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To Show, or Not To Show—That Was the Question: A Discussion Regarding the First Amendment Issues Implicated By the Sony Pictures Entertainment Cyberhack & the Interview Debacle

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**TO SHOW, OR NOT TO SHOW—THAT
WAS THE QUESTION: A DISCUSSION
REGARDING THE FIRST AMENDMENT
ISSUES IMPLICATED BY THE SONY
PICTURES ENTERTAINMENT
CYBERHACK & THE INTERVIEW
DEBACLE**

CHELSEY HUSO*

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I. INTRODUCTION

Every year, in the weeks leading up to December 25, the entertainment industry hypes up the public in anticipation for a holiday-themed feature film. But the Christmas season of 2014 was different.

On November 24, 2014, the giant media company, Sony Pictures Entertainment, was maliciously cyberhacked.¹ While red skeletons danced across their screens, Sony employees unsuccessfully tried to regain control of their computer network.² A group calling themselves the Guardians Of Peace (“GOP”)³ sent a message to Sony claiming responsibility for the hack, which accessed Sony’s internal data including employee emails, unreleased movie information, and personal information.⁴ GOP demanded that the soon-to-be-released feature, *The Interview*, a comedic film depicting the assassination of North Korea’s leader starring Seth Rogan and James Franco, be canceled if Sony wished to avoid additional hacking jobs.⁵

America’s first guess as to the identity of the hacker was North Korea, who had recently expressed its disfavor of the plot of *The Interview*.⁶ When

* J.D. Pepperdine University School of Law, 2016. I dedicate this Article to my incredible family, especially my mother who always believed in me and to my one and only love, Matthew MacDonald, whose care and affection truly changed my life.

¹ Levi Winchester, *North Korea v Sony: How the Bitter Rose Over The Interview Unravelled*, DAILY EXPRESS (Dec. 18, 2014, 14:00), <http://www.express.co.uk/news/world/547653/Timeline-of-North-Korea-Sony-row>; see also Sony Pictures Entm’t Notice Letter, State of Cal. Dep’t of Justice Office of the Attorney Gen. (Dec. 8, 2014), http://oag.ca.gov/system/files/12%2008%2014%20letter_0.pdf?.

² Kim Zetter, *Sony Got Hacked Hard: What We Know and Don’t So Far*, WIRED (Dec. 3, 2014, 4:02 PM), <http://www.wired.com/2014/12/sony-hack-what-we-know/>. The hack “caused crippling computer problems for workers at Sony, who were forced to work with pen and paper[,]” and even resorted to the fax machine. *The Interview: A Guide to the Cyberattack on Hollywood*, BBC NEWS (Dec. 29, 2014), <http://www.bbc.com/news/entertainment-arts-30512032>.

³ The GOP claimed to be “an international organization including famous figures in the politics and society from several nations such as United States, United Kingdom and France. We are not under direction of any state.” Zetter, *supra* note 2.

⁴ It is estimated that approximately 40 gigabytes of confidential company data was stolen and posted online. *Id.*

⁵ The early stages of the movie envisioned a plot about the assassination of a *fictionalized* leader of North Korea. It was only after auditions began that the world found out the plot would be a comedic portrayal of the assassination of North Korea’s actual leader, Kim Jong-Un. Martin Fackler, Brooks Barnes, & David E. Sanger, *Sony’s International Incident: Making Kim’s Head Explode*, N. Y. TIMES, Dec. 15, 2014, at A1, http://www.nytimes.com/2014/12/15/world/sonys-international-incident-making-kims-head-explode.html?_r=1.

⁶ On June 26, 2014, Korean Central News Agency came out with the following statement: “The Interview was first condemned on June 26 by state-run Korean Central News Agency who, without making direct references to the movie, said the government promised ‘merciless action’

GOP threatened to terrorize any theater that premiered the movie, the film industry, the U.S. Government, and the American people each voiced their opinion as to whether or not the film should be shown.⁷ But in the end, the film industry caved to GOP's demands.⁸

The dialogue between these groups raises significant issues on the limits of free speech in the face of cyber intimidation and the limits, if any, on national security measures to override First Amendment rights.

The American people have always valued the freedom of expression.⁹ The fabric of our great society is founded upon that very concept.¹⁰ The founding fathers believed that the greatness and success of the American nation was largely attributed to its respect for individual freedoms.¹¹ Express protection for freedom of expression is reflected in the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."¹² In sum, this amendment protects the most basic and indispensable liberties of the American people: freedom of religion, speech, press, petition, and assembly. However, interpretation of the amendment is far from easy as many courts have tried to define the limits of these freedoms.

Limits on First Amendment rights have evolved throughout American history. The American people have interpreted the First Amendment and applied it to varying circumstances since the country's founding, in turn creating a robust body of precedent for courts to use. Today, technology is revamping the very concept of speech while the First Amendment is being molded and tweaked to accommodate modern methods of communication and

against the US if the film went ahead." Winchester, *supra* note 1.

⁷ Actor Rob Lowe tweeted the following: "Wow. Everyone caved... [t]he hackers won. An utter and complete victory for them. Wow." Comedian Jimmy Kimmel also tweeted a similar complaint when theatres refused to show the film saying, it was "an un-American act of cowardice that validates terrorist actions and sets a terrifying precedent." *The Interview: A Guide to the Cyberattack on Hollywood*, *supra* note 2.

⁸ Brent Lang, *Sony Cancels Theatrical Release for 'The Interview' on Christmas*, VARIETY (Dec. 17, 2014, 5:58 PM), <http://variety.com/2014/film/news/sony-cancels-theatrical-release-for-the-interview-on-christmas-1201382032/>.

⁹ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011).

¹⁰ *Id.*

¹¹ *Id.*; see, e.g., WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 767–68 (1953); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 119–219 (1985); Thomas F. Carroll, *Freedom of Speech and of the Press in the Federalist Period; The Sedition Act*, 18 MICH. L. REV. 615, 627–37 (1919–20).

¹² U.S. CONST. amend. I.

preserve expression as best as possible. Private media companies have demonstrated significant vulnerability to the erosion of free speech rights through avenues like public pressures, economic coercion, and perhaps even political intimidation. Whether or not business practices in these media companies place much value on the First Amendment is not always clear. The film industry may in fact be more interested in its bottom line profit—it is difficult to discern a parallel between the founding fathers' lofty vision of heralding free speech rights and protection of individual liberties and an entertainment company who refuses to stick out its neck to stand for the very rights it has profited from.

An examination of these business practices and entertainment industry philosophy is warranted and may help monitor the vitality of the First Amendment's pulse in American society. How much do American businesses—specifically the entertainment media companies—value the First Amendment? How should the government, media companies, and American public react when a national threat hinges on a free speech production? What about First Amendment rights to consumers of the entertainment industry? What about the rights of media businesses who host productions? What about the actors and their respective rights? This jumbled mix of questions stimulates a contentious and disturbing dialogue that both the American people and their courts will continue to see surface in the near future and will need to give thoughtful consideration.

Part II of this article will discuss the relationship between entertainment media companies and free speech rights, touching on controversies in the past that shed light on The Interview Debacle. Specifically, this article will focus on the unique relationship between entertainment companies and First Amendment free speech rights as well as their effect on business practices. Part III of the article will then explore the nature of the Sony cyberhack: how it happened and why, who did it, its legal significance, and society's reactions. Part IV will next address the pending class action lawsuit by the employees of Sony and their requisite demands on cyber security protocols. Lastly, Part V will explore the possible future implications this debacle will have on the way in which the national government handles cyber-terrorism/hacks; how private businesses in the film industry protect their production secrets as well as protect their employee's confidential information; and also how the average American's notion of freedom of speech rights may change in the wake of this scenario. The Sony cyberhack case is a perfect illustrative tool to attempt to discover the answers to these pointed questions. But first, history.

II. HISTORICAL PROGRESSION OF FREE SPEECH ISSUES IN ENTERTAINMENT MEDIA

A. *The Relationship Between Private Media Companies and Free Speech Rights, Touching on Controversies in the Past that Shed Light on The Interview Debacle.*

Movies and shows shape the popular social image of the American community. Therefore, what the industry chooses to broadcast or *not* broadcast invariably affects how Americans perceive themselves and are perceived by others.¹³ After all, to speak freely is at the very core of the American identity.¹⁴ No freedom is free however. As America's history can attest, the First Amendment came at a high cost. Whether Americans should expect to sacrifice anything less to preserve this freedom remains to be seen.

The entertainment industry has become an integral mechanism by which we exercise our free speech rights.¹⁵ As such, it wields considerable influence over its viewers.¹⁶ The industry constructs narratives that reflect society's

¹³ "To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker." Frederick Douglass, *A Plea for Free Speech in Boston at Music Hall* (1860); GREAT SPEECHES BY FREDERICK DOUGLASS 50 (James Daley ed., Dover Publ'ns 2013).

¹⁴ Rosenthal, *supra* note 9, at 1.

¹⁵ A right is a sufficient ground for holding others under a duty, in the individualistic sense that it grounds requirements for action in the interest of other beings . . . [t]o ground a right, the interest should both be important *and* justify through sound arguments that a certain right exists in virtue of that interest.

Ilias Trispiotis, *The Duty to Respect Religious Feelings: Insights From European Human Rights Law*, 19 COLUM. J. EUR. L. 499, 505–06 (2013). If such a right exists, there is a reason to hold other persons to a duty. *Id.* It was not until the seminal 1915 case, *Mutual Film Corp. v. Industrial Commission of Ohio*, was overturned that the American public was able to embrace entertainment as an important medium by which to express free speech. In that case, the Supreme Court held that motion pictures were not a part of the United States press because films were merely entertainment "with a powerful capacity to incite audiences to immoral behavior." Samantha Barbas, *How Movies Became Speech*, 64 RUTGERS L. REV. 665, 665 (2012) (quoting *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 244–45 (1915)). During that time, entertainment like movies was considered an immoral influence due to its ability to impress the mind. *Joseph Burstyn, Inc. v. Wilson* declared that entertainment channels such as films and shows were equivalent to America's traditional notion of the press; further, movies were an "important medium for the 'communication of ideas' protected by the First Amendment." Barbas, *supra*, at 666 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)). See generally PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 148 (2004).

¹⁶ Kimberlianne Podlas, *Respect My Authority! South Park's Expression of Legal Ideology and Contribution to Legal Culture*, 11 VAND. J. ENT. & TECH. L. 491, 499 (2009). Television shows and the like broadcast opinions and ideologies to their audiences which cultivate a shared consciousness concerning popular topics. Thus, the themes communicated by America's entertainment can serve as a pulse on what the collective social opinion is, regarding various subjects. For example, in the legal context, researchers have discovered significant correlations

beliefs on any number of topics and inevitably influences the average American's perception of the legal system.¹⁷ Moreover, a symbiotic relationship exists between the entertainment industry and legal culture.¹⁸ Thus, entertainment media plays a key role informing legal culture by shaping society's perception on important legal rights, like free speech.¹⁹

between what mainstream culture comprehends of the legal system and the law-related shows they watch. See WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 13 (2004) ("Mass-manufactured legal knowledge constitutes and reconstitutes law itself."). The suspenseful courtroom drama encapsulated in shows like *Law and Order* work impressions into the minds of its viewers leaving them with a collective impression of how the legal system must really function. Whether that impression is the reality is another matter entirely.

¹⁷ Hollywood constructs stories that "show us how the legal system operates and defines the contours of law, thereby contributing to and mediating our understandings." Podlas, *supra* note 16, at 496. In effect, entertainment programs function as a mirror; they show us what society's collective beliefs are on a given topic and reflect back at us a reconstituted narrative in the popular imagination. *Id.* Television's ability to cultivate certain beliefs and values in people is remarkable. It works as a conduit; shaping discussions by reference to pop culture and realigning the majority's sensibilities to a common ground understanding of the given topic. It is for this reason that television ads are such a lucrative industry. The same principle applies to the law. If popular media channels by and large propagate the belief that defense attorneys are all corrupt, "viewers will come to adjudge that issue salient." See *MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH* 44 (Jennings Bryant & Dolf Zillmann eds., 2d ed. 1994) [hereinafter *MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH*]. That entertainment programs communicate messages, which translate into public perceptions, represents a monumental cultural force affecting how people view the world around them. Narratives can take many different forms given the vastness of the entertainment industry. See Sonia Livingstone, *Mediated Knowledge: Recognition of the Familiar, Discovery of the New*, in *TELEVISION AND COMMON KNOWLEDGE* 97 (Jostein Gripsrud ed., 1999).

¹⁸ Podlas, *supra* note 16, at 4. Outside its more traditional stereotype, "law is also a cultural entity" which includes "our common sense notions of justice, perceptions of what is lawful, [and] expectations of how the legal system works . . ." *Id.* at 3-4; see HALTOM & MCCANN, *supra* note 16, at 10-13; Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 118 (2004); NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 2 (1998); see also Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983). Television shows and more broadly, entertainment programs, serve to educate us about what issues are currently important, why they are important, and for what reasons they are breaking news. Consider comedies like the *Daily Show*, *The Colbert Report*, or *Saturday Night Live*. Young adults in America by and large turn to these types of programs as a "significant source of socio-political information" informing their understanding of current issues, including law-related topics. See Zetter, *supra* note 2, at 498-99; R. Lance Holbert et al., *Primacy Effects of The Daily Show and National TV News Viewing: Young Viewers, Political Gratifications, and Internal Political Self-Efficacy*, 51 J. BROADCASTING & ELECTRONIC MEDIA 20, 22 (2007).

¹⁹ Over fifty years ago, Justice Robert Jackson observed that each type of media has different characteristics that affect the constitutionality of laws restricting expression. Justice Jackson stated that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck, and the street corner orator have differing natures, values, abuses, and dangers." The vast expansion of avenues of communication wrought by the information age has forced the Court to evaluate the differing 'natures, values, abuses,

Given entertainment media's vast influence begs the question: Do private media companies endowed with powers²⁰ to mold the social perception of the law have some type of obligation to construct popular culture understandings that resonate with America's fundamental beliefs? Moreover, does the industry, whose very existence was founded and now thrives under First Amendment protection, bear any responsibility²¹ to champion free speech when challenged? It is unclear the extent to which media companies and the industry in general are expected by the public or obligated by business practices to take a particular stance regarding First Amendment issues. Equally unclear is the role of the federal government in relation to private media companies. Unique challenges arise when America's free speech rights come in contact with nations whose laws are not as liberal. Understandably, the United States Government has an interest to protect its citizens from outside threats. But whose will triumph when terrorist threats culminate from perfectly legitimate free speech rights exercised by American entertainment enterprises—specifically those in Hollywood?

and dangers' of myriad emerging modes of communication. Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 149 (2004) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). Most researchers agree that the media has profound effects on our choice of actions, from the "way we dress and the way we talk, and it is not a stretch to conclude that it influences the way we think" as well as government policy. Dov Greenbaum, *Is It Really Possible to Do the Kessel Run in Less Than Twelve Parsecs and Should It Matter? Science and Film and Its Policy Implications*, 11 VAND. J. ENT. & TECH. L. 249, 254 (2009); see, e.g., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 171 (2000) ("Movies are a large part of our culture, determining, for instance, what Americans will discuss at the water cooler. The importance of movies in our culture is somewhat reflected by the manner in which movies become big hits.").

²⁰ See Greenbaum, *supra* note 19, at 254 (We are plugged into an "unstoppable media juggernaut.").

²¹ Podlas, *supra* note 16, at 500–01. "When television frames a political or regulatory issue in a particular way, viewers apply that framework or logic in forming impressions about the issue," and thus what topics are addressed and positions espoused by popular media merge and refashion public perceptions regarding legal issues like free speech rights. See *id.* at 501–02 (discussing television's power over its "viewers to adopt certain ideologies of law and philosophies . . ."). See Robert Goidel et al., *The Impact of Television Viewing on Perceptions on Juvenile Crime*, 50 J. BROADCASTING & ELECTRONIC MEDIA 119, 124 (2006) (discussing the media's effect on public opinion relating to sentencing leniency). For example, if the entertainment industry "evaluates political figures in terms of experience versus change," the public will use an experience versus change framework in forming their opinion; by extension, how the media portrays free speech rights—as either an inalienable American citizen's right or as a foregone notion in today's interconnected, technology-based globe—will work a change on public perceptions of First Amendment free speech. Podlas, *supra* note 16, at 500–01.

B. Marketplace of Ideas

America's modern free speech doctrine contemplates the open exchange of thoughts that comprises the "marketplace of ideas"²² upon which the nation was founded.²³ Under current law, "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed towards inciting or producing imminent lawless action and is likely to incite or produce such action."²⁴ In the seminal case *Whitney v. California*, Justice Brandeis made the following powerful statement embodying America's unrelenting free speech mentality:

The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.²⁵

²² "[I]t is a presupposition of a working marketplace of ideas that different views are placed in the public arena so that they may compete against each other." Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, The New Mass Media, and The Political Components Of Culture*, 74 N.C.L. REV. 141, 160–61 (1995); see Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949 (1995) for a discussion of the marketplace metaphor. See generally Justice Holmes's opinion in *Abram v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the metaphor at considerable length). Further, the free exchange of ideas which makes up our marketplace in America includes "opinions that we loathe," which are meant to compete with less distasteful opinions for public acceptance. Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4, 10 (2004).

²³ Some critics posit that even fundamental precepts like the First Amendment must take second chair in light of the government's duty to ensure citizen safety, which has justified the government sacrificing free speech rights after September 11, 2001. See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2707–08 (2010) (finding constitutional a federal law that prohibits providing material support to groups designated as foreign terrorist groups, despite the intent of such activity).

²⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Recent laws demonstrate Americans' "unwillingness . . . to conform to the free speech notions of other democratic societies," demarcating a shift from post-9/11 willingness to forego personal freedoms in return for increased national security, including controversial legislation affecting free speech rights like the Patriot Act. G. Aaron Leibowitz, *Terry Jones and Global Free Speech in the Internet Age*, 31 CARDOZO ARTS & ENT. L. J. 509, 522–23 (2013); see N.Y. C.P.L.R. § 5304 (2008); H.R. 1304, 111th Cong. (1st Sess. 2009); *Ehrenfeld v. Bin Mahfonz*, 9 N.Y.3d 501 (2007); *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272 (2001). Moreover, until the global free speech issue can be "properly framed as one involving diverse concepts of individual freedom as opposed to group ideologies," it is unlikely issues such as those presented by the Sony Cyberhack will be easily navigated. Leibowitz, *supra*, at 525.

²⁵ *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

In an increasingly interconnected world, broad declarations espousing free speech similar to Justice Brandeis' concurrence are more and more likely to offend cultures and laws outside the U.S. whose tolerance for free speech is considerably less. Media production companies encounter this type of problem all the time—having to filter content to appear politically correct. One author believes the pervasive American anti-self-censorship attitude exacerbates problems in international relations.²⁶ He asserts that an expectation for media companies to “acknowledge the current state of global affairs,” and tailor their actions accordingly would be a reasonable response in light of the increasing violent reactions at home and abroad to American free speech.²⁷ This view is overly broad. While American jurisprudence holds that free speech rights has its limits,²⁸ it is completely contrary to the fundamental principle of free speech, as set out in the First Amendment, to comprehensively claim that media companies are burdened with a duty, in the interest of the greater American good, to screen out potentially contentious content merely because differing cultural backgrounds and national identities could be offended.²⁹ This hardly seems reasonable. How much should the average American citizen care if he offends other nations? Did the liberties the First Amendment was created to protect change so much due to technology that the United States' very understanding of free speech was uprooted? Times are different from when the Founding Fathers first envisioned the breadth of individual liberties—that much is clear. Equally clear is the fact that if America abandons its interpretation of free speech on grounds that technological inter-connectedness calls for drastic change, America succumb to the very same pressures early Americans fought to overcome. There is a fine line between respect for other cultures and cowardly succumbing to intimidation. It is crucial to properly frame the issue as dealing with freedoms, rather than group ideologies.³⁰

²⁶ Leibowitz, *supra* note 24, at 530 (discussing how the media and by extension, the entertainment industry needlessly cultivates animosity by playing off of the sensitivities and national doctrinal differences among nations and peoples).

²⁷ *Id.*

²⁸ *See Brandenburg*, 395 U.S. at 447.

²⁹ Leibowitz, *supra* note 24, at 529 (discussing the difficulty of applying the legal rules articulated in *Brandenburg* given the realities of modern communication methods: “One of the difficulties created by America’s historical treatment of free speech is that it may have spurred the overvaluation of some speech, such that any efforts to combat present-day issues like security concerns and global sensitivity may be thwarted by this historical notion of expression as a fundamental, unfringeable right.”).

³⁰ Leibowitz, *supra* note 24, at 525 (refocusing our attention on the fundamental liberties at issue should put individual ideologies into the bigger perspective, thereby effectively recalibrating how nations react to one another’s free speech expression).

C. First Amendment and Ideology

In 2011, a pastor in Florida conducted a mock trial for the Islamic holy book, the Koran,³¹ and sentenced it to a public burning. Terry Jones, the pastor, scheduled the Koran burning to take place on the ninth anniversary of 9/11.³² He “openly admitted that he knew the Koran burning would provoke violence,” but nonetheless believed it was protected free speech and “part of his overarching mission to spread a belief that Islam and the Koran are mere instruments of ‘violence, death, and terrorism.’”³³ National security became a hot topic in the weeks before the scheduled burning, with figures such as Secretary of State Hillary Clinton, Attorney-General, Eric Holder, and Secretary of Defense Robert Gates, each respectively denouncing the burning as “disgraceful,”³⁴ “idiotic and dangerous,”³⁵ and expressing “grave concern that going forward with the Quran burning would put at risk the lives of our forces around the world.”³⁶ President Barack Obama warned Jones that “[a]s a very practical matter, as commander (in) chief of the armed forces of the United States, I just want him to understand that this stunt that he is pulling could greatly endanger our young men and women in uniform.”³⁷ But these

³¹ While this article focuses primarily on free speech protections under the First Amendment, periodically, religious freedom issues are addressed conjointly as the two issues are often found in tandem. “The pastor said the church also debated whether to shred the book, shoot it or dunk it in water instead of burning it.” Kevin Sieff, *Florida Pastor Terry Jones’s Koran Burning Has Far-Reaching Effect*, WASH. POST (Apr. 2, 2011), http://www.washingtonpost.com/local/education/florida-pastor-terry-jones-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC_story.html.

³² *Id.*

³³ Leibowitz, *supra* note 24, at 509–10 (quoting Lizette Alvarez, *Koran-Burning Pastor Unrepentant in Face of Furor*, N.Y. TIMES, Apr. 3, 2011, at A4, <http://www.nytimes.com/2011/04/03/us/03burn.html>).

³⁴ Lucy Madison, *Hillary Clinton, Joe Lieberman Denounce Florida Pastor’s Planned Quran Burning Event*, CBS NEWS (Sept. 8, 2010, 3:31 PM), <http://www.cbsnews.com/news/hillary-clinton-joe-lieberman-denounce-florida-pastors-planned-quran-burning-event/>.

³⁵ *Id.*

³⁶ Frank James, *Preacher Terry Jones Got Call from Defense Secretary Gates*, NAT’L PUB. RADIO (Sept. 9, 2010, 7:37 PM), <http://www.npr.org/blogs/thetwo-way/2010/09/09/129760129/terry-jones-got-call-from-defense-secretary-gates>.

³⁷ Leibowitz, *supra* note 24, at 510 (quoting Suzan Clark & Rich McHugh, *President Obama Says Terry Jones’ Plan to Burn Korans is ‘A Destructive Act,’* ABC NEWS (Sept. 9, 2010), <http://abcnews.go.com/GMA/president-obama-terry-jones-koran-burning-plan-destructive/story?id=11589122>); see also David Alexander & Matt Spetalnick, *Obama Says Planned Koran Burning Is Boosting Qaeda*, THOMAS REUTERS (Sept. 9, 2010, 9:12 AM), <http://ca.reuters.com/article/topNews/idCATRE68820G20100909?sp=true>. In addition to the risk of culminating animosity towards American soldiers, Jones personally received thousands of death threats. Matt Gutman, Nick Schifrin, & Lee Ferran, *Pastor Terry Jones Receives Death Threat After Koran Burning*, ABC NEWS (April 4, 2011), <http://abcnews.go.com/US/pastor-terry-jones-receives-deaths-koran-burning/story?id=13289242#.UbIvluvQo7A>. On a global scale, Muslims in

pleas were only “verbal warnings”³⁸ with only the force of an urging or recommendation; and no government actor had any constitutional grounds to stop the demonstration.³⁹ In 2013, Jones was arrested for attempting to burn nearly 3,000 Korans during the twelfth anniversary of 9/11.⁴⁰ The grounds for his arrest? Felony charges of unlawful conveyance of fuel (which he used to douse the Korans for the burning) and open display of a firearm.⁴¹

At the end of the day, the First Amendment is about the right to say what you want, when you want, despite the reactions of others⁴² and United States

Afghanistan staged a violent protest at a United Nations facility, killing at least eleven people, and the Islamist group, Jama’at-ud-Da’wah, posted a \$2.2 million bounty on Jones. *Id.*; Taimoor Shah & Rod Nordland, *Deadly Protests Over Koran Burning Reach Kandahar*, N.Y. TIMES, Apr. 3, 2011, at A9, <http://www.nytimes.com/2011/04/03/world/asia/03afghanistan.html> (reporting on a girls high school, supported by United States Agency for International Development, that was burned and an attempted suicide bombing at American Kabul military base as a result of the Koran burning).

³⁸ Leibowitz, *supra* note 24, at 511.

³⁹ “My understanding is that [Terry Jones] can be cited for public burning . . . [b]ut that’s the extent of the laws that we have available to us.” *See* Alexander & Spetalnick, *supra* note 37. Jones has consistently ignored pleas from U.S. officials urging him not to carry out his burnings. Tamara Lush, *Fla. Pastor Arrested as He Prepped to Burn Qurans*, USA TODAY (Sept. 12, 2013, 8:19 AM), <http://www.usatoday.com/story/news/nation/2013/09/11/florida-pastor-burning-qurans/2802169/US/wireStory/fla-pastor-arrested-burn-qurans-20230014>. Though, back in 2011, Jones ended up only setting one Quran on fire, he has since then “held mock trials with the Quran and the Muslim prophet Muhammad as defendants and found them guilty of various crimes.” *See* Keith Morelli, *Rev. Jones Arrested on Way to Burn Qurans in Polk County*, TAMPA TRIB. (Sept. 11, 2013), <http://tbo.com/news/breaking-news/rev-jones-arrested-on-way-to-burn-qurans-in-polk-county-20130911/>.

⁴⁰ Ironically, “[i]t wasn’t a jihadist or suicide bomber who stopped the Rev. Terry Jones from torching nearly 3,000 Qurans on the 12th anniversary of the Sept. 11, 2001, terrorist attacks. It was the long arm of the law.” Morelli, *supra* note 39. Despite a plea not to carry out the protest from General Lloyd Austin III, commander of U.S. Central Command at MacDill Air Force Base, Jones refused to relent. *Id.*

⁴¹ *Id.* Many supporters of the protest believed the charges were merely a pretext to stop the protest in the absence of constitutional grounds to prevent Jones’s exercise of free speech. One supporter claimed it was all a setup, stating: “That’s bull. Whether you agree with the man or not, he has the right to protest.” *Id.* Given the volatility of any form of critique of the Islamic faith, in the wake of 9/11, it is instructive to note the various authorities speaking out during the Jones matter, in particular government officials. In Jones’s case, even the President thought the protest was not a good idea, and advised against Jones’s free speech demonstration. Alexander & Spetalnick, *supra* note 37. But how much weight should be given that authority up against free speech? Consider now the Sony Cyberhack. In that case, Obama explicitly backed Sony and encouraged the company to proceed to air the film in the name of free speech.

⁴² Of course there are limits on free speech—hate speech and sexual orientation, for example. But the bounds of American free speech law are extensive and render a significant amount of controversial subject matter beyond the reach of restriction. *Students in Action: Debating the “Mighty Constitutional Opposites,”* A.B.A. DIVISION FOR PUB. EDUC., http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html (last visited Nov. 15, 2015) (“When a conflict arises about which is more important—protecting community interests or safeguarding the rights of the individual—a balance must be found that protects the

law allows American citizens to do just that, “knowing that it will probably incite violence . . . in foreign countries whose laws and culture prohibit such speech.”⁴³ Some critics believe the widespread use of the internet and technology channels has changed the playing field⁴⁴ so much that America needs to revamp how it assesses the national dangers caused by media productions.⁴⁵ They believe the United States needs to impose “modest requirements” to “ease the tensions with those who disagree with our free speech philosophy, thereby helping to build international accord and protect Americans abroad.”⁴⁶ As a sovereign nation, how much consideration, if any, should America, and by extension its citizens and businesses, give to the global consequences of exercising free speech?

D. The Use and Effect of Comedy

The use of humor to convey social and political commentary is a “specialized form of communication”⁴⁷ which can speak “critically, calling attention to incongruities and hypocrisies in the world.”⁴⁸ Comedic productions using humor and satire allow speakers to convey messages in the undercurrent of their actual words, providing a “degree of insulation”⁴⁹ and “[d]epending on

civil rights of all without limiting the civil liberties of the speaker.”).

⁴³ Liebowitz, *supra* note 24, at 511; see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–55 (1989) (justifications for free speech range from the marketplace of ideas, personal development, encouraging tolerance, social stability, and the search for truth).

⁴⁴ “[A]s of December 31, 2011, over 2.2 billion people used the Internet, marking a 528% increase over the previous ten years. YouTube alone has hundreds of millions of international users who upload forty-eight hours of content per minute, or eight years-worth of video streams per day.” Liebowitz, *supra* note 24, at 511. Indeed, the internet as a source for media, and in this case entertainment, is a global phenomenon that is not easily confined under American free speech precedent.

⁴⁵ *Id.* at 513.

⁴⁶ *Id.*

⁴⁷ Podlas, *supra* note 16, at 512; see PAUL LEWIS, *CRACKING UP: AMERICAN HUMOR IN A TIME OF CONFLICT* 3 (2006).

⁴⁸ Podlas, *supra* note 16, at 512; cf. Gregg Carnfield, *How MTV “Re-Butts” the Satirical Argument of Beavis and Butthead*, in *NEW DIRECTION IN AMERICAN HUMOR* 30 (Davide E. E. Sloane ed., 1998). Using comedy can be traced through history, with myriads of our most noted cartoonists, philosophers and comedians employing it as a tool to critique society. Christopher Lamb, *Changing with the Times: The World According to “Doodlesbury,”* 23 J. POPULAR CULTURE 113, 113 (1990) (discussing Pulitzer Prize winner, Garry Trudeau, the first comic strip artist to achieve such a recognition). Comedy as a social critique device is unique in that the speaker can craftily mask his true meaning in a joke, meaning otherwise inappropriate references are more palatable due to the context in which they couched. Lewis, *supra* note 47, at 155–62 (the use of humor and satire is often used in political discourse). For a discussion on the distinction between parody and depiction, see *infra* note 53.

⁴⁹ Podlas, *supra* note 16, at 513.

the context, the same comment can be funny or mean, insightful or inappropriate.⁵⁰ A perfect example is the comedy central show, South Park, whose creators, Stone and Parker, creatively couple satire⁵¹ with comedy to address poignant legal issues like free speech. For example, in one episode involving a free speech debate, all of South Park chooses to literally bury their heads in the sand to avoid dealing with a problem.⁵² The Interview was a comedy, albeit centered on contentious issues; but then most comedy or satire is created for the very purpose of drawing attention to controversial topics in a humorous, yet thought-provoking manner. The question then becomes, how far does the marketplace of ideas for which the First Amendment was designed to protect extend? Other countries' cultural differences, like religious background and political orientation, often impose higher speech restrictions than those afforded in America, posing unique challenges as to how to resolve discrepancies between speech rights between nations. One of those challenges is national protection. If the United States must protect its citizens' free speech rights, how far should that protection extend?

1. *The Danish Cartoons*

Take the Danish cartoon controversy in 2005, for example. Jyllands-Posten, the largest daily newspaper in Denmark, published twelve cartoons including a drawing of the prophet Muhammed wearing a turban with a bomb in it.⁵³ The cartoon sparked global riots from eleven Muslim countries, attacks

⁵⁰ *Id.*; cf. Stephanie Koziski Olson, *Standup Comedy*, in HUMAN IN AMERICA: A RESEARCH GUIDE TO GENRES AND TOPICS 129 (Lawrence E. Mintz ed., 1988).

⁵¹ "Satire is a sophisticated form of humor that criticizes the ideologies and conventions of the cultural status quo . . ." Podlas, *supra* note 16, at 509. See generally Peter Goodrich, *Three Theses on the Unbearable Lightness of Legal Critique*, 17 CARDOZO STUD. L. & LIT. 293, 294 (2005) ("[A]ll effective humor is satirical."). Topical comedies as well as animated series, including Family Guy, King of the Hill, and The Simpsons, are examples of the media's ability to synergize humor "and animation as a platform for social satire." Podlas, *supra* note 16, at 516; see *id.* at 541 ("Be it through late night comedies or daytime judge shows, television plays a role in shaping our legal culture . . . even 'non-legal,' 'non-serious' programs like South Park frame issues of legal regulation and advance ideologies of law" that "go straight to the heart of culture's most contentious issues," including issues concerning individual free speech rights); M.S. Mason, *Drawn to Animation: Adult Viewers Help Cartoons Make it Big in Prime Time*, CHRISTIAN SCI. MONITOR, Jan. 29, 1999, at 13.

⁵² *South Park: Cartoon Wars* (Comedy Central television broadcast Apr. 5, 2006), transcript available at <http://111.spscriptorium.com/ScriptGuideIndex.htm> [hereinafter *South Park: Cartoon Wars*].

⁵³ Jacob Wheeler, *The Newspaper That First Published Muhammad Cartoons Doesn't Stand With Charlie Hebdo*, DAILY BEAST (Jan. 13, 2015, 5:50 PM), <http://www.thedailybeast.com/articles/2015/01/13/the-newspaper-that-first-published-muhammad-cartoons-doesn-t-stand-with-charlie-hebdo.html>. Published under the headline, "The Face of Muhammad," the twelve illustrations sparked protests that left nearly 250 people dead and approximately 800 people

on Danish embassies in the Middle East, and the main cartoonist, Kurt Westergaard, was nearly killed in his home in 2010.⁵⁴ The Muslim population in Denmark claimed the cartoons were “calculated to incite Muslims”⁵⁵ as it is well known in Islam that depictions of the prophet are considered blasphemy. Conversely, the newspaper refused to apologize for the cartoons, claiming it had done nothing against Denmark’s free speech laws, and additionally, the cartoons were not meant as a provocation.⁵⁶ Needless to say, the controversy that ensued as to whether or not other international newspapers⁵⁷ would publish the cartoons became highly contested and “prompted discussions about the line between free speech . . . and the extent to which Western democracies’ policies on speech should accommodate other cultures... given the likely global consequences of doing so.”⁵⁸ While it appears the cartoons were not purposely

wounded. Peter McGraw & Joel Warner, *The Danish Cartoon Crisis of 2005 and 2006: 10 Things You Didn’t Know About the Original Muhammad Controversy*, HUFFINGTON POST (Sept. 25, 2012, 1:28 PM), http://www.huffingtonpost.com/peter-mcgraw-and-joel-warner/muhammad-cartoons_b_1907545.html.

⁵⁴ Wheeler, *supra* note 53; Dan Bilefsky, *With New Cover of French Paper, New Set of Fears*, N.Y. TIMES, Jan. 14, 2015, at A1, <http://www.nytimes.com/2015/01/14/world/europe/new-charlie-hebdo-has-muhammad-cartoon.html>. Westergaard has lived under 24-hour security since 2010 after an individual attempted to murder him in his home with an ax. McGraw & Warner, *supra* note 53.

⁵⁵ Dan Bilefsky, *Denmark Is Unlikely Front in Islam-West Culture War*, N.Y. TIMES (Jan. 8, 2006), <http://www.nytimes.com/2006/01/08/international/europe/08denmark.ready.html>.

⁵⁶ *Id.* According to Jyllands-Posten Cultural Editor Flemming Rose, even if the cartoons had been intended to provoke Muslim animosity, “that does not make our right to do it any less legitimate before the law.” *Id.* As former Iranian journalist motivated against self-censorship, Rose commissioned the cartoons for Jyllands-Posten after discovering that Danish cartoonists were too intimidated to illustrate a children’s biography of Muhammad. *Id.* “[F]ree speech, no matter how radical, should be allowed to flourish, from all varieties of perspectives.” *Id.*

⁵⁷ Following the release of the Danish cartoons, the United Nations rebuked the paper. *Id.* Three weeks after their release, Norwegian newspaper *Magazinet* reprinted the cartoons, and its editor Vebjoern Selbekk, who stated that “he was ‘sick of the ongoing hidden erosion of the freedom of expression,’ had received fifteen death threats and more than 1,000 hate letters.” John Ward Anderson, *Cartoons of Prophet Met With Outrage: Depictions of Muhammad in Scandinavian Papers Provoke Anger, Protest Across Muslim World*, WASH. POST (Jan. 31, 2006), <https://www.washingtonpost.com/archive/politics/2006/01/31/cartoons-of-prophet-met-with-outrage-span-classbankheaddepictions-of-muhammad-in-scandinavian-papers-provoke-anger-protest-across-muslim-world-span/44c5f483-16d9-4384-bd58-e1a58ebe4cc7/>. French newspaper, Charlie Hebdo’s reprinting of the cartoons resulted in violent protests and eventual firebombing of the paper’s offices in 2011. See Leibowitz, *supra* note 24.

⁵⁸ Leibowitz, *supra* note 24, at 512; see also R. Ashby Pate, *Blood Libel: Radical Islam’s Conscripted of the Law of Defamation into a Legal Jihad Against the West-And How to Stop It*, 8 FIRST AMEND. L. REV. 414 (2010). Beyond domestic challenges, free speech extends global consequences that challenge our military forces operating abroad. The speech at issue in the Sony case, though not directly related to an armed controversy, is similar to issues that arise regarding free speech that impedes war efforts. For a discussion of the Espionage Act, see Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919). See also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (articulating the clear and present danger test which allowed courts to

created to cause the violence that eventually took place, it is clear that the creators were at least reckless when distributing the material.⁵⁹ However, determining when reckless crosses the line to sufficient provocation against another nation's sovereignty (or in Denmark's situation, religious views) is no easy task, especially given the unique challenges when those incited to violence do not recognize the "marketplace of ideas" as a fundamental cornerstone of individual liberty.⁶⁰

2. *South Park*

Condemning certain speech relating to a particular belief or ideology while tolerating others is inherently contradictory and is well illustrated by the

assess the likelihood that certain speech would produce negative results, including impeding war efforts: "The question in every case is whether the words used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."). The questions presented are essentially the same: under what circumstances is the government justified in curbing free speech; when should matters of public concern outweigh the nation's duty to protect its citizens; and, more specifically, what expectations are placed on private businesses to protect free speech or conversely, curb free speech to protect the public? Keeping in mind the SPE cyberhack as an example of the adverse results possible given America's free speech doctrine, our focus is to explore the relationship between the entertainment media companies and free speech, analyzing the effects of political intimidation upon existing relationships relative to the American nation as a whole and to individual citizens' rights and further analyzing the messages conveyed to other nations by our reactions and their impacts.

⁵⁹ In 2006, Denmark's estimated 200,000 Muslims were experiencing an increase in anti-immigrant sentiment that was later reflected in the government when the far-right Danish People's Party gained significant sway in Danish Parliament and passed increasingly harsh anti-immigration laws. Bilefsky, *supra* note 55.

⁶⁰ Leibowitz, *supra* note 24, at 517. The United States expressly reserved itself from a section of the International Covenant on Civil and Political Rights of 1992 that prohibits incitement to discrimination and violence because it conflicted with the First Amendment, thus distinguishing itself from "other nations that continue to advocate for the abolishment of offensive speech" by its "strict adherence to free speech." *Id.* at 520. One scholar suggests that the understandings of free speech may vary more within the Western world as opposed to between the Islamic world and the West. For example, Robert A. Kahn claims that European countries view offensive speech as a threat by "totalitarians in waiting" resulting from fear engendered from atrocities like the Holocaust. This attitude stands in contrast, asserts Kahn, to an American perspective that views offensive speech as opinions by "puny anonymities." Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. MIAMI INT'L & COMP. L. REV. 151, 180 (2009). Given the varying tolerance for free speech in the West and beyond, concerns about political correctness in the interest of security begin to crop up as nations realize that one man's joke is another man's offense. If sovereign nations strive for political correctness and walk on eggshells to keep speech noncontroversial, what affect will there be upon citizens' individual free speech rights?

controversies that arose when South Park displayed Muhammad.⁶¹ In 2001, South Park aired “The Super Best Friends,” an episode that depicted the Prophet Muhammad completely uncensored.⁶² For their 200th episode, South Park aired, “200,” where a group of celebrities demand that the town of South Park produce the prophet Muhammad. Seven days later, “201” was released which also depicted Muhammad.⁶³ In response to “201,” Revolution Muslim, a radical Muslim organization posted threats “targeting the creators of South Park for satirizing the depiction of the Prophet Muhammad” including posting a picture of the assassinated Dutch filmmaker, Theo Van Gogh.⁶⁴ At Comedy

⁶¹ While the show is controversial on many fronts, we will be analyzing specifically the controversy involving the display of Muhammad. “‘South Park’ has been vilified as crude, disgusting and nihilistic, and the eagerness of Stone and Parker to impale every sacred cow they can reach is a major reason for its success. After all, in the fictional town of South Park, Colo.—home to third-graders Kenny, Kyle, Stan and the evil Cartman—everything is fair game.” Jake Tapper & Dan Morris, *Secrets of ‘South Park,’* ABC NEWS (Sept. 22, 2006), <http://abcnews.go.com/Nightline/Entertainment/Story?id=2479197&page=1> (“It’s hard to think of any significant religious, political or social movement which hasn’t been outraged by the programme at one point or another.”); *How Kenny Survived 10 Years of South Park*, INDEPENDENT.IE (Oct. 11, 2006, 00:11), <http://www.independent.ie/unsorted/features/how-kenny-survived-10-years-of-south-park-26354811.html>.

⁶² Tapper & Morris, *supra* note 61. The episode featured additional deities including Jesus, Buddha, Joseph Smith, Krishna, Laozi, and Sea Man. Four years later, the show tried to depict Mohammed again in their two-part episode “Cartoon Wars,” but Comedy Central refused to air them. Jonah Weiner, *Bleeps Be Upon Him*, SLATE (Apr. 29, 2010, 9:46 AM), http://www.slate.com/articles/arts/culturebox/2010/04/bleeps_be_upon_him.html.

⁶³ *Comedy Central Censors South Park Mohammed Episode*, TELEGRAPH (Apr. 22, 2010, 5:51 PM), <http://www.telegraph.co.uk/culture/tvandradio/7620854/Comedy-Central-censors-South-Park-Mohammed-episode.html>.

⁶⁴ Anti-Defamation League, *Abu Talhah Al-Amrikee- an Extensive Online Footprint*, <http://www.adl.org/assets/pdf/combating-hate/Abu-Talhah-Al-Amrikee-An-Extensive-Online-Footprint-2013-1-11-v1.pdf> (last updated May 17, 2011). The caption beneath the photo of van Gogh stated: “Theo Van Gogh – Have Matt Stone and Trey Parker Forgotten This?” In the post, Chesser provided the address to Stone and Parker’s offices and encouraged people to “contact them” or:

. . . pay Comedy Central a visit We have to warn Matt and Trey that what they are doing is stupid and they will probably wind up like Theo Van Gogh if they do air this show. This is not a threat, but a warning of the reality of what will likely happen to them.

Id. Theo van Gogh was slain in Amsterdam in 2004 after producing a film discussing the abuse of Muslim women in Islamic societies. Dave Itzkoff, *‘South Park’ Episode Is Altered After Muslim Group’s Warning*, N.Y. TIMES (Apr. 22, 2010, 8:41 AM), <http://artsbeat.blogs.nytimes.com/2010/04/22/south-park-episode-is-altered-after-muslim-groups-warning/?hp&r=0>. For more information regarding the assassination of Theo Van Gogh, see Jörg Victor, *Theo van Gogh Murdered on the Streets of Amsterdam*, WORLD SOCIALIST WEBSITE (Nov. 10, 2004), <http://www.wsws.org/en/articles/2004/11/gogh-n10.html>. See also *Backgrounder: Revolution Muslim Introduction*, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/main_terrorism/revolution_muslim.html?Multi_page_sections=sHeading_1#.VPAtfnF-So (last updated Feb. 2012).

Central's direction, when the episode aired, the name and depiction of Muhammad were blocked out with a black "Censored" box and all references to the deity were bleeped out. Stone and Parker released the following statement:

In the 14 years we've been doing South Park we have never done a show that we couldn't stand behind. We delivered our version of the show to Comedy Central and they made a determination to alter the episode. It wasn't some meta-joke on our part. Comedy Central added the bleeps. In fact, Kyle's customary final speech was about intimidation and fear. It didn't mention Muhammad at all but it got bleeped too. We'll be back next week with a whole new show about something completely different and we'll see what happens to it.⁶⁵

Parker and Stone stated that they harbored no ill feelings toward Comedy Central since the network confessed it did not withhold the episode out of religious tolerance but rather out of fear of "getting blown up."⁶⁶ While it is understandable—not wanting to be blown up that is—the issue remains if safety concerns should override the creators' right to have their work shown to the public.

What makes South Park so great is its all-around criticism that knows no

⁶⁵ Itzkoff, *supra* note 64. Comedy Central later confirmed it had indeed added the extra bleeps and that it has restricted South Park Studios from playing the episode on their web site. *Id.*

⁶⁶ Tapper & Morris, *supra* note 61. The creators did, however, criticize Comedy Central for "pussing out" when they pixelated a depiction of Muhammed in the episode "Cartoon Wars." See Alex Leo, *South Park's Depiction of Muhammad Censored AGAIN*, HUFFINGTON POST (June 22, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/04/22/south-park-mohammed-censo_n_547484.html. After the images were censored in "201," Stone made the following comment to the Huffington Post:

I think Comedy Central totally . . . pussied out. Now, they weren't any different than anyone else, so it's not like you can single them out. But I think it would've been an *important statement for one media outlet in America to stand up*. That was one of my most disappointing moments as an American—the American press's reaction to the Muhammad cartoons. It was completely wimpy. Cartoonists, people who do satire—we're not in the army, we're never going to be . . . drafted and this is our time to stand up and do the right thing. And to watch the *New York Times*, Comedy Central, everybody just go "No, we're not going to do it because basically we're afraid of getting bombed' sucked. I was so disappointed."

Id. (emphasis added). The Network also caved when actor Tom Cruise threatened to quit promoting Mission Impossible 3 if it refused to pull a South Park episode entitled "Trapped In The Closet" in which Tom Cruise is mocked for being a Scientologist. *How Kenny Survived 10 Years of South Park*, INDEPENDENT.IE (Oct. 11, 2006, 1:11 AM), <http://www.independent.ie/unsorted/features/how-kenny-survived-10-years-of-south-park-26354811.html>. Parker and Stone replied to the cancellation by stating the following: "So, Scientology, you may have won THIS battle, but the million-year war for Earth has just begun! You have obstructed us for now, but your feeble bid to save humanity will fail! Hail Xenu." *Id.*

bounds.⁶⁷ In the spirit of free expression, Stone and Parker work by the philosophy that everything has “got to be OK or none of it is”⁶⁸ because once you start picking and choosing who to parody, then all of a sudden the ones you made fun of before are no longer OK anymore.

Markedly, South Park makes fun of everyone; no preferences and no privileges. But given these disputes about the Mohammed depictions, an interesting conversation about the ethics of censorship must be had. Take for example the fact that South Park has been and still does openly mock Jesus Christ. In what Stone and Parker have termed “open season on Jesus,” the creators are given full leeway to depict Jesus doing whatever they wish.⁶⁹ Pit that against the blank screen and bleeps that attended every appearance of or reference to Muhammed. Sound a little preferential? Ironically, Comedy Central’s reaction was exactly the type of censorship parodied in the episodes.⁷⁰ The network received a great deal of criticism.⁷¹ Many experts

⁶⁷ “‘South Park,’ from its very beginning has been about mocking that which is held most sacred.” Tapper & Morris, *supra* note 61.

⁶⁸ *Id.*

⁶⁹ *Id.* “We can do whatever we want to Jesus, and we have. We’ve had him say bad words. We’ve had him shoot a gun. We’ve had him kill people. We can do whatever we want. But Muhammed, we couldn’t just show a simple image.” *Id.*

⁷⁰ While Stone and Parker self-censored their work at the insistence of Comedy Central, the irony was not lost on the creators who used the censorship “as a commentary on the network’s policy of not allowing them to show the character, which the episode equated with giving in to the demands of extremists.” Itzkoff, *supra* note 64. In fact, the creators put Muhammad in a bear suit as an “obvious play on the fear of showing Muhammad on TV.” Chris Yogerst, *Comedy Central Continues to Censor ‘South Park,’* MEDIA RES. CTR. (May 9, 2011, 11:53 AM), <http://newsbusters.org/blogs/chris-yogerst/2011/05/09/comedy-central-continues-censor-south-park>. “South Park’s parody of the Prophet Muhammed has morphed into a parody of self-censorship.” Soraya Roberts, ‘South Park’ Parody of the Prophet Muhammed Is Censored Following Radical Islamists’ warning, DAILY NEWS (Apr. 23, 2010, 1:03: AM), <http://www.nydailynews.com/entertainment/tv-movies/south-park-parody-prophet-muhammed-censored-radical-islamists-warning-article-1.169091>. Generally, South Park Studios streams its newest episodes online, but Comedy Central did not allow “201” to be streamed, apparently giving into the “hyper-politically-correct elements in our society.” Yogerst, *supra*. All four episodes that made any reference to Muhammad have since been made unavailable to the public. Even the Season 14 DVD release was heavily edited. *Id.* Paradoxically, the network continued to run an episode from an earlier season where Muhammad is fully depicted and audible. According to Stone, the network seemed to rationalize that content created before the Danish cartoon controversy was fine but anything after that was subject to self-censorship. Scott Collins & Matea Gold, *Threat Against ‘South Park’ Creators Highlights Dilemma for Media Companies*, L.A. TIMES (Apr. 23, 2010), <http://articles.latimes.com/2010/apr/23/entertainment/la-et-south-park-20100423/2>.

⁷¹ Seventy-one percent of American adults disagreed with Comedy Central’s censorship of South Park’s 201st episode while only 19 percent agreed. Jennifer Riley, *Majority of Americans Oppose South Park’s ‘Muhammad’ Censor*, CHRISTIAN POST (Apr. 30, 2010, 2:49 PM), <http://www.christianpost.com/news/surveymajority-of-americans-oppose-south-park-censor-44966/>. The decision was possibly the “the lowest point in the history of American TV” while journalists said that terrorism triumphed over free speech using intimidation. Margaret Wente,

believe that actions by media companies, like South Park, trying to “forestall such threats,” may actually be empowering extremists and set a “dangerous precedent” grounded in fear.⁷² Behavior that is “rewarded gets repeated.”⁷³ This incident demonstrates the continuing struggle faced by media conglomerates to balance free speech against safety concerns—especially in light of today’s increasing terrorist threats. Preferential censorship dramatically conflates free speech rights with safety concerns,⁷⁴ and while ethics certainly has a role to play in what content is released, individual freedoms should not be so lightly subjected to disparate treatment.

"Part of living in the world today is you're going to have to be offended . . . [t]he right to be offended and the right to offend is why we have a First Amendment. If no speech was offensive to anybody, then you wouldn't need to guarantee it."⁷⁵ Our interconnected globe endows a domestic speaker with worldwide influence.⁷⁶ Outside the well-settled exceptions to the First Amendment, where there is a sufficient government interest in preventing obstruction of government operations, a sovereign entity should maintain the right to decide the extent to which its *own* people interact in the marketplace of ideas. Dictating what is shown on American shores falls outside that sovereign right.

III. SELF-CENSORSHIP ON THE RISE: TUG OF WAR BETWEEN THE ADAGE "BETTER SAFE THAN SORRY" AND THE RIGHT TO FREE SPEECH

A. Private Media Companies Shift Towards Self-Censorship

Private media companies engage in self-censorship marking a shift away from government suppression to private, self-imposed regulation. One author suggests that deregulation and privatization have decreased freedom of speech

Jihad Jitters at Comedy Central, GLOBE & MAIL (Apr. 24, 2010, 5:00 AM), <http://www.theglobeandmail.com/news/opinions/jihad-jitters-at-comedy-central/article1545262>.

⁷² Collins & Gold, *supra* note 70. According to UCLA law professor, Eugene Volokh:

The consequence of this position is that the thugs win and people have more incentive to be thugs There are lots of people out there who would very much like to get certain kind of material removed, whether religious or political. The more they see others winning, the more they will be likely to do the same.

Id.

⁷³ *Id.*

⁷⁴ Undeniably, differences in free speech notions have resulted in massive bloodshed in the last decade. Podlas, *supra* note, 16 at 537.

⁷⁵ Tapper & Morris, *supra* note 61.

⁷⁶ Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 990 (2011).

by fostering the “seemingly little noticed area of private censorship.”⁷⁷

The importance of free speech cannot be overstated.⁷⁸ To restrict free speech impedes the discovery of truth by extinguishing valuable opinions.⁷⁹ But how do we determine what constitutes a “valuable opinion”?⁸⁰ Would a movie, moreover, a comedic presentation⁸¹ predicted to incite lawless action be considered a valuable enough opinion, or does it boil down to a speech-for-speech-sake argument?⁸² “[O]pinions, even when objectively true, tend to become ‘prejudices over time if not argued over and defended; and uncontested opinions lose their vitality and effectiveness.’”⁸³ Determining the merits of a valuable opinion becomes even more difficult since often “wrong opinions may contain grains of truth necessary to find the whole truth.”⁸⁴ In sum, we are walking a fine line by bringing to the surface important questions in light of the

⁷⁷ Robert E. Riley, Jr., Book Note, *Free Speech and Private Enterprise*, 80 DENV. U. L. REV. 487, 496 (2002) (reviewing LAWRENCE SOLEY, *CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* (2002)).

⁷⁸ “Free speech is pivotal for the creation of new knowledge” as it provides a means by which individuals can question existing paradigms and suggest new, improved ideas. Trispiotis, *supra* note 15, at 508.

⁷⁹ Restricting free speech “may prevent valuable opinions and evidence from being published, and have detrimental consequences on the discovery of truth.” *Id.* at 507–08.

⁸⁰ *Id.*

⁸¹ Ridicule or comedy’s aim is to satirize, scorn, and mock; since ridicule reflects individuals’ “views and tastes, distorting or banning it is equivalent to unfairly withholding someone’s opportunity to express his or her voice.” *Id.* at 512. See generally David Keane, *Cartoon Violence and Freedom of Expression*, 30 HUM. RTS. Q. 845 (2008) (discussing religious satire). The bigger discussion involving free speech expression usually involves religious expression and offending religious views; we would point the reader to look even further beyond that monstrosity, which so often takes the stage and focus on the effects of political intimidation on free speech expression. While the SPE cyberhack case definitely has similarities to a religious expression case in part, perhaps, because North Koreans are taught to view their leader as a deity, our focus will be on the influence political intimidation tactics have on limiting American free speech rights. HELEN-LOUISE HUNTER, *KIM IL-SONG’S NORTH KOREA* 25–30 (1999).

⁸² Podlas, *supra* note 16, at 530–31. By “speech-for-speech-sake,” I am referring to the mindset encouraging the exercise of free speech rights no matter what the content and despite the lack of personal knowledge or interest in the topic. This mindset not only dilutes legitimate free speech arguments but also severely detracts from the underlying message being conveyed when individuals rally together to uphold a free speech right. If an individual participates in a protest for the simple reason that she enjoys being around large crowds but knows nothing, cares little about, and will likely not care about the cause in the future illustrates how a speech-for-speech sake argument can undercut the very right being espoused.

For example, when Jyllands-Posten published the Muhammad cartoons, European newspapers decided to republish them, not necessarily because they agreed with the message or espoused them as wise editorial policy, “but out of solidarity with the threatened individuals, and in defense of free speech as a central value of liberal democracies.” Guy Haarscher, *Rhetoric and Its Abuses: How to Oppose Liberal Democracy While Speaking Its Language*, 83 CHI.-KENT L. REV. 1225, 1234 (2008).

⁸³ Trispiotis, *supra* note 15, at 508.

⁸⁴ *Id.*

fact that SPE significantly limited Americans' access⁸⁵ to *The Interview* and, by extension, limited the filmmakers, directors, and actors from displaying their work to the public.⁸⁶ Further, Sony limited airings in foreign countries.⁸⁷

B. *The Sony Cyberhack*

What has now been termed the “Sony Pictures Entertainment Cyberhack of 2014,” (SPE) was a release of confidential company information on November 24, 2014 by the cyberhacking group, GOP, who threatened to hack and release more company information unless its demand that Sony cancel the release of the comedy, “*The Interview*” was met.

1. *How It Happened and Why*

The SPE Cyberhack implicated a variety of legal issues and was the featured news story on most news channels for the better end of 2014 and past the New Year's holiday. First, the circumstances surrounding this hacking incident render it unique from prior incidents. The film's poster became a symbol for the ongoing cyber battle between GOP, allegedly backed by North Korea, and SPE.⁸⁸ The breadth of information stolen by GOP is clear in the notice Sony released to its employees shortly after the security breach:

Dear SPE Employee:

Sony Pictures Entertainment (SPE) is writing to provide you with a summary of SPE's prior communication regarding the significant system disruption SPE experienced on Monday, November 24, 2014, as well as to provide you with additional detail.

⁸⁵ Brooks Barnes & Michael Cieply, *Sony Drops “The Interview” Following Threats*, N.Y. TIMES, Dec. 18, 2014, at B1, <http://www.nytimes.com/2014/12/18/business/sony-the-interview-threats.html>. In the South Park incident Comedy Central not only censored domestic broadcast but also international release to several European countries. Peter Vinthagen Simpson, *South Park Muhammad Joke Won't Air in Sweden*, LOCAL SE (Apr. 29, 2010, 16:57), <http://www.thelocal.se/20100429/26366>; see Trispiotis, *supra* note 15, at 500 (discussing the academic debate on the necessity of a duty not to publish religiously or politically inflammatory material when it is reasonably foreseeable that violence and death will ensue).

⁸⁶ Simpson, *supra* note 85; see Trispiotis, *supra* note 15, at 500.

⁸⁷ Itzkoff, *supra* note 64.

⁸⁸ Katharine Lackey, *North Korea Blasts U.S. for ‘Hostility,’ Sanctions*, USA TODAY (Jan. 4, 2015, 2:02 PM), <http://www.usatoday.com/story/news/world/2015/01/04/nkorea-sanctions-response/21253467%20>. North Korea has since denied its involvement in the hack, claiming the United States of “deliberately linking the ‘cyber terror’ with the . . . Democratic People's Republic of Korea” and aiming “to save its face and tarnish the image of the DPRK in the international arena at any cost.” *Id.*

As you know, SPE has determined that the cause of the disruption was a brazen cyber attack. After identifying the disruption, SPE took prompt action to contain the cyber attack, engaged recognized security consultants and contacted law enforcement.

SPE learned on December 1, 2014, that the security of personally identifiable information that SPE received about you and/or your dependents during the course of your employment may have been compromised as a result of such a brazen cyber attack. Although SPE is in the process of investigating the scope of the cyber attack, SPE believes that the following types of personally identifiable information that you provided SPE may have been obtained by unauthorized individuals: (i) name, (ii) address, (iii) social security number, driver's license number, passport number, and/or other government identifier, (iv) bank account information, (v) credit card information for corporate travel and expense, (vi) username and passwords, (vii) compensation and (viii) other employment related information.⁸⁹

And that's not all. "In addition" to the list of personally identifiable information listed above, "unauthorized individuals may have obtained . . . HIPPA protected health information, such as name, social security number, claims appeals information . . . submitted to SPE (including diagnosis and disability code), date of birth, home address, and member ID numbers [from] . . . SPE health plans."⁹⁰

And that's still not all. In addition to have the confidential information of more than 6,000 employees comprised, Sony lost copies of previously unreleased Sony films, like Sony's remake of the musical *Annie*, *Still Alice*, and *To Write Love on Her Arms* to file-sharing sites.⁹¹

2. *Who Did it?*

The exact start date of the hack is unknown. After an anonymous source pointed a finger at North Korea, the media ran with it.⁹² And why not? Just a

⁸⁹ Letter from Sony Pictures Entm't to Sony Pictures Entm't Emps. (Dec. 8, 2014), https://oag.ca.gov/system/files/12%2008%2014%20letter_0.pdf?

⁹⁰ *Id.*

⁹¹ Justin McCurry, *North Korea Denies Hacking Sony Pictures*, GUARDIAN (Dec. 4, 2014, 4:03 PM), <http://www.theguardian.com/technology/2014/dec/04/north-korea-denies-hacking-sony-pictures-cyber-attack-movies>. The hackers also leaked the recently released film *Fury* and shut down the company's email and entire corporate network. Justin McCurry, *North Korea Refuses to Deny Role in Sony Cyber-Attack*, GUARDIAN (Dec. 2, 2014, 11:14 AM), <http://www.theguardian.com/world/2014/dec/02/north-korea-sony-cyber-attack>.

⁹² Ira Winkler & Araceli Gomes, *Sony Hack: Never Underestimate the Stupidity of Criminals*, COMPUTERWORLD (Jan 14, 2015, 7:45 AM), <http://www.computerworld.com/article/2868662/sony-hack-never-underestimate-the-stupidity-of-criminals.html>. The media began speculating that the soon-to-be released film, *The Interview*, had something to do with the cyber-hack. *Id.* While not

few months prior, North Korea's rigid leader, Kim Jong-Un promised "merciless' retaliation" against the United States "if [*The Interview*] is released" and stated that "the movie's release would be an 'act of war.'" ⁹³ Not surprisingly, North Korea did not appreciate being blamed. ⁹⁴ According to White House Press Secretary, Josh Earnest, both the National Security Division, the FBI, and the Department of Defense headed up the Sony hack investigation, which was treated as "a serious national security matter." ⁹⁵ According to government intelligence, "North Korea was 'centrally involved' in the hacking of Sony Pictures computers." ⁹⁶ And based on the FBI's investigation, "[t]echnical analysis of the data deletion malware used in this attack revealed links to other malware that the FBI knows North Korean actors previously developed. For example, there were similarities in specific lines of code, encryption algorithms, data deletion methods, and compromised networks." ⁹⁷

The FBI also observed significant overlap between the infrastructure used in this attack and other malicious cyber activity the U.S. government has previously linked directly to North Korea. For example, the FBI discovered

concretely confirmed, most news agencies and government news releases still attribute the attack to North Korea, and President Obama believes there has been "no indication" that any other country could have been behind the attack. President Barack Obama, Remarks in Year-End Conference at James S. Brady Press Briefing Room (Dec. 19, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/19/remarks-president-year-end-press-conference>. "North Korea's actions were intended to inflict significant harm on a U.S. business and suppress the right of American citizens to express themselves." Press Release, Fed. Bureau of Investigation, Update on Sony Investigation (Dec. 19, 2014), <https://www.fbi.gov/news/pressrel/press-releases/update-on-sony-investigation>.

⁹³ *North Korea Threatens War on US over Kim Jong-un Movie*, BBC NEWS (June 26, 2014), <http://www.bbc.com/news/world-asia-28014069>. The state-run Korean News channel, KCNA news agency, further stated that the film was a "gangster moviemaker" production and a "wanton act of terror The act of making and screening such a movie that portrays an attack on our top leadership . . . is a most wanton act of terror and act of war, and is absolutely intolerable." Sam Frizell, *Kim Jong Un Swears 'Merciless' Retaliation if New Seth Rogen Film Released*, TIME (June 25, 2014), <http://time.com/2921071/kim-jong-un-seth-rogen-the-interview-james-franco/>. The country's spokesman blamed Washington for "provocative insanity" by allowing this film to "defile the country's supreme leader", which has "inspired [a] 'gust of hatred and rage' among North Korea's citizens and soldiers." Choe Sang-Hun, *North Korea Warns of 'Merciless' Measures over Movie Mocking Its Leader*, N.Y. TIMES, June 26, 2014, at A4, <http://www.nytimes.com/2014/06/26/world/asia/north-korea-warns-us-over-film-parody.html>.

⁹⁴ *Sony Cyber-Attack: North Korea Faces New US Sanctions*, BBC NEWS (Jan. 3, 2015), <http://www.bbc.com/news/world-us-canada-30661973>. Further, "North Korea has denied any involvement in the hacking and is therefore likely to respond angrily to" the United States sanctions. *Id.*

⁹⁵ President Barack Obama, Remarks in Year-End Conference, *supra* note 92.

⁹⁶ David Sanger & Nicole Perloth, *U.S. Said to Find North Korea Ordered Cyberattack on Sony*, N.Y. TIMES, Dec 18, 2014, at A1, <http://www.nytimes.com/2014/12/18/world/asia/us-links-north-korea-to-sony-hacking.html>.

⁹⁷ Press Release, Fed. Bureau of Investigation, *supra* note 92.

that several Internet protocol (IP) addresses associated with known North Korean infrastructure communicated with IP addresses that were hardcoded into the data deletion malware used in this attack.⁹⁸

Separately, the tools used in the SPE attack have similarities to a cyber attack in March of 2013 against South Korean banks and media outlets, which was carried out by North Korea.⁹⁹

The FBI has determined that the intrusion into SPE's network consisted of the deployment of destructive malware and the theft of proprietary information as well as employees' personally identifiable information and confidential communications. The attacks also rendered thousands of SPE's computers inoperable, forced SPE to take its entire computer network offline, and significantly disrupted the company's business operations.¹⁰⁰

During a cybersecurity conference, James Comey, the director of the FBI, stated that North Korea was behind the cyber attack but its proxy, Guardians of Peace or GOP "got sloppy" during their hacking job.¹⁰¹ There were also reports that the NSA may have previously picked up on North Korea's involvement in a hacking scheme. According to an undisclosed NSA report by Der Spiegel, the NSA had conducted surveillance of North Korea due to concerns regarding the country's technological maturation in 2010 and knew the origins of the cyber attack.¹⁰²

North Korea denied involvement and offered to help investigate the hack.¹⁰³ Interestingly enough though, the North Korean government praised the Sony hack as a "righteous deed."¹⁰⁴ In sum, North Korea's involvement is

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Russell Brandom, *FBI Director Comey Reveals New Details on the Sony Hack*, VERGE (Jan. 7, 2015, 12:40 PM), <http://www.theverge.com/2015/1/7/7507981/fbi-director-comey-reveals-new-details-on-the-sony-hack>. GOP failed to secure the IP addresses they used for the hack, allowing FBI investigators to track down their internet connections and discover they originated exclusively from North Korea. *Id.*

¹⁰² David E. Sanger & Martin Fackler, *Tracking the Cyberattack on Sony to North Koreans*, N.Y. TIMES, Jan. 19, 2015, at A1, <http://www.nytimes.com/2015/01/19/world/asia/nsa-tapped-into-north-korean-networks-before-sony-attack-officials-say.html>.

¹⁰³ Reuters & Hunter Walker, *North Korea Says It Wants to Help Find the Sony Hackers*, BUS. INSIDER (Dec. 20, 2014, 6:56 AM), <http://www.businessinsider.com/r-north-korea-proposes-joint-probe-with-the-us-into-sony-cyber-attack-kcna-2014-12>. North Korean News Agency, (KCNA) described the United States accusation against North Korea for the cyber hack as slander; North Korea then proceeded to offer its assistance in the investigation warning there would be "grave circumstances" if America refused their offer to help or continued to place blame on their country. *Id.* "As the United States is spreading groundless allegations and slandering us, we propose a joint investigation with it into this incident." *Id.*

¹⁰⁴ Nicola Davison, *North Korea Claims Cyber Attack on Sony Pictures as 'Righteous Deed'*, TELEGRAPH (Dec. 7, 2014, 11:09 AM), <http://www.telegraph.co.uk/news/worldnews/asia/>

virtually unclear. There are serious doubts as to the country's capability to even pull off a hack of this magnitude. On the other hand, Kim Jong-un did promise retaliation if the film aired. Whether or not the United States investigation is correct, it appears clear that US officials will stand by their position that North Korea is responsible no matter what.¹⁰⁵

If it was not North Korea, then who was it? Washington staunchly rejected theories brought forward by the vocal American hacker community suggesting other parties may have been culpable.¹⁰⁶ One popular theory may well be the true story. According to Sony, there may be a group of disgruntled former employees who wanted their piece of the pie.¹⁰⁷ GOP appears to have unlimited knowledge of the ins and outs of Sony's technology and corporate structure.¹⁰⁸ They even appeared well acquainted with the confidential information and used it effectively.¹⁰⁹ For example, GOP leaked damning evidence of racism on the corporate leadership level, a tactic that would undoubtedly satiate a dissatisfied former employee.¹¹⁰

northkorea/11278176/North-Korea-claims-cyber-attack-on-Sony-Pictures-was-righteous-deed.html.

¹⁰⁵ Winkler & Gomes, *supra* note 92. Upon independent investigations following the cyber hack, analysts from security consulting firms, like Norse, theorized that the more likely cause of the attack stemmed not from a North Korean international threat but rather:

. . . that a former Sony employee provided information to former Lulzsec members, thus enabling the attacks. Norse noted that the malware used in the attacks included insider credentials. It also contended that North Korea would not act so childishly and would not have deployed the same command-and-control structure it had used in the past.

Id.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ While the hacking methods used seem to point to North Korea, it may have been possible that the real attackers mimicked North Korean strategies to shield their true identities. The malware the hackers used was identified as the same malware used during the Dark Seoul cyberattack where North Korea hacked South Korean financial institutions. Malware aside,

Sony was vulnerable to just about any attacker. The malware used on Sony's systems could have been detected with adequate anti-malware software. The fact that terabytes of data could be downloaded, supposedly including full-length movies, which constitute Sony's most prized intellectual property, demonstrates that Sony inadequately monitored critical assets and network traffic. North Korea may have thousands of cyberwarriors who were available to target Sony, but in fact it deployed nothing that an appropriate security program couldn't have stopped.

Id. Certainly Sony cannot be expected to have the perfect security system against any and all cyber hacks since no security program can grant absolute immunity. However, Sony needed to assume that they were targets of "script kiddies to nation-states," especially given the plot of the Interview. *Id.*

¹¹⁰ "[I]t is possible that a laid-off, disgruntled employee sought out parties to exact revenge."
Id.

A great deal of trepidation arose when authorities realized the hack might be aiming to destroy rather than merely steal confidential information.¹¹¹ Potential cyber threats from international powers is enough to keep anyone awake at night. Here, Sony discovered malicious malware in its computer system containing a Korean language code linked to a North Korean group called DarkSeoul that wiped out South Korea's banks and broadcaster computer systems in March 2013.¹¹² This type of malware has the ability to overwrite data files making it "extremely difficult and costly, if not impossible, to recover the data using standard forensic methods."¹¹³

If one cannot identify the enemy, how does one retaliate? Was this a serious national security matter or an internal United States terrorist threat? While not dispositive to analyzing the situation, labeling the incident may help drive further inquiry. Some critics are beginning to hypothesize that the whole incident may have been mere happenstance.¹¹⁴ After all, coincidence is a probability. On the flipside, maybe North Korea chose to take an ambiguous stance as to whether or not it was involved in the hack based on its earlier disapproving statements regarding *The Interview*.

C. Sony Capitulates

Though the true source of the hack is still questionable, the media attention given to accusations against North Korea eventually won out. Theater owners refused to book the movie due to GOP threats "demanding that Sony not release *The Interview*, even threatening 9/11-style attacks against theater-goers."¹¹⁵ And Sony capitulated.¹¹⁶

The SPE hack exposed thousands of employees' personal data, a crime everyone this day in age knows full well can be devastating. Not unlike Comedy Central, Sony feared further retaliation from the hackers if they refused to pull *The Interview* as significant dangers were reasonably

¹¹¹ *Id.*

¹¹² Chris Strohm, *Sony Hack Signals Threat to Destroy Not Just Steal Data*, BLOOMBERG BUS. (Dec. 4, 2014, 2:00 AM), <http://www.bloomberg.com/news/articles/2014-12-04/sony-hack-signals-emerging-threat-to-destroy-not-just-steal-data>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Winkler & Gomes, *supra* note 92.

¹¹⁶ *Id.* On December 16, 2014, Sony canceled the Christmas Day release date for *The Interview*. Sony also considered editing the film to be less offensive, discussing methods like: "cutting the death scene, in which Korean-American actor Randall Park stars as Kim, for fear of angering North Korea's supreme leader." Ben Child, *Kim Jong-un Face-Melting May Be Wiped from Seth Rogen's The Interview*, GUARDIAN (Aug. 14, 2014, 3:45 PM), <http://www.theguardian.com/film/2014/aug/14/kim-jong-un-face-melting-seth-rogen-the-interview>.

foreseeable.¹¹⁷ What if the hackers did more than steal employee information and movie information; what if they carried out their terrorist threats on innocent American people? After all, North Korea did state that it viewed the movie as an “act of war.”¹¹⁸ What was more damning than Sony’s spineless capitulation was its agreement to release *The Interview* on a limited basis to small, independent theaters and via online streaming in the “name of patriotism.”¹¹⁹ Taking a closer look at the facts of the SPE cyber hack, Sony’s decision to pull *The Interview* and only allow certain theatres to show the film may have actually increased the likelihood of risk to citizens. Those that thought seeing the movie was an exercise of their free rights, which many did, would then seek out those locations and watch the film.¹²⁰ If terrorist attacks were being planned against establishments airing the movie, Sony may have made it much easier for the hackers to pin point where to plant their bombs. Protecting the public is a legitimate goal, but at the heart of this issue is Sony’s action, which ignored a basic American right, choosing a hands-off approach that shifted the full burden of showing the movie to theaters with the guts to feature it.¹²¹

Matt Stone and Trey Parker, the creators of the renowned animated satire, *South Park*, encountered a similar circumstance when they released *Team America: World Police* in 2004.¹²² “The film mocks Kim [Jong-il] for being an eccentric dictator with a lamentable grasp of English. In one scene, he sings ‘I’m So Ronrey,’ a play on his mispronunciation of the word ‘lonely,’ which follows the dictator around his ornate palace where he spends almost all of his time.”¹²³ Let us not forget the Psy’s viral Kim Jong-un rendition of *Gangnam Style*.¹²⁴ The *Charlie Hebdo* cartoons involved the same types of issues, where terrorist threats were used to intimidate the media in defense of Islam.¹²⁵ In North Korea, Kim Jong-un and the position he holds is considered

¹¹⁷ See *id.* The hackers straight up announced that they would retaliate further if the movie was not pulled from airing. *Id.*

¹¹⁸ *Id.*

¹¹⁹ Winkler & Gomes, *supra* note 92.

¹²⁰ See Trispiotis, *supra* note 15.

¹²¹ *Id.* at 504 (“[A]lthough public order constitutes a legitimate limitation ground with regard to certain human rights, that is not to justify a *carte blanche* to national authorities whenever they express fears of social disorder.”).

¹²² See Tapper & Morris *supra* note 61. The liberal Hollywood elite—who were to be further lambasted in Parker and Stone’s fantastic *Team America: World Police*—are a common target treated with no mercy. *Id.* Sean Penn is perhaps the most famous target of their ire, while former friend George Clooney was also a target in the episode *Smug Alert*. *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Bilefsky, *supra* note 54.

holy.¹²⁶ *The Interview* debacle is similar to a religiously charged free speech issue such as Quran burning, because Kim Jong-un and the position he occupies approaches the level of a deity; therefore, any effort to belittle, defame, or assassinate (even in jest) the leader engenders the same types of reactions to First Amendment issues implicated by religiously charged issues.¹²⁷

IV. BALANCING THE COMPETING INTERESTS: SAFETY IN AN INCREASINGLY UNPREDICTABLE WORLD NOW MORE THAN EVER AT RISK OF CYBER TERRORISM AGAINST THE CONSTITUTIONAL RIGHT TO VOICE CONTROVERSIAL OPINIONS

A. Reactions, Responses, and Retaliations

Was the hack a serious international security matter or just an internal United States terrorist threat? It might have been a coincidence or disgruntled workers getting revenge. While knowing the true source of the attack would be preferable, there simply is no concrete answer to the question as of this date. What is more important, however, is not just determining who was behind the attack, but rather examining how certain entities reacted following the cyber hack. To examine the reactions of political bodies, the American public,

¹²⁶ See Austin Ramzy, *Propaganda Campaign Grows in North Korea as Kim Jong Un Consolidates Power*, TIME (July 18, 2012), <http://world.time.com/2012/07/18/propaganda-campaign-grows-in-north-korea-as-kim-jong-un-consolidates-power/>. The Kim family, who has ruled North Korea for decades, is known for its deep-seated personality cult. *Id.* Kim Jong-un's grandfather, Kim Jong-il possessed a media-induced personality cult whereby the people of North Korea would perceive their leader as the "eternal President." *Id.* Thanks to North Korea's unique propaganda machine, Kim Jong-un enjoys god-like status. See Lucy Williamson, *Delving Into North Korea's Mystical Cult of Personality*, BBC NEWS (Dec. 27, 2011), <http://www.bbc.co.uk/news/world-asia-16336991>. For example, only specific individuals are allowed to even draw the leader, much less take a picture of him. *Id.* According to a former North Korean artist, only select artists could draw North Korea's first leader, Kim Il-sung, "[s]o [he] would lock [him]self into a room to draw Kim Il-Sung and then burn it . . . because it was 'taboo' for ordinary artists to do so." *Id.*

¹²⁷ See *Sony Pictures Caves to Outraged North Korea by Editing New Seth Rogen-James Franco Comedy*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-2724377/Sony-Pictures-caves-outraged-North-Korea-editing-new-Seth-Rogen-James-Franco-comedy.html> (last updated Aug. 14, 2014, 8:41 AM). In the wake of North Korean complaints, Sony tossed around the idea of removing scenes from *The Interview*, including a scene where North Korea's supreme leader's face is shown melting off. *Id.* Sony considered digitally altering background information in the film that pointed to North Korea such as military buttons that are accurate copies of North Korean soldiers' attire, which are worn in honor of Kim and his late father Kim Jong-il. *Id.* Depiction of these buttons in the film would be viewed as blasphemy by the regime, so Sony considered altering its creation to avoid angering Kim Jong-un. *Id.*

private media businesses, Hollywood, and even the President sheds light on the current status of First Amendment freedoms in the American consciousness.

“The cyber attack against Sony Pictures Entertainment was not just an attack against a company and its employees It was also an attack on our freedom of expression and way of life.”¹²⁸ President Barack Obama supported keeping the film available.¹²⁹ He went on to state that he believed Sony had made a mistake in pulling the film, and “[w]e cannot have a society in which some dictator some place can start imposing censorship here in the United States” and that producers should “not get into a pattern where you’re intimidated by these . . . [acts].”¹³⁰ White House Press Secretary Josh Earnest further iterated that “Obama’s administration stands ‘squarely on the side of artists and other private citizens who seek to freely express their views.’”¹³¹ Though Obama did express understanding for Sony’s choice to pull the movie, Michael Lynton, Sony’s CEO, claimed the President misunderstood the incident.¹³² Kazuo Harai, Sony’s Japanese chief executive, broke with a 25-

¹²⁸ Luke O’Neil, *Politicians Only Love Journalists When They’re Dead*, DAILY BEAST (Jan. 8, 2015, 2:11 PM), <http://www.thedailybeast.com/articles/2015/01/08/politicians-only-love-journalists-when-they-re-dead.html>.

¹²⁹ Nick Allen, *Barack Obama Says Sony Made ‘Mistake’ Pulling The Interview*, TELEGRAPH (Dec. 19, 2014, 9:21 PM), <http://www.telegraph.co.uk/news/worldnews/asia/northkorea/11305233/Barack-Obama-says-Sony-made-mistake-pulling-The-Interview.html>.

¹³⁰ *Id.* President Obama has carefully moved away from calling the cyber hack an “act of war,” and has chosen to use the term “cyber vandalism” to characterize the situation. David Mortokso & Francesca Chambers, *Obama Says North Korea’s Sony Hack Was Not ‘An Act of War’ - It Was ‘Cyber Vandalism’ and Again Asserts that Capitulation Sets a Bad Precedent*, DAILY MAIL (Dec. 21, 2014, 10:58 AM), <http://www.dailymail.co.uk/news/article-2882607/North-Korea-s-cyber-hack-not-act-war-Obama-says-cyber-vandalism-Sony-s-capitulation-sets-bad-precedent.html>. Both costly and damaging, cyber vandalism, said Obama, should be treated as any other criminal conduct by the United States. *Id.* While Obama sympathized with the concerns Sony cited as its reasons for capitulating, he reiterated his belief that Sony erred in pulling the film: “That’s not who we are. That’s not what America is about.” Allen, *supra* note 129. Further, the President opined, what happens “when [people] see a documentary . . . or news report[] they don’t like”? *Id.* Obama further stated, would be “even worse” if this incident sets a trend of “self-censorship” among media companies for fear of “offend[ing] the sensibilities of somebody whose sensibilities probably need to be offended.” *Id.*

¹³¹ Ariana Bacle, *White House is Treating Sony Hack as ‘Serious National Security Matter’*, ENT. WKLY. (Jan. 18, 2015, 3:05 PM), <http://www.ew.com/article/2014/12/18/white-house-sony-interview-north-korea>.

¹³² Elizabeth Weise, Kevin Johnson, & Andrea Mandell, *Obama: Sony ‘Did the Wrong Thing’ When it Pulled Movie*, USA TODAY (Dec. 19, 2014, 10:08 PM), <http://www.usatoday.com/story/news/2014/12/19/sony-the-interview-hackers-gop/20635449/>. Appearing on CNN, Lynton stated that his decision to cancel *The Interview* release was not triggered by the threats, but because of the majority of theaters refusing to show the film. *Id.* After President Obama’s statement labeling the decision to pull the movie as a “mistake,” Sony issued a follow-up statement claiming free speech “should never be suppressed by threats and extortion” and “[w]e have not given in” and “we would still like the public [to] see this movie.” *Id.* According to Lynton, Sony just had no

year tradition when he intervened in the decision making of Sony, and stated that he was proud of his company employees for standing up to the “extortionist efforts of criminals.”¹³³

The hackers’ 9/11 type threats against theaters and moviegoers produced an unintended result.¹³⁴ Though the film was originally released at only 331 select theaters and was only otherwise viewable through online streaming sites, *The Interview* grossed approximately \$31 million by video on demand purchases,¹³⁵ making it the best Christmas gift Sony could have asked for. Audiences were comprised of individuals who voiced their vehement dedication to free speech rights by paying to see the movie and accepting any

other choice. *Id.*

¹³³ Associated Press, *Sony CEO Kazuo Hirai Breaks Silence on ‘The Interview’ Hack*, N.Y. DAILY NEWS (Jan. 6, 2015, 10:35 AM), <http://www.nydailynews.com/entertainment/movies/sony-ceo-breaks-silence-interview-hack-article-1.2067195>. While a threat from North Korea may seem far-fetched to most Americans, many Japanese perceive North Korea as a very visible threat. See Eric Johnston, *The North Korea Abduction Issue and Its Effect on Japanese Domestic Politics* (Japan Policy Research Inst., Working Paper No. 101, 2004), <http://www.jpri.org/publications/workingpapers/wp101.html>. In fact, until about thirty years ago, North Korean agents occasionally kidnapped Japanese people to serve as Japanese-language teachers. *Id.* Additionally, long-range North Korean rockets on test runs have flown ominously over Japan’s main islands. *Id.*

¹³⁴ Damon Beres, *Sony Hackers Threaten People Who See ‘The Interview,’ Invoke 9/11*, HUFFINGTON POST (Dec. 16, 2014, 6:59 PM), http://www.huffingtonpost.com/2014/12/16/sony-hackers-911-the-interview_n_6335174.html. The GOP promised to make the world full of fear if *The Interview* was released. *Id.* The GOP posted the following warning to any theaters and moviegoers alike, warning of the consequences if the film were shown or seen:

Warning

We will clearly show it to you at the very time and places “The Interview” be shown, including the premiere, how bitter fate those who seek fun in terror should be doomed to.

Soon all the world will see what an awful movie Sony Pictures Entertainment has made.

The world will be full of fear.

Remember the 11th of September 2001.

We recommend you to keep yourself distant from the places at that time.

(If your house is nearby, you’d better leave.)

Whatever comes in the coming days is called by the greed of Sony Pictures Entertainment.

All the world will denounce the SONY.

Id.

¹³⁵ Ryan Faughnder, *‘The Interview’ Earns \$31 Million from VOD, \$5 Million at Box Office*, L.A. TIMES (Jan. 6, 2015, 1:56 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-sonys-the-interview-vod-box-office-20150106-story.html>. An estimated 4.3 million purchases or rentals were recorded from various “streaming sites, digital retailers, and cable and satellite [video on demand]”—“Google Play, YouTube Movies, Microsoft’s Xbox Video and iTunes, as well as VOD services from the likes of Comcast, Cox Communications and Time Warner Cable.” *Id.* The film was originally projected to gross about \$45 million to \$60 million in domestic ticket sales. *Id.*

risk that might come along with it.¹³⁶ According to the Los Angeles Times, “perhaps the most lasting effect of the raunchy comedy could be in the way Americans go to the movies—or don’t.”¹³⁷ As a movie, *The Interview* received mediocre reviews¹³⁸ and a prevailing reason many saw the movie was to demonstrate their patriotic spirit.¹³⁹ Whether true patriotism or a “speech for speech’s sake” trend,¹⁴⁰ it is clear audiences were motivated to watch the film

¹³⁶ See Brian Stelter & Susanna Capelouto, *For Moviegoers, ‘Patriotic Duty’ to See ‘The Interview’*, CNN MONEY (Dec. 25, 2014, 1:23 PM), <http://money.cnn.com/2014/12/25/media/the-interview-box-office/>.

¹³⁷ Ryan Faughnder, *VOD Success of ‘Interview’ Could Make Online Film Releases More Common*, L.A. TIMES (Dec. 30, 2014, 4:00 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-sony-hacking-interview-vod-20141230-story.html>.

¹³⁸ David Blaustein, *Movie Review: ‘The Interview,’ Starring Seth Rogen and James Franco*, ABC NEWS (Dec. 24, 2014, 4:47 PM), <http://abcnews.go.com/Entertainment/movie-review-interview-starring-seth-rogen-james-franco/story?id=27817831>. Receiving a 2.5 star rating, it was clear the majority of views were fueled by the interest and curiosity surrounding the recent controversy coupled with a wish to demonstrate solidarity for free speech. *Id.*

¹³⁹ Stelter & Capelouto, *supra* note 136. Believing the assault on Sony was a direct attack upon American free speech rights, many people expressed their willingness to accept any risks of terrorism to go to the movie. *Id.*

¹⁴⁰ A “speech for speech’s sake” attitude that may have provoked moviegoers to watch the film begs the question: Does well-intentioned solidarity for free speech really stand up for the rights being assaulted? For example, a random passerby who joins in a protest without knowing fully the cause for the protest is undoubtedly expressing a view, but that view may be prompted not by the true issue at stake; rather, a broadcasted generic shout-out for the sake of being patriotic. If it were to come down to it, are individual American citizens willing, as were our forefathers, to lay down their lives for free speech rights—would we have the guts that moviegoers demonstrated by going to the movies if it meant risking our lives? Even well-intentioned solidarity may hurt civil discourse by just saying something for the sake of saying something, which detracts from the value of the message. Arguably those who saw the movie did face a risk of a terror attack, so perhaps they are the stronger Americans of us all. On the other hand, the community sentiment of togetherness and solidarity for our free speech that arose following the hack was felt across the nation. Reaching further, should media companies be legally compelled to stand up for free speech rights? Probably not, but it should go without saying that citizens who make up these media companies should place more value on their right to free speech. Take the 2011 firebombing of the Charlie Hebdo offices, which came soon after the magazine mocked the success of an Islamist party in Tunisia with a cover cartoon of Muhammad saying: “One hundred lashes if you don’t die laughing.” Was this just the work of a shameless provocateur? The same type of risks faced by Sony were true for the threats and violence directed at politicians Geert Wilders and Pim Fortuyn, film-maker Theo van Gogh, and cartoonist Kurt Westergaard. Timothy Garton Ash, *Intimidation and Censorship are No Answer to This Inflammatory Film*, GUARDIAN (Apr. 9, 2008, 7:06 PM), <http://www.theguardian.com/commentisfree/2008/apr/10/islam.religion> (referring to the Geert Wilders anti-Islam film). Charlie Hebo, a satirical French magazine renowned for pushing the limits of free speech, was attacked on January 7, 2015 by two masked gunmen claiming to be avenging the Prophet Muhammad for Charlie’s insulting cartoons depicting the prophet. *Id.* The gunmen left twelve dead, including the magazine’s renowned editor, Stéphane Charbonnier, commonly known as Charb, who refused to back down when his offices were firebombed three years before in protest of similar cartoons. *Id.* According to his partner, Jeanette Bougrab: “[Charb] died standing He defended secularism, he defended Voltaire’s spirit, he in fact was really the fruit of this ideal of the Republic that we’ve almost forgotten. He died, executed with his

due to the hack, whatever their personal reasons were.¹⁴¹ “This is how a mature free society responds to such a film. Not by appeasement of murderers, not by censorship, and not simply by blanket condemnation.”¹⁴²

The United States may or may not have retaliated in kind to North Korea’s alleged involvement in the cyber hack.¹⁴³ While it is unconfirmed whether the United States was behind the subsequent power outage in North Korea, the United States did impose sanctions on the country, announcing that they “stand by the assessment that North Korea was at fault.”¹⁴⁴ This is perhaps the first time the United States has imposed sanctions “to punish any

comrades” Braden Goyette, *Jeannette Bougrab, Partner of Charlie Hebdo Editor Charb, Speaks about His Death*, WORLD POST (Jan. 8, 2015, 7:28 PM), http://www.huffingtonpost.com/2015/01/08/jeannette-bougrab-charlie-hebdo_n_6439474.html. The French public soon began tweeting the catchphrase “Je Suis Charlie” in solidarity for the magazine’s strong stance for freedom and the tragedy that had befallen their efforts to fight censorship. Dan Carrier, *We Are Charlie: ‘Freedom of Speech Needs to be Strongly Defended’*, GUARDIAN (Jan. 8, 2015, 7:48 PM), <http://www.theguardian.com/world/2015/jan/09/we-are-charlie-guardian-event-charlie-hebdo> (“I’d rather die standing than live on my knees.”).

¹⁴¹ After the attack, New Regency cancelled its plans to release a film adaptation of the graphic novel, *Pyongyang: A Journey in North Korea* starring Steve Carell, for fear of further retaliation. Conversely, Hustler founder Larry Flynt’s reaction was quite the opposite, expressing his intention to release a pornographic parody of *The Interview*. Mark Hanrahan, *Larry Flynt’s Hustler to Make Porn Parody of ‘The Interview’, Criticizes Response to Sony Hack*, INT’L BUS. TIMES (Dec. 20, 2014, 12:31 AM), <http://www.ibtimes.com/larry-flynts-hustler-make-porn-parody-interview-criticizes-response-sony-hack-1763880> (“If Kim Jong-un and his henchmen were upset before, wait till they see the movie we’re going to make”).

¹⁴² Ash, *supra* note 140.

¹⁴³ Only hours after President Obama declared the United States would respond proportionately to the cyber hack, North Korea’s internet began to fail. Nicole Perloth & David E. Sanger, *North Korea Loses Its Link to the Internet*, N.Y. TIMES, Dec. 23, 2014, at A1, <http://www.nytimes.com/2014/12/23/world/asia/attack-is-suspected-as-north-korean-internet-collapses.html>. According to experts, the outage was one of the worst in North Korean history with even “the few connections to the outside world—available only to the elite, the military, and North Korea’s prodigious propaganda machine” offline. *Id.* The outage may have been attributable to any number of causes. A mere coincidence aside, some security experts hypothesize that North Korea may have been taking its systems offline preemptively in case the United States retaliated. *Id.* China may have pulled the plug on its neighbor. *Id.* In addition, the United States is certainly positioned to cause internet failures, “[b]ut there is no evidence that American cyber activities in China have moved from surveillance to what experts call ‘computer network exploitation’ or, the next step, actual attacks.” No matter who caused the outage, it was unlikely to quell North Korean hacking as it is believed that many are actually based in China. *See id.* Whoever was responsible seemed to be firing “a warning shot that two can play the game of disruption.” *Id.*

¹⁴⁴ *U.S. Imposes New Sanctions on North Korea*, NAT’L PUB. RADIO (Jan. 3, 2015, 7:58 AM), <http://www.npr.org/2015/01/03/374736996/u-s-sanctions-against-north-korea-are-mostly-symbolic>. North Korea is already under four UN Security Council resolutions from 2006 and two U.S. sanctions programs targeting its weapons development industry—nuclear weapon technology. *Id.*

country for cyber-attacks on a US company.”¹⁴⁵ The North Korean government responded with disgust.¹⁴⁶

The cyber hack also released sensitive information and correspondences that have had their own set of reactions. The cyber hack released emails that revealed Sony’s management engaging in racist dialogue, including criticizing President Obama and slamming Hollywood actors.¹⁴⁷ Sony’s co-chairperson, Amy Pascal, had thousands of her emails released to the public, which revealed company secrets and sensitive internal correspondence.¹⁴⁸

B. The SPE Employee Class Action Lawsuit and Their Requisite Demands on Cyber Security Protocols.

After the hack, former Sony Pictures employees initiated a class action suit under data protection laws, and entertainment lawyers believe the case will have immense legal implications in years to come.¹⁴⁹ Sony employees filed

¹⁴⁵ *Sony Cyber-Attack: North Korea Calls US Sanctions Hostile*, BBC NEWS (Jan. 4, 2015), <http://www.bbc.com/news/world-asia-30670884>.

¹⁴⁶ *See id.* North Korea’s state-run KCNA news agency announced that “[t]he persistent and unilateral action taken by the White House to slap ‘sanctions’ against the DPRK patently proves that it is still not away from inveterate repugnancy and hostility toward the DPRK.” *Id.* The North Korean government claims that America’s suspicions are misplaced and the sanctions are merely an attempt to save face. *Id.* North Korea continues to deny involvement in the attack, pointing to cyber experts in the West who doubt North Korean involvement. *Id.*

¹⁴⁷ Mark Gongloff, *Sony Hack a Reminder to Stop Saying Stupid Things in Email*, HUFFINGTON POST (Dec. 18, 2014, 3:47 PM), http://www.huffingtonpost.com/2014/12/18/sony-hack-email-lesson_n_6347774.html; *see also* Kevin Roose, *Hacked Documents Reveal a Hollywood Studio’s Stunning Gender and Race Gap*, FUSION (Dec. 1, 2014, 8:05 PM), <http://fusion.net/story/30789/hacked-documents-reveal-a-hollywood-studios-stunning-gender-and-race-gap/> (discussing racial and gender disparities perpetrated in the Sony company). Correspondence between Pascal and producer Scott Rudin listed films they thought the president enjoyed, “all of which prominently feature African-American actors and storylines, such as ‘Lee Daniels’ *The Butler*, ‘*Django Unchained*’ and ‘*Ride Along*.’” Brennan Williams, *Sony’s Hacked Emails Highlight Hollywood’s Problem with Diversity*, HUFFINGTON POST (Dec. 11, 2014, 4:28 PM), http://www.huffingtonpost.com/2014/12/11/sony-hack-hollywood-ignorance-diversity_n_6310436.html. Following the correspondence release, Pascal and Rudin both issued apologies for their comments claiming the emails were “insensitive” and “written in haste.” *Id.*

¹⁴⁸ Sam Frizell, *The 7 Most Outrageous Things We Learned From the Sony Hack*, TIME (Dec. 9, 2014), <http://time.com/3625392/the-7-most-outrageous-things-we-learned-from-the-sony-hack/>. Pascal’s and others’ emails released by the hack not only revealed secret movie information but also a “trove of workplace complaints.” *Id.* The emails also contained personal opinions about actors like Adam Sandler, revealed that Sony employs primarily white males, only one female Sony employee makes over \$1 million—that being Ms. Pascal, and various racial comments. *Id.*

¹⁴⁹ Oliver Laughland, *Christmas Release of The Interview Canceled by Sony*, GUARDIAN (Dec. 18, 2014, 9:12 AM), <http://www.theguardian.com/film/2014/dec/17/sony-pictures-cancels-christmas-release-the-interview>.

seven class action lawsuits against the company for failing to protect their data that was released during the hack.¹⁵⁰ This information included sensitive confidential information such as Social Security numbers and medical information.¹⁵¹ Due to the related nature of all the claims, it is likely the cases will be consolidated.¹⁵² The claims allege similar legal and factual issues related to the SPE data breach publicized on November 24, 2014.¹⁵³ Their claims boil down to two points against Sony: (1) that SPE failed to “secure its computer systems, servers, and databases” because it made a “business decision to accept the risk,” and (2) that SPE subsequently “failed to timely protect confidential information of its current and former employees” from cyber hackers.¹⁵⁴ That Sony owed its current and former employees a legal duty is unquestionable, and the company is by no means a stranger to data breaches.¹⁵⁵ And the fact that the company is again the victim of cyber hacking speaks to Sony’s ability to learn from its mistakes and suggests Sony should have known that such a security breach was likely.¹⁵⁶ This looks remarkably similar to negligence, and the plaintiffs thought so too as reflected in their complaints.¹⁵⁷ Entertainment media companies like Sony owe their employees certain duties just like any other company.

Sony counters that the plaintiffs have failed to plead a concrete injury and points to the fact that “[t]here are no allegations of identity theft, no allegations of fraudulent charges, and no allegations of misappropriation of

¹⁵⁰ See Cory Bennett, *Sony Hack Lawsuits Could Join Forces*, HILL (Jan. 14, 2015, 3:33 PM), <http://thehill.com/policy/cybersecurity/229513-sony-hack-lawsuits-likely-consolidating>.

¹⁵¹ Kevin Roose, *Sony Pictures Hackers Make Their Biggest Threat Yet: “Remember the 11th of September 2001”*, FUSION (Dec. 16, 2014, 12:53 PM), <http://fusion.net/story/34344/sony-pictures-hackers-make-their-biggest-threat-yet-remember-the-11th-of-september-2001/>.

¹⁵² Bennett, *supra* note 150. A hearing was held on February 23, 2015 to discuss consolidating the matters before the California district court. See Notice of Unopposed Motion & Unopposed Motion for Consolidation & Appointment of Interim Co-Lead Class Counsel, *Corona v. Sony Pictures Entm’t, Inc.*, No. 14-CV-09600 RGK (C.D. Cal. June 15, 2015), 2015 WL 3916744 [hereinafter Motion for Class Counsel]. The case is proposed to be consolidated under *In re Sony Pictures 2014 Data Breach Litigation*. *Id.*

¹⁵³ See Motion for Class Counsel, *supra* note 152, at *6 (“Plaintiffs in each of the cases generally allege that SPE failed to maintain adequate security policies and practices to protect Plaintiffs’ information.”).

¹⁵⁴ Class Action Complaint at ¶ 2, *Corona v. Sony Pictures Entm’t, Inc.*, No. 14-CV-09600 RGK (C.D. Cal. June 15, 2015), 2015 WL 3916744 [hereinafter Class Action Complaint].

¹⁵⁵ John Gaudiosi, *Why Sony Didn’t Learn from Its 2011 Hack*, FORTUNE (Dec. 24, 2014, 1:22 PM), <http://fortune.com/2014/12/24/why-sony-didnt-learn-from-its-2011-hack/>. In Spring 2011, Sony’s PlayStation gaming system was hacked by a splinter group of the hacker collective, Anonymous. *Id.*

¹⁵⁶ Class Action Complaint, *supra* note 151, at ¶ 24. According to plaintiffs Michael Corona’s and Christina Mathis’ complaint, after the hack, Sony assured its employees that their information was safe and the best IT staff was being assigned to control the situation. *Id.*

¹⁵⁷ *Id.* at ¶ 98.

medical information.”¹⁵⁸ Further, Sony argues that the plaintiffs lack standing such that their common law and statutory causes of action “based on their alleged fear of an increased risk of future harm” are void.¹⁵⁹

How this case will play out will likely have an effect on how entertainment media companies handle situations like the SPE hack in the future—not just regarding raising concerns about data retention policies, but also business practices dictating employee privacy.¹⁶⁰

V. FUTURE IMPLICATIONS

What will Sony’s capitulation mean for the future of free speech rights in the media? It may be a pretext for harsher cyber crime anti-hacking government regulations in the near future.¹⁶¹ Whether that would be good or bad for free speech—only time would tell. Similar to earlier illustrations such as *Charlie Hebdo* or *South Park*, self-censorship may or may not be a problem in the future. Glancing back at the Terry Jones situation, how the national government handles cyber terrorism and hacks strikes an interesting balance between sovereignty and a media company’s right to free speech as well as personal security.

It may mean media companies content themselves with producing films

¹⁵⁸ Sony Pictures Entm’t Inc.’s Memorandum of Points & Auths. in Support of its Motion to Dismiss Complaint Pursuant to Fed. Rules of Civil Procedure 12(b)(1) & 12(b)(6) at 1–2, *Corona v. Sony Pictures Entm’t Inc.*, No. 14-CV-09600 RGK (C.D. Cal. June 15, 2015), 2015 WL 3916744 [hereinafter Memo of P & A].

¹⁵⁹ *Id.* at 6. “It makes no difference that the plaintiffs allege that data already has been posted on the Internet, thereby allegedly increasing the risk of future identity theft. What matters for standing purposes is whether the plaintiffs have suffered concrete, imminent injury—and they do not allege that they have.” *Id.*

¹⁶⁰ The class action plaintiffs allege following the breach, Sony was more interested in preserving its own interests, “not on protecting . . . the harm to its employees and their families. But rather, S[ony] has focused on securing its own intellectual property from pirates and a public relations campaign directed at controlling the damage to S[ony] associated with the release of embarrassing internal emails.” Amended Class Action Complaint at 3, *Corona v. Sony Pictures Entm’t Inc.*, No. 14-CV-09600 RGK (C.D. Cal. June 15, 2015), 2015 WL 3916744.

¹⁶¹ According to California Senator Dianne Feinstein, the Sony cyber hack was “only the latest example of the need for serious legislation to improve the sharing of information between the private sector and the government to help companies strengthen cyber security.” Laughland, *supra* note 147; see also Ted Johnson, *President Obama Pushes for Cyber Legislation in Wake of Sony Hack*, VARIETY (Jan. 13, 2015, 8:30 AM), <http://variety.com/2015/biz/news/president-obama-pushes-for-cyber-legislation-in-wake-of-sony-hack-1201403776/> (discussing President Obama’s push for increased cyber legislation after the cyber breach: “The legislation also would require private companies to comply with privacy restrictions, such as removing unnecessary personal information and, in order to comply with liability protection, taking measures to protect data that is shared with government agencies.”).

that will not offend anyone—if such a film exists.¹⁶² Undoubtedly though, this case will affect how private businesses like the film industry protect their production secrets as well as their employees’ confidential information.

Enterprise-size organizations like Sony must assume that they are being targeted by everyone from script kiddies to nation-states. While no security program will provide perfect security to such an organization, enterprise organizations do require robust security programs that account for the most likely and most basic attacks. It would require a series of articles to outline the composition of such a program, but it certainly would include anti-malware software that should have prevented the malware used in the attack against Sony.¹⁶³

Moreover, this case illustrates how the average American’s notion of freedom of speech rights is influenced, and perhaps may change that notion in coming years. Other nations often restrict access to freedoms protected under our Constitution to prevent their citizens from seeing an “alternative vision” than the one espoused by the national government.¹⁶⁴ The United States though has modeled and should continue to model “a more robust commitment to democratic debate.”¹⁶⁵ Threats like the SPE cyber hack cause participation to wither and “alienation takes its place[, t]he result [of which] is the corruption of ordinary democratic processes by practitioners of violence.”¹⁶⁶

¹⁶² After the hack, other potentially volatile movies were pulled. See Malene Arpe, *Steve Carell’s North Korea Movie Has Been Canceled*, STARGAZING BLOG (Dec. 18, 2014, 7:38 AM), http://www.thestar.com/entertainment/stargazing_blog/2014/12/steve_carell_s_north_korea_movie_has_been_cancelled_.html.

¹⁶³ Winkler & Gomes, *supra* note 92 (suggesting alternative ways to protect oneself from a cyberattack).

¹⁶⁴ Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4, 17 (2004).

¹⁶⁵ *Id.* “Extreme speech warrants protection because of its strong ontological and pragmatic links to ideals of participation” in civic discourse, and:

[s]uch speech may be an element of a learning process for participants, who may test extreme rhetoric, and then determine that it does not meet their needs. Extreme rhetoric can also serve as an outlet for dissent, and as an indication of vulnerabilities for regimes that may then undertake reform.

Id. at 22–23; see also Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, 152, 166 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

¹⁶⁶ Margulies, *supra* note 161, at 35. “The Internet is a singularly useful medium for such intimidation.” *Id.*; see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 364–73 (1975) (examining totalitarian movements including paramilitary capability, core images and narratives, as well as engagement of opposing views).

VI. CONCLUSION

The decision to show or not to show *The Interview* encapsulates a broader debate concerning the relationship between private media companies and the right to free speech. Looking at that relationship brings to the surface questions like what obligation private media companies have to uphold First Amendment protections—especially in light of terrorist threats. It also brings to light issues such as what effect self-censorship has on creative productions, and among others, what future implications are likely to arise after the First Amendment debates concerning *The Interview* and its subsequent impact on its viewers. While the movie itself was not an award-winner, *The Interview* contributed to an important discussion regarding free speech rights and will be remembered for its instigating role in that discussion.