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## Pirates of the Copyrighted: Who Will Defend Creators from Marauding State Governments?

BY BRIAN D. WASSOM AND LINCOLN BANDLOW FOR THE FORUM'S IP COMMITTEE

Sometimes life imitates art, even in the intellectual property realm. One of most enduring genres of adventure storytelling is the pirate tale—epics that come complete with such familiar tropes as seemingly unstoppable pirate hordes, underdog heroes, and nail-biting conflicts in which each side competes for the upper hand. And no matter how dead the pirates appear to be by the end of the story, there's always a sequel.

The Supreme Court's March 23, 2020, decision in *Allen v. Cooper* is the latest chapter in a long-running tale that reads a lot like these sagas. Indeed, piracy is so ingrained in this tale that the factual background of the case involves an actual pirate ship, and the U.S. Supreme Court's opinion openly labels the state governments as copyright pirates—even while ruling that, thanks to the Eleventh Amendment and sovereign immunity, there's precious little copyright owners can do about the pirates stealing their treasure. Meanwhile, the tangible consequences of state-sponsored infringement continue to pile up—in dozens of reported decisions across the country that the Supreme Court did not acknowledge, as well as anecdotal examples of copyright enforcement fizzling without

litigation in light of the insurmountable barrier posed by the Eleventh Amendment—all but ensuring that this will not be the last chapter in the long-running quest to hold state government Jack Sparrows accountable for their copyright plunder. This article examines how we got here, how bad the problem really is, the response to that problem by the Supreme Court in *Allen*, and the few options left to copyright owners.

### Opening Scene: Pirate States Seize the Upper Hand over Copyright Owners

The Eleventh Amendment to the U.S. Constitution reads: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although

*Continued on page 32*

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# How the Forum Is Rolling with the Changes

BY DAVE GILES

The challenge of writing a column in 2020—the material is almost out of date before it is printed. As I sat down to write on Memorial Day, it seemed like the appropriate time to reflect and write about all that has happened since the Forum on Communications Law’s 25th Annual Conference in early February. A few months ago—and even last week—seem like another time. But here are my observations.

It was less than four months ago that many of us gathered in Austin, Texas, for the annual conference. As we wrapped up the much anticipated weekend—three days of networking and learning—there was a sense of momentum for the Forum. The conference had its largest attendance ever, and the quirks of the event (and there are always challenges pulling off a function that large and complex) were few and far between.

We celebrated those whose efforts had perpetuated the annual conference for 25 consecutive years and the Forum’s past chairs, most of whom were able to attend. Whether it was the opening night filled with tasty barbecue and great music at Austin City Limits; honoring Barbara Wall for her dedication to the Forum, amazing career, mentorship, and friendship; or participating in the many well-presented plenaries, workshops, and Friday afternoon conversations over cocktails, the energy was palpable.

Little did we know that we were



Dave Giles

just weeks away from a global pandemic that has killed more than 580,000 worldwide, including 138,000-plus Americans, shuttered businesses, canceled graduations, restricted travel, and kept most of us close to home for the safety of ourselves and others.

Two of our affected events were the 15th

Annual Privacy and Data Security Symposium and the 39th Annual Representing Your Local Broadcaster Conference. Stay-at-home restrictions forced cancellation of those showcase events, as well as the spring issue of *Communications Lawyer*.

With all that hard work paused, the Forum had to pivot and focus on remote learning with a series of what we hope are engaging webinars. In May, we presented “Access to Court Records: A Review of Recent Case Law” (<https://www.americanbar.org/events-cle/ecd/ondemand/398879878>). Our June webinar was entitled “Doxing, Bullying and Sextortion: The Legal and Social Landscape of Technology Facilitated Harassment” (<https://www.americanbar.org/events-cle/ecd/ondemand/400809800>).

The Forum has two more sessions planned for later in the summer focused on internet content. One has a working title of “Internet Law: Content Management from CDA to the DMCA and Beyond,” and the other, “Internet Law: The Legal Impact of Deep Fakes, AI and Emerging Technologies on the Media.”

Newsletters from our Women in Communications Law Committee and the Young Lawyers Committee continue to provide terrific content. After its brief hiatus, *Communications Lawyer* is back with great

content, including an article on the U.S. Supreme Court’s recent ruling on the copyright case *Allen v. Cooper* by Forum members Brian Wassom and Lincoln Bandlow.

Forum members also have been hard at work ensuring that free speech and public access are protected during the pandemic. For example, we are participating in the National Conference of Commissioners on Uniform State Laws (ULC), and they have invited the ABA’s participation in the Study Committee on State Governance during Public Health Emergencies. The ULC is studying the authority of state governments to respond to epidemics, pandemics and other public health emergencies, and Steven Zansberg is serving as an ABA advisor to ensure that Forum members’ interests are protected as the ULC determines whether state governments can or should temporarily restrict access to court proceedings or suspend open meetings and open records laws.

The Forum also has been involved with the ABA Standing Committee on Legal Aid and Indigent Defendants as they examine the best approach for conducting virtual or remote court proceedings established as a result of

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the COVID-19 pandemic. While the committee's emphasis is on prioritizing those cases in which litigants' consent to the use of virtual or remote processes, Gregg Leslie and Tom Burke are participating to ensure that press and public access are preserved in these important proceedings.

Forum leadership is also navigating how to plan for the next annual conference at a time when social distancing is the new normal, serious economic issues impact most organizations, and travel challenges seem to be greater by the day. There is hope that we can still hold the annual conference in Coronado Bay in San Diego with the annual dinner aboard the aircraft carrier *U.S.S. Midway*. Reality may intrude, as many other ABA divisions, sections, and forums have had to chart a new course and hold their conferences virtually. In fact, the 2020 ABA Annual Meeting will now be virtual. Nonetheless,

the Forum planning committee, led by incoming Chair Lynn Carrillo, is focused on ensuring that the 26th Annual Conference will be as value added, informative, and engaging as in years past—whether it takes place virtually or in person.

While no one is yet sure what our future will look like, the Forum is working hard to adapt and keep you up to date on cutting-edge issues in defamation, privacy, digital communications, commercial speech, freedom of information, data collection and use, access to courts, government meetings and public records, FCC and FTC regulations, and First Amendment law. If you have ideas about how we may remain connected and continue to serve our members, or just want to become more involved, I encourage you to reach out to any of the Governing Committee and committee members.

In my two years as chair, I've seen

first-hand all the hard work put in by Forum leaders and members to ensure the rights of a free press, often in the challenging circumstances. On Memorial Day, George Floyd's death stirred outrage and worldwide protests about its injustice. The world is changing by the day, from peaceful protests, to looting, to curfews, to home restrictions, to journalists being targeted, hit, and arrested by the police. Politicians call for understanding and listening, while others call for force.

Our Forum consists of truly amazing people whose work is more important now than ever. As a highlight of some of those amazing people, the following pages recount the Forum's celebration of Barbara Wall, including introductions by former Chairs George Freeman and Lee Levine.

Enjoy this edition, and remember to wash your hands, wear a mask, and stay safe. ■

## OnDemand Webinars

### Access to Court Records: A Review of Recent Case Law

This program will provide a review of recent cases about accessing court records and provide guidance to communications lawyers looking to obtain these documents for their work. This webinar is free for members of the ABA Forum on Communications Law and students.

#### Lead Facilitator

**Michael J. Grygiel**, Shareholder | Greenberg Traurig

#### Speakers

<b>Heather Goldman</b> Partner Bryan Cave Leighton Paisner	<b>Rachel Matteo-Boehm</b> Partner Bryan Cave Leighton Paisner	<b>Christine Walz</b> Partner Holland & Knight, LLP
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#### Registration

<https://www.americanbar.org/events-cle/ecd/ondemand/398879878/>



AMERICANBARASSOCIATION

Forum on  
Communications Law

### Doxing, Bullying and Sextortion: The Legal and Social Landscape of Technology Facilitated Harassment

This webinar is intended to be an introduction to the legal issues surrounding cyber sexual harassment. Panelists discuss the practicalities of what lawyers can and must do to successfully represent clients facing online harassment that is sexual in nature and those representing companies hosting content that may be impacted by online harassment.

#### Lead Facilitator

**Jennifer A. Dukaraski**, Shareholder | Butzel Long

#### Speakers

<b>Anette Beebe</b> Founder & Managing Member Beebe Law	<b>Elisa D'Amico</b> Partner K & L Gates
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#### Registration

<https://www.americanbar.org/events-cle/ecd/ondemand/400809800/>

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# Barbara Wall Receives the 2020 ABA Forum on Communications Law's Champion of the First Amendment Award

**B**arbara Wall, former senior vice president and chief legal officer of Gannett, was awarded the most prestigious award of the ABA Forum on Communications Law, for her more than 40 years of dedicated service to the Media Bar. The Forum honored Wall with the **Champion of the First Amendment Award** in February during its 25th Annual Conference. The award is co-sponsored by the Freedom Forum.

The Freedom Forum's mission is to foster First Amendment freedoms for all. It works to raise awareness of First Amendment freedoms through education, advocacy, and action, sharing the stories of Americans who have exercised their rights to ignite change.

Below are introductory remarks by former Forum Chairs George Freeman, executive director, Media Law Resource Center (MLRC), and Lee Levine, senior counsel, Ballard Spahr. Barbara Wall's acceptance speech follows.

## Remarks by George Freeman

I first met Barbara at an MLRC Conference held in the basement of some hotel at O'Hare Airport in the mid-1980s—ironic, since then we were two newbie media lawyers, and now I am the director of the MLRC and she went on to much more exalted heights. But I quickly discovered that, as now, she was very charming, very convivial, and very clever—and that basement meeting paved the way to a wonderful 35-year friendship.

The more I got to know Barbara, the more I appreciated her unique skills and traits:

- She has great judgment; she doesn't just instinctively waive the



Barbara Wall

First Amendment flag. She fights doggedly when the facts warrant it and will retreat and negotiate wisely at other times.

- She is a great mentor; I can't even guess at the number of people in this room, mainly women, who have told me that they had gained a new job or position because Barbara had interceded to make it happen.

- She is a great speaker; I've seen Barbara speak at PLI panels and ABA Conferences for over 25 years, and she is by far the most practical speaker in our Bar. Rather than citing and summarizing Court of Appeals decisions from far-reaching Circuits, Barbara invariably tells audiences what they should know about handling situations that will come up in their day-to-day practice. Indeed, she did just that at a PLI panel she was on just a few weeks ago, when I'm sure her mind was more focused on the upcoming Gannett merger proceedings.

My keynote experience with

Barbara occurred during a dinner we had in London during an ABA boondoggle there. I was bemoaning that I had just been to another bar group's annual meeting in Boca Raton, Florida, and that it was very different from the Media Bar's—it included lots of time for tennis, golf, swimming, beaching, eating, drinking, and schmoozing—very unlike our conferences where one essentially worked all day with no time for bonding or fun. Rather than commiserate with me, Barbara directly responded: "Why don't we have a conference like that too?," suggesting that since she was currently co-chair of the ABA's First Amendment and Media Litigation Committee, she could get that done.

We spent the rest of the dinner planning it out—the site, on the ocean at Boca Raton; the schedule, work through lunch, then recreational activities giving attendees time to deal with each other out of the workplace and work clothes environment; some of the programs, why not have a retrospective of a past case (our first conference commemorated the 25th anniversary of the Pentagon Papers, the next, Watergate); and to include families, a moot court case for kids. As it turned out, the ABA's Litigation Section turned her down for silly bureaucratic reasons, but Barbara was undaunted: She went to Lee Levine, chair of the ABA's Communications Forum, and convinced the Forum to be our sponsor and supporter.

So quickly the first Boca conference was up and running, but soon we ran into another problem: attendance was paltry, and I was panicking. Barbara had a practical

solution for that too. She called for a meeting of all Gannett outside lawyers from all over the country to be held in Boca Raton the day before our conference was scheduled to start. I organized a similar, though smaller, meeting of Times Company lawyers, and soon we had a respectable attendance of about 150. After a successful inaugural conference, we soon grew to above 200—and I'm happy to see that we're here today, about 325 strong, celebrating the 25th anniversary of the Boca conference.

So congratulations, Barbara. It's been a great 35 years—from picking menus and programs for our Boca conferences and watching you successfully politic and maneuver the honchos of the ABA to forming successful coalitions on amicus brief and newspaper vending machine issues (remember *USA Today* boxes all over the country?), and just plain having fun.

#### Remarks by Lee Levine

I, of course, endorse everything George has said. So I'll try my best to be brief.

I too will never forget that day, more than 25 years ago, when Barbara called and attempted to persuade me to join her and George in starting an annual, ABA-sponsored conference for our bar. The rest, as they say, is history. For the next 10 years, I got to see Barbara in action as we planned each year's conference. And during those years, and during those that have followed, I learned a lot about her. Above all else, I learned that Barbara Wall is a leader. She embodies all the essential qualities of leadership: excellent judgment, a mastery of the art of gentle persuasion, a penchant for helping her colleagues succeed, an awareness of her responsibility to serve as a role model, a sense of grace and humility, and an uncanny ability to get things done.

In proving that case, the existence of this conference is certainly Exhibit A, but there are volumes of others. I'll mention just one. While she was Forum chair, Barbara co-founded Women in Communications Law, where she practiced what she preached about mentoring young

lawyers. I can't tell you how many calls I've received from Barbara over the years urging our firm to hire a young lawyer who had impressed her, asking me to put in a good word for someone who was applying for an in-house job at one of our firm's clients, or gently suggesting (always gently) that I advocate for one of our colleagues seeking some new position or other. And, in doing so, Barbara was always cognizant of her unique position as a role model and advocate for the women in our bar. By my count, Barbara will be the fifth recipient of the award she is receiving today, joining a group that includes Dick Winfield, Jim Goodale, the late John Borger, and Tom Kelley. It is more than appropriate that Barbara is the first woman to join that distinguished group.

Finally, I would be remiss if I did not say a few words about Barbara's personal kindness and friendship. As George mentioned, Barbara has been a long-time faculty member at the PLI Communications Law program, which I co-chair. This past year, when she had her hands more than full with the Gannett/Gatehouse merger, Barbara nevertheless made the time to come to New York and fulfill her commitment. More than 20 years ago, when a rag-tag group of media lawyers named Levine Sullivan and Koch got the crazy idea to start their own firm, Barbara volunteered to pay us a monthly retainer, which helped see us through that first, cash-strapped year. When I taught media law at Georgetown Law School, Barbara came to the class several times to talk to prospective media lawyers about her craft. For all of these things, Barbara, I am in your debt.

When Barbara would come to my class at Georgetown, she would always begin by showing a clip from the film *Absence of Malice*, the scene in which the smug newspaper lawyer does pre-publication review of a dubious story and pronounces it fit for publication. She would then proceed, year after year, to teach those students how a real media lawyer *should* comport him or herself. For decades, with her trademark grace and dignity, Barbara has been teaching all of us

how to comport ourselves and that, my friends, is the very definition of leadership.

In the audience with us today is Lata Nott, chief content officer of the Freedom Forum. Barbara, it is my great honor, on behalf of the ABA Forum on Communications Law and the Freedom Forum, to present you with this Champion of the First Amendment award.

#### Remarks by Barbara Wall

Thank you, thank you, thank you.

A lot has been said about me today, and I appreciate all the kind words—thanks so much.

But now I'd like to spend a few minutes talking about all of you. And what an impressive group you are!

I took a look at the list of attendees, and it turns out that in the room today we have representatives of 25 news organizations—CBS, Atlantic Media, AP, PBS, NBC, *New York Times*, Fox, Dow Jones, E.W.Scripps, Vox Media Reporters Committee, CNN, Pro Publica, Quartz, *Washington Post*, Discovery Network, NPR, Tegna, Meredith, NextStar, Univision, MPAA, Verizon Media and Gannett—and outside counsel from 36 states, including Florida, Illinois, Arizona, Michigan, South Carolina, Louisiana, Washington, Hawaii, Oklahoma, and Mississippi, as well as Australia, Canada, Bermuda, and the UK.

And the lawyers in this room have

- successfully defended thousands of libel cases (raise your hand if you've defended a libel case);
- won access victories at the highest courts in the country, including the Supreme Court (show of hands);
- convinced judges to quash countless subpoenas, including those for confidential sources (show of hands); and
- provided prepublication advice on investigative reports that have won Pulitzers and Emmys, but more importantly have changed lives around the world (show of hands).

What you do is exceptionally

important.

And while I know you take pride in the victories in cases you handle individually, you know it's even better to be part of a community like this one where we get together once a year to celebrate these victories and gain inspiration from one another.

So congratulations to all of you and thank you for being here.

Now a lot has been said about my advocacy for advancing the careers of women in communications law. It's true, it's a cause near and dear to my heart, though, of course, I admire and respect the work that the men in this room do, too.

And again, going back to the list of attendees, I counted 325, almost half of whom are women.

When I started out practicing law in 1979 and the LDRC dinner was the place that media lawyers gathered, it would be a good year if 5 percent of the attendees were women. So progress has been made!

And as far as this conference is concerned, I like to think the way we organized it

- to be family friendly (remember moot court for kids?);
- to include a wide range of activities, everything from tennis and golf, to sailing trips and antiquing in Palm Beach;
- to showcase young talent; and
- to include a gathering of WICL each year

has created an atmosphere where everyone feels welcome and comfortable. Heck, people have begun to feel

so comfortable, we even had a wedding at the conference in 2017. Where are you, Lincoln Bandlow? So I'm very pleased to have been part of the group that brought this conference into being.

In closing, let me say

- It's been the honor of a lifetime to be a part of this community.
- Thank you for the kind words.
- Thank you for the Champion of the First Amendment Award.
- Thank you for the impressive work you all do on behalf of news organizations.

And promise me that you will never give up the good fight because freedom of the press is a cause we cannot take for granted now more than ever. ■

## Upcoming Webinar



AMERICAN BAR ASSOCIATION

Forum on the Entertainment & Sports Industries

### Literary Publishing: Where the Roles of Lawyers and Agents Intersect

July 28, 2020 | 1:00 PM Eastern | 60-minutes

Lawyers and agents both play important roles for clients interested in publishing, marketing, selling, or licensing their works. This panel will discuss the role agents and lawyers play in negotiating deals for their clients and the legal limitations of those interactions. It will also discuss the differences between agents and lawyers and their roles in literary publishing, how and where those roles overlap, and the industry norms and regulations that guide and shape them. Additionally, it will discuss how lawyers and agents can work together to best serve their publishing clients.

#### Lead Facilitator

**Dirk Vanover** Attorney  
Vanover Legal, LLC



#### Speakers

**Cheryl Davis**  
General Counsel  
The Authors Guild



**Wendy Strothman**  
Literary Agent  
The Strothman Agency



**Jonathan Lyons**  
Attorney,  
Lyons & Salky Law, LLP  
and Vice President,  
Curtis Brown



Registration: <https://www.americanbar.org/events-cle/mtg/web/402243062/>

# Examining the Embedding Evolution: Counseling Clients on Safely Embedding Copyrighted Material

BY MICHAEL J. LAMBERT

Your client calls with a “quick legal question” about her latest online article. In the piece, she intends to highlight the works of 10 women social justice photojournalists. “Most of them have posted their photos on Instagram,” she explains. “Can’t I just embed them on our website? I mean, after all, we are providing free publicity.” You take a deep breath, collect your thoughts, and tell her, “It’s not quite that easy.”

You remember a recent embedding case, *Goldman v. Breitbart*,<sup>1</sup> where the court rejected the Server Test and held that embedding violated the exclusive display right. Before telling your client she’s out of luck, you pull up *Goldman* and refresh your memory:

In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to **licensing and authorization**. There is also a very serious and strong **fair use defense**, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.<sup>2</sup>

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You breathe a sigh of relief. You remember that *Goldman* only addressed the display right, leaving other defenses available. You then explain to your client how she could safely embed by seeking permission from the photojournalists, considering whether Instagram’s Terms of Use grants a sublicense, and transforming the images under fair use. You add that she can always link to the photos without liability risk.<sup>3</sup>

Copyright case law has traditionally focused on whether embedding infringes upon the exclusive rights. However, there are other ways to avoid copyright liability. This article will take a macro view of copyright law and discuss how to advise clients who want to embed copyrighted content. It will explore the history of embedding and then pick up where the *Goldman* court left off and consider how clients can minimize risks through authorization and fair use.

## Background

### *The basics of copyright law*

Under the U.S. Constitution, Congress has the power to create copyright law in order to promote art and culture.<sup>4</sup> The Copyright Act of 1976 grants a limited right of ownership in original expressive works “now known or later developed,” such as text, images, paintings, music, and sculptures.<sup>5</sup> Copyright ownership exists the moment the expression (not an idea or a fact) is created and recorded.

Registering a work with the U.S. Copyright Office<sup>6</sup> is not required to obtain copyright protection, but it is a prerequisite for bringing an infringement action.<sup>7</sup> Copyright law provides a bundle of exclusive rights to the owner, including the rights to (1) reproduce, (2) prepare derivative

works, (3) publicly distribute, (4) publicly perform, and (5) publicly display the content.<sup>8</sup>

A copyright owner may bring a claim for direct liability against a party who violates its exclusive rights.<sup>9</sup> It may also bring a claim for secondary liability if a party is liable for the infringing acts of another under theories of contributory liability,<sup>10</sup> vicarious liability,<sup>11</sup> and inducement.<sup>12</sup> Defenses to copyright infringement include receiving authorization from the copyright holder and using the work in a “fair” manner.<sup>13</sup> Under the law, courts are authorized to order an infringer to pay statutory damages and attorney fees, where statutory requirements are met.<sup>14</sup>

### *Copyright law and embedding*

Copyright law generally applies equally to content distributed through traditional media and the internet. However, special legal considerations have been developed to address unique aspects of internet technology, such as the ability to “embed” copyrighted materials. Put simply, embedding allows a website designer to incorporate content located on a third party’s website onto its website.<sup>15</sup>

Social media platforms and websites often make “embed codes” of content available to third parties, such as website publishers. For example, an embed code exists for every public post on Instagram. When the code is embedded into a third-party website, the file (consisting of the post with text and an image or video) is incorporated into the new webpage, but the file remains stored on Instagram’s server. So, while the user views the content on the third-party website, it is technically receiving the content from the original source.

This new technology has spawned copyright lawsuits from content creators claiming that the act of embedding infringes their exclusive rights. Initially, courts ruled that embedding did not constitute infringement because the copyrighted content was located on third-party servers under what became known as the “Server Test.” More recently, however, lower courts have questioned this test. Courts have also considered defenses to infringement in the embedding context, such as authorization and fair use.

## (1) Server Test

### *Perfect 10*

The first significant embedding case came in 2007. In *Perfect 10, Inc. v. Amazon*, the U.S. Court of Appeals for the Ninth Circuit considered whether Google had directly infringed the display right by embedding third-party images on its Image Search.<sup>16</sup> The court applied what lower courts called the “Server Test.” Under this analysis, liability for copyright infringement rests on whether content is hosted on the publisher’s server or on a third party’s server. The court held that Google did not “display” the images and did not commit direct copyright infringement because it did not host the images on its own server.<sup>17</sup>

### *Flava Works*

In 2012, the U.S. Court of Appeals for the Seventh Circuit applied the Server Test to claims of contributory copyright infringement in *Flava Works, Inc. v. Gunter*.<sup>18</sup> The court reviewed whether myVidster, an online video platform, became a contributory infringer of the exclusive reproduction and display rights when it embedded third-party videos uploaded by users.<sup>19</sup> myVidster’s technology functioned similarly to Google’s in *Perfect 10*. When a myVidster user clicked on a thumbnail of a video, the user viewed the video on myVidster’s webpage even though the video was stored and transmitted from the server of the creator of the original video. The court ruled that, under the Server Test, myVidster had not created a new

copy of the original video on its servers, did not encourage the uploading of copyrighted content, and was not guilty of contributory infringement.<sup>20</sup>

Two years later, the federal district court in Chicago applied *Flava Works* and the Server Test to dismiss a direct infringement claim based on embedding.<sup>21</sup>

### *Goldman*

In the years after 2012, media lawyers often relied on the Server Test and what was perceived to be the “unbroken line of authority” of *Perfect 10* and *Flava Works*. A plaintiff named Justin Goldman put a crack in that line in 2018 when he sued a number of media companies for embedding his photo from Twitter without permission.<sup>22</sup> Goldman had taken a photo of NFL quarterback Tom Brady talking to the general manager of the Boston Celtics in the Hamptons while the Celtics were rumored to be recruiting Kevin Durant in NBA free agency. Goldman posted the photo on his private Snapchat Story. Friends of Goldman who saw the photo on his Snapchat Story took screenshots of the photo and posted it on Twitter. Numerous news outlets embedded the image from Twitter. Goldman sued the outlets for copyright infringement in the U.S. District Court for the Southern District of New York.

The court divided the litigation into two phases: (1) the potential violation of the display right and (2) the liability of the outlets and any defenses raised.<sup>23</sup> The parties filed cross motions for partial summary judgment on the display right issue. Relying on the Server Test, the news outlets argued that their conduct was “functionally and technologically indistinguishable” from that in *Perfect 10*.

The court disagreed, rejecting the Server Test and ruling that embedding the Tweet violated Goldman’s display right: “The fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield [defendants] from [liability].”<sup>24</sup> Judge Katherine Forrest explained that Congress cast a “very wide net” by including the display right in the

Copyright Act and that there was “nothing in either the text or purpose of the Copyright Act suggesting that physical possession of an image is a necessary element to its display for purposes of the Act.”<sup>25</sup> As she saw it, the U.S. Supreme Court’s decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*,<sup>26</sup> holding that a technology company could not escape liability “based upon purely technical distinctions,” “strongly supported” the conclusion that the news outlets violated the display right even if the images were not stored on their servers.<sup>27</sup> The judge distinguished *Perfect 10* on the basis that the Ninth Circuit had “relied heavily” on the fact that Google was a search engine.<sup>28</sup>

The court also rejected the defendants’ position that *Perfect 10* was part of an “unbroken line of authority,” noting that only three courts outside of the Ninth Circuit had considered the display right post-*Perfect 10*.<sup>29</sup> One of those, *Flava Works*, adopted the Server Test for contributory liability. The second court did not rely on *Perfect 10*.<sup>30</sup> And the third court declined to apply the test.<sup>31</sup> Since *Goldman*, two federal courts have likewise refused to apply the Server Test when faced with motions to dismiss.<sup>32</sup> One of those courts questioned the test’s application outside of the search engine context.<sup>33</sup>

The Second Circuit refused to hear an interlocutory appeal of Judge Forrest’s decision. The parties ended up settling the case, leaving the questions about defenses such as authorization and fair use unanswered.

## (2) Authorization

One alternative to relying on the Server Test is to obtain permission from the content creator to embed the content. Such authorization can be received expressly or implicitly through licenses.<sup>34</sup> Explicit licenses can be obtained through formal written agreements with detailed terms; abbreviated agreements through text, email, or social media messaging; and verbal permission. Deciding which of these tactics to use will depend on the risks associated with using the content, the client’s risk tolerance, and the logistics of contacting the content creator. Clients, especially those focused on breaking



news, frequently rely on shortened agreements obtained through online correspondences. In making these arrangements, clients should ask the content creator to affirm it has all necessary rights in the content and that it is granting permission to reproduce the content in the specific way desired.

Authorization can also be obtained implicitly through internet conduct. Licensing agreements are unconsciously entered into online. For instance, agreements are formed upon registering to use a social media platform or downloading an application. As a condition of using the platform, users are bound to its Terms of Use/Services and Policies. When a user uploads content to a platform, the content becomes subject to the agreed-upon terms, which often give the platform rights over the content. Those rights are sometimes shared with other users under a sublicense. To justify embedding copyrighted content from social media without permission, media companies have argued that they obtained a sublicense to embed the content through a social media platform's terms.

### **Morel**

In 2011, the U.S. District Court for the Southern District of New York considered whether Twitter's Terms of Service (TOS) provided a blanket license for a third party to use copyrighted content without permission.<sup>35</sup> In *Agence France Presse v. Morel*, a photographer posted photographs of an earthquake on Twitter, and a Twitter user then reposted the photos on her Twitter page. A newswire agency obtained permission to use the photos from the Twitter user but not from the original photographer. The newswire agency then licensed the photos to another entity.

After receiving takedown requests from the photographer, the newswire agency preemptively sued the photographer, arguing that Twitter's TOS granted it a license to use the photos. The photographer responded with a copyright infringement counterclaim.

The court determined that Twitter's TOS did not allow the use of copyrighted content without

permission. "Construing the Twitter TOS to provide an unrestrained, third-party license to remove content from Twitter and commercially license that content would be a gross expansion of the terms of the Twitter TOS."<sup>36</sup> Rather, the court explained, the TOS featured "directly contrary" provisions to the newswire agency's licensing argument. For instance, the TOS clearly stated: "You retain your rights to any Content you submit, post or display" and "what's yours is yours—you own your content."<sup>37</sup> In sum, the plain language of the Twitter TOS, the court found, granted a license only to Twitter and its "partners" but not to general users such as the newswire agency.<sup>38</sup>

### **Sinclair**

More recently, the Southern District of New York initially held in *Sinclair v. Ziff Davis* that Instagram's Terms of Use (TOU) *did* provide a sublicense allowing a media outlet to embed copyrighted content from a public profile without permission.<sup>39</sup> Media and entertainment platform Mashable.com wanted to embed photos posted on Instagram by a photojournalist named Stephanie Sinclair in an online piece about women social justice photographers. Mashable emailed Sinclair for permission to feature her photo in the article. Sinclair responded and inquired about Mashable's licensing budget. Mashable replied that Sinclair would be paid \$50 per picture and asked if that would be acceptable. Sinclair did not respond, but Mashable went ahead and embedded one of her Instagram posts featuring a photo in an article listing Sinclair as one of "10 female photojournalists with their lenses on social justice."<sup>40</sup>

Sinclair sued Mashable for direct copyright infringement. On April 13, 2020, the court dismissed the case because it found that Mashable had a valid sublicense to embed Sinclair's photo under Instagram's Terms of Use: "Here, Plaintiff granted Instagram the right to sublicense the Photograph, and Instagram validly exercised that right by granting Mashable a sublicense to display the Photograph."<sup>41</sup>

Judge Kimba Wood explained

that by creating an Instagram account, Sinclair had agreed to its TOU. The TOU provide that the user "grant[s] to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to the Content that you post on or through [Instagram], subject to [Instagram's] Privacy Policy."<sup>42</sup> Under Instagram's Privacy Policy, all content uploaded from "public" accounts are subject to use by others through Instagram's Application Programming Interface (API). Per its Platform Policy, Instagram's API allows website publishers, users, and others to "discover content, get digital rights to media, and share media using web embeds," subject to privacy settings and other restrictions. Thus, Mashable had the right to embed Sinclair's Instagram post with the photograph using the API.<sup>43</sup>

The court rejected Sinclair's argument that Instagram's Terms were "circular," "incomprehensible," and "contradictory."<sup>44</sup> While acknowledging that photographers may be faced with an "unfair" choice of remaining in private mode or granting third parties sublicensing rights, the judge said Sinclair was bound by her decision to post the photograph to her public Instagram account.<sup>45</sup> The court noted that it did not need to address the question at issue in *Goldman*—whether embedding an image infringes on the display right—because Instagram granted Mashable a valid license to display the photograph.<sup>46</sup>

### **McGucken**

On June 1, 2020, the same federal court in New York faced a similar question but reached a different conclusion. In *McGucken v. Newsweek LLC*, a photographer posted a photograph of a lake on her Instagram.<sup>47</sup> *Newsweek* asked the photographer for a license to use the photo. The photographer declined. Nevertheless, *Newsweek* embedded a post from the photographer's public Instagram account containing the image into a news article. The photographer sued *Newsweek* for direct copyright infringement.

Judge Katherine Polk Failla denied *Newsweek's* motion to dismiss. While she found Judge Wood's

decision in *Mashable* to be “well-reasoned,” she found “no evidence” of a sublicense between Instagram and *Newsweek*. She therefore declined to dismiss the claims based on the licensing theory “at this stage in the litigation.”<sup>48</sup> Even though Instagram’s Terms and Policies “clearly foresee the possibility” that third parties will embed other users’ content, the Terms did not expressly grant a sublicense to those embedding publicly posted content.<sup>49</sup> The court also found no evidence of an implied sublicense based on the pleadings. While it “may be possible to read Instagram’s various terms and policies to grant a sublicense to embedders,” the court refused to do so given the limited review permitted on a Rule 12(b)(6) motion.<sup>50</sup>

In the wake of *McGucken*, Instagram informed the technology website *Ars Technica* that it does not provide users of its API a copyright license to display embedded images on other websites.<sup>51</sup> “While our terms allow us to grant a sub-license, we do not grant one for our embeds API,” the company told *Ars Technica* in an email. “Our platform policies require third parties to have the necessary rights from applicable rights holders. This includes ensuring they have a license to share this content, if a license is required by law.”

### **Sinclair (on reconsideration)**

On June 24, 2020, Judge Wood granted Sinclair’s motion for reconsideration and revised her initial ruling.<sup>52</sup> She concluded that the pleadings, in fact, contained *insufficient* evidence that Instagram granted *Mashable* a sublicense to embed the photograph. The court’s initial decision “did not give full force to the requirement that a license must convey the licensor’s ‘explicit consent’ to use a copyrighted work.”<sup>53</sup> While Instagram’s Platform Policy *could* be interpreted to grant API users the right to embed public content of other Instagram users, that was not the only possible understanding. Citing *McGucken* and *Morel*, the court determined that Instagram’s terms were “insufficiently clear to warrant dismissal of Plaintiff’s claims at this stage of litigation.”<sup>54</sup>

These recent licensing developments raise many questions: Will a licensing theory prevail with a more developed case record? To what extent will Instagram’s statement influence interpretations of its terms in future cases? Will other social media platforms take similar positions? Will these recent embedding decisions encourage Instagram and other social media platforms to revise their terms to clarify what uses are permitted? Will they result in the revisions of privacy settings to give content creators more control?

Two conclusions can be drawn from the case law to date: First, media companies may be permitted to embed copyrighted material from public profiles if the platform’s terms grant permission to do so. And second, unless the platform’s terms contain clear language granting users a license to embed material posted by other users, a media company is not likely to establish such permission on a motion to dismiss.

### **(3) Fair Use**

Media lawyers have often focused on how clients can take advantage of the Server Test and licensing. These theories are attractive because they don’t require an ad hoc assessment tailored for each use: The Server Test essentially permits *carte blanche* use of social media content as long as embedding guidelines are followed; licensing provides a trusted policy tailored for each platform. But given recent challenges to the Server Test and the fluidity of social media terms, the fair use doctrine, if utilized correctly, may provide the most reliable way to avoid liability for embedding copyrighted material without permission.

As an initial caveat—embedding alone will likely not be considered a fair use. As seen by a pair of cases out of the Southern District of New York this summer, courts will apply traditional fair use principles to embedded works. This involves a fact-intensive inquiry, analyzing how the work was used and why it was used.

### **McGucken**

In *McGucken*, *Newsweek* embedded

an Instagram post featuring a photograph of a lake taken by a professional photographer.<sup>55</sup> The online piece, “Huge Lake Appears in Death Valley, One of the Hottest, Driest Places on Earth,” focused on a lake in Death Valley National Park near Salt Creek.<sup>56</sup> In the article, the author wrote that photographer Elliot McGucken captured the spectacle at Salt Creek and shared several photos of it on Instagram. It then included a post from McGucken’s Instagram containing a photo of Salt Creek.

The court ruled that embedding the Instagram post containing the photo, without more, was not a fair use as a matter of law, denying *Newsweek*’s 12(b)(6) motion to dismiss.<sup>57</sup> The first fair use factor—the purpose and character of the use—favored the photographer: While the use of a copyrighted photograph in a news article *can be transformative* when the photograph itself is the subject of the story, it fails that standard when it is being used as “an illustrative aid depicting the subject of the Article.”<sup>58</sup> The court added: “[T]he mere addition of some token commentary is not enough to transform the use of a photograph when that photograph is not itself the focus of the article.”<sup>59</sup> The second and third fair use factors were neutral, while the fourth factor weighed in favor of the plaintiff. The court found a presumption of market harm because *Newsweek*’s use was commercial<sup>60</sup> and was a duplication of the original as opposed to a transformative use.<sup>61</sup>

### **Walsh**

In *Walsh v. Townsquare Media, Inc.*, the hip-hop outlet XXL embedded a post from rapper Cardi B’s Instagram featuring a professional photograph of her at a fashion show.<sup>62</sup> The article, “Cardi B Partners with Tom Ford for New Lipstick Shade,” discusses how she had received her own lipstick from designer Tom Ford.<sup>63</sup> It mentions the announcement of the new lipstick, reactions from fans, and how Cardi B claimed, in an Instagram post, that the lipstick had already sold out, adding the caption, “Sorry :/ . . .” Under this section of the article, XXL embedded three Instagram posts, including a post from Cardi B’s

account featuring a composite image of her new lipstick on the left, a professional photograph of Cardi B at a fashion show on the right, and the words “Cardi B’s Tom Ford Lipstick has already SOLD OUT!!!” at the top. It included Cardi B’s Instagram caption, “Sorry :/ . . .”

The court held that embedding the Instagram post featuring the professional photograph was fair as a matter of law, granting XXL’s motion for judgment on the pleadings.<sup>64</sup> The first factor favored XXL because the article used the photograph for “an entirely different purpose than originally intended.”<sup>65</sup> While the photograph was originally taken to depict Cardi B at a fashion show, XXL published the post, which “incidentally” contained the photograph, to report on the fact that Cardi B had made the post. It did not use the photograph as a “generic image of Cardi B” or alongside an article about the fashion show. The court found that Cardi B’s making and dissemination of the post were the subject of the story; therefore, the function of the photograph was transformed in a new context. The other three factors also weighed in favor of fair use: The photograph was already published and was not particularly creative.<sup>66</sup> Embedding the post, which contained the photograph, was the only way to accomplish XXL’s “journalistic objective.” The website did not take more than was necessary.<sup>67</sup> And it was considered “implausible” that the use would impact the market for the work because the photograph, not the post, had value to potential licensees.<sup>68</sup>

*McGucken* and *Walsh* demonstrate the importance of knowing how and why you are using a copyrighted work before embedding. The fate of a fair use defense will likely hinge on whether the use is transformative. Ask yourself: Is the work the subject of the story? Or is it being used to illustrate a separate focus of the piece? Is the work being used for a different purpose than originally intended? Or does it serve the same goal as the original work?<sup>69</sup>

You should also consider other risk factors: Does the content creator make a living licensing her work, such as a professional photographer?

Does the work depict the content creator in a negative light? Are there third-party copyrighted works featured within the work?

### Conclusion

The Server Test, authorization, and fair use provide ways to circumvent liability when embedding copyrighted material. They should be carefully used on an individual basis with your client and the nature of the copyrighted content in mind. And they should be reconsidered as case law develops. Until courts provide more clarity, we must provide the most tailored legal analysis to help our clients make informed decisions based on what we know. Here are some key takeaways to keep in mind:

- The fate of the Server Test is unclear. It remains the law in the Ninth Circuit for direct infringement of the reproduction and display rights and in the Seventh Circuit for contributory infringement. Lower courts have questioned its application outside of the search engine context. District courts in the Second and Fifth Circuits have refused to apply the Server Test. And courts in the Ninth and Seventh Circuits have declined motions to dismiss based on it.
- Clients *may* be able to rely on licensing through social media terms and policies. This will involve a case-by-case assessment of each platform’s terms, awareness of changes to policies, and monitoring of public statements made by the platforms. A licensing defense based solely on terms is not likely to prevail on a motion to dismiss unless language is explicit.
- Fair use remains a viable defense—as long as you would have a fair use argument without embedding. Ask whether the work is being used in a different way than the original and if the work is itself newsworthy. Also consider the potential market value of the work and the likelihood of the content creator bringing a claim. ■

### Endnotes

1. 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

2. *Id.* at 596.

3. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH (BQRX), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

4. U.S. CONST. art. I, § 8, cl. 8.

5. 17 U.S.C. § 102.

6. *Id.* § 408.

7. *Id.* § 411.

8. *Id.* § 106.

9. *Id.* § 501. When assessing a direct copyright infringement action, courts will consider whether (1) the plaintiff owns a valid registered copyright, (2) the defendant had access to the plaintiff’s work, and (3) the alleged infringing work is substantially similar to the copyright work. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Computer Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992).

10. To prove contributory liability, the copyright owner must prove (1) direct infringement, (2) knowledge of the direct infringement, and (3) participation in the direct infringement. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987); *Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181 (D.D.C. 2005).

11. The copyright owner must show the following to succeed on a vicarious liability claim: (1) direct infringement, (2) the right and ability to control the direct infringer, and (3) the intent or purpose of promoting the infringing use. *See A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

12. To show inducement, the copyright owner must prove (1) direct infringement, (2) distribution of the device used to infringe, and (3) the intent or purpose of promoting the device for its infringing use. *See MGM v. Grokster*, 545 U.S. 913 (2005).

13. *See* 17 U.S.C. § 107.

14. *Id.* § 412.

15. *See Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018); *Connecting to Other Websites*, STAN. UNIV., <https://fairuse.stanford.edu/overview/website-permissions/linking>; *Linking to Copyrighted Materials*, DIGITAL MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/>

linking-copyrighted-materials.

16. 508 F.3d 1146 (9th Cir. 2007).
17. *Id.* at 1159–61.
18. 689 F.3d 754 (7th Cir. 2012).
19. *Id.* at 756.
20. *Id.* at 757–58.
21. *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, No. 13 C 4664, 2014 WL 3368893, at \*5 (N.D. Ill. July 8, 2014).
22. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).
23. *Id.* at 586.
24. *Id.*
25. *Id.* at 584. The court also noted that the Register of Copyrights testified that the display right was “intended to cover every transmission, retransmission, or other communication of [the image]” and to adapt to changing technology. *Id.* 26. 573 U.S. 431 (2014).
27. *Goldman*, 302 F. Supp. 3d at 595. In *Aereo*, the U.S. Supreme Court held that an online streaming technology infringed the public performance right. The fact that users clicked a button to initiate the performance was inconsequential in the Court’s view. 573 U.S. at 451. Applying the reasoning in *Aereo*, Judge Forrest wrote that liability “should not hinge on invisible, technical processes imperceptible to the viewer.” *Goldman*, 302 F. Supp. 3d at 595.
28. *Id.* The court also said it was “skeptical” of the Ninth Circuit’s interpretation of the display right. By focusing on whether a “copy” of the image was stored on the server, the Ninth Circuit, according to Judge Forrest, incorrectly collapsed the display right in section 106(5) into the reproduction right in section 106(1). *Id.*
29. *Id.* at 591.
30. *Capital Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (stating as a factual matter that the Ninth Circuit has held that infringement hinges on where the image was hosted).
31. *Leader’s Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017) (disagreeing with the Ninth Circuit’s view that possession of a copy is a necessary condition for violating the display right).
32. *See Bell v. Chi. Cubs Baseball Club LLC*, No. 19-cv-2386, 2020 WL 550605 (N.D. Ill. Feb. 4, 2020) (the motion to dismiss relied on facts not alleged in the governing complaint); *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d

1162 (N.D. Cal. 2019) (noting that subsequent cases have refused to apply the Server Test outside of the search engine context).

33. *See Free Speech Sys., LLC*, 390 F. Supp. 3d at 1172.
34. A copyright owner may license his or her rights in copyrighted material to one or more parties. *See Davis v. Blige*, 505 F.3d 90, 98–99 (2d Cir. 2007); *see also* 17 U.S.C. § 203.
35. *Agence France Presse v. Morel*, 934 F. Supp. 2d 547 (S.D.N.Y. 2013).
36. *Id.* at 562.
37. *Id.*
38. *Id.*
39. No. 18-cv-790, 2020 WL 1847841 (S.D.N.Y. Apr. 13, 2020).
40. *Id.* at \*1.
41. *Id.* at \*2.
42. *Id.* at \*3.
43. *Id.* at \*1.
44. *Id.* at \*4.
45. *Id.*
46. *Id.* n.3.
47. No. 19 Civ. 9617 (KPF), 2020 WL 2836427 (S.D.N.Y. June 1, 2020).
48. *Id.* at \*4.
49. *Id.*
50. *Id.* at \*5.
51. Timothy Lee, *Instagram Just Threw Users of Its Embedding API Under the Bus*, ARS TECHNICA (June 4, 2020), <https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/?comments=1>.
52. Opinion and Order, No. 18-cv-790, ECF No. 41.
53. *Id.* (quoting *Ward v. Nat’l Geographic Soc.*, 208 F. Supp. 2d 429, 442–43 (S.D.N.Y. 2002) (quoting *Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (2d Cir. 2002))). *Ward* was not raised “with any clarity” in the original briefs. *Id.*
54. *Id.*
55. *McGucken*, 2020 WL 2836427, at \*1.
56. Katherine Hignett, *Huge Lake Appears in Death Valley, One of the Hottest, Driest Places on Earth*, NEWSWEEK (Mar. 14, 2019), <https://www.newsweek.com/death-valley-lake-california-flooding-rain-winter-storm-1362695>.
57. *McGucken*, 2020 WL 2836427, at \*9.
58. *Id.* at \*6.
59. *Id.*
60. *Id.* The court considered *Newsweek’s* use to be commercial because the Second Circuit has recognized that almost all “newspapers, books and

magazines are published by commercial enterprises that seek a profit.” *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 83 (2d Cir. 2014).

61. *McGucken*, 2020 WL 2836427, at \*9.
62. No. 19-CV-4958 (VSB), 2020 WL 2837009 (S.D.N.Y. June 1, 2020).
63. Nick Mojica, *Cardi B Partners with Tom Ford for New Lipstick Shade, XXL* (Sept. 10, 2018), <https://www.xxlmag.com/cardi-b-tom-ford-lipstick-shade-named-after-her>.
64. *Walsh*, 2020 WL 2837009, at \*8.
65. *Id.* at \*5. The court asked whether the use superseded the original work or added something new, with a further purpose or different character. It noted that fair use applies to news reports when the copyrighted work is itself the subject of the story, transforming the function of the work in a new context, but not when it is used for the same reason it was created, such as accompanying an article about a person or describing the event depicted in the photograph. Such examples include displaying a screenshot or clip from a video that has gone viral “to illustrate what all the fuss is about” or displaying a controversial photograph with commentary about the artistic merit or appropriateness of the photograph. *Id.* at \*4.
66. *Id.* at \*6.
67. *Id.* at \*7.
68. *Id.* at \*8.
69. Two other rules of thumb should be considered: (1) Determine what you are reporting or commenting on and (2) Use only what you need and no more. *See Steve Zansberg, Counseling Your Clients on Fair Use of Others’ Works . . . While Standing on One Foot*, 34 COMM’NS LAW., no. 2, Winter 2019, at 10, [https://www.americanbar.org/content/dam/aba/publications/communications\\_lawyer/Winter19/cl\\_v034n02-winter19-d7.pdf](https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/Winter19/cl_v034n02-winter19-d7.pdf).

# Recent Cases Address Requirement That Access to Court Records Be Contemporaneous (or Timely)

BY RACHEL MATTEO-BOEHM, HEATHER GOLDMAN, AND KATHERINE KEATING

**D**uring a six-week period in January and February 2020, just before the COVID-19 pandemic hit the United States, federal courts in California and Virginia decided three important cases addressing the requirement that access to court records be “contemporaneous” or, in the words of the Ninth Circuit, “timely.”

As courts navigate the COVID-19 crisis and adjust their procedures for public and press access to court records in the changing environment, these decisions set the framework for determining whether procedures for public and press access to court records are constitutional. They also provide a framework for future litigation challenging delays in access to not only newly filed civil complaints but other court records as well.

Courthouse News Service (CNS), which reports on civil litigation in state and federal courts throughout the country, brought the lawsuits to remedy delays in access to new civil complaints in Southern California’s Ventura and Orange Counties (*Courthouse News Service v. Planet*<sup>1</sup> and *Courthouse News Service v. Yamasaki*<sup>2</sup>) and Virginia’s Prince William County and Norfolk (*Courthouse News Service v. Schaefer*<sup>3</sup>). Collectively, these three cases address a number of important issues relating to access to court records, including:

- What does “contemporaneous” access, also known as “timely” access, mean in the context of court record access?

- Under what circumstances can a court clerk deny “contemporaneous” or “timely” access?
- When does the First Amendment right of access attach for purposes of determining whether access is contemporaneous or timely?
- Does the right of access implicate the right of free expression?
- Does the requestor’s commercial or other interest in requesting the records matter?

The cases also address procedural issues arising in court-record access lawsuits, including mootness, abstention,<sup>4</sup> the scope of injunctive and declaratory relief, and the particularities of actions under 42 U.S.C. § 1983.

## Background: CNS and Its Access Litigation

CNS offers many publications about civil litigation, including subscriber-based reports of newsworthy civil complaints written by staff reporters who comb through each day’s new filings. Traditionally, courts made paper copies of the day’s complaints available to journalists who visited the court each day, regardless of whether court staff had completed the often time-consuming process of docketing them.

CNS saw a decline in access as courts began implementing technology—first scanning and later e-filing—just as financial pressures for the traditional press meant fewer reporters visiting courthouses to guard against scanning and e-filing interfering with access to new filings. Many courts adopted technology without undermining access. But in courts that implemented technology without regard to its impact on access, the press often had to wait until court staff had finished post-filing “processing” (i.e., docketing) and

scanning paper-filed complaints and “processing” e-filed complaints. In these courts, new complaints tended to accumulate in an actual or virtual stack (e.g., a computer queue) beyond the reach of the press. By the time reporters could see new complaints, they were old news, less likely to be reported on, and news stories about them less likely to be read.

Unlike most access litigation, in which the media seeks access to court proceedings that are closed or records that are sealed in a particular high-profile case, CNS sought injunctive and declaratory relief requiring clerks to use procedures to ensure contemporaneous access to new civil complaints on an ongoing basis. And rather than intervening to resist sealing or closure, CNS’s cases were brought under 42 U.S.C. § 1983 against court clerks in their official capacity. While the Eleventh Amendment generally prohibits federal court actions against state actors, an exception exists under *Ex Parte Young* for official capacity suits seeking prospective, nonmonetary, injunctive, and/or declaratory relief. In addition, prevailing plaintiffs in section 1983 actions are normally entitled to recover attorney fees.

## Development of First Amendment Right of Access to Court Records

The right to access court records can be found in state statutes and rules (including public records laws in some states), state constitutions, federal common law, and the First Amendment. The common law right of access, recognized in *Nixon v. Warner Communications*,<sup>5</sup> applies to all court records, but it does not provide as much substantive protection as the First Amendment right of access. The First Amendment right of access applies only to specific categories of

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court records, but, where it applies, limitations on the right of access are subject to constitutional-level scrutiny.

In a series of cases decided in the 1980s, the U.S. Supreme Court found a right of access to criminal trials and criminal pretrial proceedings grounded in the First Amendment freedoms of speech and press.<sup>6</sup> A number of federal circuit and district courts and state courts have since recognized that the First Amendment right of access extends to civil proceedings and to court records in civil and criminal cases.<sup>7</sup>

To determine whether the First Amendment right of access applies to a particular category of court hearing or record, courts most often apply the “experience” and “logic” test set forth in *Press-Enterprise II*.<sup>8</sup> This test examines whether the particular document or proceeding has historically been open to the press and general public (“experience”) and “whether public access plays a significant positive role in the functioning of the particular process in question” (“logic”).<sup>9</sup> Some circuits, such as the Second and the Fourth, also use an “analytical” approach, which asks whether the record is a necessary corollary of the capacity to attend the relevant proceedings.<sup>10</sup> Under either approach, courts have long recognized that access delayed is access denied.<sup>11</sup> Most recently, this was the sentiment of Eastern District of Virginia Judge Henry Coke Morgan Jr., who, ruling from the bench at the end of a four-day jury trial, stated: “The Court finds that news has a rapidly diminishing shelf life, and therefore access delayed is access denied.”<sup>12</sup>

### **The Virginia Litigation: *CNS v. Schaefer et al.***

In July 2018, CNS brought a section 1983 action in the Eastern District of Virginia against the clerk of the Norfolk Circuit Court, George Schaefer, and the clerk of the Prince William County Circuit Court, Jacqueline Smith (together, the “Virginia Clerks”), in their official capacities. CNS sought declaratory and injunctive relief to address the Virginia Clerks’ practices and policies of withholding new civil complaints from public or press review until they had

been posted to public access terminals—after administrative processing and scanning—which resulted in delayed access in violation of the First Amendment.

The Norfolk and Prince William Circuit Courts are voluntary e-filing courts, but the majority of new complaints are still filed in paper.

The Virginia Clerks responded to the suit by filing a motion to dismiss based on failure to join a necessary and indispensable party—the Office of Executive Secretary of the Supreme Court of Virginia (OES)—and for misjoinder and lack of venue over Smith. Five months later, in January 2019, the Virginia Clerks filed a motion for abstention. Both of these motions—dismissal and abstention—were denied by the court on March 18, 2019.<sup>13</sup>

Throughout the litigation, one of the Virginia Clerks’ main defenses was that there were no delays in access and that they were providing access to newly filed complaints on the same day as filing. Given the Virginia Clerks’ claims of no delays, extensive discovery was required to locate documentation to confirm that delays did exist. Third-party discovery from OES ultimately revealed that metadata existed showing when a complaint was scanned and made available on the public access terminals.

Using the OES data, CNS’s expert calculated delays for newly filed civil complaints (using a calculation of the time between the filed date stamped on the complaint and the scan date) and found that, for the relevant period of January through June 2018, only 5 percent of complaints were made available on the same day of filing in Norfolk and only 38 percent were made available on the same day in Prince William. The Virginia Clerks also hired an expert who calculated delays for all civil filings (not just civil complaints) based on what was made available “within one court day of filing.” Their expert found that 89.7 percent of new filings were made available within one court day of filing in Norfolk and 94.3 percent of new filings were made available within one court day of filing in Prince William.<sup>14</sup>

Once the lawsuit was filed, access

in both courts gradually improved. In 2019, CNS saw an average of 94 percent of new civil complaints at the Prince William Circuit Court on the day of filing, and up to 90 percent of new complaints on the day of filing in Norfolk.

Although virtually unheard of in right of access litigation, a four-day bench trial was held from January 31, 2018, through February 5, 2018. Witnesses at trial included CNS’s founder and editor, CNS’s Southeast Bureau Chief, the Virginia Clerks and supervising clerks in each of their offices, and the parties’ experts.

On February 5, 2020, the last day of trial, in a ruling from the bench, the court granted CNS a declaratory judgment.<sup>15</sup> Two weeks later, on February 21, 2020, the court’s written opinion and order was issued.<sup>16</sup> Discussion of key holdings from the February 21, 2020, written opinion and order include the following.

### ***1. There Is a First Amendment Right of Access to Civil Complaints***

Before analyzing the application of the First Amendment to the facts of the case, the court first observed that “each federal court to reach this question have [sic] found that the First Amendment applies in similar cases filed by this Plaintiff and another.”<sup>17</sup> In making this observation, the court cited several decisions: *Courthouse News Service v. Planet*,<sup>18</sup> *Courthouse News Service v. Tingling*,<sup>19</sup> *Courthouse News Service v. Jackson*,<sup>20</sup> and *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*.<sup>21</sup>

While the court found that “the federal courts’ unanimity is good evidence that the First Amendment applies to this case,”<sup>22</sup> it also undertook its own analysis. In applying the *Press-Enterprise II* experience and logic test, the court agreed with these prior cases and found that there is a First Amendment right to access civil complaints. The court found that the history (experience) prong was satisfied because “[a]s to the complaints at issue here, there is no law or fact cited that suggests that there is a lack of experience of the public’s open access to newly filed civil complaints.”<sup>23</sup>

And, in finding that the “logic” prong was satisfied, the court stated

that “access to a complaint plays a significant role in civil litigation, whether the particular procedure is a motion to dismiss, a motion for summary judgment, trial, or even appeal.”<sup>24</sup>

The court also found that a First Amendment right of access existed under the analytical approach (aka the “critical component” test), which has been used by the Fourth Circuit. Under this test, the court stated that “[u]nlike discovery filings, housekeeping filings, or other minor court papers, the Complaint is significant for a multitude of reasons. Complaints frame the issues for trial and invoke the power of the Court to resolve a dispute. Indeed, to understand subsequent proceedings, reference to the Complaint is often necessary.”<sup>25</sup>

## 2. “Contemporaneous” Means Same Day Where Practicable

Having determined that there is a First Amendment right of access to civil complaints, the court turned to the issue of timing. Quoting the Fourth Circuit’s decision in *Doe v. Public Citizen*, the court held that “[w]hen the First Amendment applies to the public’s right of access to a particular court document or procedure, the public and press generally have a ‘contemporaneous right of access.’”<sup>26</sup>

Noting that the Fourth Circuit had not defined “contemporaneous,” the court concluded that “the word ‘contemporaneous’ means in this context: on the same day of filing, insofar as practicable.”<sup>27</sup>

In reaching this conclusion, the court looked at how “contemporaneous” was defined in both *Black’s Law Dictionary* and *Webster’s Dictionary*. “Black’s Law Dictionary defines ‘contemporaneous’ as ‘[l]iving, occurring, or existing at the same time.’”<sup>28</sup> “Webster’s Third uses a similar definition, and defines ‘contemporaneously’ as ‘at or near the same time.’”<sup>29</sup>

## 3. Application of Strict Scrutiny Is Required

Turning next to the determination of whether the Virginia Clerks’ customs and practices resulting in delays in access were justified, the court applied strict scrutiny, as required by

# Recent Cases Find That Lawsuits Challenging State Court Access Delays Belong in Federal Court

BY RACHEL MATTEO-BOEHM, HEATHER GOLDMAN, AND KATHERINE KEATING

While the recent round of federal court rulings in the *Planet III*,<sup>1</sup> *Yamasaki*,<sup>2</sup> and *Schaefer*<sup>3</sup> cases are most notable for the precedent they create for determining whether access to newly filed court records is contemporaneous and timely, these cases are also the latest to address the question of whether the *Younger* and *Pullman* abstention doctrines can be used to block federal court litigation seeking to redress unconstitutional state court access procedures.

In practical terms, the issue is whether a lawsuit seeking to address systemic violations of the First Amendment right of access by a state court can be brought in federal court, or whether parties seeking to prevent such violations must instead be left to enforce their rights in the very state courts that are denying those rights.

The state court clerks sued in *Planet*, *Schaefer*, and two other similar access cases brought by Courthouse News Service (CNS)—*Courthouse News Service v. Tingling*<sup>4</sup> and *Courthouse News Service v. Brown*<sup>5</sup>—each urged the federal courts to abstain on the basis of one or both of these doctrines (or their progeny). In *Planet III*, the Ninth Circuit reaffirmed its decision in *Planet I*,<sup>6</sup> rejecting abstention and confirming that these cases “present[] . . . important First Amendment question[s] . . . that should be decided by the federal courts.”<sup>7</sup> The U.S. District Courts for the Eastern District of Virginia in *Schaefer* and the Southern District of New York in

*Tingling* rejected similar abstention arguments. Even before the CNS litigation, other federal circuit courts had rejected abstention arguments in cases brought to redress First Amendment access violations in state courts. That leaves the Seventh Circuit’s *Brown* decision as the only case in which a federal court has abstained from hearing such claims.

The overwhelming conclusion that abstention doctrines have no applicability to federal lawsuits challenging state court access procedures is confirmed by the rule that “federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred” and “the areas in which such ‘abstention’ is permissible” are “‘the exception, not the rule.’”<sup>8</sup> Or, as Chief Justice John Marshall stated in *Cohens v. Virginia*, federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,” and to do otherwise “would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them.”<sup>9</sup>

**The Younger Abstention Doctrine and Its Progeny—O’Shea, Rizzo**  
In *Younger v. Harris*,<sup>10</sup> the federal court plaintiff filed a suit to enjoin California’s District Attorney from its then ongoing prosecution of him in a state court criminal action, alleging the prosecution violated his federal constitutional rights.<sup>11</sup> The federal district court agreed and restrained the District Attorney

*Continued on page 23*

Fourth Circuit precedent.<sup>30</sup> “To survive strict scrutiny, the party seeking to restrict access, here, Defendants, must prove that the restriction is necessitated by a compelling government interest and [is] narrowly tailored to serve that interest.”<sup>31</sup> Strict scrutiny “require[s] Defendants to come forward with evidence, not mere argument, to show that the delays are narrowly tailored to some higher governmental interest.”<sup>32</sup>

The Virginia Clerks claimed that “their interests in the orderly administration of their office and protecting confidential information outweigh the public’s First Amendment right to contemporaneous access.”<sup>33</sup> However, as the court observed, under Virginia law, it is not clerk, but the *filer* who has responsibility for redacting confidential information.<sup>34</sup> The court also noted that, after the filing of the lawsuit, the Clerks were able to “ensur[e] that confidential information is protected while maintaining contemporaneous access” and failed to offer any evidence that the improvements actually disrupted their offices or put confidential information at risk.<sup>35</sup>

The court found the Virginia Clerks failed to satisfy their burden to show their customs and practices resulting in access delays satisfied either strict scrutiny or even the more-deferential time, place, and manner (TPM) analysis, and thus violated the First Amendment.

#### 4. The Case Was Not Moot

The Virginia Clerks argued that whether CNS received contemporaneous access was a moot issue because it was undisputed that they were, at the time of trial, providing the contemporaneous access CNS sought. The court, however, dismissed the argument, holding that “[w]hile Defendants are now providing Plaintiff the access it seeks, there is ample evidence to show that during the relevant time period, Defendants denied Plaintiff its constitutionally protected right of access” and that “[t]here is no evidence of a formal policy or other means to show that the alleged unlawful delays cannot reasonably be expected to reoccur.”<sup>36</sup>

#### 5. Relief Granted

CNS sought both a declaratory judgment and an injunction. In granting CNS a declaratory judgment, the court ordered, adjudged, and decreed:

1. That the press and public, including Plaintiff, enjoy a qualified right of access to newly-filed civil complaints contemporaneous with the filing of the complaint.
2. That “contemporaneous” in this context means “the same day on which the complaint is filed, insofar as is practicable;” . . . Based upon the evidence in this case, including but not limited to the . . . statistics, a reasonable expectation is that 85–90% of the new civil filings will be accessible to the public and press on the date of filing.<sup>37</sup>

While the court denied CNS’s request for injunctive relief, it did so without prejudice. “Based on the record and arguments of counsel, the Court is not persuaded that an injunction is appropriate at this time. However, the Court is persuaded that Plaintiff has made a showing that there is a real risk that Defendants, in the absence of an injunction, could revert to their pre-lawsuit practices and customs.”<sup>38</sup> The court also retained jurisdiction over the case and ordered the parties to “monitor the levels of access provided by Defendants for six (6) months following the conclusion of the bench trial” and file a joint status report with the Court.<sup>39</sup>

As of the date of this article, the Joint Status Report has not been filed with the Eastern District of Virginia. The court’s decisions are also currently on appeal to the Fourth Circuit. CNS’s fee motion is pending.

#### Ventura County, California: The Planet Litigation

In September 2011, CNS filed suit in the U.S. District Court for the Central District of California against Michael Planet, in his official capacity as the Clerk of the Ventura County Superior Court (Ventura). The suit sought declaratory and injunctive relief under 42 U.S.C. § 1983 to address Planet’s practices and policies resulting in systemic and pervasive delays in access to newly filed complaints, in violation of the public and press’s

First Amendment right of access to civil complaints.

The practice and policy at issue was the withholding of newly filed civil complaints from public or press view until they had been administratively “processed” by court clerks, which could take days or weeks.

In the month before CNS sued, more than 75 percent of new civil complaints—all of which were paper-filed—could not be seen for more than two days after they were filed.

In November 2011, the Central District of California granted Planet’s motion to dismiss on abstention grounds.<sup>40</sup> In 2014, the Ninth Circuit reversed, concluding that the “novel and important” First Amendment issues CNS presented in the case “may be adjudicated on the merits in federal court, where they belong.”<sup>41</sup>

*Planet I* also discussed several critical issues that would continue to be litigated for the next six years. While acknowledging that the Ninth Circuit had not “expressly held that the First Amendment right of access encompasses civil cases,” *Planet I* made it clear that the Ninth Circuit agreed with other federal courts of appeals, which have “widely agreed that [the right] extends to civil proceedings and associated records and documents.”<sup>42</sup> And while it did not apply the *Press-Enterprise II* “experience” and “logic” test to determine whether a First Amendment right of access applies to civil complaints, it concluded there was “no question” that Courthouse News had “alleged a cognizable injury caused by the [clerk’s] denial of timely access to newly filed complaints.”<sup>43</sup>

The opinion also explained that CNS’s access claim “implicates the same fundamental First Amendment interests as a free expression claim, and it equally commands the respect and attention of the federal courts,”<sup>44</sup> and that whether delays are permissible are tested under constitutional scrutiny.<sup>45</sup>

After the Ninth Circuit issued its opinion in *Planet I*, Ventura announced that it would begin making scanned versions of new complaints available on public access terminals “prior to processing” in the court’s Records Department during regular business hours (8:00 a.m. to 3:00 p.m.) and that complaints



filed by 3:00 would typically be made available the same business day, with complaints filed after 3:00 typically available the following business day (the “Scanning Policy”).

Meanwhile, back in the Central District of California, Planet in 2014 again sought dismissal, this time for failure to state a claim. The district court granted the 12(b)(6) motion, concluding that neither the “experience” nor “logic” prongs of the *Press-Enterprise II* test “support[ed] CNS’s claimed right of same-day access to . . . civil . . . complaints before they had been minimally processed. . . .”<sup>46</sup> The court added that it did “not doubt that a constitutional right of access to civil complaints could arise under the *Press-Enterprise* test at some point during the course of civil proceedings. . . . But while civil complaints may someday be the subject of a ‘hearing to which the public has a First Amendment right of access, it does not follow that the public should necessarily have access to information before that time.”<sup>47</sup>

The Ninth Circuit again reversed, finding, in its 2015 *Planet II* decision, that the district court “disregarded [its] mandate by erroneously ruling as a matter of law that filed civil complaints which have not yet been the subject of a hearing are outside the scope of the First Amendment right of access.”<sup>48</sup>

On remand, the case was assigned to a different judge, and both parties moved for summary judgment. Planet focused on the Scanning Policy, arguing that the adoption of that policy following *Planet I* rendered CNS’s challenge to the original no-access-before-processing policy moot. Planet claimed the Scanning Policy resulted in 97 percent of complaints being scanned on the day of filing. Because court staff continued to scan complaints after the Records Department closed to the public, however, many of the complaints within that 97 percent universe could not actually be seen until the following court day.

In 2016, the district court granted in part and denied in part CNS’s motion for summary judgment and denied Planet’s motion.<sup>49</sup> The court denied CNS’s motion insofar as it had asked the court to find a “universal” or “unyielding” First

Amendment right of same-day access to newly filed complaints,<sup>50</sup> but it concluded that (a) CNS had established a First Amendment right of access to complaints that attaches when the complaint is received by a court, rather than after it is “processed,” and (b) both Ventura’s original no-access-before-processing policy—which had not been rendered moot—and the subsequent Scanning Policy violated the First Amendment because Planet failed to meet his burden of justifying them under either strict scrutiny or the intermediate TPM analysis.<sup>51</sup>

Though the parties disputed the extent of delays under the Scanning Policy, the district court concluded that closing the Records Department to the public while staff continued to scan complaints meant that some of the day’s complaints were not available until the following day. Planet “ha[d] not provided any reason, much less one that is ‘compelling,’ why [Ventura] should be permitted to preclude members of the public and the press from viewing newly filed complaints that happen to be scanned after the Records Department—the sole area in which one can read such scanned documents—shuts its doors.”<sup>52</sup>

Entering judgment for CNS, the district court declared that “[t]here is a qualified First Amendment right of timely access to newly filed civil complaints . . . that . . . attaches when new complaints are received by a court, rather than after they are ‘processed’ . . . regardless of whether courts use paper filing or e-filing systems,” and that both Ventura policies violated CNS’s right of timely access.<sup>53</sup>

The court permanently enjoined Planet “from refusing to make newly filed unlimited civil complaints and their associated exhibits available to the public and press until after such complaints and associated exhibits are “processed,” regardless of whether such complaints are filed in paper form or e-filed” and directed him “to make such complaints and exhibits accessible to the public and press in a timely manner from the moment they are received by the court, regardless of whether such complaints are scanned, e-filed, or made available in any other format, except in those instances where the filing party has properly moved to place the

complaint under seal.”<sup>54</sup> Pursuant to 42 U.S.C. § 1988, the court awarded CNS more than \$2.1 million in costs and attorney fees.

Planet appealed, and on January 17, 2020, the Ninth Circuit issued a lengthy opinion affirming in part and reversing in part.<sup>55</sup> Key holdings from *Planet III* include the following.

### **1. The First Amendment Right of Access Applies to Newly Filed Civil Complaints**

Planet III affirms the district court’s finding that the *Press-Enterprise II* “experience” and “logic” test supports a First Amendment right of access to newly filed nonconfidential civil complaints.<sup>56</sup>

### **2. The Right of Access Is Not Contingent on Judicial Action and Instead Attaches on Filing**

The court rejected Planet’s contention that “the right of access to civil complaints attaches only at the moment ‘they become the subject of some type of judicial action.’”<sup>57</sup> Rather, “[a]bsent a showing that there is a substantial interest in retaining the private nature of a judicial record, once documents have been filed in judicial proceedings, a presumption arises that the public has the right to know the information they contain.”<sup>58</sup> Thus, “the qualified right of access to nonconfidential civil complaints arises when they are filed with the court.”<sup>59</sup>

### **3. The Right of Access Includes a Right to “Timely” Access**

The Ninth Circuit recognized that “a necessary corollary of the right to access is a right to timely access.”<sup>60</sup> It acknowledged that “reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation’s court systems,” and that “a ban on reporting news ‘just at the time [the] audience would be most receptive’ would be effectively equivalent to ‘a deliberate statutory scheme of censorship.’”<sup>61</sup> “In other words, the public interest in obtaining news is an interest in obtaining *contemporaneous* news.”<sup>62</sup>

With these principles established, the court addressed how access delays should be tested. Though the opinion says Ventura's access policies "resemble time, place, and manner restrictions,"<sup>63</sup> the court did *not* apply TPM analysis. It instead concluded that delays should be tested under "*Press-Enterprise II's* two-prong balancing test," under which access "may be restricted only if 'closure is essential to preserve higher values and is narrowly tailored to serve those interests.'"<sup>64</sup> The court characterized this scrutiny as "'rigorous,' but not strict."<sup>65</sup>

Applying this test to the two policies at issue, *Planet III* characterizes the relevant government interest as "the fair and orderly administration of justice"—an umbrella term the opinion uses to encompass all the various interests clerks raise to justify delays. Thus, the Ninth Circuit required Ventura to demonstrate (1) "that there is a 'substantial probability' that its interest in the fair and orderly administration of justice would be impaired by immediate access" and (2) "that no reasonable alternatives exist to 'adequately protect' that government interest."<sup>66</sup>

The use of the word "immediate" in this test makes it clear that *access at the point of filing is the baseline*; delays beyond the point of filing might be constitutional, but *only if they satisfy this two-part test*.

Ventura's no-access-before-processing policy failed both prongs of the test. Despite having "a substantial interest in the orderly administration and processing of new complaints," Ventura did not show a "real relationship" between its policy and its "legitimate administrative concerns" necessary under the first prong.<sup>67</sup> As for the second prong, the policy "caused far greater delays than were necessary to adequately protect [Ventura's] interests given the reasonable alternatives available," including the later-adopted Scanning Policy.<sup>68</sup>

The Scanning Policy, however, survived scrutiny. On the first prong, the Ninth Circuit accepted Planet's testimony that the policy addressed various administrative concerns. On the second, it found that measures Ventura took to comply with the injunction in 2016 (keeping the

clerk's office open later while making the filing deadline earlier) were "not a reasonable alternative available to Ventura" when it adopted the Scanning Policy in 2014.<sup>69</sup> The court credited Planet's assertions that "severe budget constraints" in 2014 required closing the clerk's office to the public at 3:00 p.m. so that "a reduced number of clerks [could] catch up on the new filings before leaving work at 4:30," concluding that "overnight delay in access to complaints filed during the last ninety minutes of the court's public hours was no greater than essential to manage necessary court operations under the circumstances existing at the time."<sup>70</sup>

Missing from this Scanning Policy analysis, however, is a recognition of other alternatives, including closing the filing counter at 3:00 p.m. but leaving the records room open so that reporters could continue using public access terminals. Also problematic is *Planet III's* statement that "nothing . . . indicate[s] that Ventura . . . considered but rejected reasonable alternatives" to the Scanning Policy.<sup>71</sup> It is the clerk's burden to consider alternatives—not the access seeker's burden to suggest them.<sup>72</sup> Moreover, the narrow tailoring prong would be meaningless if clerks could evade it by refusing to consider alternatives.

Three other aspects of *Planet III* are noteworthy. First, it confirmed that CNS's First Amendment right of access fully implicates free expression.<sup>73</sup> Second, it rejected the argument that Ventura's adoption of the Scanning Policy mooted CNS's challenge to the no-access-before-processing policy.<sup>74</sup> And, third, it shot down the notion that a requester's commercial interest in obtaining court records is relevant to the access analysis.<sup>75</sup>

### The Yamasaki Litigation

In January 2017, the year after the district court issued the injunction in *Planet*, CNS filed another 42 U.S.C. § 1983 action in the Central District of California, this time against the clerk of Orange County Superior Court (Orange County), David Yamasaki. As in *Planet*, CNS sought declaratory and injunctive relief to address Yamasaki's practice and policy of

withholding new civil complaints from public or press review until after they have been administratively processed, in violation of the First Amendment.

Unlike Ventura, Orange County is a mandatory e-filing court. Yamasaki's principal argument was that clerks must process complaints before the press and public can see them because processing includes a review for confidential information. CNS countered with evidence of alternatives that would protect confidential complaints at least as effectively as Orange County's procedures without delaying access.

Following denial of CNS's motion for a preliminary injunction,<sup>76</sup> Yamasaki moved for summary judgment, which the district court granted, for the most part.<sup>77</sup> Starting with the dubious assertion that the First Amendment right of access is "not coextensive with the First Amendment's protection of free speech," the district court went on to dismiss CNS's arguments as to "the purported benefits of access."<sup>78</sup> Among other things, it said "the interest in 'informed public discussion of ongoing judicial proceedings' isn't triggered by the mere submission of a complaint to a court," that "newsworthiness has no effect on whether or when a right of access attaches," and that "access to complaints is [not] imperative for the public to learn about important claims."<sup>79</sup>

It also said that a party's subjective interest in seeking court records is relevant to an access claim: "Does it matter . . . if an organization seeks a right of access not to disseminate information on the functioning of government to the general public, but to share revenue-generating data with a select few? The answer is probably no—unless, as here, there's no evidence that the right of access sought also meaningfully promotes the free discussion of governmental affairs."<sup>80</sup>

The district court concluded that under the experience and logic test, "timely access is provided—at a minimum—when complaints are released the calendar day after they're submitted," and that delays should be tested under TPM.<sup>81</sup> In other words, a court could withhold new complaints for any reason—or no reason

at all—until at least the day after filing, need only justify delays of two or more days, and then under a TPM analysis rather than more rigorous scrutiny.

Finding that differences in the parties' delay statistics "prevent[ed] the Court from determining that no delay involved in this case violates the First Amendment right of access," however, the district court left the question of delays of two or more court days for trial.<sup>82</sup> After a summary trial on a stipulated written record, the court concluded that about 2 percent of civil complaints filed in a 14-month period had been delayed for two or more court days, applied TPM to that 2 percent, and entered judgment for Yamasaki in August 2018.<sup>83</sup>

Following entry of judgment, delays at Orange County increased dramatically. In one week tracked by CNS in late 2018, only 6 percent of complaints were available the day of filing, and 76 percent were delayed for two or more days after filing.

With much of the district court's decisions throughout the *Yamasaki* case conflicting with the Ninth Circuit's holdings in *Planet III*, on February 24, 2020, the Ninth Circuit vacated the district court's preliminary injunction order, summary judgment order, and order entering final judgment and remanded "for further proceedings consistent with" *Planet III*.<sup>84</sup> Because the district court judge who decided *Yamasaki* retired in January 2020, the case will proceed not only under a new legal framework but also with a new judge. ■

## Endnotes

1. 947 F.3d 581 (9th Cir. 2020) (*Planet III*), *aff'ing in part and vacating in part* Courthouse News Serv. v. Planet, 2016 WL 4157210 (C.D. Cal. May 26, 2016), *and remanding to district court*.

2. 950 F.3d 640 (9th Cir. 2020), *vacating* Courthouse News Serv. v. Yamasaki, 2017 WL 3610481 (C.D. Cal. Aug. 7, 2017) (denial of preliminary injunction); Courthouse News Serv. v. Yamasaki, 312 F. Supp. 3d 844 (C.D. Cal. May 9, 2018) (granting in part clerk's motion for summary judgment); *and* Courthouse News Serv. v. Yamasaki, 2018 WL 3862905 (C.D. Cal. Aug. 13, 2018) (district court's findings of fact and conclusions of law based on parties' submission of a

summary bench trial based on a stipulated written record), *and remanding for "further proceedings consistent with" Planet III*.

3. 2020 WL 863516 (E.D. Va. Feb. 21, 2020), *appeal filed*, No. 20-1290 (4th Cir. Mar. 2, 2020).

4. *See* Abstention Sidebar.

5. 435 U.S. 589 (1978).

6. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (criminal trials); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982) (testimony during trial); Press-Enter. Co. v. Super. Ct., 464 U.S. 501 (1984) (*Press-Enterprise I*) (voir dire); Press-Enter. Co. v. Super. Ct., 478 U.S. 1 (1986) (*Press-Enterprise II*) (preliminary hearings).

7. *See, e.g.*, Dhiab v. Trump, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (collecting cases).

8. 478 U.S. at 8–9.

9. *Id.*

10. *E.g.*, Co. Doe v. Pub. Citizen, 749 F.3d 246, 267 (4th Cir. 2014); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004).

11. Globe Newspaper v. Pokaski, 868 F.2d 497, 507 (1st Cir. 1989) ("[E]ven a one to two day delay impermissibly burdens the First Amendment."); Lugosch v. Pyramid Co., 435 F.3d 110, 126–27 (2d Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.") (quoting Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994), with approval); United States v. Wecht, 537 F.3d 222, 229 (3d Cir. 2008) ("[V]alue of . . . access would be seriously undermined if it could not be contemporaneous."); *In re* Charlotte Observer, 882 F.2d 850, 856 (4th Cir. 1989) (Even a "minimal delay" in access to court records underlying judicial decision "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure."); *Doe*, 749 F.3d at 272 ("Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we take this opportunity to underscore the caution of our precedent and emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies."); *Grove Fresh Distribs.*, 24 F.3d at 897 ("In light

of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. . . . The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."); *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) ("It is irrelevant that some of these pretrial documents might only be under seal for, at a minimum, 48 hours under the . . . order. The effect of the order is a total restraint on the public's first amendment right of access even though the restraint is limited in time.").

12. *Courthouse News Serv. v. Schaefer*, Case No. 18-cv-391, ECF No. 93 (Trial Transcript Vol. 4) at 587:16–17 (E.D. Va. Feb. 5, 2020).

13. *Courthouse News Serv. v. Schaefer*, 429 F. Supp. 3d 196 (E.D. Va. 2019). *See also* Abstention Sidebar.

14. The court accorded the testimony of the Virginia Clerks' expert "little weight" because he "presented his conclusions as number of filings available 'within one court day'" and "did not break his analysis down to show how many filings were available on the same day that they were filed and how many filings were available on the court day immediately following the day that they were filed." *Courthouse News Service v. Schaefer*, 2020 WL 863516, at \*7 (E.D. Va. Feb. 21, 2020), *appeal filed*, No. 20-1290 (4th Cir. Mar. 2, 2020).

15. *See generally Schaefer*, ECF No. 93.

16. *Schaefer*, 2020 WL 863516.

17. *Id.* at \*14.

18. *Planet III*, 947 F.3d 581, 591 (9th Cir. 2020), *aff'ing in part and vacating in part* *Courthouse News Serv. v. Planet*, 2016 WL 4157210 (C.D. Cal. May 26, 2016), *and remanding to district court* ("As we held in *Planet I*, and as the district court correctly concluded, a qualified First Amendment right of access extends to timely access to newly filed civil complaints."); *accord* *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) (*Planet I*) (describing CNS's First Amendment claim as "cognizable").

19. 16 Civ. 8742, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016); Transcript Proceeding, Order reported at 2016 WL 8505086 (S.D.N.Y. Dec. 16, 2016).

20. Civil Action No. H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009).

21. 14-CV-6867, 2016 WL 1071107 (S.D.N.Y. Mar. 18, 2016), *aff'd*, 814 F.3d 132 (2d Cir. 2016).

22. *Schaefer*, 2020 WL 863516, at \*14.

23. *Id.* at \*16.

24. *Id.*

25. *Id.* at \*17 n.18.

26. *Id.* at \*17 (quoting *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014)).

27. *Id.*

28. *Id.* (quoting *Contemporaneous*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

29. *Id.* (quoting *Contemporaneous*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE—UNABRIDGED (1986)).

30. *Id.* at \*18 (citing *Doe*, 749 F.3d at 266).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (citing VA. CODE §§ 8.01-420.8(A), 17.1-223(B)(i)).

35. *Id.*

36. *Id.* at \*11.

37. *Id.* at \*20.

38. *Id.* at \*21.

39. *Id.*

40. See Abstention Sidebar.

41. *Planet I*, 750 F.3d 776, 793 (9th Cir. 2014).

42. *Id.* at 786.

43. *Id.* at 788.

44. *Id.* at 785, 787, 788 (“[A]ccess to public proceedings and records is an indispensable predicate to free expression about the workings of government,” and “the First Amendment right of access ensures that th[e] constitutionally protected discussion of government affairs is an informed one.”) But “the public cannot discuss the content of . . . civil complaints about which it has no information.”)

45. *Id.* at 793 n.9 (“[T]he right of access may be overcome by an ‘overriding [governmental] interest based on findings that closure is essential to preserve higher values’ [quoting *Press-Enterprise II*, 478 U.S. 1, 9 (1986)]. The delay in making the complaints available may also be analogous to a permissible ‘reasonable restriction[] on the time, place, or manner of protected

speech.”).

46. *Courthouse News Serv. v. Planet*, 2014 WL 12740134, at \*5 (C.D. Cal. Aug. 28, 2014).

47. *Id.*

48. *Courthouse News Serv. v. Planet*, 614 F. App’x 912, 915 (9th Cir. 2015) (*Planet II*).

49. *Courthouse News Serv. v. Planet*, 2016 WL 4157210 (C.D. Cal. May 26, 2016).

50. *Id.* at \*11–12.

51. *Id.* at \*12–21.

52. *Id.* at \*21.

53. *Courthouse News Serv. v. Planet*, 2016 WL 4157354, at \*1 (C.D. Cal. June 14, 2016).

54. *Id.*

55. *Planet III*, 947 F.3d 581 (9th Cir. 2020).

56. *Id.* at 591.

57. *Id.*

58. *Id.* at 592.

59. *Id.* at 594.

60. *Id.*

61. *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 269 (1941)).

62. *Id.* (emphasis added).

63. *Id.* at 595.

64. *Id.* at 594–96.

65. *Id.* at 595–96.

66. *Id.* at 596 (quoting *Press-Enterprise II*, 478 U.S. 1, 14 (1986)).

67. *Id.* at 596–97.

68. *Id.* at 597–98.

69. *Id.* at 599.

70. *Id.* at 599–600.

71. *Id.* at 599.

72. See *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982); *accord Presley v. Georgia*, 558 U.S. 209, 214–15 (2010).

73. *Planet III*, 947 F.3d at 587, 589–90 (“The First Amendment right of access exists . . . to enable free and informed discussion about important issues of the day and governmental affairs. Thus, [t]he news media’s right of access to judicial proceedings is essential not only to its own free expression, but also to the public’s’ . . . These values hold especially true where, as here, the impetus for CNS’s efforts to

obtain newly filed complaints is its interest in timely reporting on their contents.”) (quoting *Planet I*, 750 F.3d 776, 786 (9th Cir. 2014)).

74. *Id.* at 598–99 n.10 (“Because Planet maintains that the public has no right of access until judicial action upon a complaint, and nothing other than the injunction in this litigation prevents Ventura County from returning to its pre-2014 policy, the district court correctly found that . . . Planet has likely not met ‘the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again.’”) (quoting *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014)).

75. *Id.* at 595–96 n.8 (“[A]lthough there is some suggestion in Ventura County’s briefs that because CNS commercially profits from its access to the complaints its First Amendment right is somehow diminished, to be clear: profit motive is entirely irrelevant to the determination of a news organization’s First Amendment rights. ‘If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times v. Hustler Magazine* would be little more than empty vessels.’”) (quoting *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989)).

76. *Courthouse News Serv. v. Yamasaki*, 2017 WL 3610481 (C.D. Cal. Aug. 7, 2017), *vacated and remanded*, 950 F.3d 640 (9th Cir. 2020).

77. *Courthouse News Serv. v. Yamasaki*, 312 F. Supp. 3d 844 (C.D. Cal. May 9, 2018), *vacated and remanded*, 950 F.3d 640 (9th Cir. 2020).

78. *Id.* at 857, 861.

79. *Id.* at 864, 866 (quoting *Planet I*, 750 F.3d 776, 787 (9th Cir. 2014)).

80. *Id.* at 867.

81. *Id.* at 867–68, 870.

82. *Id.* at 877.

83. *Courthouse News Serv. v. Yamasaki*, 2018 WL 3862905 (C.D. Cal. Aug. 13, 2018), *vacated and remanded*, 950 F.3d 640 (9th Cir. 2020).

84. *Yamasaki*, 950 F.3d at 640.

# Reckless Disregard Brings Case Out from Sullivan’s Shadow

REVIEWED BY CYNTHIA L. COUNTS

When it comes to defamation, few U.S. Supreme Court rulings are cited as often as *New York Times v. Sullivan*, 376 U.S. 254 (1964). But many have forgotten that the Supreme Court issued a pivotal decision four years later which helped to ensure and clarify the landmark protections announced in *Sullivan*. Eric P. Robinson’s book—*Reckless Disregard: St. Amant v. Thompson and the Transformation of Libel Law* (LSU Press, 2018)—explains the important history of the often-underappreciated *St. Amant* case and vividly brings the decision to life.

Robinson is an assistant professor who teaches media law in the journalism school at the University of South Carolina. He was formerly co-director of the Press Law and Democracy Project at Louisiana State University’s Manship School of Mass Communication and deputy director of the National Center for Courts and Media at the University of Nevada, Reno. He was also a staff attorney for the Media Law Resource Center and a legal fellow at the Reporters Committee for Freedom of the Press.

Much remained unanswered in the wake of the *Sullivan* ruling as to what it meant to publish a statement with actual malice. The Supreme Court established the test as whether the statement was

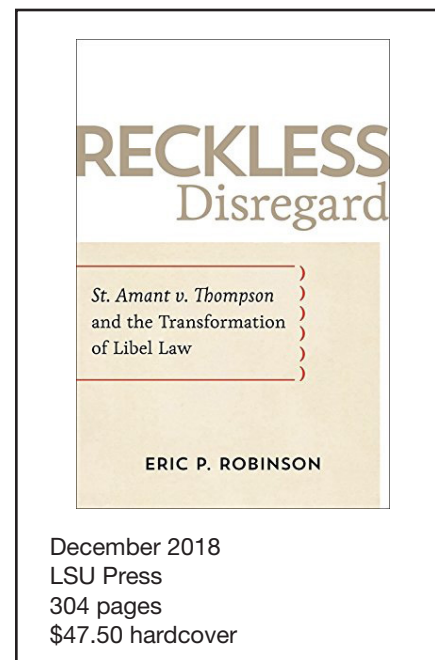
published “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Sullivan* at 280. But lawyers and judges alike struggled with the phrase “reckless disregard.” Just how broad was the intended scope of these protections for free expression and criticisms of public officials?

The Supreme Court’s decision in *St. Amant v. Thompson*, 390 U.S. 727 (1968), was pivotal to ensuring the heightened protection of the actual malice standard that was first enunciated in *Sullivan*.

Before explaining any of this important precedent and the evolution of libel law through the *St. Amant* decision and subsequent rulings, Robinson takes us to the origins of the case in the contentious Democratic primary election in Louisiana between Philemon “Phil” St. Amant and incumbent U.S. Senator Russell Long in 1962—two years prior to the Supreme Court’s *Sullivan* ruling.

As Robinson explains, few know the history of the *St. Amant* decision because Long won the election and St. Amant never won significant elective office. But a little-noticed statement that St. Amant made during a televised campaign address—that money had “passed hands” between Baton Rouge Teamsters leader Ed Partin and East Baton Rouge Parish deputy sheriff Herman A. Thompson—led to a defamation lawsuit that became an important libel precedent. St. Amant implied that the funds transfer showed corruption, while Thompson maintained that the money was for a youth baseball league.

In the course of chronicling the saga of the case, Robinson offers more than the due diligence of solid



legal analysis and the ramifications of the ruling. Instead, he builds the case like a play, setting the stage with social and political context and identifying key personalities of the time. Detailed depictions of Louisiana politics in the early 1960s, the conditions and clout of labor unions, and the influence of the Mafia combine to offer a kind of rich framework to better understand how this landmark case made its way to the Supreme Court.

Robinson also chronicles the *St. Amant* case itself with rigorous, scholarly research, including a deep dive into the microfilmed records and transcripts of the state court trials and appeals and the Supreme Court justices’ papers at various archives. Despite this detailed research, the book is written with both great clarity and effortlessness, coming off more like a friendly conversation than a didactic academic book.

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Robinson shows that the Supreme Court came very close not to issuing any opinion in *St. Amant* at all because the Justices apparently thought the answer to the question about whether the defendants acted with actual malice should have been obvious. Yet, in relating the details about the lower court opinions of lawyers, judges, and the parties, Robinson shows it wasn't so clear and that the *St. Amant* ruling was a necessary step in refining the actual malice "reckless disregard" standard.

Robinson even tracks citations of the principles announced in *St. Amant* in published opinions from the U.S. Supreme Court and lower federal and state courts since the ruling was issued in 1968. But that is intricately interwoven with his discussion of the facts of the case and its history and social context

which, without Robinson's book, would likely have been forgotten and lost to all of us.

In fact (spoiler alert!), the importance and the legacy of the case were even unknown to St. Amant himself, who spoke to Robinson and was still alive when the book was published. He had no idea that his case was an important landmark libel precedent. (St. Amant died in August 2019 at age 101.)

By chronicling the historical, social, and political backdrops of the time, Robinson has provided a full and complete account of this most important case that played so prominently in the post-*Sullivan* evolution of libel law. This isn't just important reading for media law scholars, history buffs, or practicing attorneys. It is required reading.

Now, we can all revel in the informative and intriguing details that

provide a historical backdrop to *St. Amant*, as well as understand and appreciate the importance of this case in the development of modern libel law in the wake of *New York Times v. Sullivan*. ■

## The 13<sup>th</sup> Annual First Amendment and Media Law Diversity Moot Court Competition



AMERICAN BAR ASSOCIATION

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**Deadline: Friday, August 7, 2020**



The annual First Amendment and Media Law Diversity Moot Court Competition presented by the Forum on Communications Law, now in its 13th year, is designed to introduce minority law students to the practice of media law and to many of the lawyers who are active in the media bar. The competition offers cash awards for superior performance in appellate briefing and oral argument.

The moot court hypothetical case will involve timely issues of national significance in the field of media law. Law students interested in the Competition submit a written application, including a short essay explaining their interest in issues of media and communications law. There is no fee to apply. All applications are due and must be received no later than Midnight PDT on the deadline date. Students may apply individually or as part of two-person teams (each team member must complete an individual application).

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## Recent Cases

*Continued from page 15*

from further prosecuting.<sup>12</sup> But the U.S. Supreme Court, relying on principles of comity and federalism, and the “longstanding public policy against federal court interference with state court proceedings,” found the federal district court should not have interfered with the adjudication of the merits of the state court case.<sup>13</sup>

*Younger* thus “counsels against federal court injunctions of state criminal proceedings pending against the federal plaintiff, absent special circumstances.”<sup>14</sup> This principle has since been extended to state civil enforcement cases against the federal plaintiff and certain civil proceedings against the federal plaintiff.<sup>15</sup>

As the Supreme Court recently made clear, *Younger* abstention is confined to three “exceptional” circumstances.<sup>16</sup> Federal courts may abstain under *Younger* only to prevent them from enjoining (1) “ongoing state criminal prosecutions,” (2) “certain civil enforcement proceedings,” and (3) “pending civil proceedings involving certain orders uniquely in furtherance of the state courts’ ability to perform their judicial functions.”<sup>17</sup>

In addition, in two other cases—*O’Shea v. Littleton*<sup>18</sup> and *Rizzo v. Goode*<sup>19</sup>—the Supreme Court extended *Younger*’s principles to cases where there is no concurrent pending state court proceeding.

In *O’Shea v. Littleton* (1974), a class of African American plaintiffs claimed defendants, including a county magistrate and judge, denied them their civil rights by setting higher bonds, imposing harsher confinement conditions, and bringing mere ordinance violations to trial in a racially discriminatory and retaliatory manner, and sought to enjoin the magistrate and judge from engaging in such practices.<sup>20</sup> The Supreme Court reversed a Seventh Circuit ruling holding that if plaintiffs’ allegations were proven, the district court should enjoin the officials and could require “periodic reports of various types of aggregate data on actions on bail and sentencing.”<sup>21</sup> As one of its bases for reversal, *O’Shea*

found the relief sought by the plaintiffs was “aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials” and “would contemplate interruption of state proceedings to adjudicate assertions of noncompliance,” resulting in “nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent.”<sup>22</sup>

Thus, while *Younger* counsels against interfering with the adjudication of pending state court proceedings, *O’Shea*’s focus was a concern about interference with the adjudication of future proceedings.

*O’Shea* went on to explain what quantum of interference with future state court proceedings would be unacceptable: The injunction contemplated in that case, the court said, would be “a major continuing intrusion” because it would lead to “continuous or piecemeal interruptions” of future state court proceedings by “any of the members of the broadly defined class.”<sup>23</sup> Furthermore, it “would require for its enforcement the continuous supervision by the federal court over the [state magistrate and a judge] in the course of future criminal trial proceedings involving any of the members of the respondents’ broadly defined class,” by way of the contemplated “periodic reporting system.”<sup>24</sup>

Two years later, in *Rizzo v. Goode* (1976), the Court expounded further on the limits it articulated in *O’Shea* regarding the scope of the federal courts’ equity powers.<sup>25</sup> Plaintiffs in *Rizzo* alleged a pattern of unconstitutional police mistreatment of minority citizens in Philadelphia. Following two trials, the federal district court entered an order requiring city officials to prepare, for the court’s approval, a “comprehensive program for improving the handling of citizen complaints alleging police misconduct.” The proposed program was then incorporated into a final judgment that required, *inter*

*alia*, an “all-encompassing 14-page” manual governing police misconduct complaints, a “‘Citizen’s Complaint Report’ . . . drawn up in a format designated by the court,” “a police recruit training manual reflective of the court’s ‘guidelines,’” and “annual summaries to provide a basis for the court’s ‘evaluation’ of the program.” The district court also “reserved jurisdiction to review . . . progress in these areas and to grant further relief as might be appropriate.”<sup>26</sup> The Third Circuit affirmed as to the injunctive relief. After granting review to consider whether the district court’s judgment “represent[ed] an unwarranted intrusion by the federal judiciary into . . . state and local law,” the Supreme Court concluded that it did, and reversed.<sup>27</sup>

### **The Pullman Doctrine**

*Railroad Commission v. Pullman Co.*<sup>28</sup> involved a challenge to a Texas Railroad Commission’s order under Texas law and the U.S. Constitution. Summarizing *Pullman* in *Planet I*, the Ninth Circuit explained that the Supreme Court “declined to adjudicate a ‘substantial constitutional issue’ that would be avoided by first giving the Texas courts the opportunity to decide whether the challenged regulation was valid under Texas law. The Court reasoned that abstaining from hearing the case would prevent it from ‘touch[ing] a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.’”<sup>29</sup> However, the Ninth Circuit also noted that “*Pullman* abstention is rarely appropriately invoked in cases implicating the First Amendment.”<sup>30</sup>

### ***Younger, Pullman, and the First Amendment Right of Access***

In the 1992 case of *Rivera-Puig v. Garcia-Rosario*,<sup>31</sup> Miguel Rivera-Puig, a reporter for the San Juan, Puerto Rico, daily *El Vocero de Puerto Rico*, challenged the constitutionality of a Puerto Rico court rule that closed all criminal preliminary hearings by filing an action in the U.S. District Court for Puerto Rico. The district court found that “abstention

under *Younger* . . . was inappropriate because plaintiff did not seek an injunction of any criminal proceeding, but rather was requesting access to future preliminary hearings.”<sup>32</sup> It also found that Puerto Rico’s rule “fell squarely within the prohibition of *Press-Enterprise II*.”<sup>33</sup> Notwithstanding this, the district court declined to issue an injunction, expressing the view that the Puerto Rico judiciary would comply with the court’s declaration without the need for an injunction.

On appeal from the federal district court’s decision, the First Circuit affirmed the judgment of the district court declaring the rule unconstitutional on First Amendment grounds but remanded the case back to the district court with instructions “to take such actions as are necessary to achieve compliance with this judgment ‘with all deliberate speed’” and “[i]f required by the circumstances, the district court shall issue injunctive relief.”<sup>34</sup> And the First Circuit agreed with the district court that “[t]he *Younger* abstention doctrine does not permit abstention in the present case,” as “the district court’s ruling did not enjoin or interfere with any state proceeding pending against Rivera-Puig or anyone whose interests are intertwined with his. The criminal cases that Rivera-Puig wishes to attend are future preliminary hearings of third-person criminal defendants. . . . These defendants have no relation whatsoever to Rivera-Puig.”<sup>35</sup>

Later, in *Hartford Courant v. Pellegrino*,<sup>36</sup> several media companies brought a 42 U.S.C. § 1983 action challenging the practice of the Connecticut state court system of sealing the docket sheets of certain cases so that the public could not discover the existence of litigation.<sup>37</sup> The Second Circuit rejected both *Pullman* and *Younger* arguments.

*Pullman* abstention, the Second Circuit noted, is only appropriate where “three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible ‘to an interpretation by a state court that would avoid or modify the federal

constitutional issue.”<sup>38</sup> However, “[e]ven when these conditions are fulfilled, we are not required to abstain, and, to the contrary, ‘important federal rights can outweigh the interests underlying the *Pullman* doctrine.’”<sup>39</sup> In the case at hand, the Second Circuit said, “there is no applicable state statute. Furthermore, the weight of the First Amendment issues involved counsels against abstaining.”<sup>40</sup>

Fast-forward seven years to 2011. Two months after CNS filed the *Planet* case, the district court granted the Ventura County Superior Court’s motion to dismiss on *O’Shea* and *Pullman* abstention grounds.

The Ninth Circuit reversed. As to *Pullman*, the Ninth Circuit ruled that Courthouse News’s “right of access claim implicates the same fundamental First Amendment interests as a free expression claim, and it equally commands the respect and attention of the federal courts.”<sup>41</sup> As such, the Ninth Circuit said it agreed with the Second Circuit in *Hartford Courant* that *Pullman* abstention is inappropriate. As the Ninth Circuit also explained, “[w]e disfavor abstention in First Amendment cases because of the ‘risk . . . that the delay that results from abstention will itself chill the exercise of the rights that the plaintiffs seek to protect by suit.’”<sup>42</sup> That risk, the Ninth Circuit said, was fully implicated in a case involving a First Amendment challenge to a state court clerk’s policies and practices resulting in delays in access: “Abstaining in this case portends particularly egregious damage to First Amendment rights because it stifles the ‘free discussion of governmental affairs’ that the First Amendment exists to protect. . . . [¶] In this instance, the deterred expression is . . . informed public discussion of ongoing judicial proceedings. CNS’s effort to timely access filed unlimited civil complaints is to report on whatever newsworthy content they contain, and CNS cannot report on complaints the Ventura County Superior Court withholds.”<sup>43</sup> Moreover, “if CNS’s protected expression is delayed while the litigation proceeds in state court, then the expression of the newspapers, lawyers, libraries, and others who rely on CNS for

information will also be stifled.”<sup>44</sup>

After reviewing its prior *O’Shea* cases, the Ninth Circuit said that *O’Shea* “abstention is inappropriate where the requested relief may be achieved without an ongoing intrusion into the state’s administration of justice, but is appropriate where the relief sought would require the federal court to monitor the substance of individual cases on an ongoing basis to administer its judgment.”<sup>45</sup>

As the Ninth Circuit then concluded, CNS’s right of access claim did not fall within the category of claims for which *O’Shea* abstention would be appropriate. “To determine whether the Ventura County Superior Court is making complaints available on the day they are filed, a federal court would not need to engage in [an] intensive, context-specific legal inquiry. . . . There is little risk that the federal courts would need to ‘examin[e] the administration of a substantial number of individual cases’ to provide the requested relief. . . . [¶] The Ventura County Superior Court has available a variety of simple measures to comply with an injunction granting CNS all or part of the relief requested.”<sup>46</sup>

As the Ninth Circuit went on to explain: “[T]hat *some* additional litigation may later arise to enforce an injunction does not itself justify abstaining from deciding a constitutional claim. Any plaintiff who obtains equitable relief under 42 U.S.C. § 1983 enforcing his constitutional rights against a state official may need to return to court to ensure compliance with the judgment.”<sup>47</sup>

That decision was soon followed by another in CNS’s 2016 case in the Southern District of New York, enjoining the clerk of New York County, New York, “from denying access to newly filed civil complaints until after clerical processing” and requiring that clerk “to provide . . . access to those documents in a timely manner upon receipt.”<sup>48</sup> Like the Ninth Circuit, Southern District of New York Judge Edgardo Ramos rejected the clerk’s *O’Shea* abstention argument, concluding, “this Court finds that the remedy sought by CNS poses little risk of an ongoing federal audit or a major continuing intrusion of the equitable power of the federal



courts into the daily conduct of state proceedings.”<sup>49</sup> And while abstention was not at issue in an earlier similar case CNS brought in the Southern District of Texas against the clerk in Houston, Southern District of Texas Judge Melinda Harmon had no trouble enjoining the clerk from denying access to complaints “on the same day [they] are filed.”<sup>50</sup>

And then came the Seventh Circuit’s decision in *Brown*, the only case in which a federal court has abstained from hearing a First Amendment access case. After Northern District of Illinois Judge Matthew Kennelly granted CNS’s request for a preliminary injunction prohibiting the Cook County Circuit Court Clerk in Chicago from enforcing her policy of withholding newly filed complaints from press review until after processing, the Seventh Circuit reversed, holding that the district court should have abstained, saying that “*Younger*, with its extension in *O’Shea* and *Rizzo*, is most closely applicable to the present case; however, it is not a perfect fit, and we ultimately base our decision on the more general principles of federalism that underlie all of the abstention doctrines.”<sup>51</sup>

The Seventh Circuit acknowledged that “[t]he situation here is not a traditional *Younger* scenario: there is no individual, ongoing state proceeding that plaintiffs seek to enjoin.”<sup>52</sup> It also acknowledged that “the district court’s order in the present case does not map exactly on the orders in *O’Shea* and *Rizzo*.”<sup>53</sup> However, the Seventh Circuit said that it “would also impose a significant limit on the state courts and their clerks in managing the state courts’ own affairs. Against the backdrop of *Younger*, *O’Shea*, and *Rizzo*, we find that CNS’s request for federal intrusion at this stage of the dispute between CNS and the Clerk calls for abstention.”<sup>54</sup>

The Seventh Circuit in *Brown* acknowledged its decision was in direct conflict with the Ninth Circuit in *Planet I*: “We acknowledge that the Ninth Circuit in . . . *Planet*, a case nearly identical to this one, came to the opposite conclusion regarding abstention. . . . On this point, we respectfully disagree

with our colleagues in the Ninth Circuit.”<sup>55</sup>

*Brown* was decided in November 2018. A few months later, the Virginia Clerks in the then pending *Schaefer* case moved to abstain, relying on *Brown*’s reasoning. But Eastern District of Virginia Judge Henry Coke Morgan was unpersuaded. As Judge Morgan stated in his order denying their motion, “abstention is not ‘a license for free-form ad hoc balancing of . . . state and federal interests.’ Rather, abstention is a principle of defined doctrines.”<sup>56</sup> And, he explained, none of those doctrines applied: “Because there is no state court proceeding in this case, and this matter is not within the three ‘exceptional’ cases warranting *Younger* abstention, the *Younger* doctrine does not apply.”<sup>57</sup> And, he said, *O’Shea* and *Rizzo* did not require abstention either: “The relief sought in this case would not invade any state court proceedings, ongoing or future. Moreover, it would not require continuous federal policing. Plaintiffs ask for an order requiring Defendants to release state court filings faster. While some future litigation may take place to enforce this Court’s order, if it were to grant one, that does not rise to the level of a federal audit that would caution against exercising jurisdiction. . . . Accordingly, *O’Shea* is distinguishable from this case.”<sup>58</sup>

Judge Morgan continued: “the Court is aware that the [sic] *Brown* was decided on principles of equity, comity, and federalism. Likewise, to the extent that *Rizzo* can be read as an abstention case, it is one which depends heavily on such principles. Federalism does not require federal courts to yield matters of constitutional concern when a federal order would not excessively entangle a federal court in the states’ own internal affairs. When Congress enacted 42 U.S.C. § 1983, it gave federal courts jurisdiction to issue relief against persons who, under color of state law, deprive another of a right secured by the federal Constitution. Plaintiff asks for a single injunction to remedy an alleged First Amendment violation. While the Court is not at this time prepared to comment on the merits of such a request

in this case, the Court need not altogether abstain from addressing the merits of such a request.”<sup>59</sup> As is discussed in the article that accompanies this one, the *Schaefer* Court ultimately resolved the case on the merits in CNS’s favor.

The Ninth Circuit’s *Planet III* decision that followed *Brown* also reaffirmed its *Planet I* ruling rejecting abstention. As the decision states: “[w]e disagree . . . with the Seventh Circuit’s decision to abstain from resolving the dispute about when the right attaches and when delays are so long as to be tantamount to a denial of the right.”<sup>60</sup> ■

## Endnotes

1. *Courthouse News Serv. v. Planet*, 947 F.3d 581 (9th Cir. 2020) (*Planet III*).
2. *Courthouse News Serv. v. Yamasaki*, 950 F.3d 640 (9th Cir. 2020).
3. *Courthouse News Serv. v. Schaefer*, 2020 WL 863516 (E.D. Va. Feb. 21, 2020), *appeal filed*, No. 20-1290 (4th Cir. Mar. 2, 2020).
4. 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016) (transcript of hearing on motion for preliminary injunction).
5. 908 F.3d 1063 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 384 (2019).
6. *Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014) (*Planet I*).
7. *Id.* at 779.
8. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358–59 (1989).
9. 19 U.S. 264, 405 (1821).
10. 401 U.S. 37 (1971).
11. *Id.* at 39.
12. *Id.* at 40.
13. *Id.* at 43–45.
14. *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 319 (1st Cir. 1992).
15. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1981). The Supreme Court has recently made clear that *Younger* abstention is confined to three “exceptional” circumstances. *See Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013). Federal courts may abstain under *Younger* only to prevent them from enjoining (1) “ongoing state criminal prosecutions,” (2) “certain civil enforcement proceedings,” and (3) “pending civil proceedings involving certain orders uniquely in furtherance of the state courts’ ability to perform their judicial

functions.” *Id.* (internal quotation marks and alteration omitted).

16. *Id.*

17. *Id.* (internal quotation marks and alteration omitted).

18. 414 U.S. 488 (1974).

19. 423 U.S. 362 (1976).

20. *O’Shea*, 414 U.S. at 491–92.

21. *Id.* at 492–93 & n.1.

22. *Id.* at 500.

23. *Id.* at 500–02.

24. *Id.* at 501.

25. *Rizzo v. Goode*, 423 U.S. 362 (1976).

26. *Id.* at 365 & n.2.

27. *Id.* at 366, 379–80.

28. 312 U.S. 496 (1941).

29. *Planet I*, 750 F.3d 776, 783–84 (9th Cir. 2014) (quoting *Pullman*, 312 U.S. at 498–99) (internal citations omitted).

30. *Id.*

31. 983 F.2d 311, 322 (1st Cir. 1992).

32. *Id.* at 316.

33. *Id.* (citing *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1 (1986)

(*Press-Enterprise II*)).

34. *Id.* at 325 (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955)).

35. *Id.* at 319.

36. 380 F.3d 83 (2d Cir. 2004).

37. *Id.* at 85–86.

38. *Id.* at 100 (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)).

39. *Id.* (quoting *Sorrell*, 221 F.3d at 385).

40. *Id.*

41. *Planet I*, 750 F.3d 776, 787 (9th Cir. 2014).

42. *Id.* (quoting *Porter v. Jones*, 319 F.3d 483, 487 (9th Cir. 2003)).

43. *Id.* at 787–88 (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982)).

44. *Id.* at 788.

45. *Id.* at 790.

46. *Id.* at 791.

47. *Id.* at 792.

48. *Courthouse News Serv. v. Tingle*, 2016 WL 8505086, at \*1 (S.D.N.Y.

Dec. 16, 2016).

49. *Courthouse News Serv. v. Tingle*, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016) (not star paginated).

50. *Courthouse News Serv. v. Jackson*, 2009 WL 2163609, at \*\*2–5 (S.D. Tex. July 20, 2009).

51. *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 384 (2019).

52. *Id.* at 1072.

53. *Id.* at 1073.

54. *Id.*

55. *Id.* at 1074.

56. *Courthouse News Serv. v. Schaefer*, 429 F. Supp. 3d 196, 207 (E.D. Va. 2019) (quoting *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007)).

57. *Id.* (quoting *Sprint Comm’ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)).

58. *Id.* (citing *Planet I*, 750 F.3d 776, 792 (9th Cir. 2014)).

59. *Id.*

60. *Planet III*, 947 F.3d 581, 581 (9th Cir. 2020) (citing *Planet I*).

# Walking a Fine Line: Finding Harmony Between California’s Deep Fake Laws and the First Amendment

BY AMANDA INGLES

Social media has become an important platform for the dissemination of news. Information can be shared with many people at a rapid rate, reaching far corners of the world. Internet users can learn about new places, current events, and foreign affairs. They can inform and create, sharing with anyone who will read, watch, or listen. However, with all the positive benefits of a more connected world come the dangers of spreading false information about individuals or weaponizing false information to manipulate and prejudice audiences.

The U.S. Constitution ensures that Americans can share their opinions without fear of government interference. Under the First Amendment, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>1</sup> False speech, at times, is protected, but the government is often allowed to proscribe it without violating the Constitution. The U.S. Supreme Court has generally allowed the government to prohibit lies when there is some “legally cognizable harm associated with a false statement.”<sup>2</sup> The Court has identified traditional categories of low-value, unprotected speech: “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”<sup>3</sup> The list is quite limited but focuses on harm. For instance, the Court has been clear that false advertising has no constitutional protection because it harmfully deceives consumers.<sup>4</sup> When false statements about a specific individual are published, the statements are likely defamatory if they damage the

individual’s reputation. To create liability for defamation, there must be (a) a false and defamatory statement concerning another, (b) an unprivileged publication to a third party, (c) fault amounting at least to negligence on the part of the publisher, and (d) special harm caused by the publication.<sup>5</sup>

Deep fake videos are false statements of fact. They are digitally constructed lies about specific people and events. Deep fake technology is a developing medium that leverages machine-learning algorithms to create realistic impersonations using images or audio recordings of actual people.<sup>6</sup> This AI-assisted technology has been used to create altered realities, particularly in the areas of pornography and politics.<sup>7</sup> Typically, a deep fake producer uses existing footage as the digital base, inserting faces and voices of actual people to create something that never happened.<sup>8</sup> The synthetic rendering is a result of large datasets of images and videos usually sourced from the internet or individuals’ social media. Someone with this technology can create a video that makes it appear as though another human is committing a sexual act he or she never performed. If that depicted individual is a teacher or community leader, the individual’s career may suffer. Without a doubt, deep fakes have the potential to harm individuals and manipulate large audiences. Because the technology is becoming more sophisticated, there is also the concern that the public will have a harder time discerning what is real from what is fake.<sup>9</sup>

Traditional First Amendment jurisprudence presupposed an information-poor world, focusing exclusively on the protection of speakers from the government to ensure that the people are not

deprived of enlightening debate.<sup>10</sup> However, today’s world has an endless supply of information due, in part, to the massive decline in publishing barriers.<sup>11</sup> With the help of advanced technology, content creators can weaponize speech as a tool to control, harass, and silence others just as easily as they can use it to foster debate. It is difficult to reconcile the main purpose of the First Amendment—speech free from government interference—with the fact that speech can also be used to suppress and harm. Deep fakes, like other disinformation on the internet (e.g., “fake news”), may not only cause irreparable harm to individuals’ reputations, but also present a danger to democracies and undermine people’s right to receive and impart information.<sup>12</sup>

The growing concern over deep fakes and government desire to regulate them conflicts with the right to freedom of expression.<sup>13</sup> As repugnant as a nonconsensual pornographic deep fake may be, the technology itself is not inherently problematic.<sup>14</sup> There are pro-social uses of the technology, such as education and art.<sup>15</sup> Deep fake videos exact significant harm in certain contexts, but certainly not in all.<sup>16</sup> Last year, a video of Mark Zuckerberg circulated on the internet in which the Facebook CEO appeared to claim he had control over billions of people’s stolen data and their lives.<sup>17</sup> It turned out to be an art project rather than a deliberate attempt at misinformation.<sup>18</sup> Nonetheless, states are enacting legislation to address deep fakes, and California is among the first.<sup>19</sup> Only time will tell if the new laws are able to strike the proper balance between regulating harmful deep fakes and allowing for freedom of expression.

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## Regulating the Marketplace of Ideas

Civil libertarians believe in a free marketplace of ideas and that the First Amendment protects this robust, uninhibited space.<sup>20</sup> In short, they believe the truth will prevail despite the existence of false speech, and there are dangers in carving out exceptions to the First Amendment. In 1996, John Perry Barlow posited that the internet would be the world's great equalizer, "creating a world where anyone, anywhere may express his or her beliefs, no matter how singular."<sup>21</sup> He also believed that laws from the physical world were not readily equipped to regulate cyberspace. To Barlow and civil libertarians, revenge porn, fake news, and other forms of harmful speech are simply the price we pay for a free society.<sup>22</sup> However, the marketplace of ideas has been ineffective in dealing with the spread of disinformation.<sup>23</sup> Although we want to trust that the public will be able to separate false speech from the truth, deep fakes will hinder that possibility. Rather than letting harmful and deliberately deceptive deep fake videos run rampant in a free marketplace, some sort of regulation is necessary without invading individuals' right to free speech.

Legal scholar Mary Anne Franks is a proponent of regulating deep fakes. She has focused her writing on the social implications of the internet, primarily with respect to women.<sup>24</sup> Her view is that the optimistic characterization of the internet as a utopia or societal equalizer is incorrect. There are divisions of power—along race, gender, and class lines—in our physical world that are magnified by the internet. To avoid this, Franks believes in establishing special rules for governing harmful speech, which means giving up some of what Locke considers to be "natural rights."<sup>25</sup> As a result, some speech is prohibited in order to establish liberty and security for those who were previously harassed or silenced. Deep fakes are a form of deliberately deceptive speech, and this "undermines, not enhances, the pursuit of truth."<sup>26</sup> But how do we balance the need to protect individuals from such speech with the need to also protect the First Amendment? Although Franks underscores

the importance of protecting minorities from harm flowing from deep fakes, she does not articulate exactly how to regulate the technology; she simply says it must happen. Even if there is a legitimate interest in protecting women from being depicted in nonconsensual pornography, any law that addresses this issue must not be overly broad. Therefore, as states begin to legislate around deep fake videos, they must be prepared to withstand the highest level of scrutiny—strict scrutiny.<sup>27</sup>

### California's Deep Fake Legislation: Does It Pass the Test?

On January 1, 2020, two new deep fake laws became effective in California. Each law seeks to regulate deep fake technology used in two separate contexts—one focuses on sexually explicit deep fakes, while the other focuses on deep fake videos used to influence elections.

A.B. 602 addresses sexually explicit deep fakes and creates a private right of action for depicted individuals against those who intentionally distribute false pornographic content, regardless of whether the distributor created such content.<sup>28</sup> The distributor must have also known or reasonably should have known that the depicted individual did not consent to the content's creation or disclosure.<sup>29</sup> The law defines "depicted individual" as an "individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction."<sup>30</sup> Deep fakes are not explicitly defined. The law simply references "altered depictions" and defines them as performances "that [were] actually performed by the depicted individual but [were] subsequently altered to be in violation of this section."<sup>31</sup> This broad language was likely drafted with the expectation of future advancements in the technology.

A.B. 602 contains various exceptions. It allows the disclosure of sexually explicit material for reporting unlawful behavior, law enforcement duties, and legal proceedings.<sup>32</sup> The law also protects content that is political, newsworthy, of public concern, or considered commentary and criticism.<sup>33</sup> However, A.B. 602 does not

include an "intent to harm" requirement, nor does it define "harm."

The second new California law, A.B. 730, has arrived just in time for the 2020 presidential election. It focuses on the creation and dissemination of deep fake content falsely depicting political figures. The law prohibits a person or other entity from distributing with "actual malice" doctored and otherwise deceptive material depicting a political candidate within sixty days of an election in the absence of an affirmative disclosure that the material has been manipulated.<sup>34</sup> A candidate who is the subject of a deep fake must show it was "materially deceptive" in order to bring an action for injunctive relief or damages. To qualify as "materially deceptive," the law requires intentional manipulation of images or audio in a manner that both (1) makes it "falsely appear to a reasonable person to be authentic" and (2) causes "a reasonable person to have a fundamentally different understanding or impression of the expressive content of the image or audio or video recording than that person would have if the person were hearing or seeing the unaltered, original version."<sup>35</sup>

Like its counterpart, A.B. 730 carves out certain protected speech: newscasts, websites that routinely publish news and commentary of general interest, and satire or parody.<sup>36</sup> Moreover, politically deceptive content that contains an affirmative disclosure stating that the material has been manipulated escapes liability, as long as the disclaimer is readable by the average viewer.<sup>37</sup> The law is also set to expire in 2023.<sup>38</sup>

Because content-based restrictions target speech based on its communicative content, they are presumptively unconstitutional and may be upheld only if the government proves that the law (1) furthers a compelling governmental interest and (2) is narrowly tailored to achieve that interest.<sup>39</sup> Here, the new California laws seem to restrict specific types of content. However, both laws are supported by compelling state interests: A.B. 602 seeks to protect those—often women—targeted by pornographic deep fakes,<sup>40</sup> while A.B. 730 seeks to protect both political candidates'

reputations and voters who may be deceived into voting for or against a candidate.<sup>41</sup>

To achieve the compelling state interest, A.B. 602 imposes liability on a person who creates and/or intentionally discloses sexually explicit material if the person knows or reasonably should have known the depicted individual did not consent to its creation or disclosure. The *mens rea* element coupled with the lack of an intent-to-harm requirement has the potential to implicate artistic expression—such as the Zuckerberg deep fake—that is not intended to cause harm.<sup>42</sup> On the other hand, A.B. 602's exceptions could narrow the law. A person is not liable for the disclosure if it is commentary, criticism, or "otherwise protected by the California Constitution or the United States Constitution."<sup>43</sup> The law does not explicitly exempt artistic expression, and it is unclear if that last exception would function as a "catch-all" for creative works.

A.B. 703 seeks to achieve its compelling state interest by limiting the law to apply only to materially deceptive content distributed with actual malice within sixty days of an election at which the depicted candidate will appear on the ballot. The law includes an "intent to harm" requirement—either an intent to harm the candidate's reputation or deceive a voter into voting for or against the candidate. Political speech is among the most protected in this country.<sup>44</sup> However, A.B. 730's requirements and exceptions regarding news and parody seem to narrow the scope of the law tremendously. On the other hand, although the law specifies broadcasters and newspapers, it leaves out others who also have a right to free speech regarding politics, such as everyday internet users or bloggers. Thus, although potentially more narrowly tailored than its counterpart, A.B. 730 may implicate some protected speech.

Without exceptions, these laws would read as a total ban on pornographic and political deep fake content. However, it is unclear if the existence of these exceptions ensures that the laws are narrowly tailored enough to avoid implicating protected speech. Although a bill or statute

may include certain exemptions, they do not always meaningfully limit the law's impermissible reach.<sup>45</sup>

#### **Future Litigants and Future Issues**

Because A.B. 602 and A.B. 730 are newly enacted, there is little case law to consider aside from some established law related to other relevant causes of action. With regards to A.B. 602 and deep fake pornography, we should expect to see fact patterns similar to the revenge porn cases that shaped many states' jurisprudence in the last few years. We could see Franks's prediction come to fruition—sexually explicit deep fakes used for harassment, suppression, and coercion. It is also likely that public figures will increasingly be depicted in sexually explicit altered content.<sup>46</sup> Although celebrities have the option to sue under right of publicity, that cause of action is typically in the commercial context. The California deep fake laws will give public figures another avenue to bring a lawsuit regarding their name, image, and likeness outside the commercial context. Of course, there is also defamation as an option for both private and public individuals. However, proving "special harm" could be difficult in scenarios where there is little to no proof of such reputational harm. Even if harm is apparent, a plaintiff's defamation claim could fail if the deep fake creator indicates that the video was manipulated. Once the creator or distributor communicates to the public that the video is not intended to be a statement of fact, the defamation claim falls flat. This is a possibility with regard to pornographic deep fakes that are clearly titled as deep fakes of certain celebrities. Although the purpose of defamation law—preventing false speech that might hurt a person's reputation—seems fairly aligned with the purpose of regulating deep fakes, a private or public individual could encounter various obstacles in bringing this type of claim. There is also the creative—yet flawed—possibility of bringing a copyright infringement claim when one's images are used as part of the dataset that rendered the deep fake.<sup>47</sup> However, due to fair use, owners of copyrighted works will find it hard to succeed in an infringement suit.

Ultimately, these new deep fake laws seem to fill a gap in the current legal landscape, preparing for the impending prevalence of this technology.

Before even thinking about litigation, businesses and public figures should also discuss with counsel new ways to protect their brands.<sup>48</sup> It will become important to implement strategies in searching for deep fakes on the internet that are related to the company's brand. Then it may be as simple as reaching out to the social media platforms on which the deep fakes are published and request removal of the content. Clients who are social media companies may also find it helpful to look into deep fake detection technology the way Facebook has recently done.<sup>49</sup> Deep fake regulations may also impact the terms and conditions companies place on deep fake tools and otherwise increase the need for close legal and business scrutiny of such technologies.<sup>50</sup>

We should expect to see a fair amount of politicians filing lawsuits under A.B. 730 as well because it is an election year. There was a recent Texas case in which Houston Mayor Sylvester Turner accused his opponent's campaign of making a television ad that showed edited photos of the mayor, along with an allegedly fake text he sent.<sup>51</sup> Texas recently passed a similar law limiting deep fakes within 30 days of an election in hopes of preventing election interference.<sup>52</sup> Unlike California's A.B. 730, however, the Texas law makes the creation or distribution of these deep fakes a misdemeanor.

Ultimately, lawyers for either side should prepare their clients to understand the emerging deep fake technology and the legal ramifications that come with it. When sued pursuant to either A.B. 602 or A.B. 730, a defendant could always challenge the law's constitutionality, whether or not the defendant is properly covered by it.<sup>53</sup> In an overbreadth challenge, a defendant would argue that the statute covers a wide range of expressive conduct—more than necessary—and, thus, it is not the least-restrictive means possible. Are the exceptions in A.B. 602 enough to narrowly tailor the law despite its lack of an intent-to-harm requirement? Or could the law implicate artistic

speech that was intentionally disclosed but not intended to harm the person depicted? Does the existence of an intent-to-harm requirement in A.B. 730 give that law a better chance at surviving strict scrutiny? Consider the fact that a statute is not substantially overbroad merely because one can conceive some impermissible applications.<sup>54</sup>

It is possible that the exceptions in both laws could properly protect people's free speech, despite the weaknesses highlighted above. In *Burson v. Freeman*, the Court found that a content-based Tennessee law prohibiting campaign signage within 100 feet of the polling location was valid under strict scrutiny.<sup>55</sup> In *State v. VanBuren*, the Supreme Court of Vermont found the state's revenge porn statute narrowly tailored to serve the compelling state interest because the language was limited to a confined class of content, there was an intent element that encompassed the nonconsent requirement, and there was an express exclusion of images warranting greater constitutional protection.<sup>56</sup>

## Conclusion

Until that constitutional issue is raised, clients should be prepared to understand how A.B. 602 and A.B. 730 function. False information delivered via deep fakes can harm the reputation of practically anyone—private or public individuals and small or large companies. Because deep fakes are particularly concerning for any type of client, these laws are certainly necessary in the same way revenge porn laws were necessary to address a novel harm fueled by social media.<sup>57</sup> Uncertainty with the laws' ability to satisfy strict scrutiny certainly does not mean deep fakes are unimportant or shouldn't be regulated. However, the problem courts will have to grapple with is the same conflict I am struggling with. On the one hand, we want to protect free speech. On the other hand, we want to protect individuals and democracy from irreparable harm. Does the harm caused by pornographic or politically deceptive deep fakes outweigh the harm caused to the First Amendment? Does policy help tip the scale in the situation? Perhaps the only way to resolve this tension

and find some common ground is to continue gaining clarity on the interpretation of these new laws. In the meantime, businesses should carefully determine the best approach suited for their brands, and both content creators and targeted deep fake subjects should understand how these laws limit the use of deep fake technology. ■

## Endnotes

1. U.S. CONST. amend. I.
2. *United States v. Alvarez*, 567 U.S. 709, 719 (2012).
3. *United States v. Stevens*, 559 U.S. 460, 468 (2010).
4. *See* *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”); *see also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).
5. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).
6. *See* Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753 (2019).
7. *See* Doug Mirell & Josh Geller, *Tracking Early State Legislative Efforts to Curb Deepfakes*, LAW360 (Oct. 28, 2019), <https://www.law360.com/articles/1214203/tracking-early-state-legislative-efforts-to-curb-deepfakes> (“The technology has been widely used to create sexually explicit depictions of celebrities, as well as altered videos of politicians and other public figures.”).
8. Chesney & Citron, *supra* note 6, at 1758.
9. *Id.* at 1753.
10. Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMENDMENT INST. (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>.
11. *Id.*
12. *See* Fernando Nunez, *Disinformation Legislation and Freedom of Expression*, 10 UC IRVINE L. REV. 783 (2020) (discussing unchecked disinformation and the harm it causes to our democracy and its serious negative effects on people's ability to enjoy their right to freedom of expression).
13. *See* David Ruiz, *Deepfakes Laws and Proposals Flood US*, MALWAREBYTES (Jan. 23, 2020), <https://blog.malwarebytes.com/artificial-intelligence/2020/01/>

[deepfakes-laws-and-proposals-flood-us](https://www.malwarebytes.com/artificial-intelligence/2020/01/deepfakes-laws-and-proposals-flood-us).

14. Chesney & Citron, *supra* note 6, at 1788.
15. *Id.* at 1769–70.
16. *Id.* at 1788.
17. *See* James Vincent, *Facebook's Problems Moderating Deepfakes Will Only Get Worse in 2020*, THE VERGE (Jan. 15, 2020), <https://www.theverge.com/2020/1/15/21067220/deepfake-moderation-apps-tools-2020-facebook-reddit-social-media>.
18. *Id.*
19. Ruiz, *supra* note 13.
20. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”); *see also* *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367 (1969).
21. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>.
22. *See* Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 894 (2019) (citing Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 847 (2018)).
23. Nunez, *supra* note 12, at 789.
24. *See, e.g.*, Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012); Mary Anne Franks & Danielle Citron, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251 (2017); Franks & Waldman, *supra* note 22.
25. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011).
26. Franks & Waldman, *supra* note 22, at 894.
27. *See* *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989) (content restrictions must promote a compelling government interest and be the least-restrictive means of achieving that interest).
28. *See* 2019 Cal. Legis. Serv. ch. 491 (A.B. 602) (West).
29. *Id.*
30. *Id.*
31. *Id.*

32. *Id.*  
33. *Id.*  
34. See 2019 Cal. Legis. Serv. ch. 493 (A.B. 730) (WEST).  
35. *Id.*  
36. *Id.*  
37. *Id.*  
38. *Id.*  
39. See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).  
40. See *State v. VanBuren*, 214 A.3d 791, 808 (Vt. 2019) (finding that the state had a compelling interest in regulating revenge porn, which was based on the U.S. Supreme Court’s recognition of the relatively low constitutional significance of speech relating to purely private matters and evidence of potentially severe harm to individuals arising from nonconsensual publication of intimate depictions of them).  
41. Nunez, *supra* note 12, at 789 (discussing how disinformation intended to influence elections may be enough of a compelling state interest).  
42. See *State v. Casillas*, 938 N.W.2d 74, 77 (Minn. Ct. App. 2019), *review granted* (Mar. 17, 2020) (where the court found a Minnesota revenge porn statute facially overbroad in violation of the First Amendment as a result of its lack of an intent-to-harm requirement and its use of a negligence *mens rea*).  
43. 2019 Cal. Legis. Serv. ch. 491 (A.B. 602) (West).  
44. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The First Amendment

affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

45. A.B. 602.  
46. See Charlotte Walsh, *What Is a Deepfake? This Video Technology Is Spooking Some Politicians*, USA TODAY (May 6, 2019, 8:14 PM), <https://www.usa-today.com/story/news/politics/2019/03/15/what-deepfake-video-technology-spooking-some-politicians/3109263002> (reporting on a recent pornographic deep fake featuring Selena Gomez’s face on an adult film star’s body).

47. See Tiffany C. Li, *Kim Kardashian vs. Deepfakes*, SLATE (June 18, 2019, 8:34 PM), <https://slate.com/technology/2019/06/deepfake-kim-kardashian-copyright-law-fair-use.html> (discussing a falsified video that used substantial amount of footage from a *Vogue* interview with Kim Kardashian and the strong case to be made that the video, among other deep fakes, would qualify as fair use).

48. See Matthew F. Ferraro et al., *Identifying the Legal and Business Risks of Disinformation and Deepfakes: What Every Business Needs to Know*, WILMER HALE (Mar. 12, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200312-identifying-the-legal-and-business-risks-of-disinformation-and-deepfakes-what-every-business-needs-to-know>.

49. Kyle Wiggers, *Facebook, Microsoft, and Others Launch Deepfake Detection Challenge*, VENTURE BEAT (Dec. 11, 2019, 9:00 AM), <https://venturebeat.com/2019/12/11/facebook-microsoft-and-others-launch-deepfake-detection-challenge>.

50. Ferraro et al., *supra* note 48.  
51. See Jasper Scherer, *Sylvester Turner Calls for Investigation into Tony Buzbee Ad, Citing “Deep Fake” Law*, HOUS. CHRON. (Oct. 18, 2019, 8:44 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Sylvester-Turner-calls-for-investigation-into-14545665.php>.

52. Tex. S.B. No. 751, <https://capitol.texas.gov/tlodocs/86R/billtext/html/SB00751F.htm>.

53. See, e.g., *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016) (where defendant sought to invalidate North Carolina’s cyberbullying statute because it was overbroad, even though defendant was properly covered by the law).

54. *State v. Casillas*, 938 N.W.2d 74, 80 (Minn. Ct. App. 2019), *review granted* (Mar. 17, 2020).

55. See 504 U.S. 191, 211 (1992) (requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise).

56. 214 A.3d 791, 811–12 (Vt. 2019).

57. *Id.* at 810 (harm to the victims of nonconsensual pornography can be substantial).

# Pirates of the Copyrighted

*Continued from page 1*

the plain meaning of this text may appear relatively straightforward, the history of its interpretation and application is anything but. With a rarely unanimous disregard of originalism, for example, the *Allen* Court noted that “this Court has long understood that Amendment to stand not so much for what it says as for the broader presupposition of our constitutional structure which it confirms.”<sup>1</sup>

The evolution of copyright law over time provides a telling microcosm of the Eleventh Amendment’s history. The courts of appeal were split over whether the 1909 Copyright Act abrogated the states’ Eleventh Amendment sovereign immunity. The Ninth Circuit, for example, found that when Congress adopted the 1909 Act pursuant to the Copyright and Patent Clause of the Constitution (Article I, § 8, Cl. 8), this was a valid abrogation of state sovereign immunity.<sup>2</sup> The Eighth Circuit, however, disagreed.<sup>3</sup> And the legislative record suggests that Congress intended the 1976 Act to apply to states as well.<sup>4</sup>

In 1985, however, the Supreme Court decided *Atascadero State Hospital v. Scanlon*.<sup>5</sup> According to that decision, a “general authorization for suit in federal court”—such as the type found in the 1909 and 1976 Copyright Acts—“is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.”<sup>6</sup> Not long thereafter, the other shoe dropped across the country as courts found the copyright statutes insufficiently specific to abrogate sovereign immunity.<sup>7</sup> In a 1988 decision acknowledging that *Atascadero* had overruled its prior circuit law, the Ninth Circuit “recognize[d] that our holding will allow states to violate the federal copyright laws with virtual impunity. It is for Congress, however, to remedy this problem.”<sup>8</sup>

## **Liberation Prophesied: The Oman Report**

Congress attempted to follow the Ninth Circuit’s suggestion. In

August 1987, the leaders of the House subcommittees with jurisdiction over intellectual property issues wrote to the Register of Copyrights, Ralph Oman, requesting his “assistance with respect to the interplay between copyright infringement and the Eleventh Amendment.”<sup>9</sup> Specifically, they asked Register Oman to conduct an inquiry and produce a report “concerning the practical problems relative to the enforcement of copyright against state governments . . . [and] concerning the presence, if any, of unfair copyright or business practices vis a vis state government with respect to copyright issues.”<sup>10</sup> In November 1987, the Copyright Office published a Request for Information in the *Federal Register* seeking public comment on these issues. It received more than 40 comments from textbook publishers, motion picture producers, composers, software companies, financial advisors, trade groups, state agencies, and others.

In June 1988, Register Oman submitted a 150-page report of his findings, titled *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights*.<sup>11</sup> Its recommendations were twofold:

1. If [Supreme Court case law] permits Article I abrogation, Congress should amend section 501 of the Copyright Act to clarify its intent to abrogate states’ Eleventh Amendment immunity pursuant to its copyright clause power and thereby make states liable to suit for damages in federal court for copyright infringement. A legislative solution is preferred since this action would merely confirm Congress’ original intent about the states’ amenability to damage suits under the federal Copyright Act. Legislative action will also avoid needless litigation and delay in clarification of the copyright law.

2. If [Supreme Court case law] does not permit congressional abrogation under Article I powers, Congress may be forced to amend the jurisdictional provision in 28 U.S.C. §1338(a), to provide that where states are defendants private individuals may sue them in state court for copyright damages under the federal copyright statute.<sup>12</sup>

In support of its conclusion that sovereign immunity ought to be waived, the report cited “[f]ive copyright proprietors [who] document[ed] actual problems faced in attempting to enforce their claims against state government infringers.”<sup>13</sup> The “problems” these citizens reported included anecdotes of state agencies willfully reproducing and performing motion pictures, musical works, and a variety of educational materials. Register Oman found no reason to believe that states would be unduly burdened by complying with copyright law, and noted that, particularly in the field of educational textbooks, the states’ immunity afforded them the negotiation leverage “to extract from or even impose on publishers substantial concessions of basic rights under the Copyright Act that . . . go far beyond the borders of fair use, educational exemptions, or the educational guidelines incorporated in the legislative history.”<sup>14</sup>

## **A Hero Rises: The CRCA**

In 1990, Congress passed the Copyright Remedy Clarification Act (CRCA).<sup>15</sup> Acting directly on Register Oman’s advice, this legislation added section 511 to the Copyright Act, which purported to resolve unambiguously the conflict between state piracy and copyright interests by decreeing that “[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution



of the United States or under any other doctrine of sovereign immunity”<sup>16</sup> from suit for copyright infringement, and that “remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State. . . .”<sup>17</sup> At the time, it was thought that this direct invocation of abrogation based on the Patents and Copyrights Clause was all that was needed to satisfy the Supreme Court’s Eleventh Amendment jurisprudence.

**Calamity Foreshadowed: The PRA**  
In 1992, Congress created a sidekick for the CRCA in the form of the Patent Remedy Act (PRA).<sup>18</sup> This statute followed the CRCA’s lead by invoking the Patents and Copyrights Clause to abrogate state sovereign immunity over patent infringement lawsuits. As in so many prior heroic tales, however, this sidekick would suffer an unfortunate fate that foreshadows the danger about to befall our hero as well.

The foundation for our heroes’ downfall was laid in *Seminole Tribe of Florida v. Florida*,<sup>19</sup> which held that Congress may not abrogate state sovereign immunity pursuant to its Article I powers. (The Court would later make an exception for the Bankruptcy Clause of Article I, but that’s a different story involving paupers, not pirates.)

Then, in 1999, the Supreme Court decided *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.<sup>20</sup> By a 5–4 vote, the Court struck down the PRA. Both the Court and the petitioners treated as a foregone conclusion under *Seminole Tribe* that the Patents and Copyrights Clause was insufficient to justify the PRA’s abrogation of immunity. Rather, the petitioners and the Solicitor General argued that the PRA was a valid exercise of Congress’s power under the Fourteenth Amendment to enforce the due process of law—which is one of the bases Congress had cited in passing the act.

Although the Court in *Florida*

*Prepaid* agreed that the Fourteenth Amendment could be a valid basis on which to abrogate state sovereignty, it held that Congress had not done a sufficient job justifying the use of that power in this instance. That is because the Fourteenth Amendment may be invoked only under “appropriate” circumstances—as explained in *City of Boerne v. Flores*,<sup>21</sup> which invalidated the extension of the Religious Freedom Restoration Act to the states because there was too little support in the record for the concerns that animated the law, rendering it a “disproportionate” remedial action. Similarly, the *Florida Prepaid* majority found that “Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.”<sup>22</sup> Thus, as in *City of Boerne*, the purported harm was not severe enough in the Court’s eyes to support the remedy.

But there is a second prong to the “adequacy of the harm” analysis. Before the Court will approve a Fourteenth Amendment remedy, Congress must also show that the pirates cannot hold themselves to account. “Thus,” the Court held, “only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.”<sup>23</sup> Here, the Court chastised Congress for giving this consideration short shrift—and, in the process, dropped some hints as to what state-level solutions it would, and would not, find adequate:

Congress, however, barely considered the availability of state remedies for patent infringement and hence whether the States’ conduct might have amounted to a constitutional violation under the Fourteenth Amendment. It did hear a limited amount of testimony to the effect that the remedies available in some States were uncertain.

The primary point made by these witnesses, however, was

not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law.

Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses. The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.

...

Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.<sup>24</sup>

Keep these musings about state-level patent infringement remedies in the back of your mind. They become important to the story later.

By the way, the four-justice majority did hit all the notes one would expect—such as to emphasize the importance of national uniformity in patent law and to decry the unfairness of “strick[ing]

down Congress' Act based on an absence of findings supporting a requirement this Court had not yet articulated."<sup>25</sup> Thus, our sidekick's passing was lamented, but the Court held it was a fatality that could not be avoided.

### **The Hero Slain: *Allen v. Cooper***<sup>26</sup>

In the years following the PRA's demise, the CRCA suffered enough wounds to fell any average statutory scheme. In the span of 20 years, it was deemed unconstitutional by district and appellate courts in the 1st, 2d, 4th, 5th, 6th, 9th, and 11th Circuits. Nevertheless, it clung to life, at least until the Supreme Court's decision in *Allen v. Cooper*.

Cut to a pirate ship arising from the briny depths. *Allen* arose from the discovery of Blackbeard's flagship, *Queen Anne's Revenge*, off the North Carolina coast. Frederick Allen and his company, Nautilus Productions, filmed the shipwreck and registered copyrights for the videos and photos that they created. In 2015, they filed a lawsuit claiming that North Carolina had infringed their copyrights by posting unauthorized copies of an independent documentarian's copyrighted videos to its state-owned website.

The pirates did not hide from the charges, they in fact hoisted the Jolly Roger with pride: North Carolina admitted it had done the deed but simply argued that the CRCA had not validly repealed Eleventh Amendment immunity for copyright infringement and therefore it could not be sued in federal court. The U.S. Court of Appeals for the Fourth Circuit agreed. Allen asked the Supreme Court to weigh in, telling them that, unless they reversed this ruling, the "creators of original expression will be left without remedy when States trample their federal copyrights."<sup>27</sup> The justices granted the request to review this pirate tale—but did not deliver the new ending that Allen desired.

Instead, the Supreme Court unanimously affirmed the Fourth Circuit's decision, finding it "compel[led]"<sup>28</sup> by the holding of *Florida Prepaid*. The Court reiterated that Article I's Patents and Copyrights Clause (or, as Justice

Elena Kagan's majority opinion somewhat imprecisely coins it, the "Intellectual Property Clause") cannot support abrogation of state immunity. Instead, the Court reviewed the CRCA's legislative record under the demanding Fourteenth Amendment analysis of *City of Boerne* and *Florida Prepaid*, even though those rules had not yet been articulated when Congress passed the CRCA. And *Allen's* analysis was no gentler on Congress than those decisions had been. In particular, the Court dissected the Oman Report and Register Oman's congressional testimony, picking out each instance in which he appeared to downplay the frequency or severity of state-sanctioned infringement. "And it gets only worse," continued the majority; "[n]either the Oman Report nor any other part of the legislative record shows concern with whether the States' copyright infringements (however few and far between) violated the Due Process Clause"<sup>29</sup>—even though the CRCA was passed well before the Court's *Seminole Tribe* decision had alerted Congress that such analysis was even necessary.

### **Pirates Triumphant?**

But the Court was not done heaping ignominy on the CRCA. Not only must our hero die, but the Court wanted readers to understand that its pirate opponents would be able to break out the rum and dance on its grave. Justice Kagan wrote for the majority that, if Congress could just come up with a version of the CRCA that would pass constitutional muster, it could "effectively stop States from behaving as copyright pirates."<sup>30</sup> Concurring, Justice Stephen Breyer was even more pointed: "one might think that Walt Disney Pictures could sue a State . . . for hosting an unlicensed screening of the studio's 2003 blockbuster film, *Pirates of the Caribbean* (or any one of its many sequels). Yet the Court holds otherwise."<sup>31</sup>

As it had in *Florida Prepaid*, the *Allen* Court faulted Congress for not demonstrating a problem severe enough to warrant the enacted solution. Part of the difficulty, of course, was that Congress did not

know that such an analysis was necessary when it passed the law. Thus, even though the Oman Report did advance the most compelling factual basis for the CRCA it could based on the 40 responses it received to its request for comment, one can't help but feel that more evidence could have been gathered, even at that time. Another difficulty in demonstrating the problem to the Court's satisfaction is that the availability of the Eleventh Amendment immunity means that many otherwise compelling infringement lawsuits are never filed in the first place, or else are resolved without a substantive judicial opinion on the constitutional merits. This suggests that the Court should have been much more sympathetic than it was to the anecdotal evidence.

Nevertheless, the judicial record is not lacking for examples of state sovereign immunity overcoming the interests of copyright owners. The following citations demonstrate just a portion of the public-record case law available for use in demonstrating the widespread and serious nature of copyright infringement by state actors:<sup>32</sup>

- *National Association of Boards of Pharmacy v. Board of Regents*.<sup>33</sup> Standardized pharmacy exam questions were gathered by university professor without permission to be used in review class. The court held state sovereign immunity bars a claim under the CRCA.
- *Chavez v. Arte Publico Press*.<sup>34</sup> Author agreed to a series of publishing contracts with a university, which continued to print copies even after author refused to renew the contract. The court held state sovereign immunity bars the claim.
- *Rodriguez v. Texas Commission on the Arts*.<sup>35</sup> Registered license plate design allegedly infringed when Commission began selling its license plates. The court held Commission immune from suit under sovereign immunity.
- *BV Engineering v. UCLA*.<sup>36</sup> Suit alleging copying of software barred by sovereign immunity of the university as an arm of the state.

- *Bynum v. Texas A&M University Athletic Department*.<sup>37</sup> Suit alleged Texas A&M copied an unpublished chapter of author's book and posted it on its website without permission. Texas A&M escaped liability by asserting sovereign immunity.
- *Dynastudy v. Houston Independent School District*.<sup>38</sup> Study guides were repeatedly used without permission. Immunity was not asserted in this case and resulted in a jury verdict of \$9.2 million.
- *Reiner v. Canale*.<sup>39</sup> Professor distributed photographer's photograph to professor's class without permission. The court held the professor was entitled to sovereign immunity to the extent he was sued in his official capacity.
- *Nettleman v. Florida Atlantic University Board of Trustees*.<sup>40</sup> The university continued to use professor's teaching materials he developed before employment despite his express denial of permission. The court held the professor's claim barred by sovereign immunity.
- *Coyle v. University of Kentucky*.<sup>41</sup> Photographer contracted with the university to take pictures of collegiate athletes and retained his copyrights under said contracts. The university used the photos for commercial gain, and the court held the university was immune from suit.
- *Issaenko v. University of Minnesota*.<sup>42</sup> Court found CRCA did not waive state immunity under the Eleventh Amendment and did not reach ownership issue. The plaintiff was a research assistant at a university laboratory who authored "independent" research.
- *Jacobs v. Memphis Convention & Visitors Bureau*.<sup>43</sup> The Visitors Bureau had a limited license to use professional photographs of Memphis landmarks and reproduced, distributed, and publicly displayed the works outside the scope of that license. The claim was dismissed due to state sovereign immunity.
- *Marketing Information Masters, Inc. v. Board of Trustees*.<sup>44</sup> Marketing research report allegedly misappropriated to create a subsequent report. The court held state actors were immune from suit.
- *InfoMath, Inc. v. University of Arkansas*.<sup>45</sup> Internet-based pre-calculus course was created by the plaintiff originally in connection with the university. The court did not reach ownership issues because it held the university was immune from suit.
- *De Romero v. Institute of Puerto Rican Culture*.<sup>46</sup> Mural stored at museum was destroyed during remodeling. VARA claim barred because the institute had sovereign immunity as an arm of Puerto Rico.
- *Salerno v. City University of New York*.<sup>47</sup> Ownership dispute in documentary material barred against the university and the institute by sovereign immunity. Individual defendants were not subject to qualified immunity.
- *Jehnsen v. New York State Martin Luther King, Jr., Institute for Nonviolence*.<sup>48</sup> This is an infringement suit for unauthorized use of leadership manual outlining the nonviolent methodology practiced by Dr. King. Holding claim was barred by sovereign immunity.
- *Lane v. First National Bank of Boston*.<sup>49</sup> Bank created a print-out of a database and devised a website and new database similar to the original database. The court held sovereign immunity barred all claims except those against the defendants sued in their personal capacity.
- *Mihalek Corp. v. Michigan*.<sup>50</sup> Copyrighted materials were integrated into promotional campaigns without credit or compensation. The court held state actors were immune from suit.
- *University of Houston System v. Jim Olive Photography*.<sup>51</sup> The court held that a state actor's copyright infringement is not a taking.

Clearly, there is ample support for the *Allen* Court's observation that the states are behaving as pirates and doing so on a frequent basis. Is there anything copyright owners can do to defend their interests from being pillaged?

### A Copyright Hero—or Heroes—Will Rise Again

Another familiar trope of heroic epics is that the Chosen One who will lead the rebellion is difficult to identify. Often, following a prophetic word of hope, a hero rises up and rallies the people to his side, only to be struck down. Hope is shattered—until either the fallen hero returns to life, or else it becomes clear that the prophecy was meant for someone else.

This story has the capacity to progress in a similar direction. A month after the *Allen* decision was announced, Senators Thom Tillis (R-North Carolina) and Patrick Leahy (D-Vermont) asked the U.S. Copyright Office and the U.S. Patent and Trademark Office to begin a study on the extent to which copyright and patent owners are suffering infringement at the hands of state government. Their letters requested a report within a year—an Oman Report 2.0, if you will—and appear designed to support an attempt at Congress passing new versions of the PRA and CRCA that would pass Fourteenth Amendment muster under the Supreme Court's current framework.

Even if Congress manages to compile a sufficient factual record, though, a constitutionally sound remedy for state infringement will likely be narrower than for other infringers. The *Allen* Court appears to have strongly suggested that a new congressional enactment should be more limited in scope than the categorical abrogations of immunity decreed by the CRCA:

When does the Fourteenth Amendment care about copyright infringement? Sometimes, no doubt. Copyrights are a

form of property. And the Fourteenth Amendment bars the States from “depriv[ing]” a person of property “with-out due process of law.” *But even if sometimes, by no means always. Under our precedent, a merely negligent act does not “deprive” a person of property. So an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause.*<sup>52</sup>

For at least six of the justices signing the majority opinion, then, a state to suit for federal copyright infringement unless that infringement is intentional. (In concurring opinions, Justice Clarence Thomas declined to advise Congress on future legislation, while Justices Breyer and Ruth Bader Ginsburg mused that “[w]hether a future legislative effort along those lines will pass constitutional muster is anyone’s guess.”<sup>53</sup>) Thus, a majority of the justices appear to agree that “negligent” infringement will remain without federal remedy. This alone upsets the national uniformity of copyright law by introducing a *mens rea* requirement of uncertain dimensions that does not exist for nonstate defendants. In other words, for everyone else, copyright infringement is strict liability; for states, it is not.

And there is more: Under *Allen*, before it will be allowed to act, Congress must also establish to the Court’s satisfaction that states cannot solve the problem themselves.

A State cannot violate that Clause unless it fails to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of “due process.” That means within the broader world of state copyright infringement is a smaller one where the Due Process Clause comes into play.<sup>54</sup>

Again, therefore, the national uniformity of copyright law—which

is the sole province of federal courts under the 1976 Copyright Act—would be disrupted.

*Allen* offers precious few hints as to how much, and what kind, of remedy states must offer for their own infringements before the Court will allow them to be dragged into a federal court to answer for their pirate exploits. But this is where both the Oman Report and the longer discussion in the *Florida Prepaid* majority opinion—the Easter eggs carefully woven into our plot more than 20 years ago—come into play. Although those sources fall far short of a comprehensive roadmap, they at least contain a few additional nuggets to go on.

The Oman Report, for example, included as its secondary recommendation that Congress amend the jurisdictional provisions of the 1976 Copyright Act to allow plaintiffs to sue in state courts, at least where state governments are the defendants. That may be the option least disruptive to the status quo. Although it would require state court judges with likely no prior experience in copyright law (which is exclusively the province of federal courts) to render decisions, at least the statutory framework would remain the same.

The Supreme Court, on the other hand, has repeatedly suggested that states themselves be given an opportunity to devise their own means of compensating copyright owners for state-sanctioned infringement. For example, *Florida Prepaid* gave no weight to the concern that state-level remedies would be procedurally less convenient or different than the “power calculus”<sup>55</sup> chosen by federal law. This suggests that states would be free to establish different, more cumbersome methods or burdens of proof for demonstrating infringement than the Copyright Act does, or even than other states do. Thus, one state may opt for judicial remedies in its court of claims, while another state sets up an administrative remedy, while still others allow a hybrid of both—with each state using a slightly different burden of proof. Copyright law could quickly come to resemble the ragtag patchwork of laws and

regulations that typify the fields of data privacy and the right of publicity. This, again, contradicts the preemption provisions of copyright law that sought to ensure that there would *not* be such a patchwork of differing copyright principles and procedures.

Like the *Allen* Court, *Florida Prepaid* also hinted that negligent infringement may be unrecoverable—perhaps even at the state level. “[I]nfringement authorized pursuant to state policy”<sup>56</sup>—whatever that means—may also be out of reach. Finally, it suggests that state compensation policies may keep federal liability at bay so long as they are not “questionable remedies” or allow “a high incidence of infringement.”<sup>57</sup>

The epic struggle between copyright owners and piracy by state sovereigns seems fated to continue for many years to come. Although the Supreme Court has been reluctant to take action against the threat, it has now at least acknowledged the problem. Congress has acted before, and appears ready to try again, as its copyright-owning constituents are no doubt insisting it do.

The *Copyright v. State Pirates* franchise, therefore, appears ready to spawn a sequel—if not an entire multimedia experience. It’s uncertain if the next installment of the franchise will once again end with the pirates ruling the seas. ■

## Endnotes

1. *Allen v. Cooper*, No. 18-877, 140 S. Ct. 994, 1000 (Mar. 23, 2020) (citations and quotations omitted).
2. *Mills Music, Inc. v. State of Ariz.*, 591 F.2d 1278 (9th Cir. 1979) (“we conclude that the Eleventh Amendment’s sovereign immunity does not permit a state to nullify the rights reserved and protected by Congress, acting pursuant to the Copyright and Patent Clause”).
3. *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (finding a school district immune from suit for copyright infringement).
4. See H.R. REP. NO. 101-282, at 1–2 (1989).
5. 473 U.S. 234 (1985).
6. *Id.* at 246.
7. See, e.g., *Woelffer v. Happy States*

- of Am., Inc., 626 F. Supp. 499, 503–05 (N.D. Ill. 1985); Richard Anderson Photography v. Radford Univ., 633 F. Supp. 1154, 1159–60 (W.D. Va. 1986), *aff'd in relevant part sub nom.* Richard Anderson Photography v. Brown, 852 F.2d 114, 117–20 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); BV Eng'g v. Univ. of Cal., L.A., 657 F. Supp. 1246, 1248–50 (C.D. Cal. 1987), *aff'd*, 858 F.2d 1394, 1397–98 & n.1 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); Lane v. First Nat'l Bank of Bos., 687 F. Supp. 11, 14–15 (D. Mass. 1988), *aff'd*, 871 F.2d 166, 168–69 (1st Cir. 1989).
8. *BV Eng'g*, 858 F.2d at 1400.
9. Letter from Robert W. Kastensmeier & Carlos Moorhead, Subcomm. on Courts, Civil Liberties & Admin. of Just., to Ralph Oman, Register of Copyrights (Aug. 3, 1987).
10. *Id.*
11. REGISTER OF COPYRIGHTS, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT (June 1988), available at <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf> [hereinafter COPYRIGHT LIABILITY REPORT].
12. *Id.* at ix.
13. *Id.* at 7.
14. *Id.* at 1 1.
15. Copyright Remedy Clarification Act (CRCA), Pub. L. No. 101-553, 104 Stat. 2749 (1990).
16. 17 U.S.C. § 511(a).
17. *Id.* § 511(b).
18. Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230.
19. 517 U.S. 44 (1996).
20. 527 U.S. 627 (1999).
21. 521 U.S. 507 (1997).
22. 527 U.S. at 640.
23. *Id.* at 643.
24. *Id.* at 643–47 (citations omitted).
25. *Id.* at 654.
26. *Allen*, No. 18-877, 140 S. Ct. 994 (Mar. 23, 2020).
27. Petition for Writ of Certiorari at 1, *Allen v. Cooper*, No. 18-877 (Jan. 4, 2019).
28. *Allen*, 140 S. Ct. at 999.
29. *Id.* at 1006.
30. *Id.* at 1007.
31. *Id.* at 1009 (Breyer, J. concurring).
32. Thanks to Brianna Loder (J.D. 2020, Michigan State University, and summer associate at Warner Norcross + Judd LLP) for compiling this research.
33. 633 F.3d 1297 (11th Cir. 2011).
34. 204 F.3d 601 (5th Cir. 2000).
35. 199 F.3d 279 (5th Cir. 2000).
36. 657 F. Supp. 1246 (C.D. Cal. 1987), *aff'd*, 858 F.2d 1394 (9th Cir. 1988).
37. No. 4:17-cv-181 (S.D. Tex. 2019).
38. No. 4:16-cv-1442 (S.D. Tex. 2019).
39. 301 F. Supp. 3d 727 (E.D. Mich. 2018).
40. 228 F. Supp. 3d 1303 (S.D. Fla. 2017).
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# Online Influencers Create Challenging “Fyre” to Contain

BY NEIL FEINSTEIN AND WILLIAM MURPHY

**K**endall Jenner, Emily Ratajkowski, and other well-known social media influencers simultaneously posted a video with a thumbnail consisting of an orange square and a logo of stylized flames to their Instagram feeds on December 12, 2016.<sup>1</sup> Clicking the thumbnail played the video, showing Bella Hadid and other supermodels running around a tropical beach.<sup>2</sup> Text throughout the video promised “an immersive music festival . . . two transformative weekends . . . on the boundaries of the impossible.”<sup>3</sup>

This was the beginning of Fyre Festival’s promotional campaign.<sup>4</sup> Fyre Festival was a “luxury” music festival founded by Billy McFarland and rapper Ja Rule.<sup>5</sup> Scheduled to take place on April 28–30 and May 5–7, 2017, on the Bahamian island of Great Exuma, the event sold day tickets ranging from \$500 to \$1,500 and VIP packages including airfare, meals “prepared by celebrity chefs,” and luxury tent accommodations in “modern, eco-friendly, geodesic domes” for \$12,000.<sup>6</sup> Advertised performers included Major Lazer, Blink-182, and a DJ “who specializes in producing ’70s and ’80s rock remixes for clients that include Middle Eastern and European royalty.”<sup>7</sup> More importantly, a group of 400 celebrities, all with at least 1 million Instagram followers, posted their plans to attend.<sup>8</sup>

Millennials, in their deification

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of influencers, hunger for exclusivity, and desire to be seen, proved a captive and impressionable audience for what McFarland and Ja Rule were selling.<sup>9</sup> More than 5,000 purchased tickets and descended upon the remote island touted as being once owned by the notorious Pablo Escobar under the illusion of rubbing elbows, frolicking on yachts, and generally “living their best lives” among the rich, famous, young, and beautiful all while Instagramming the entire experience.<sup>10</sup>

In reality, Fyre Festival’s marketing misled attendees from the very start as its organizers proved knowingly incompetent to deliver on their promises by gravely underestimating the planning, organization, time, and cost for staging such a large event.<sup>11</sup> While the promotional footage with supermodels was filmed on Norman’s Cay, a lightly populated island with a connection to Pablo Escobar’s Medelin Cartel, Great Exuma, where the festival was to actually be held, was neither private nor remote.<sup>12</sup> Rather, the festival would take place in a remote parking lot north of Sandals, part of an abandoned resort development with no infrastructure.<sup>13</sup>

As scheduled acts, led by Blink-182, pulled out, guests arrived, by school bus, and the true state of the festival revealed itself.<sup>14</sup> Accommodations were little more than scattered disaster relief tents with dirt floors, some with mattresses soaking wet from a morning rain, and the gourmet food consisted of nothing more than the now infamous cheese sandwiches served in foam containers.<sup>15</sup> Additionally, baggage was either mishandled or stolen, hired security grew overzealous, and there was no lighting, paved walkways, medical personnel, event staff, cell phone and internet service, portable toilets, or running water.<sup>16</sup> In desperate attempts at fleeing the island, many found them themselves stranded when

the Bahamian government shut down air traffic, with some even ending up locked in the Exuma Airport without access to air conditioning, food, and water overnight.<sup>17</sup>

A subsequent criminal investigation into Fyre Festival ensued and organizer Billy McFarland eventually pled guilty in federal court to charges of wire fraud and wire fraud related to a scheme to defraud a ticket vendor.<sup>18</sup> He was sentenced to six years in prison and ordered to forfeit \$26 million.<sup>19</sup> A series of civil lawsuits against McFarland and the other organizers soon followed, alleging claims of fraud, breach of contract, and negligent misrepresentation among others.<sup>20</sup> Most notably, both Netflix and Hulu each produced its own wildly popular documentary providing a deep, inside look at Fyre Festival and met with high praise from critics and audiences alike.<sup>21</sup>

Of the many civil lawsuits, the second, filed in Los Angeles County Superior Court, stood out as particularly interesting because not only were McFarland and the other Fyre Festival organizers named as defendants, but, for the first and only time, the 400 social media influencers and celebrities that promoted it were as well.<sup>22</sup> Leaked Fyre Festival marketing plans later revealed that the influencers received fees ranging from a minimum of \$20,000 to upward of \$250,000 for their promotion.<sup>23</sup> However, none of the influencers’ Instagram posts, sans Emily Ratajkowski’s, disclosed that they were paid and compensated by Fyre Festival as official marketing partners.<sup>24</sup>

Not only did these glaring omissions result in the aforementioned legal action and flagrantly violate Federal Trade Commission (FTC) guidelines,<sup>25</sup> but they also ignited much criticism of and debate about influencer culture generally.<sup>26</sup> Chief among the concerns was the ability, or lack thereof, of the FTC to enforce

its outdated guidelines for social media influencers.<sup>27</sup> Compounding the matter further is the emergence of “anonymous influencers.”<sup>28</sup> Already struggling to police known influencers with millions of followers, the FTC, and the general public, face an even steeper challenge when the source of deceptive or misleading information is unknown.

### **Influencer Marketing**

Influencer marketing can be defined as marketing that uses “key content creators to drive authentic conversation and engagement around a brand’s products and message.”<sup>29</sup> An *influencer* is “a social media user that can have anywhere from several hundred to several million followers. Influencers drive conversation and engagement around a particular topic, discussion, or niche area.”<sup>30</sup>

Many claim that Aunt Jemima was the first influencer when she was introduced as an advertising spokesperson in 1889, yet social media was not born, let alone the internet, and there was no way for consumers to interact with this iconic brand symbol.<sup>31</sup> The fact is that brands have always created icons, such as Frosted Flakes’ Tony the Tiger, and celebrities have been paid for years to endorse products, but this was always a one-way communication with brands pushing the messaging out to consumers.<sup>32</sup> Influencer marketing primarily occurs on social media, such as blogs, and this enables consumers to engage or converse with the influencer.<sup>33</sup> The ability to interact is a key differentiator between an influencer and a spokesperson.<sup>34</sup>

The modern-day seed for influencer marketing was planted in 2001, when Heather Armstrong launched Dooce.com, a model for moms to blog about the trials and tribulations of balancing family and life.<sup>35</sup> “Mommy blogging” was an outlet for writers to eulogize about their lives in a way that was “raw and authentic.”<sup>36</sup> They were “real voices” that consumers believed.<sup>37</sup> In 2006, a business model was established for influencer marketing with the launch of PayPerPost.com, a digital marketplace where marketers could connect with bloggers, pay them to create content, and post about their brands.<sup>38</sup> Influencer

marketing first gained international notoriety in 2010 when Procter & Gamble’s Old Spice launched its “Smell Like a Man, Man” campaign, featuring NFL wide receiver Isaiah Mustafa.<sup>39</sup> In a social media stunt, the muscled spokesman answered questions live on YouTube wearing a towel. This real-time conversation created an air of authenticity and spontaneity about the product helping to transform the cologne that kids bought for grandpa at Christmas into the hottest fragrance for young men.<sup>40</sup>

Researchers have identified four shifts in marketing: Marketing 1.0 was product driven, with the focus being a product’s benefits to its target consumer.<sup>41</sup> Marketing 2.0 was customer-centric, the heyday of Direct Marketing when marketers could use consumer data to make marketing decisions.<sup>42</sup> Marketing 3.0 occurred when brands shifted to human-centered marketing.<sup>43</sup> This was the age of collaboration, coinciding with the widespread adoption of social media.<sup>44</sup> No longer could marketers advertise *at* consumers.<sup>45</sup> Instead, they could collaborate with consumers on social media with the intent of influencing brand affinity and purchase decisions.<sup>46</sup>

We are now in Marketing 4.0, the natural outgrowth of Marketing 3.0, characterized by strong consumer mobility and connectivity, enabled not by devices but by screens and the Internet of Things.<sup>47</sup> It is theorized that the shift that occurred in Marketing 3.0 to the widespread adoption of social media, and the reasons driving that shift, created an environment ripe for Influencer Marketing.<sup>48</sup> As the power of advertising to persuade consumers waned, social media became a popular information-gathering resource; social networks enhance modes of “ecstatic sharing” and possess the capacity to solidify opinions.<sup>49</sup>

The strong mobility and connectivity of Marketing 4.0 may have enabled the rise of Instagram and YouTube as the most popular channels for influencer marketers.<sup>50</sup> With its massive user base (Pew Research found that 37 percent of internet users in the United States are “on” Instagram), visual focus, and ease of posting, Instagram is a preferred channel for influencers.<sup>51</sup> The

increasing consumer demand for video, the simplicity of developing influencer-generated content, video’s well-known power to evoke emotions, and the growing availability of wireless internet access explain why YouTube is preferred by brands as an influencer channel.<sup>52</sup> Pew Research found that 73 percent of internet users in the United States view videos on YouTube.<sup>53</sup>

In Marketing 4.0, the age of connectivity, consumers are seeking connections to trusted, credible sources.<sup>54</sup> It is no surprise then that research has shown influencers have more sway than advertisers with consumers.<sup>55</sup> Sideqik conducted a survey, finding that 70 percent of respondents said they trust the opinions of influencers as much or more than their real-world friends and 78 percent of respondents said they trust influencer opinions more than traditional advertisements.<sup>56</sup> Clearly, influencer marketing has forever changed the approach brands take to relationship-building, and individual influencers have significant power to change opinions, motivate purchase decisions, and persuade consumers. This, of course, begs the question: How are influencers regulated, what are their responsibilities, and when deceptive or misleading, what liabilities may they face?

### **FTC Regulation**

The federal statute applied by the FTC to regulate the conduct of social media influencers deals generally with “unfair” marketing practices and became effective in 2006, long before social media grew into a compulsory and ubiquitous function of everyday life, and influencer marketing and messaging overtook traditional advertising as the dominant strategy for successfully persuading consumers.<sup>57</sup> As such, it failed to anticipate the nuances accompanying subsequent advances in social media technology and utility that seamlessly blended mass commercial and social behavior worldwide without clear delineation.<sup>58</sup>

Over the following 14 years, the FTC has tried playing catch-up with influencer marketing on several occasions by retrofitting the existing but obsolete law through a series of guidelines, Frequently Asked

Questions (FAQs), and publications to more accurately match perpetually evolving modern practices.<sup>59</sup> At their core, all of the FTC's attempts at providing guidance share the common principle that "advertising should be truthful and not misleading."<sup>60</sup>

More specifically, they all focus heavily on the necessity and form of disclosure when an influencer maintains a "relationship" with a brand, business, or organization about which it is posting.<sup>61</sup> A "relationship" must be disclosed when a "financial, employment, personal, or family" connection exists between the influencer and the subject of his or her social media "activity," which is similarly broadly and somewhat vaguely construed to encompass "tags, likes, pins, and similar ways of showing you like a brand or product" in addition to basic posts.<sup>62</sup>

Proper disclosures are easily seen and understood, expressed in the simplest and clearest terms, and blatantly placed directly within the text, picture, or video itself rather than hidden in a click for "More" section or a series of hashtags or links at the very end.<sup>63</sup> The FTC further urges avoidance of social media abbreviations and shorthand as well as use of "In partnership with . . ." and other similar features built in to the various platforms.<sup>64</sup>

Prior to Fyre Festival, the FTC's enforcement of its guidelines was sporadic at best and focused not on the influencers themselves, but instead on the brands and products they promoted. The most notable example involved FTC charges filed in late 2016 against Warner Brothers Home Entertainment (Warner Bros.) involving the promotion of "Shadow of Mordor," a new video game, on YouTube.<sup>65</sup> Specifically, the FTC's complaint alleged that Warner Bros. provided reputable influencers in the gaming industry free access to pre-release versions of the game and cash payments totaling tens of thousands of dollars in exchange for the influencers' posting of positive reviews on YouTube.<sup>66</sup>

Although all posted videos openly disclosed the paid promotion arrangement, they failed to do so directly within the videos, as required by the FTC.<sup>67</sup> Rather, at the instruction of

Warner Bros., they did so within the "description box" appearing beneath the video player, requiring any viewer to scroll down to the very bottom of the page and click a "Show More" button in order for it to be read.<sup>68</sup> During the course of the promotional campaign, consumers viewed the videos over 5.5 million times.<sup>69</sup> Warner Bros. eventually settled the charges by merely agreeing to make compliant disclosures in the future, not misrepresent that sponsored content are the objective and independent opinions of influencers, and take minimum steps to educate, monitor, and terminate influencers where necessary.<sup>70</sup>

Ironically, the FTC's first small step toward enforcing its guidelines against influencers came one week before the Fyre Festival fiasco.<sup>71</sup> After reviewing numerous Instagram posts by celebrities, athletes, and other influencers, the FTC mailed more than 90 "educational" letters.<sup>72</sup> The letters reminded influencers that they should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media if there is "a connection that might affect the weight or credibility that consumers give the endorsement."<sup>73</sup>

Additionally, the letters informed recipients that when making endorsements on Instagram, they should disclose any material connection above the "More" button because "consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post" and further noted that "when multiple tags, hashtags, or links are used, readers may just skip over them."<sup>74</sup> Lastly, the letters pointed out that abbreviated disclosures such as "#sp," "Thanks [Brand]," and "#partner" do not sufficiently inform consumers of a sponsorship.<sup>75</sup>

The FTC filed charges against an influencer directly for the first time later in 2017, although unique circumstances, specifically that the targeted influencers and deceptively promoted brand were actually one and the same, rendered any claim of enforcement purely against influencers dubious at best.<sup>76</sup> The complaint alleged that Trevor "TmarTn" Martin and Thomas "Syndicate" Cassell, well-known influencers in the online

gaming community, misleadingly promoted the CSGO Lotto gambling service without disclosing that they jointly owned it.<sup>77</sup>

CSGO Lotto, Martin, and Cassell settled the charges on terms even more lenient than the prior Warner Bros. settlement, required only to "clearly and conspicuously disclose any material connections" moving forward.<sup>78</sup> The only other action taken by the FTC directly against influencers to date was sending 21 follow-up, "warning" letters to a subset of influencers included in the initial 90 "educational" letter recipients and citing specific social media posts of concern on the same day as the CSGO Lotto settlement.<sup>79</sup>

Given the FTC's substandard enforcement record, all of its inadequate and intermittent efforts have had little to no effect on the behavior of influencers.<sup>80</sup> One 2018 study based on a sample of 800 Instagram accounts found that 71.5 percent disclosed their monetary partnerships, but only 25 percent did so compliantly, and concluded that the results were indicative of ambiguity in the FTC's guidelines and a lack of FTC resources for sufficient regulation of an issue with such massive scope.<sup>81</sup>

Other commentators have criticized the FTC for not fully exercising its authority in a small sampling of high-profile cases to set an example.<sup>82</sup> The FTC makes clear that the guidelines are not regulations, and, therefore, there are no civil penalties associated with them,<sup>83</sup> but reserves the right to pursue legal action for violation of the FTC Act, which provides for monetary fines up to \$10,000 and other equitable relief<sup>84</sup> despite never actually doing so.

Complicating matters further for the FTC is the increased prevalence of "micro-influencers," influencers with anywhere between 10,000 and 500,000 followers and a highly engaged niche audience.<sup>85</sup> Often operating under the proverbial radar due to their smaller follower counts, brands are quickly realizing that micro-influencers may be even more influential than more instantly recognizable "mega" and "macro" influencers because of their significantly higher level of direct interaction with their followers.<sup>86</sup>



With such difficulty enforcing its guidelines against the comparatively small group of influencers with countless millions of followers, any efforts at policing the massive and rapidly expanding population of micro-influencers seem futile from the onset.<sup>87</sup>

Arguments have been made that social media platforms are self-policing with regard to influencer activity through enforcement of their respective terms and conditions and user vigilantism and skepticism; however, the continued existence of deceptive and misleading influencer marketing clearly proves otherwise.<sup>88</sup> Private causes of action by individuals against influencers also remain an enforcement option, albeit a very impractical, unscalable, and economically divisive one given the time and cost of litigation with no guarantee of success.<sup>89</sup>

To its credit, the FTC has recently sought public comment on modernizing and strengthening its regulation of influencer marketing,<sup>90</sup> but yet again misdiagnosed the problem by focusing proposed changes, including potential fines, almost wholly on the brands and not the influencers,<sup>91</sup> clearly demonstrating the desperate need for strong, decisive, and unambiguous legislative intervention to protect consumers.

### **Anonymous and Advocacy Influencers**

The necessity for sweeping federal legislation governing influencer conduct grows even more apparent when considering the possibility of influencer anonymity and online social advocacy potentially based on false claims or information. With the FTC seemingly helpless to police known influencers, any thought of the FTC enforcing its guidelines against anonymous influencers seems impossible and, when influencers' actions are for social advocacy rather than marketing purposes, out of the FTC's jurisdiction altogether.<sup>92</sup>

Beginning in October 2017, the advertising industry took notice of an anonymous Instagram account aimed at exposing sexual harassment and discrimination in its agencies.<sup>93</sup> Dubbed "Diet Madison Avenue" (DMA) and operated by "twelve people working in the advertising industry," the account began publicly

naming and labeling male advertising executives as "serial predators, attaching pig noses to pictures of the men, and repeatedly calling for the immediate firing . . ." based on "a minimum of 6 corroborated stories."<sup>94</sup>

In January 2018, DMA posted a similar Instagram story specifically targeting Ralph Watson, chief creative officer of the advertising agency Crispin Porter + Bogusky (CP+B).<sup>95</sup> After a series of adamant denials citing no prior complaints of any sexual impropriety by Watson, efforts by CP+B's Human Resources to investigate the allegations were immediately leaked and subsequently mocked on the DMA Instagram account the very same day as it also campaigned for Watson's termination.<sup>96</sup> Within one week, a CP+B employee came forward alleging sexual misconduct by Watson.<sup>97</sup> CP+B terminated Watson, for "cause," later that day, and the DMA Instagram account responded with a celebratory post.<sup>98</sup>

Watson, maintaining his innocence from the "false allegations" throughout and believing any investigation conducted by CP+B into their truthfulness was wholly inadequate, resorted to filing still-ongoing defamation suits in both New York and California against the anonymous DMA Instagram account for lack of other viable options.<sup>99</sup> In each of the cases, Watson has thus far fought an uphill battle simply initiating meaningful litigation.<sup>100</sup> Originally at issue in the California suit was Watson's ability to name the individuals behind the otherwise anonymous DMA account until the Los Angeles Superior Court granted a limited subpoena to obtain identifying information of those responsible for the relevant Instagram posts.<sup>101</sup>

Conversely, in ruling on the defendants' motion to dismiss, the Federal District Court for the Southern District of New York denied Watson's requests for additional discovery to learn the identities behind some of the alleged defamatory statements, recognizing that the right to post on Instagram anonymously or under a pseudonym is "protected by the First Amendment right to free speech."<sup>102</sup> The court further dismissed several causes of action with prejudice, limiting his claims solely to specific

statements made by only two of the "Doe" defendants, one his direct accuser within CP+B and the other responsible for a related post falsely reporting the existence of nine accusers within CP+B leading to Watson's termination.<sup>103</sup> Nearly two years into his lawsuits, Watson has made little to no progress with proving the anonymous influencers' claims false or clearing his name and likely spent tens of thousands of dollars engaging in pre-answer motion practice to merely learn their identities and move the cases forward.<sup>104</sup>

### **Conclusion**

As online influencer marketing continues increasing in prevalence and effectiveness, the need to protect consumers from potentially deceptive or misleading activity correspondingly takes on greater importance. The FTC, responsible for policing such activity, seldom enforces its 2009 online advertising guidelines and, when it does, almost always does so against the promoted brand and not the influencer. Given its inability to enforce its outdated guidelines against even the most widely recognized influencers, it appears unrealistic for the FTC to competently enforce them against micro or anonymous influencers.

Additionally, when anonymous influencers are alleged to spread false information in furtherance of a social movement instead of a brand, product, or service, the FTC lacks jurisdiction altogether, and the only recourse for an alleged victim is expensive and lengthy litigation with no guarantee of success. New federal legislation aimed at protecting the public from all forms of dishonest online influencer activity may be the only remedy able to combat the growing challenges posed by perpetually emerging and evolving social media technologies, their misuse, and accompanying negative effects. ■

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