HAYNES BOONE

Media, Entertainment and First Amendment Newsletter

Year in Review

November, 2022

Global Developments in Freedom of Expression

By Laura Lee Prather[1]

On December 10, 1948, after the end of World War I and II, while the world was forging a peaceful path forward, the United Nations was formed and adopted the **Universal Declaration of Human Rights (UDHR)**. This simple 8-page document declared that human rights, recognized as inalienable rights of all, are the foundation of freedom, justice, and peace in the world and, as such, should be protected by the rule of law. The, at the time 58 (now 193) Member States pledged themselves to achieve, "in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms." Included in the UDHR are:

- Article 19 - Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
- Article 20 – 1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association.

This document set the stage for a common understanding of inalienable and inviolable rights of all members of humanity and creates an obligation for their global protection.

United States' advance anti-SLAPP legislation to protect those who are sued for exercising their First Amendment rights

Fast forward to 1989, and University of Denver professors George Pring and Penelope Canan bring to light a troubling trend of people getting sued for speaking out about matters of public concern. (George W. Pring & Penelope Canan, SLAPPs: GETTING SUED FOR SPEAKING OUT 8-10 (Temple Univ. Press 1996)). Their research demonstrated that thousands of people engaging in public debate and citizen involvement in government have been and will be the targets of multi-million-dollar lawsuits for the purpose of silencing them and dissuading others from speaking out in the future.

In the United States, we generally speak in terms of protecting constitutional or First Amendment rights: the right to speak freely, the right to a free press, the freedom to petition our government, to associate and to assemble; but these rights run even deeper than that bestowed upon Americans by way of the Constitution and instead flow from one's existence as a human. SLAPP suits are brought in retaliation for one exercising these core human rights.

As time would tell, the phenomenon identified by Pring and Canan was at its infancy – before the internet was ubiquitous and everyone could be a publisher. The problem has increased by orders of magnitude since that time with the media and protestors at the forefront and the receiving end of SLAPP suits.

The antidote to the rising tide of SLAPP suits has been the passage of anti-SLAPP laws, which has been done in at least 33 states and the District of Columbia (**The Changing Landscape of the Texas Citizens Participation Act**). The checkerboard of state laws, however, provides varied protection with some anti-SLAPP statutes being broadly worded and others providing narrow applicability.

To address this concern, in 2020, the Uniform Law Commission passed the Uniform Public Expression Protection Act (UPEPA – a model anti-SLAPP law), which much like the Uniform Commercial Code, is to provide consistency among state anti-SLAPP laws. So far, it has been adopted in Washington state, Hawaii, and Kentucky. UPEPA provides broad protections against SLAPP suits, including a stay of the proceedings while the Court determines whether the case has merit.

SLAPP suits filed in federal court present a greater problem, though, because Congress has not yet passed a federal anti-SLAPP law, and courts across the country disagree about whether state anti-SLAPP provisions apply in federal diversity cases. (**An Active Year in Anti-SLAPP Developments**). This state of confusion has led to rampant forum shopping by zealous plaintiffs who want to avoid the reach of anti-SLAPP laws and, oftentimes, will make spurious jurisdictional allegations to circumvent their protections.

On September 15, 2022, Congressman Jamie Raskin, Chairman of the Subcommittee on Civil Rights and Civil Liberties, introduced **H.R. 8864, the Strategic Lawsuits Against Public Participation (SLAPP) Protection Act** to establish a mechanism for dismissing and deterring strategic lawsuits against public participation and punishing entities that attempt to use this type of litigation to stifle First Amendment protected speech. The need for a federal law is clear both due to the disproportionate burden being placed on our federal court system by litigants seeking to avoid anti-SLAPP laws and by the opening this creates to judicially harass and silence those who speak truth to power and expose wrongdoing through meritless claims filed in federal court.

The SLAPP Protection Act will help ensure that people can speak up and participate in decisions that affect their lives without fear of being silenced through judicial harassment. It will protect community leaders, the media, activists, and everyday citizens across the political spectrum who rely on their First Amendment rights to speak up about important issues. It will not undercut current protection provided by state anti-SLAPP laws but instead will ensure that state anti-SLAPP laws that currently apply in federal court will continue to do so and provide new protection in those federal courts that don't currently recognize state anti-SLAPP protection. This is accomplished through a savings clause in the legislation that says: "Except as provided for in this chapter, nothing in this chapter shall reduce or limit any substantive claim, remedy, or defense to a SLAPP under any other Federal law or under the laws of any State or locality."

Between more states' adoption of UPEPA and the potential passage of the SLAPP Protection Act, the United States is well on its way to providing fundamental protection for the core human rights found in the First Amendment to our Constitution and in the Uniform Declaration of Human Rights.

The European Union has a Wake-Up Call and Advances an EU-Wide Anti-SLAPP Directive

Meanwhile, the seeds of discontent toward online publishers, investigative journalists, human rights defenders, and civil society who could now magnify their voices through social media and the internet, began to grow in the European Union, a jurisdiction not as well-known as the U.S. for rampant litigation.

This was mostly clearly demonstrated by the case of Maltese investigative journalist and blogger Daphne Caruana Galizia who was killed when a car bomb was detonated inside her vehicle on October 16, 2017. For decades before she was murdered, Caruana Galizia had published articles exposing wrongdoing, including information and allegations relating to several Maltese politicians and the Panama Papers scandal. She continued her investigative work, despite intimidation and threats, false arrests, and over 40 libel lawsuits pending against her at the time of her death.

Caruana Galizia's death provided a wake-up call to the European Union. They could no longer turn a blind eye to atrocious actions, including judicial harassment and worse, being taken against those whose job it is to inform citizens about issues of public interest and keep those in power in check. Shortly after Caruana Galizia's death, recognizing the critical nature of these functions in maintaining democracies, members of the European Parliament and NGOs across Europe began calling for legislative reforms. In 2020, the EU issued its Democracy Action Plan with pillars dedicated to the safety of journalists, including proposing an initiative to curb abusive use of lawsuits against public participation (SLAPPs).

After working with an expert group for more than a year, on April 27, 2022, the EU Commission issued its proposed **EU-wide anti-SLAPP Directive** along with complementary **Recommendations** to encourage Member States to align their rules with the proposed DU law for domestic cases and in all proceedings.

Much like our federal/state court system in the U.S., the EU has laws dealing with cross-border issues and their Member States have laws dealing with what happens within their borders. The cross-border issues are what the EU-wide anti-SLAPP Directive would govern, and the Recommendations issued by the Commission are to guide the Member States in adopting their own laws within each country. The Recommendations also calls on Member States to take a range of other measures, such as training and awareness raising, to fight against SLAPPs.

The proposed EU-wide Directive covers SLAPPs in civil matters with cross-border implications. It enables judges to swiftly dismiss manifestly unfounded lawsuits against journalists and human rights defenders. It also establishes several procedural safeguards and remedies, such as compensation for damages, and dissuasive penalties for launching abusive lawsuits. Before it becomes law, it will need to pass through the European Parliament and the Council of Europe.

UK join the fight against SLAPPs

On January 30, 2020, when Brexit went into effect and the UK left the EU, prior discussions about being a part of the EU Democracy in Action plan ceased. And, despite being a well-known haven for defamation plaintiffs, the UK did not begin taking a serious look at this form of judicial harassment until the war in Ukraine began. It was then that the UK was forced to look inward at how it has catered to Russian oligarchs (and others) who were now using the UK judicial system to harass and silence investigative journalists who uncover the sources of their dirty money and tax havens.

In fact, cases brought in 2021 like those against journalist Catherine Belton and her publisher Harper Collins by Russian oligarch Roman Abramovich over the book "*Putin's People: How the KGB Took*

> The proposed EU-wide Directive covers SLAPPs in civil matters with cross-border implications.

Back Russia and then Took on the West," and those brought against journalist Tom Burgis and his publisher the Financial Times by Eurasian Natural Resource Corp. (ENRC) over the book "*Kleptopia: How Dirty Money is conquering the World*," clearly demonstrate how those in power were using their ill-gotten gains to silence truth tellers as a direct affront to democracy.

Confronted by this stark reality, on January 20, 2022, the UK Parliament held a debate on "**Lawfare and the UK Court System**." After this debate, on March 17, 2022, the UK Ministry of Justice issued a Call for Evidence on Strategic Lawsuits Against Public Participation (SLAPPs). After receiving 120 responses to its Call for Evidence, on July 20, 2022, the Ministry issued its **Response**.

Like the European Union, the UK Ministry of Justice recommended much needed reform to stymie this form of judicial harassment (aka "Lawfare"). In broad strokes, the mandate is for the UK Parliament to develop a statutory early dismissal process and costs protection scheme to fight against SLAPP suits. This too will play out in the Parliament in the near future and appears headed in a similar direction as the U.S. and EU in recognizing the threat to democracy caused SLAPP suits, putting an end to them at an early stage and disincentivizing similar methods of lawfare in the future.

Conclusion

Progress in the EU, UK and in the U.S. in adopting strong protection against SLAPP suits is encouraging. Although Anti-SLAPP laws are often viewed as protections for the press, the reality is that the fundamental protection of freedom of expression and the right to access information stems from core human rights recognized as "inalienable and inviolable rights" and Anti-SLAPP protections are just one way to ensure these rights are kept intact.

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U.S. Supreme Court Rules That Unknowing Mistakes of Law Do Not Invalidate Copyright Registrations

By Jason Bloom and Michael J. Lambert

The U.S. Supreme Court recently granted additional protections to those applying for a copyright registration. In *Unicolors v. H&M*[1], the Court held, 6–3, that a copyright holder can pursue a claim even when its registration includes inaccurate information because of an innocent mistake of law (as long as the error is not knowingly made) under § 411(b)(1)(A) of the Copyright Act.[2] The decision is important since a successful challenge to a copyright registration's validity can often end a case in its early stages.

Section 411(b) states that a copyright registration with inaccurate information is valid unless the registrant included it "with knowledge that it was inaccurate."[3] Prior to the decision, courts agreed that § 411(b) forgave *mistakes of fact* in copyright registrations.[4] For example, the Ninth Circuit previously held that mistakenly including two previously published designs in an application for an unpublished collection did not invalidate the registration.[5] Now, *mistakes of law* will be treated similarly.[6]

The statute "does not distinguish between a mistake of law and a mistake of fact; lack of either factual or legal knowledge can excuse an inaccuracy in a copyright registration under § 411(b)(1)(A)'s safe harbor," Justice Stephen Breyer wrote for the majority.[7]

Background

The case stemmed from a suit brought by Unicolors, a fabric and design service out of Los Angeles, against H&M, a multinational clothing retailer, for copyright infringement over H&M's use of a copyrighted design on a jacket in 2016.[8] A California court found that H&M infringed the design and awarded Unicolors over $750,000 in damages and attorney fees.[9] But the Ninth Circuit overturned the award in 2020 after invalidating Unicolors' copyright registration because it contained known inaccuracies.[10] Unicolors used a single application to register 31 textile works marketed and sold separately when a single-unit registration requires that all works in the application be published in a singular, bundled collection.[11] Although the registration may have been improperly obtained, the errors did not relate to Unicolors' ownership of the designs or the designs' copyrightability.[12] The Supreme Court vacated the Ninth Circuit's decision and remanded the case for further proceedings.[13]

Analysis

The Court explained that "knowledge" has the same meaning whether it applies to knowledge of facts or law.[14] The text of § 411(b) and its surrounding provisions confirm that "knowledge" means actual, subjective awareness of both facts and law.[15] "Nothing in the statutory language suggests that Congress wanted to forgive applicants—many of whom lack legal training—for factual but not (often esoteric) legal mistakes," Justice Breyer wrote.[16]

The statute's legislative history also supported this conclusion, according to the Court. Congress intended § 411(b) to make it easier, not more difficult, for nonlawyers to obtain valid copyright registrations by "eliminating loopholes that might prevent enforcement of otherwise validly registered copyrights."[17]

The Court rejected H&M's arguments that copyright holders would be too easily able to claim lack of knowledge to avoid the consequences of an inaccurate application.[18] Circumstantial evidence of willful blindness can support a finding of actual knowledge, the Court held.[19] It also wrote that the legal maxim "ignorance of the law is no excuse" does not apply to a civil case such as copyright infringement.[20]

In a dissenting opinion joined by Justices Samuel Alito and Neil Gorsuch, Justice Clarence Thomas wrote that the Court should have dismissed the case as improvidently granted because Unicolors relied on a different argument in its briefing than it did in asking the Court to review the case.[21] The dissent argued that the issue the Court decided had not been presented to or decided by the lower court.[22] The dissent also argued that requirements to know the law are generally satisfied by constructive knowledge rather than actual knowledge, and for the Court to impose an actual knowledge requirement for legal mistakes was unwise given the minimal precedent for doing so.[23]

Takeaways

For content creators who may not be familiar with copyright law, the case provides additional protections when applying for a copyright registration. Registration certificates will not be easily invalidated under § 411(b) in litigation simply because an applicant makes an unknowing mistake of fact or law in the application. In fact, the Supreme Court may have created a test for invalidating registrations under § 411(b) that is impossible, in most cases, to meet. While the Court held that willful blindness of an inaccuracy could constitute actual knowledge under § 411(b), that will be difficult to show in most cases, even with circumstantial evidence. The Court opined that such circumstantial evidence may include "the significance of the legal error, the complexity of the relevant rule, [and] the applicant's experience with copyright law."[24] However, the Court did not provide guidance as to when such evidence might tip the scales in favor of invalidation under §411(b). For the time being, it appears that registrations will only be invalidated under § 411(b) in exceptional cases.

However, it should be noted that the impact of the decision is limited to invalidating a registration under § 411(b). Section 411(b), per its own terms, only applies to the validity of *registration certificates* for purposes of instituting suit and, if successful, recovering statutory damages and attorney fees when the effective date of the registration preceded the infringement. But § 410 of the Copyright Act makes clear that a registration certificate is only prima facie evidence of the facts stated therein, and that the evidentiary weight to be afforded to a registration certificate beyond that is within the court's discretion.[25] Therefore, the *Unicolors* decision does not deprive courts of the ability to make copyright rulings, and even invalidate registrations, based on issues such as copyrightability and ownership, even if mistakes on those issues were made unwittingly by the copyright applicant. Therefore, while § 411(b) challenges to registrations

are less likely to succeed going forward, litigants and courts will still be able to challenge issues such as copyrightability and ownership through summary judgment proceedings and trials.

A case in point: Company A obtains a copyright registration for a video game, claiming ownership of the game as a "work for hire." Unknown to Company A, it did not actually own the copyright to the video game under the work for hire doctrine because a nonemployee contractor, who never assigned away their rights, created the game. When Company A sues Company B for infringement, Company B will not be able to invalidate the registration under § 411(b) and seek dismissal based on the unknowing error. Nonetheless, Company B will still be entitled to establish,at summary judgment or trial, that Company A is not the rightful owner of the copyright to the video game and seek dismissal and invalidation of the registration on that ground, regardless of Company A's knowledge when it applied for the registration. That is because ownership is anelement of copyright infringement, and a registration certificate is only prima facie evidence—not conclusive evidence—of ownership.

It should also be noted that § 411(b) was not frequently used prior to *Unicolors*. H&M contended in its brief that the Copyright Office only opined 23 times in 13 years on § 411(b) inquiries.[26] Although the case drew considerable amicus interest, it is unlikely that the outcome will have a substantial impact on copyright litigation going forward.

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1 Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941 (2022).

2 17 U.S.C. § 411(b)(1)(A).

3 *Id.*; *see* Archie MD, Inc. v. Elsevier, Inc., 261 F. Supp. 3d 512, 518 (S.D.N.Y. 2017).

4 *See* L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 853 (9th Cir. 2012); Data Gen. Corp. v.Grumman Sys. Support Corp., 36 F.3d 1147, 1161 (1st Cir. 1994).

5 *See L.A. Printex Indus.*, 676 F.3d at 853.

6 *Unicolors*, 142 S. Ct. 941.

7 *Id.* at 943.

8 *See* Complaint, Unicolors, Inc. v. H&M Hennes & Mauritz L.P., No. 16-cv-02322-AB (SKx), 2016 WL10706718 (C.D. Cal. Apr. 5, 2016), ECF No. 1.

9 *See* Order, *Unicolors*, No. 16-cv-02322-AB (SKx), 2018 WL 10307045 (C.D. Cal. Aug. 1, 2018), ECFNo. 262.

10 Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 959 F.3d 1194, 1200 (9th Cir. 2020).

11 *See* 37 C.F.R. § 202.3(b)(4).

12 *Unicolors*, 959 F.3d at 1199.

13 *Unicolors*, 142 S. Ct. at 949.

14 *Id.* at 947.

15 *Id.*

16 *Id.* at 943.

17 *Id.* at 948.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 949 (Thomas, J., dissenting).

22 *Id.* at 950.

23 *Id.* at 950–51.

24 *Id.* at 948 (majority opinion).

25 17 U.S.C. § 410(c).

26 *See* Brief for the Respondent, Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., No. 20-915, 2021WL 4353036, at *6 (9th Cir. Sept. 21, 2021).

With the Future of Online Liability at Stake, Courts Consider the Constitutionality of State Social Media Regulations and Scope of Section 230

By Michael J. Lambert and Reid Pillifant

Introduction

The internet—and the laws that regulate it—hangs in the balance as courts across the country continue to grapple with novel legal questions presented by social media platforms.

This year, Florida and Texas (among other states) enacted laws restricting how social media platforms can moderate speech and instituting transparency and due process requirements. But the laws are on hold in the face of First Amendment challenges, as two federal appellate courts have reached opposite conclusions regarding the constitutionality of such regulations. In May 2022, the Eleventh Circuit struck down most of Florida's SB 7072, which treats social media platforms like common carriers and requires them to host a wide range of speech. ***NetChoice, LLC v. Attorney Gen., Florida***, 34 F.4th 1196 (11th Cir. 2022). But in October 2022, the Fifth Circuit upheld Texas' HB 10, which bans "viewpoint" discrimination and requires certain disclosures. ***NetChoice, LLC v. Paxton***, No. 21-51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022). The circuit split sets up a likely showdown in the U.S. Supreme Court in 2023.

Meanwhile, next year, the Supreme Court will consider the future of Section 230 of the Communications Decency Act, the federal law governing online liability affectionally known as "the twenty-six words that created the internet." Section 230 shields online platforms from liability for third-party content and grants them a safe harbor to remove objectionable content. Although Congress enacted Section 230 with bipartisan support in 1996, it has faced newfound criticism from courts, Congress, and constituents from both sides of the aisle as social media platforms have evolved and gained power in the modern marketplace of ideas. Republicans often argue that Section 230 allows social media platforms to moderate (or "censor") too much speech, while Democrats criticize the same platforms for not doing more to aggressively police disinformation, hate speech, and other harmful conduct. In October, the Supreme Court agreed to review a pair of Ninth Circuit cases—***Gonzales v. Google, Inc.*** and ***Taamneh v. Twitter, Inc.***—that ask whether social media platforms are liable under anti-terrorism laws and whether content promoted by algorithms deserve Section 230 protection.

With the Supreme Court set to review the scope of Section 230 and likely consider the constitutionality of state social media laws in 2023, next year looks to be an even more active—and consequential—year for online liability. But first, let's recap what transpired in 2022.

State laws limit content moderation, require transparency from social media platforms

Florida

In April 2021, Florida Governor Ron DeSantis signed SB 7072, which, among other provisions, declares social media platforms to be common carriers, requires social media platforms to host certain content, and prohibits them from moderating speech by or about political candidates or by "journalistic enterprises." The law authorizes the state's attorney general and individuals to bring claims against social media platforms for violating its terms.

A month after SB 7072's passage, the Eleventh Circuit held, 3-0, that most provisions of the law violated the First Amendment, finding that social media platforms are private actors, not common carriers, that make expressive editorial decisions protected under the U.S. Constitution. ***NetChoice,***

> With the Supreme Court set to review the scope of Section 230 and likely consider the constitutionality of state social media laws in 2023, next year looks to be an even more active—and consequential—year for online liability.

LLC v. Attorney Gen., Florida, 34 F.4th 1196 (11th Cir. 2022). "When platforms choose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First Amendment-protected activity," Judge Kevin C. Newsom wrote for the panel. At the same time, the court upheld provisions requiring social media platforms to provide information, such as data and moderation rules, to users. In September 2022, the Florida Attorney General asked the Supreme Court to review the decision. No. 22-277.

Texas

Like SB 7072, Texas' HB 20 is intended to curb what legislators believe is "censorship" by social media platforms. HB 20 features two main sections: Section 7 bans "social media platforms" with "more than 50 million active users" from "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person" based on the "viewpoint" of the user or another person. Section 2 demands that social media platforms release information about their algorithms, publish an "acceptable use policy," and explain content removal decisions.

In December 2021, Judge Robert Pitman of the Western District of Texas issued a preliminary injunction, initially putting the law on hold, after finding that it violated the First Amendment. *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092 (W.D. Tex. 2021). "Social media companies have a First Amendment right to moderate content disseminated on their platforms," Judge Pitman explained. The Fifth Circuit quickly stayed the decision, but in May 2022, the Supreme Court, 5-4, vacated the Fifth Circuit's stay in an unsigned order. *NetChoice, LLC v. Paxton*, ___ U.S. ___, 142 S. Ct. 1715 (2022). Justice Samuel Alito wrote a dissent, joined by Justices Clarence Thomas and Neil Gorsuch, in support of the Fifth Circuit's stay. Justice Elena Kagan agreed that the Court should not yet get involved in the case, but she did not join the dissenting opinion.

In September 2022, the Fifth Circuit, 2-1, vacated the district court's preliminary injunction temporarily blocking the law, holding that Section 7 passed constitutional muster because it chills "censorship," not speech. No. 21-51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022). Section 7, according to Judge Andrew Oldham, "does not prevent anyone from expressing their good-faith opinions on matters of public concern" but "*protects* Texans' ability to freely express a diverse set of opinions through one of the most important communications mediums used in that State." *Id.* at *9 (emphasis included). The plaintiff social media platforms are expected to either ask the entire Fifth Circuit to review the case or appeal directly to the Supreme Court.

New York

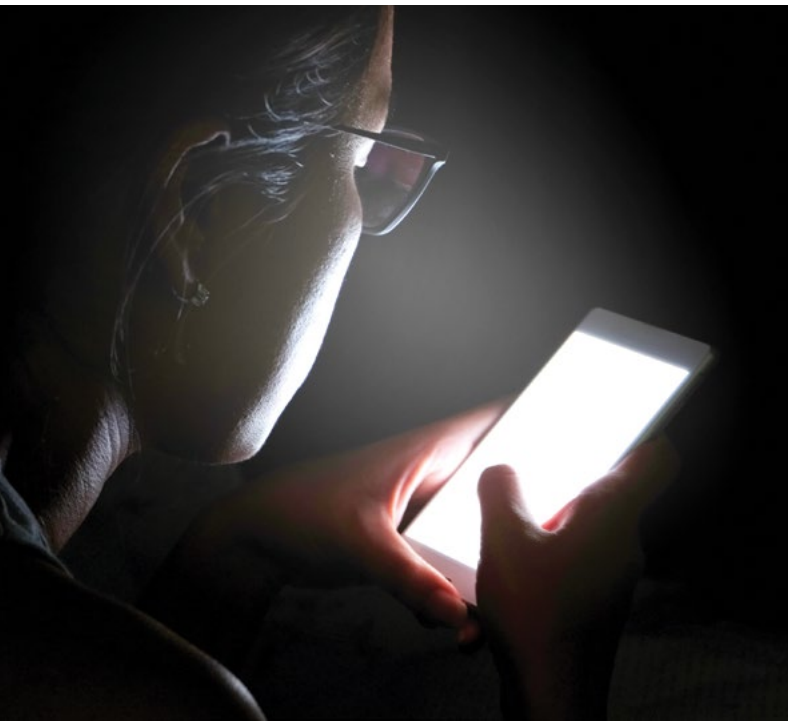
This summer, New York enacted AB 7865, which requires social media platforms to provide and maintain a clear and accessible "hateful conduct policy" that allows users to report or file complaints regarding "incidents of hateful conduct." While the law demands that such policies exist, it does not mandate how social media platforms respond to the complaints.

California

In September 2022, California Governor Gavin Newsom signed AB 587, a transparency-focused law, which requires social media platforms to publish their terms of service, send them to the Attorney General every six months, and explain how they moderate certain content, such as hate speech, harassment, and misinformation.

Other States

More states are likely to consider regulating social media platforms. So far, lawmakers in 34 states, including Georgia, Ohio, Tennessee, and Michigan, have proposed social media bills.



U.S. Supreme Court to scrutinize Section 230

In October 2022, the U.S. Supreme Court agreed to hear two cases asking whether Section 230 protects online platforms from claims under the Anti-Terrorism Act and claims based on third-party content generated by a platform's algorithm.

Gonzales v. Google, Inc. and *Taamneh v. Twitter, Inc.*

In *Gonzalez v. Google, Inc.*, the surviving family members of Nohemi Gonzalez, who was murdered in Paris during a spree of ISIS killings in 2015, accused Google of supporting ISIS through its YouTube platform. 335 F. Supp. 3d 1156 (N.D. Cal. 2018). The plaintiffs allege that YouTube contributed to the attacks in Paris by presenting ISIS videos to users who expressed an interest in terrorism-related content and that YouTube provided material support to ISIS by providing advertising revenue to users who posted ISIS content.

In *Taamneh v. Twitter, Inc.*, the relatives of Nawras Alassaf, a Jordanian citizen who was killed in an ISIS attack in Turkey in 2017, brought similar claims against Twitter, Google, and Facebook, alleging that they allowed ISIS and affiliated entities to use their platforms for years "with little or no interference." 343 F. Supp. 3d 904 (N.D. Cal. 2018). The plaintiffs claimed that the platforms were directly liable for providing material support to ISIS and secondarily liable for aiding and abetting ISIS's activities.

Northern District of California

Although the Northern District of California dismissed both cases, the court dealt with the claims differently. In *Gonzalez*, the court found that Google was immune under Section 230 based on YouTube's content-serving algorithm. The court held that Section 230 did not apply to the claims based on a revenue-sharing theory, but it dismissed those claims for failure to show proximate cause. In *Taamneh*, a different judge in the Northern District dismissed all claims for failing to adequately allege proximate cause for direct liability and failing to state a claim for aiding and abetting. Importantly, the *Taamneh* court did not answer whether Section 230 applied.

Ninth Circuit

The Ninth Circuit consolidated the cases (along with a third case) and issued a single opinion. The divided panel upheld the application of Section 230 to the algorithm-based claims in *Gonzalez*, citing circuit precedent, while openly questioning whether courts have over-extended immunity offered by Section 230.

The majority opinion, written by Judge Morgan Christensen, held that even if "Google's algorithms recommend ISIS content to users, the algorithms do not treat ISIS-created content differently than other third-party created content, and thus are entitled to § 230 immunity." *Gonzalez v. Google, Inc.*, 2 F.4th 871, 894 (9th Cir. 2021). The majority wrote that "[u]nder our existing case law, § 230 requires this result," but also noted "[w]e share the dissent's concerns about the breadth of § 230." *Id.* at 896.

In a concurring opinion, Judge Marsha Berzon wrote that there is "just no getting around" circuit precedent regarding the algorithm-related claims. But she also made clear that she does not believe the definition of "publisher" in Section 230 should sweep so broadly as apply to "activities that promote or recommend content or connect content users to each other," and she urged the court to revisit that precedent *en banc. Id*. at 913, 915.

Judge Ronald Gould dissented from the application of Section 230, drawing, in part, from a detailed dissent by Second Circuit Chief Judge Katzmann in a similar case, *Force v. Facebook Inc.* Judge Gould also cited Justice Clarence Thomas' skepticism of Section 230 immunity. *See Malwarebytes, Inc. v. Enigma Software Group USA, LLC,* ___ U.S. ___, 141 S. Ct. 13 (2020) (Thomas, J., dissenting). "I agree with Justice Thomas that Section 230 has mutated beyond the specific legal backdrop from which it developed, and I cannot join a majority opinion that seeks to extend this sweeping immunity further," Judge Gould wrote. *Id*. at 925 n.9.

The **cert petition** filed by the *Gonzalez* plaintiffs acknowledged that the majority opinion applied Section 230, but it pointed to a "different majority" for curbing the extent of Section 230 immunity. The petition noted that many judges across several circuits have questioned the extent of Section 230 immunity and that the lack of a circuit split was merely "happenstance."

Twitter filed its own "conditional" **cert petition**, urging the Supreme Court not to take up *Gonzalez*, but asking the justices to also grant cert in *Taamneh*, if they agreed to hear *Gonzalez*. The Court ultimately granted review in both cases.

Analysis

The stakes of *Gonzales/Taamneh* and the *NetChoice* cases are significant, both for the future of online liability and the future of the internet itself. *Gonzales* and *Taamneh* represent the first time the U.S. Supreme Court will opine about Section 230. It's not clear—outside of Justice Thomas—how the Justices will view the law. Some, like Justice Gorsuch, are likely to take a textualist approach, closely dissecting the language of Section 230. Other Justices may focus on the intent of the law when President Bill Clinton signed it in 1996. All Justices are likely, however, to view the law through the lens of the modern internet. Regardless of the text and original intent, the practical effects of Section 230 are vastly different in 2022, when online speech is the predominant form of communication, platforms hosting online speech have gained a large share of market power, and the public is more conscious of the potential harms of online speech.

If the Supreme Court rules in favor of the social media platforms, it would clarify that Section 230 immunity extends to content promoted by algorithms, which would largely preserve the status quo. A decision in favor of the plaintiffs could expose social media platforms to increased liability for third-party content and would likely spur operational changes. Social media platforms would probably institute a more robust practice of screening content they recommend.

While most Justices (outside of Justice Thomas) remain mum on their views on Section 230, many have already tipped their hand regarding the *NetChoice* cases. In their dissenting opinion in support of the Fifth Circuit's stay, Justices Alito, Thomas, and Gorsuch indicated that they would likely rule in favor of Texas if the case reached the Court again. Although they claimed to "have not formed a definitive view on the novel legal questions" presented by the Texas law, the trio was sympathetic to the government's positions. Justice Kagan's vote not to vacate the stay has largely been seen as an objection to intervening at such an early stage in the case, not an endorsement of the dissenting opinion. The votes of Chief Justice John Roberts and Justices Sonia Sotomayor, Stephen Breyer, Amy Coney Barrett, and Brett Kavanaugh show they are inclined to strike down the statute, although new Justice Ketanji Brown Jackson will replace Justice Breyer.

What's less clear, however, is what a decision reviewing the Texas and/or Florida laws would mean. If the Court clarifies, at least to some extent, how states can moderate online content or institute transparency requirements, state legislatures could receive some guidance for enacting future legislation. Even then, blue and red states are likely to regulate social media platforms differently, which would again lead to a patchwork of state laws.

It's worth noting that Congress could resolve both questions at any time. It could repeal Section 230, amend it, or pass a new law. It could also enact a federal content moderation and transparency law. But given the divide between Republicans and Democrats over how social media platforms should be regulated, Congress will likely leave these important issues up to the judicial branch in 2023 and beyond.

SPEAKING ENGAGEMENTS

UK Anti-SLAPP Conference

Development of Anti-SLAPP Legislation - Pros and Cons from a Global Perspective

Speaker: Laura Prather | November 28, 2022 | London

Practising Law Institute: Communications Law in the Digital Age 2022

Defamation and Related Claims

Panelist: Laura Prather | November 10, 2022 | New York City

32nd Annual Entertainment Law Institute

Litigation Roundtable on the Amber Heard/Johnny Depp Trial

Panelist: Michael Lambert | November 10-11 | Austin

Driving Diversity in Law & Leadership: LA Centerforce Conference

Panelist: Theresa Conduah | November 9, 2022 | Los Angeles

Moody College of Communications at the University of Texas at Austin Celebrates Free Speech Week

The Modern Public Square: The Past, Present, and Future of Online Speech Regulations

Speaker: Michael Lambert | October 20, 2022 | Austin

American Bar Association 2022 IP Fall Institute

Copyright and Censorship: Many Ways, Many Motives

Panelist: Michael Lambert | October 12, 2022

RECOGNITIONS

50 Influential Women in IP World IP Review Diversity 2022 edition (October 14, 2022)

- Theresa Conduah

Haynes Boone Lawyers recognized in Texas Super Lawyers 2022 (September 19, 2022)

- Media/Advertising – Laura Prather

Haynes Boone attorneys featured prominently in Best Lawyers in America 2023 (August 18, 2022)

- Lawyer of the Year – Laura Prather
- Best Lawyers – Jason Bloom
- Ones to Watch – Michael Lambert

Haynes Boone and partners recognized in the 2022 edition of the Intellectual Asset Management (IAM) Patent 1000 legal directory (July 7, 2022)

- Top lawyers in patent prosecution, litigation and transactions – Lee Johnston

Laura Prather Receives Prestigious Fulbright Scholarship (June 10, 2022)

Haynes Boone Lawyers Featured in 2022 Chambers USA Rankings (June 1, 2022)

- First Amendment Litigation (USA - Nationwide) – Laura Prather

PUBLICATIONS

Church's 'Hamilton' Show Likely Runs Afoul of Copyright Law

August 11, 2022 | Jason Bloom

News Outlets Report Public Records Requests Delayed, Denied

July 28, 2022 | Laura Prather

Media Outlets Lawyer Up to get Uvalde Shooting Records

July 21, 2022 | Laura Prather

The Biggest Copyright Rulings Of 2022: A Midyear Report

July 8, 2022 | Jason Bloom

Sign Ordinances and the First Amendment - City of Austin v. Reagan National Advertising

July edition | *IP Beacon* by Reid Pillifant

Texas Agencies Resist Releasing Public Records that Could Help Clarify Response to Uvalde School Shooting

June 15, 2022 | Laura Prather

MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTERS

May 2022

February 2022

To sign up for publications, please email: rochelle.rubin@haynesboone.com

HB MEDIA MINUTE PODCAST

Welcome to *HB Media Minute*, a podcast series by Haynes Boone focused on new legal developments and trends impacting the media and entertainment industry, intellectual property, and open government and First Amendment law.

Seizure of Counterfeit Products as a Civil Remedy for Infringement
August 8, 2022 | Ryan Patrick

Texas Drone Law Held Unconstitutional
June 24, 2022 | Michael Lambert

Cannabis Advertising
May 3, 2022 | Theresa Conduah

A Review of Ketanji Brown Jackson's Media Law Jurisprudence
April 18, 2022 | Reid Pillifant

5th Circuit Opinion On Police Filming
April 1, 2022 | Michael Lambert

US Copyright Claims Board: What You Need to Know
February 25, 2022 | Jason Bloom and Michael Lambert

Racial Injustice Exposed on Camera: Police Transparency and Government Access in a Viral World (George Floyd, COVID-19 discussions)
February 3, 2022 | Michael Lambert

If you would like to listen to any of these or future podcast episodes, click on the QR Code.

Advertising, Marketing and Promotional Law Group

In today's competitive environment, compliance with advertising laws is critical as brands face more scrutiny than ever before. Our Advertising, Marketing, and Promotional Law Practice Group provides clients with practical guidance to help manage their advertising legal risks related to consumer legal actions and competitors' potential claims, as well as to regulatory and enforcement actions. Our team regularly advises clients on all issues relating to the creation, structure, production, implementation, and defense of advertising, marketing, and promotional campaigns across all types of media.

We represent clients in state and federal court and before the National Advertising Division (NAD) to assert challenges and defend against false advertising claims. Advertisers and challengers have come to rely on our team to successfully challenge unfair, deceptive, or misleading advertising as well as to defend adequately substantiated claims. Our team routinely advises clients as to the strategic choice of which is the best forum to address their advertising related disputes.

Learn more on our industry page, **Advertising, Marketing, and Promotional Law**.

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