys'] procurement action for damages."

¹⁶² Id at 184-186. The appeals court cites several cases in its rationale. Concerning press rights under the First Amendment, it cites a finding in *Branzburg v. Hayes* that "it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." By this, the court seems to imply even if illegal activities provide newsworthy information, that fact – on its face – does not mean automatic immunity from conviction for such conduct.

¹⁶³ Id at 194. The appeals court found that district court improperly applied strict scrutiny to the case and should have applied intermediate scrutiny; Id at 190. The appeals court notes that unlike *Bartnicki* [where the media had no involvement with the interceptor] or *Boehner* [where media liability was not at issue], the involvement of WFAA and Riggs with the interceptor dictates that the issues of use and disclosure must satisfy an intermediate level of scrutiny applicable to content-neutral restrictions.

¹⁶⁴ Id.

¹⁶⁵ Trager at 201; Middleton & Lee at 151-152.

V: Conclusion

Under certain conditions, using Twitter and other speed-intensive technologies to disseminate police scanner traffic provides an important service. Such an example occurred on September 6, 2010, when Sandra Charlier Fish, a University of Colorado journalism instructor, was working at home and smelled smoke.¹⁶⁶ “Online, there was nothing in the news yet. So I went to the sheriff’s site, and there was nothing there yet either ... I remembered that I’d listened to the local police scanner online before, so I turned that on. Then I noticed that other local people were tweeting about a fire, so I tweeted the link to the scanner. Then I tweeted about which areas they were evacuating, and when they lost structures.”¹⁶⁷

Fish’s tweets about the Fourmile Canyon Fire apprised followers about evacuations, blocked escape routes and new flare-ups.¹⁶⁸ A moment of levity came when she tweeted that one resident tried to return to an evacuated area to “feed her fish.”¹⁶⁹ All of this information was collected from scanner traffic, a skill Fish honed through years of newsroom experience.¹⁷⁰

Yet there are times when all the experience at some of nation’s major news outlets is not enough to avoid erroneous reporting based on scanner traffic. Such was the case on September 11, 2009, when CNN, Fox News and other outlets reported that the Coast Guard fired on a recreational boat in the Potomac River.¹⁷¹

¹⁶⁶ Michele McLellan, *Scanner tweeting: Breaking news lessons from the Boulder fire*, Knight Digital Media Center (Sept. 9, 2010), http://www.knightdigitalmediacenter.org/leadership_blog/comments/20100909_scanner_tweeting_breaking_news_lessons_from_the_boulder_fire/, (last visited Dec. 7, 2010).

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ William Branigin, Debbi Wilgoren and Spencer S. Hsu, *Radio Traffic Led to False News Reports of Gunfire on Potomac*, Wash. Post, (Sept. 11, 2009, 4:21 PM). <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091101740.html>. (last visited Dec. 7, 2010).

The story carried particular import because it occurred near where President Barack Obama paid tribute to victims of the 9/11 attacks.¹⁷² Part of the confusion occurred when CNN decided to air a radio transmission that it recorded after the Coast Guard denied knowledge of officers ordering shots fired at a “suspicious vessel.”¹⁷³ In the recording, a Coast Guard member was heard to say: “Vessel, if you don’t slow down, stop your vessel . . . you will be fired upon.”¹⁷⁴ It turned out that the transmission occurred over a Coast Guard training frequency.¹⁷⁵ Yet false reports over live TV – comparable in speed to Twitter – triggered a chain reaction that halted departures at Reagan National Airport for 22 minutes and caused political fallout over the decision to train near the Pentagon – a target of the 9/11 attacks – on such a sensitive day.¹⁷⁶

Concerns about the intersection of high-speed or social media with police scanner traffic are hardly limited to inaccurate reporting. During the G-20 economic summit held in Pittsburgh in September 2009, at least two self-described anarchists claimed responsibility for thwarting police activities by listening to scanner traffic and tweeting police movements.¹⁷⁷ Even more nefarious is the use of smart-phone applications that can stream police radio traffic by criminals in cities such as Oakland, Calif.¹⁷⁸ To prevent the use of radio communications against their officers, some public safety agencies – such as in Findlay, Ohio, and Oakland County, Mich., –

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Steven Thrasher, *An Interview with the Tweeting Anarchist, Elliot Madison*, Village Voice, (Nov. 10, 2009, 9:48 AM). http://blogs.villagevoice.com/runninscared/2009/11/an_interview_wi.php (last visited Dec. 7, 2010); Mike Gogulski, *G20 riots in Pittsburgh – How I organized them via Twitter*, (Sept. 28, 2009). <http://www.nostate.com/3240/g20-riots-in-pittsburgh-how-i-organized-them-via-twitter/> (last visited Dec. 7, 2010).

¹⁷⁸ Dispatch Magazine On-Line, *Police Warn of Smartphone Scanner Apps*, (June 7, 2010, 3:32 AM), <http://www.911dispatch.com/2010/06/police-warn-of-smartphone-scanner-apps/> (last visited Dec. 7, 2010).

have adopted systems that encrypt radio traffic.¹⁷⁹ Others such as the Los Angeles Police Department continue to stream radio traffic onto the internet, but use a two-minute delay.¹⁸⁰

Given increased concerns about the abuse of police scanner traffic, it is within the interests of news media – as purveyors of truth – to use such information as responsibly as possible. While social media such as Twitter offer a tempting platform to reach increasingly mobile audiences, the speedy and often hectic nature of tweeted messages raises the odds that problematic content – even at 140 characters or less – may be inadvertently spread.

To minimize the likelihood of disseminating messages that could pose ethical, privacy or libelous issues, scanner tweeting should be done sparingly and under pre-determined guidelines designed to minimize errors and avoid compromising the safety of emergency personnel and media – as well as the public that both serve. Although many news organizations, such as *The Denver Post*, still lack official policies, the *Post* generally avoids scanner tweeting unless “it’s absolutely critical information that needs to get out quickly.”¹⁸¹

Concerning such guidelines, several approaches may be considered. One is the constant – not occasional – use of attribution while noting the information comes from radio traffic and as such is initially unconfirmed.¹⁸² For example, one could briefly preface a tweet by stating “heard on scanner, unconfirmed: federal building being evacuated” and then later confirm the activity by citing additional sources or eyewitness accounts. Another is to avoid tweeting people’s names – even if they are included in radio traffic.¹⁸³ Although a person can claim defamation by

¹⁷⁹ Jordan Cravens and Joy Brown, *City police to silence radio traffic*, *The Courier*, (March 18, 2010). http://www.thecourier.com/Issues/2010/Mar/18/ar_news_031810_story1.asp?d=031810_story1,2010,Mar,18&c=n (last visited Dec. 8, 2010); Catherine Kavanaugh, *Police scanners go silent*, *The Daily Tribune*, (Dec. 18, 2009). <http://www.dailytribune.com/articles/2009/12/18/news/srv0000007111760.txt> (last visited Dec. 8, 2010).

¹⁸⁰ *Id.* Kavanaugh.

¹⁸¹ *Supra* note 164. See the comments section posting by Daniel Petty, the *Post*’s social media editor.

¹⁸² *Id.*

¹⁸³ *Id.* See Fish’s comments in the general story authored by Amy Gahrn below McLellan’s blog post.

proving the language is “of and concerning” them,¹⁸⁴ avoiding the use of names generally reduces the burden of proof.

Because tweeting will inevitably produce errors, outlets should develop strategies to fix them.¹⁸⁵ In these circumstances, speed is essential – to a point. While quickly correcting errors minimizes the time window in which inaccurate information can be re-tweeted, moving too rapidly can sometimes compound the error. One way to address an error is to immediately tweet that the information at issue is erroneous, then tweet the updated information only after it is confirmed as correct, rather than rushing to post new information that may or may not be.

Another prudent measure is to assign tweeting duties only to staffers with Twitter experience.¹⁸⁶ They should be prepared to tweet the scanner in a crisis,¹⁸⁷ meaning they should also be experienced covering police, fire and public safety. Because it can be intense work, scanner tweeters should be relieved “every hour or so.”¹⁸⁸ Scanner tweeters should also be wary of divulging information that may hinder law enforcement or put the public at increased risk. For example, if a manhunt is ongoing and the fugitive follows a reporter’s Twitter account, it would be irresponsible to tweet specific locations where authorities are searching.

In closing, the potential dangers of “tweeting the scanner” are not much different from those that media traditionally face. The main difference is speed. In the past, longer news cycles gave journalists more time to catch errors and that was never a perfect endeavor. In a wireless world, such luxuries are shrinking as news outlets – once reticent about relying on scanners for purposes other than news tips – now rationalize it as a way to cater to audiences’ needs for

¹⁸⁴ Middleton & Lee at 111.

¹⁸⁵ Supra note 164.

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id.

instant information. Maintaining a proper balance between speed and accuracy has always been a challenge for media organizations. As the police scanner enters a new era as a cited news source, the presence of Twitter as a tag-along partner requires news outlets to redouble such efforts – if they are serious about maintaining credibility and minimizing the potential liabilities posed by news cycles that are now measured in minutes or seconds, rather than hours or days.