

MLRC Media Law Resource Center MEDIALLAWLETTER

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From the Executive Director's Desk

The Show Must Go On

*The Challenges and Rewards of
Conference Hosting in the Covid-Era*

With our [Digital Law Conference](#) upcoming in Silicon Valley in just two weeks, and two MLRC in-person conferences having recently taken place in Los Angeles and Miami, I can't help but reflect on the challenges of putting on such gatherings in the midst of a worldwide, though somewhat ebbing, pandemic. The good news is that the two April meetings, our LA Entertainment Law Conference and the Latin American Media Law Conference went off well, with timely programs and engaging speakers – more on that later in this column – and remarkably the LA confab had the most attendance we ever had for that conference.

We hope that the same will be true for the [Legal Frontiers in Digital Media Conference](#), as is its formal name, which will take place in the Computer History Museum in Mountain View, CA on May 19-20. But one problem with events in the last two years is that – for good reason – people decide whether or not to travel and attend at the last minute, so we have no idea of the likely attendance. This obviously plays havoc with our budget, our food and drink needs (for our Thursday evening reception, Friday morning breakfast and breaks). For example, two weeks before the Entertainment Conference, we feared sparse attendance, but a wave of registrations in the last two weeks brought us record numbers. Let's hope the same wave will occur in the next two weeks for Digital.



George Freeman

Of course, estimating attendance is hardly the only challenge put forth by the pandemic. Whether to have an in-person event is obviously the first and biggest question. We start from the proposition that we would like all of our events to be personal gatherings. We feel that is the ingredient to a truly fulfilling conference experience: we try to offer not only timely, interesting and needed substantive materials, but also a forum at which to informally discuss those legal topics and so much more with colleagues, clients and friends. While virtual meetings are a way of disseminating such information, they lack the in-person contact which so many of us crave.

Our Zoom call series – of now over 100 calls with leaders in both media law and journalism – from Bob Woodward to Nick Kristof and Columbia Pres. Lee Bollinger to Ted Koppel – has been a smashing success, but the truth is that Zoom fatigue has set in. Our numbers parallel those of other organizations who report that the number of Zoom participants have decreased by about 33% in the second year of the pandemic from the first. Thus, our average Zoom call in 2020 reached 100-150 members, while in 2021 and after the average tends to be in the 75-100 range. So while Zoom and virtual presentations have been great, they are really not a perfect substitute for talking face to face. (When asked what we missed most during the pandemic, my



MLRC’s Jeff Hermes (left) and George Freeman in San Francisco scouting conference sites. Our next conference, [Legal Frontiers in Digital Media](#), will be held May 19-20 at the Computer History Museum in Mountain View.

college class listserv’s consensus was “travel and hugs” – both of which are missing from a virtual conference.)

Needless to say, our members’ safety and health overrides the presumption of in-person meetings. So we take into account nationwide and local figures of Covid cases, and we occasionally poll members as to their attitudes and proclivities as to travel, as well as their firms’ and companies’ rules about business travel. Needless to say, if a conference won’t draw a critical mass, there is no point in having it. Which brings us to another challenge brought on by the pandemic: the force majeure clause.

Generally, contracts with sites are signed 9 to 12 months before the event, way too early – given the volatility of the Covid variants – to be able to predict the feasibility of an in-person meeting. So, since typically at least a 50% deposit must be paid early, we need a strong out to get our money back if we feel forced to cancel. The venue’s form Covid paragraph generally will allow postponement if a government decree or order makes travel unfeasible. But we don’t think that protects us enough: what if there is no government action limiting travel (or, indeed, the opposite, such as we have seen lately) but a general sense among members that travel is unwise or dangerous. So negotiations ensue, so far with reasonable results for us, but given the extreme volatility of this virus and the politicization of government decisions about travel and masking, it always becomes a fraught exercise.

Of course, there are additional burdens too. For example, we have strictly adopted a policy as to all our meetings that proof of vaccinations is required; that entails a lot more administrative burdens and more paperwork, as well as extra personnel to check submissions at the door. Fortunately, all this has worked. We are unaware that anyone has gotten sick at last Fall’s Virginia Conference or Annual Dinner or at the two in-person conferences last month.

* * *

All that said, Michael Norwick and Jeff Hermes are busy preparing for our Digital Law Conference in a few weeks. It is back at Mountain View after two years without an in-person conference and the prior two years in downtown San Francisco; our USF site (just down the

street from where Steph Curry and the Warriors play) was closed during the pandemic and hasn't been up and running, so we went back to our old haunt at the Computer History Museum. It has outdoor space for our reception after the programs on Thursday evening. We hope that the timely program Michael and Jeff have put together, along with the engaging speakers they have recruited, will excite you and will engender many registrations in the next two weeks.

This Conference always has been a two-day affair, starting after lunchtime on Thursday, May 19 and concluding at lunchtime the next day, Friday, May 20. Apparently early on members wished to have some working time on both days; hence, the one-afternoon/next morning schedule. The program is first-rate and focuses on timely issues. Michael and the planning committee carefully vet speakers and sometimes review their prior speeches and performances to ensure not only substantive knowledge but, perhaps more important, a lively and engaging speaking style.

Our first session will focus on legislation to make social media platforms' moderation policies transparent – are they worthwhile and do they bump up against First Amendment protections. A truly expert panel will discuss these issues – and they might just have something to say about some recent, small changes at Twitter as well. That program will easily lead into the next session on legislative efforts to intensify content regulation in the EU. We'll be brought up to date on finalization of the EU's Digital Services Act and legislative activities in the various EU countries. The panel will include speakers who've traveled to the West Coast from Europe to bring you the latest developments. Finally on Thursday will be a session entitled "Who Moderates the Moderators", focusing on social media moderation, deplatforming decisions and disputes over Sec 230. The panel will also discuss what Congress is posed to do in this area.

After our outdoor reception Thursday evening sponsored by Google and a continental breakfast hosted by Microsoft Friday morning, we begin bright and early with a very timely though depressing subject: Social Media and the War in Ukraine. Should Russian state media and its lies be shut down on social media sites? What role does social media play in bringing true news to Russians? Does it play a role in documenting war crimes and building a historical record? That will be followed by a short session on emerging EU law on data and AI, and what European legislators are trying to achieve with their initiatives. Finally, the Conference will end with a session dealing with acronyms for the serious privacy lawyer: CCPA, CPRA, VCDPA, CPA and the UCPA. That should leave a lot of food for thought, and perhaps translation, for the weekend.

I would be remiss if I didn't mention one invitation which is still out there. After I read about former President Obama's speech at Stanford about disinformation and social media, and heard this was the initiative to which he was devoting a lot of his efforts, I thought what better audience for him to address but ours. So bragging about our members' intelligence and



Will our former president, lately taking up the battle against misinformation, make a surprise appearance at the Digital Conference? An ED can dream.

leadership qualities, I invited him to speak, either in-person or virtually, at our Digital Law Conference. What could be a better fit? To date, I have not heard back from the former President, but here's hoping.

* * *

I hope and believe the Digital Law Conference will have as vibrant and informative programs and speakers as the two conferences we had in April.

We held our 19th annual Entertainment & Media Law Conference on April 7th, returning to Los Angeles after two years away. It was fantastic to see people in person again at the Japanese American National Museum, especially because many of our California members couldn't make it out to Virginia last year. The turnout for the conference was remarkable – as high or higher than at our last in-person L.A. conference – and we are grateful to everyone who braved the unseasonably warm weather to attend. (For those of you who couldn't make it, we understand, and we've applied for approval to offer the recordings online for California MCLE credit; more on that soon.)

We started the conference with a session on the legal issues that arise in true crime productions, featuring a presentation by Andrew Jarecki, the director of *The Jinx: The Life and Deaths of Robert Durst*, on how he worked with counsel to handle the remarkable and shocking inculpatory evidence that he gathered in the course of the production. That segued into a discussion of how relationships with law enforcement play out in different contexts, comparing documentaries to true crime television series and newspaper reporting.

Our second session tackled the issue of libel-in-fiction claims, bringing together in-house and law firm counsel to share their thoughts on vetting fictional works for defamation risks, the merits of creatively-presented disclaimers in series such as *Inventing Anna*, and other special issues such as the use of composite or look-alike characters (including a particularly notable example involving terrible haircuts). The session also featured a highly-regarded fact checker for Hollywood productions and a discussion of how to handle third-party reports with an eye toward potential litigation.

The third session was about intellectual property clearances. Particularly interesting was the panel's discussion of the massive market for video games and the differential treatment of the use of IP in games as compared to other entertainment content. The panel also discussed issues such as the evolution of fair use standards in both copyright and right of publicity cases, the embedding of content from social media, hurdles arising from DMCA's rules about copyright management information, and the potential impact of the Copyright Office's new CASE Act procedures on independent filmmaking.

The upcoming Digital Law Conference will be as vibrant and informative as the two conferences we had in April. It's clear that our members really enjoyed being out again, and thrived on the personal association with friends and colleagues.



Timeline

- **2012:**
 - Filmmakers discover evidence that indicates Durst wrote the Cadaver note
 - Arrange a second interview with Durst in April to get his reaction to evidence
 - Durst reacts strongly
 - Filmmakers reach out to FBI (October)

Victor Kovner, left, and director Andrew Jarecki discuss the remarkable inculpatory evidence gathered in producing *The Jinx: The Life and Deaths of Robert Durst*.

We rounded out the conference with a session about non-fungible tokens, taking a look at how they are being used by entertainment companies and the copyright and trademark issues that have arisen with this new form of digital asset. The discussion dived in on what, exactly, one buys when purchasing an NFT, whether NFTs will remain their own thing or become part of the larger technology of the metaverse, and the potential of blockchain-tracked art to support a distributed ecosystem for creativity that could avoid racial and other inequities of current models. And after that, we moved on to our reception, by which time the weather had cooled off enough for us to enjoy the Museum's lovely Hirasaki Garden.

Two weeks later, we were in Miami for our Latin American Media Law Conference. Almost all the attendees remembered the last Miami in-person gathering: it was on Monday, March 9, 2020, the day the market fell precipitously because something called the coronavirus was approaching our shores. I remember flying back to New York the next day amongst great angst about the impending doom, and by Wednesday, March 11, New York was heading into lockdown mode and almost nobody was going into his office – for what we then thought would be a couple of weeks. That conference, as those in the years prior, was at the University of Miami. But UM was in session in April, so this year's Conference was held at the beautiful offices of Holland & Knight, who hosted us regally in a large conference room overlooking Biscayne Bay and the ocean.



Our Miami Conference, Legal Issues Concerning Hispanic and Latin American Media, featured a panel on Cross-Border Streaming Services. Pictured left to right: Rita Chertorivski, TelevisaUnivision; Paula Mena Barreto, CMA Law, Rio de Janeiro; Katharine Menendez de la Cuesta, Holland & Knight; and Alexia Bedat, Klaris Law, also chair of MLRC's new Media Deals Committee.

The highlight of the Conference, attended by lawyers from Rio, Buenos Aires, and Mexico City as well as South Floridian lawyers who work with South American clients, was a luncheon speech by Julie Brown, the intrepid Miami Herald reporter who led the way on the Jeffrey Epstein disclosures. She spoke movingly about her interviews of Epstein's victims, the steps she took in moving ahead with the story, her dealings with her editors, and, in general, gave an enthralling account of her work and the entire scandal.

Before she spoke were two very timely and informative programs. The first was a talk by Thiago Oliva, a Senior Policy Advisor to the Facebook Oversight Board. He talked in great detail about the Oversight Board's procedures, some of its decisions from Latin America and how Meta, as he named it, was dealing with disinformation issues. That was followed by a talk by Natalie Southwick of the Committee to Protect Journalists about the persecution and censorship of journalists in Latin America; she focused on Mexico, which, she said, was the worst country in attacking reporters, both legally and physically.

After a lovely lunch hosted by Holland & Knight, we heard a talk from a former US Attorney from the Southern District of Florida, on ethical questions surrounding enforcement of the Foreign Corrupt Practices Act. And the program ended with an interesting session moderated by Alexia Bedat of our Media Deals Committee on Cross-Border Streaming Services, discussing the contractual issues and types of deals in that field.

In sum, it's been a very active Spring with three in-person conferences scheduled within two months. If the first two are a guide, members have really enjoyed being out again, and have thrived on the personal association with their friends and colleagues. While the programs have been high caliber, the energy levels at receptions and breaks have been of equal heights. I hope many of you will experience all of that at the [upcoming digital conference in California](#).

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Kentucky's New Anti-SLAPP Legislation a Welcome Addition

By Darren W. Ford

On April 20, Kentucky became the 32nd state in the country to enact an [anti-SLAPP law](#), and just the second to adopt a version of the Uniform Law Commission's ("UCL") "[Uniform Public Expression Protection Act](#)" ("UPEPA"). The legislation was the product of a rare bipartisan effort, passing the Kentucky Senate with a vote of 30 to 2. As Kentucky has seen several high profile SLAPP suits in recent years, the legislation is a welcome addition to Kentucky law.

Although Kentucky did not adopt the UPEPA in its entirety, and modified it in several respects, it retained the core of the model act. Thus, Kentucky's anti-SLAPP law applies to causes of action against individuals and businesses that are based on the person's speech in three categories. First, the law applies to claims based on a person's "communication" in various governmental proceedings. The second category covers communications "on an issue under consideration or review" in governmental proceedings. And finally, the law applies to claims based on a person's free speech and other First Amendment rights on a matter of public concern.

Although Kentucky did not adopt the UPEPA in its entirety, and modified it in several respects, it retained the core of the model act.

Kentucky's version of UPEPA incorporates the exceptions found in the model act for causes of action asserted against the government, and against businesses for communications related to the sale of their products or services, but adds a number of other exceptions. For instance, Kentucky's law excepts claims against a person relating to real property, or based on a common law fraud claim, among others. But the act also provides that such excepted claims are covered by the act when they arise from certain types of activities, such as news gathering and promoting artistic works, as well as where the communication is related to "consumer opinions or commentary, evaluation of consumer complaints, or reviews or ratings of businesses."

To invoke the protections of Kentucky's law, a party must file a motion under the act within sixty days after the party is served with a pleading asserting a covered cause of action. Once a motion is filed, the court must stay all proceedings between the parties, including discovery. The primary exception to the stay is that the law requires a court to allow "limited discovery" if one of the parties shows that "specific information is necessary to establish whether a party has satisfied a burden" under the act, "and the information is not reasonably available unless discovery is allowed." The act also affords the court some flexibility in managing proceedings between the parties on other issues unrelated to the motion, or where necessary to protect against an imminent threat to public health or safety. Once the court renders a decision on the motion, the losing party may immediately appeal in accordance with the Kentucky Civil Rules.

Central to the purpose of any anti-SLAPP law is the remedy afforded to the moving party if they prevail. Here, the Kentucky General Assembly adopted the UCL’s language without alteration. Thus, under the act, a court must award court costs, reasonable attorney’s fees, and reasonable litigation expenses related to the motion to a prevailing movant. A responding party is only entitled to an award if they prevail, and the court finds that the motion was brought by the moving party “without good cause.”

Like the model act, Kentucky’s version instructs courts to broadly construe and apply it “to protect the exercise of the right of freedom of speech and the press, the right to assemble and petition, and the right of association, as guaranteed by the United States Constitution and Constitution of Kentucky.” This statement of legislative intent will assist courts in applying the act to effectuate its intent, and avoid the sorts of narrow interpretations that detracted from the efficacy of such acts when first enacted in other jurisdictions.

In sum, although Kentucky’s version of UPEPA is not a verbatim adoption of the model act, it preserves the model act’s core components, and most critically, the ability of a prevailing movant to recover their attorney’s fees. The new law should thus provide Kentuckians—and those sued in Kentucky courts—meaningful protection against lawsuits that seek to intimidate them into remaining silent on matters of public concern.

Darren Ford is a partner at Graydon in Ft. Mitchell, KY.

Colorado Court Grants News Anchor's Anti-SLAPP Motion

Dismisses Libel Case Premised on Report About Plaintiff's Involvement in the Events of January 6, 2021

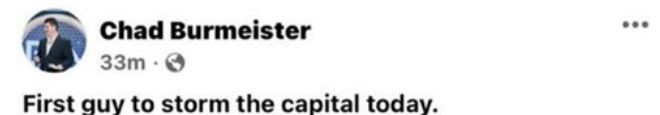
By Steven D. Zansberg

In only the second case to date to apply Colorado's anti-SLAPP Act (passed into law in 2019) to a news outlet, a trial court judge tossed a defamation case against Kyle Clark, the nightly news anchor at KUSA-TV/9News, the TEGNA-owned NBC affiliate in Denver. The court found the challenged news report, and its online counterpart (as well as Clark's tweets promoting the television report) were substantially true and, alternatively, plaintiff had not demonstrated a "reasonable likelihood" that he could prove actual malice.

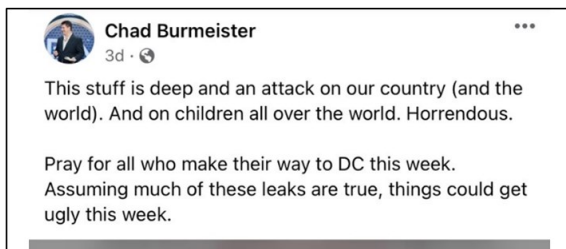
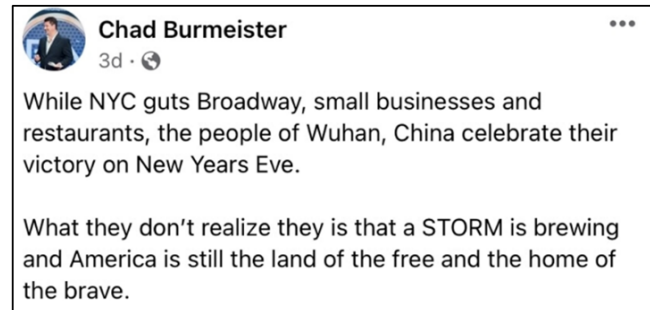
What Prompted the Publication At Issue

The news report that gave rise to the suit aired at 6:00 p.m. on January 7, 2021, the night after the insurrection at the U.S. Capitol. Earlier that day, a member of Colorado's state House of Representatives, Mark Baisley, tweeted that those who had violently assaulted police officers and infiltrated the U.S. Congress shouting "Hang Mike Pence!" were not actual supporters of then-President Trump, but likely were Antifa operatives.

Shocked to see this comment, Clark set out to debunk that claim for his broadcast that evening. He came upon (or was tipped off to) the Facebook page of one Chad Burmeister, a Colorado resident, and CEO of an artificial intelligence-based marketing firm in Littleton, Colorado, who had posted (and boasted) that he'd been on the Capitol Mall on January 6. In fact, Burmeister had posted the "selfie" on the right showing himself standing beside a younger man who claimed he was "the first guy to storm the capital [sic] today."



After dozens of people took to Twitter to denounce Burmeister, calling for his immediate firing and arrest, long before that evening’s news report on KUSA-TV, Burmeister changed the caption of the photo to read “Peaceful march to the capital [sic].” Clark looked into Burmeister’s prior Facebook postings and found he’d espoused several views supportive of those who violently assaulted the Capitol building on January 6. Among the things he had posted were:



And, once he’d flown to the nation’s capitol to participate in the “Stop the Steal” rally, he posted:



Prior to airing his commentary debunking Representative Baisley’s tweet by using Burmeister’s presence at the Capitol (and his espoused beliefs above) as “exhibit A,” he reached out to Burmeister for comment. Burmeister responded by email, saying he did not breach the Capitol during the riot, and he was only in Washington D.C. to participate in a peaceful march. Later in the day, in response to Clark’s follow-up question about Burmeister’s having used “STORM” as a noun – the term QAnon followers used to describe the day when Trump’s supporters would vanquish (and execute) his “enemies” – Burmeister stated:

Thank you for highlighting my peaceful march to the Capitol yesterday. It was an honor to live my First Amendment. Just to clarify, “storm” for me was to march to the Capitol and be on the grounds. As I mentioned in my posts, I was there for a peaceful march, always respecting the laws of our land.

Defendants’ Publication, and the Resulting Lawsuit

The news segment/commentary, broadcast at 6:00 p.m. on January 7, 2021, [can be viewed here](#).

Burmeister, who is represented by Steven Biss of Virginia (notorious for having filed numerous frivolous libel suits on behalf of former U.S. Representative Devin Nunes (R. Cal)), filed suit against Clark and KUSA-TV in Denver District Court. The Complaint asserts a single claim for defamation per se, premised on the broadcast report, an online print story accompanying the broadcast piece, and Clark’s tweets touting the broadcast report. (Burmeister/Biss have also filed two other libel cases, in federal courts in Boston and San Francisco, against business associates of Burmeister’s who posted links to the 9News broadcast piece on Facebook, Twitter, and LinkedIn. Those two suits seek a combined \$13.5 million in damages and are still pending).

In the Denver lawsuit, Burmeister claimed that Clark defamed him by (1) falsely stating that he had “stormed” (violently entered) the Capitol, when it was the other fellow in the selfie photo above who claimed to have done so, or that Burmeister had “claimed” to do so; (2) that he “bragged” about having done so, (3) that he “boasted” about being at the anti-government rally, and (4) that he was falsely portrayed as a member of radical and violent conspiracy organizations like QAnon and the Three Percenters. (Burmeister had conspicuously donned a battle fatigue sweatshirt bearing the Three Percenter’s logo on the Capitol Mall on January 5, 2021).

Anti-SLAPP Motion and the Court’s Ruling

Clark and his station, KUSA-TV, filed a Special Motion to Dismiss the complaint under Colorado’s anti-SLAPP Act. That statute, copied practically verbatim from California’s Anti-SLAPP Act, immunizes publications in public fora on matters of public concern (“prong 1”), unless the plaintiff can demonstrate a “reasonable probability of prevailing” on his claims (“prong 2”). It was uncontested that Clark’s commentary addressed a legitimate matter of public concern and was published in a public forum.

Turning to prong two, the defendants' Special Motion to Dismiss argued that Burmeister could not show a likelihood of prevailing because he could not satisfy two elements of his libel. First, material falsity (or lack of substantial truth): Clark's broadcast statements describing Burmeister's social media postings characterizing them as showing Burmeister having boasted about his being on the grounds of the Capitol during the insurrection, and "bragging" about standing beside the fellow who claims to have been the first one to gain entry to the Capitol were substantially true. The fact that the broadcast and online reports included Burmeister's statement declaring he'd not personally entered the Capitol building, and had broken no laws, made it impossible for him to show that he was falsely accused of having done so. Lastly, Clark's actual statement, that Burmeister's "Facebook page is full of QAnon conspiracies about 'the storm,'" was also substantially true (and did not necessarily imply that he was a member of those organizations).

Second, actual malice (required under Colorado law even for a private figure plaintiff when suing on a publication addressing a matter of legitimate public concern): accompanying the Special Motion to Dismiss was Clark's sworn declaration attesting to the steps he had taken to prepare his report, including having reviewed Burmeister's postings above on Facebook, Twitter and LinkedIn, as well as exchanging communications with Burmeister eliciting his statements that were *included in the broadcast* report. Accordingly, defendants argued, Burmeister could not present competent "clear and convincing evidence" of actual malice.

On March 9, 2022 Judge Ross Buchanan of the Denver District Court [granted the defendants' Special Motion to Dismiss](#), finding that Burmeister had not met his burden under Colorado's anti-SLAPP Act of establishing a reasonable likelihood that he could prevail on his claim for defamation. Buchanan essentially adopted the arguments that had been presented in the defendant's Special Motion to Dismiss, but also distinguished between stating the Burmeister had actually entered the Capitol and the erroneous statement (in the online version, not uttered by Clark) that Burmeister had "claimed" to have done so.

As noted above, the trial judge's ruling marks only the second time to date in which a member of the "mainstream"/legacy news media has invoked Colorado's anti-SLAPP statute, resulting in dismissal both times. Mr. Burmeister, through his attorney Steven Biss, has announced their intention to appeal the District Court's order granting the special motion to dismiss.

Steve Zansberg of The Law Office of Steven D. Zansberg, L.L.C. in Denver, Colorado represented Kyle Clark and TEGNA Inc. d/b/a KUSA-TV. Chad Burmeister was represented by Steven S. Biss of Charlottesville, Virginia.

The fact that the broadcast and online reports included Burmeister's statement declaring he'd not personally entered the Capitol building, and had broken no laws, made it impossible for him to show that he was falsely accused of having done so.

The Fight for the Public’s Right to Access Videos of the Landmark Prop 8 Trial Again Moves to the U.S. Supreme Court

By Sara A. Fairchild, Thomas R. Burke, & Rochelle L. Wilcox

More than a decade after the landmark trial that found California’s Proposition 8 unconstitutional, the proposition’s proponents have now asked the U.S. Supreme Court to review a recent Ninth Circuit decision that would finally allow the public to access video recordings of the trial. [Hollingsworth v. Perry](#) (petition for cert.).

Heard in a federal courtroom in San Francisco five years before *Obergefell v. Hodges*, the trial on Prop 8’s same-sex marriage ban was one of the most socially and culturally significant trials in our nation’s history. Yet the contemporaneous recordings of the trial remain sealed. After a decade of litigation over the public’s right to view the recordings, including multiple rounds in the Ninth Circuit and a trip to the U.S. Supreme Court, in November 2021, the Ninth Circuit held the Prop 8 proponents lacked standing to challenge a district court order declining to extend the seal. *Perry v. Newsom*, 18 F.4th 622 (9th Cir. 2021). Because the proponents have now brought this fight to the Supreme Court, we provide this history of the litigation and summarize the issues at stake.

A Decade of Litigation

In 2008, California voters passed Proposition 8, which amended the California Constitution to provide that “Only marriage between a man and a woman is valid or recognized in California.” Cal. Const. Art. 1, § 7.5. Two same-sex couples sued to challenge Prop 8’s constitutionality in the Northern District of California in a case assigned to then-Chief Judge Vaughn Walker. Because the named state defendants refused to defend the amendment, the official proponents of the initiative intervened. The case garnered international attention as it teed up the question whether same-sex couples have a right to marry under the U.S. Constitution.

Leading up to the January 2010 bench trial, a coalition of media entities (including San Francisco public television and radio station KQED) sought permission to televise the trial. At a hearing on the motion, Judge Walker discussed the possibility of livestreaming the trial to other courthouses across the country and issued an order indicating he intended to do so under a Ninth Circuit pilot program. The Prop 8 proponents petitioned the Ninth Circuit for a writ of mandamus that would prevent such broadcasting, without success. They then turned to the U.S. Supreme Court which, that weekend, asked the parties and the media coalition to brief the issue.

The trial on Prop 8’s same-sex marriage ban was one of the most socially and culturally significant trials in our nation’s history. Yet the contemporaneous recordings of the trial remain sealed.

The morning of the first day of trial, the U.S. Supreme Court issued a temporary stay of the live broadcast, and two days later, it extended the stay. The Court concluded the Northern District of California likely had not properly amended its Local Rules to allow livestreaming.

Hollingsworth v. Perry, 558 U.S. 183, 189 (2010) (per curiam). Four of the Court's justices dissented, describing the decision as an "unusual" and "extraordinary intervention" into local court administration. *See id.* at 207-08 (Breyer, J., dissenting).

Before the full Court's decision, Judge Walker had videotaped the first two days of trial in the event the Court lifted its temporary stay. Following the decision, Judge Walker stated he would continue recording for use in chambers, as permitted by Local Rule, and "not ... for purposes of public broadcasting or television." No party objected.

In August 2010, Judge Walker held that Prop 8 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and enjoined its enforcement. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *rev'd sub nom.*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (proponents lacked standing to appeal). In that order, Judge Walker also directed the clerk to file the recordings of the trial in the record under seal.

The following year, upon learning that then-retired Judge Walker had used excerpts of the recordings of the trial in public appearances, the Prop 8 proponents moved for the return of all copies to the district court. Plaintiffs and a coalition of media companies cross-moved to unseal the recordings. The district court ordered the recordings unsealed based on the common-law right of access and the proponents' failure to show compelling reasons that outweighed it. *Perry v. Schwarzenegger*, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011). The Ninth Circuit reversed, holding the proponents had reasonably relied on Judge Walker's assurances "that the recordings would not be broadcast to the public, at least in the foreseeable future." *Perry v. Brown*, 667 F.3d 1078, 1084-85 (9th Cir. 2012). The Ninth Circuit noted, however, that under then-Local Rule 79-5(f) (now (g)), "[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed." *Id.* at n.5.

In 2017, KQED moved to unseal the trial recordings. The district court again agreed the common-law right of access applied and found the proponents offered no facts showing disclosure would cause them harm. Nevertheless, the court held the proponents' reliance interest continued to justify sealing until the seal presumptively expired at the 10-year mark. [*Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047 \(N.D. Cal. 2018\)](#). The court thus ordered the recordings be unsealed in August 2020 "absent further order from this Court that compelling reasons exist to continue to seal them." The Prop 8 proponents appealed, but the Ninth Circuit dismissed for lack of jurisdiction, concluding the district court's order was neither a final order nor an appealable collateral order. *Perry v. Schwarzenegger*, 765 F. App'x 335 (9th Cir. 2019).

As the 10-year mark approached, the Prop 8 proponents requested to extend the seal and make it permanent. The district court denied their request, finding that the proponents still had offered

no evidence “that any Proponent or witness ... wants the trial recordings to remain under seal.” *Perry v. Schwarzenegger*, 2020 WL 12632014 (N.D. Cal. July 9, 2020). The proponents appealed, and the Ninth Circuit stayed release of the recordings pending its review.

Ninth Circuit Decision

Weighing in for the third time on the dispute over public release of the Prop 8 trial recordings, the Ninth Circuit held the proponents’ lack of injury deprived them of Article III standing. *Perry v. Newsom*, 18 F.4th 622 (9th Cir. 2021). Judge Fletcher wrote for the majority, and Judge Ikuta dissented.

The court distinguished the posture of this appeal from the proponents’ previous appeals, pointing out that a decade ago, when the court found a compelling reason to keep the recordings under seal, the proponents’ merits appeal was pending and the proponents had presented evidence of harassment. Releasing the recordings then could have deterred witnesses from testifying at a retrial had the Ninth Circuit vacated Judge Walker’s decision on the merits. A decade later, none of these concerns still existed.

The court found no indication that releasing the recordings today would result in harm to the proponents or anyone aligned with them. Although the record showed supporters of Prop 8 had experienced harassment in 2009 and earlier, the proponents presented no evidence of harassment in the years since, despite having multiple opportunities to do so. The one proponent who testified at trial had not participated in the proponents’ efforts to block the recordings’ release for years. And neither of the two other witnesses the proponents called at trial had ever expressed fear of harassment.

The court also specifically rejected the proponents’ claim that Judge Walker had promised the trial recordings would never be made public and that releasing the recordings would breach that promise. As the court explained, in an earlier argument to the court the proponents had conceded they understood the recordings would not remain permanently sealed—the local rule required a showing of good cause to extend the seal beyond 10 years. And Judge Walker’s statement that he was not recording “for purposes of public broadcasting or television” did not create an enforceable contract.

The court was also unpersuaded by the proponents’ claims that unsealing would harm “the sanctity of the judicial process” and future litigants. As the court held, any purported injury to the judicial system would be an “impermissible ‘generalized grievance’” common to all members of the public, and any purported injury to future litigants was unrelated to the proponents. Neither claim could support Article III standing.

The Ninth Circuit’s decision thus reconciled the preceding decade of litigation—including Judge Walker’s statement about the recordings’ purpose, the Ninth Circuit’s 2012 ruling that the

The court found no indication that releasing the recordings today would result in harm to the proponents or anyone aligned with them.

proponents' reliance on that statement precluded unsealing at that time, and Local Rule 79-5(g), which mandates unsealing of court records unless compelling reasons exist to maintain the seal.

In dissent, Judge Ikuta accused the majority of distorting the court's rules and standards "to ensure this single high-profile trial is broadcast." In her view, Judge Walker's statement was an enforceable promise not to broadcast the video, and the proponents relied on this promise by not objecting to his continued recording. Releasing the videos to the public would therefore violate the proponents' legal rights and cause an injury in fact under Article III. Judge Ikuta further reasoned the proponents' awareness that the promise would not last indefinitely goes to the merits, not standing.

The proponents petitioned for rehearing en banc, but the court denied the petition after no judge requested a vote. In late March 2022, the proponents filed a petition for certiorari in the U.S. Supreme Court. The cert. petition contends the Ninth Circuit erred because Judge Walker's statement was a binding promise that the recordings would *never* be broadcast and the district court's breach of that promise confers Article III standing.

The Videos' Significance

The Prop 8 trial is the only federal trial to hear testimony on whether same-sex couples have the right to marry. It remains a critical chapter in the history of the gay rights movement and marriage equality. It also represents a shining moment for the federal judiciary when the right of same-sex couples to marry was put to a trial with evidence and testimony bearing on this issue of profound importance to millions in California and throughout the world.

With only the transcripts available, actors have attempted to recreate the trial testimony. A noted play based on the trial, *8*, was performed on Broadway, later broadcast, and adapted for a radio play. A docuseries on ABC, *When We Rise*, featured an extended recreation of the trial with acclaimed actors playing Chief Judge Walker, the attorneys, and the witnesses. Multiple documentaries have been made about the case, including *The Case Against 8*, which was released in theaters and aired on HBO. But none of these reenactments or stories of the trial are a substitute for the video recordings sitting under seal in the court record.


During the trial, the same-sex couples challenging Prop 8 testified to prove their relationships were worthy of legal recognition. As the couples described in declarations supporting the unsealing efforts, the videos of their testimony uniquely show the human impact of discriminatory laws like Prop 8 and the fight to overturn them. Kristin Perry wrote,

Seeing the video, you will be able to see how terrified I was, you will see how personal this was for me. You will see on my face that I was carrying the weight of not only my family but the lesbian and gay community as well, ... and I felt the pressure of that with every word I said at trial.

The cert. petition contends the Ninth Circuit erred because Judge Walker's statement was a binding promise that the recordings would never be broadcast.

Her partner, Sandy Stier, commented that while the reenactments and transcript give “the impression of someone that is very brave and confident,” the video reveals “I was vulnerable.” It shows a lesbian woman on the witness stand in a courtroom dominated by straight men “testifying about the most personal part of my life, with fear on my face.”

Paul Katami and Jeff Zarrillo described the feeling of being under attack—particularly given their desire to have kids and the Prop 8 campaign’s narrative that same-sex marriage poses a threat to children. Paul stated, “If you see the trial tapes, you will be able to see the tears in my eyes, and you will hear the way my voice quivers when I talk about what Jeff means to me.” Jeff added, “Reading a transcript is different than seeing a human being pour his heart out while under oath, and that is what I did.”



Now over a decade later, the public’s right to view the recordings of this landmark trial remains uncertain.

Now over a decade later, the public’s right to view the recordings of this landmark trial remains uncertain. If the U.S. Supreme Court denies review, the public will finally be able to see this important chapter of history and witness the testimony themselves.

Sara A. Fairchild, Thomas R. Burke, & Rochelle L. Wilcox are lawyers with Davis Wright Tremaine LLP. Thomas R. Burke and Rochelle L. Wilcox represent KQED in this litigation.

New Jersey Supreme Court Rules to Release Police Disciplinary Records

By CJ Griffin and Brittany Burns

The New Jersey Supreme Court issued two major unanimous decisions ordering the disclosure of records involving law enforcement misconduct and access to settlement agreements that resolve discipline which reshape the landscape for the state's Open Public Records Act and common law access. [Libertarians for Transparent Government v Cumberland County](#) (March 7, 2022); [Rivera v. Union County Prosecutor's Office](#), (March 14, 2022)

In the first case, Libertarians for Transparent Government (Libertarians) requested access to a settlement agreement between the Cumberland County Jail and a former corrections officer after learning that the officer was permitted to retire in good standing despite admitting to having inappropriate sexual relationships with two inmates confined at the facility. County officials withheld the settlement agreement, and instead, provided a false statement claiming that the officer in question was terminated from his position.

Libertarians then sued the county, arguing that it had the right to access the settlement agreement under OPRA and the common law right of access. The trial court ruled that the settlement agreement could be disclosed with certain personnel information redacted. The state appeals court later reversed, ruling that settlement agreements are exempt under OPRA and must be withheld.

In [Libertarians for Transparent Government v. Cumberland County](#), (No. A-1661-18T2, 2022 N.J. LEXIS 187 (N.J. Mar. 7, 2022)), the Supreme Court reversed the Appellate Division's ruling and reinstated the trial court's decision to allow access to a redacted version of the actual settlement document. The court explained that the plain language of N.J.S.A. 47:1A-10 calls for a balancing of the right of access to government records versus the need to protect certain personnel information and permits the redaction of "information that should not be disclosed" prior to being made available to the requestor.

Declaring that OPRA permits the public to guard against corruption and misconduct, Chief Justice Stuart Rabner, writing for the Court, ruled that "access to public records fosters transparency, accountability, and candor. That applies to questions about sexual abuse in prison as well as the overall operation of prison facilities and other aspects of government."

In the second case, [Richard Rivera v. Union County Prosecutor's Office](#) (No. A-2573-19T3, 2022 N.J. LEXIS 190 (N.J. Mar. 14, 2022)), Rivera, a retired police officer, filed an OPRA request with the Union County Prosecutor's Office for an internal affairs report concerning a

Chief Justice Stuart Rabner, writing for the Court, ruled that "access to public records fosters transparency, accountability, and candor."

former police director. The director had reportedly used racist and sexist language to refer to employees on multiple occasions. When the prosecutor's office denied his request, Rivera sued under OPRA and the common law right of access.

Although the trial court ruled that the records should be made public under OPRA, the state appeals court later denied access to the records on the basis that they were not available under OPRA or the common law and asserted that disclosure would discourage future witnesses from reporting misconduct.

The Supreme Court reversed that ruling, holding that internal affairs reports should be disclosed under the common law when interests that favor disclosure outweigh reasons for confidentiality. The Court explained that in order to release a record, the requester must first establish the public's interest in the subject matter of the record, and then weigh that interest against the state's interest in confidentiality. This new balancing test specifically asks the court to consider whether the alleged misconduct was substantiated; the nature of the discipline imposed; the nature of the official's position; and the nature and seriousness of the misconduct. The ruling was a marked expansion of common law access for police records.

Internal affairs reports should be disclosed under the common law when interests that favor disclosure outweigh reasons for confidentiality.

In the opinion, Chief Justice Rabner wrote, "There are good reasons to protect the confidentiality of internal affairs reports under the common law in many instances. This is not one of them." He continued, "In a matter like this, the public interest in disclosure is great." Rabner then remanded the case to the trial court directing it to "expeditiously" review the report to complete the balancing test prescribed by the common law and enter an order of disclosure.

These landmark rulings acknowledge the importance of government transparency and accountability in misconduct investigations. Not only did the Court order these records to be released, but they have also provided an important framework for public access to internal affairs reports. We've now received crucial guidance on OPRA and common law right of access issues. This is sea change.

The court also mentioned the amicus briefs submitted by attorney Bruce S. Rosen on behalf of The Reporter's Committee for Freedom of the Press, New Jersey Press Association, and a host of additional media organizations in both opinions.

Both rulings serve to affirm the importance of offering public access to records that would otherwise conceal acts of misconduct within law enforcement. These landmark holdings set crucial precedent for New Jersey courts in deciding open records cases.

CJ Griffin is a partner with DCS member Pashman Stein Walder Hayden, P.C. in Hackensack, NJ. Ms. Burns is a law clerk with the firm. CJ Griffin argued the cause for appellant Libertarians for Transparent Government; and appellant Richard Rivera. Bruce S. Rosen, Pashman Stein, submitted media amicus briefs in both cases.

Ninth Circuit Reaffirms CFAA Does Not Prohibit Web Scraping in *hiQ v. LinkedIn*

By Grayson Clary, Gillian Vernick and Gabe Rottman

Three years ago, in [hiQ Labs, Inc., v. LinkedIn Corp.](#), the U.S. Court of Appeals for the Ninth Circuit issued an important opinion finding that scraping a publicly available website does not violate the federal Computer Fraud and Abuse Act (CFAA). But after the Supreme Court’s intervening opportunity to interpret the CFAA in *Van Buren v. United States*, the Justices vacated *hiQ* and sent it back to the Ninth Circuit to consider *Van Buren*’s relevance to that issue, leaving the question in limbo again. On April 18, 2022, the Ninth Circuit reaffirmed its initial view—an important early test of *Van Buren*’s significance for scraping and other data journalism techniques. [hiQ Labs, Inc., v. LinkedIn Corp.](#)

Background

In May 2017, LinkedIn, the professional networking site, served data analytics company hiQ with a cease-and-desist letter. hiQ built its products in part by scraping public-facing LinkedIn profiles, a practice that LinkedIn alleged was in violation of state and federal law, including the CFAA, the Digital Millennium Copyright Act (“DMCA”), California’s computer crime statute, and the California common law of trespass. In response, hiQ demanded that LinkedIn recognize its right to access the site’s public-facing content.

A week later, hiQ filed an action seeking an injunction that would require LinkedIn to withdraw its letter, as well as a declaratory judgment that LinkedIn could not invoke the previously asserted laws against it. The U.S. District Court for the Northern District of California granted a preliminary injunction; LinkedIn promptly appealed.

In its initial opinion, the Ninth Circuit found that hiQ raised serious questions on the merits sufficient to uphold the district court’s preliminary injunction. With respect to the CFAA in particular, the panel concluded that the statute contemplated “three kinds of computer information: (1) information for which access is open to the general public and permission is not required, (2) information for which authorization is required and has been given, and (3) information for which authorization is required but has not been given.” Because the pages hiQ had scraped were “available to anyone with an Internet connection,” the court found that they fell in the first category—and therefore beyond the scope of the CFAA’s prohibition on “unauthorized access.”

hiQ built its products in part by scraping public-facing LinkedIn profiles, a practice that LinkedIn alleged was in violation of state and federal law, including the CFAA, the DMCA, California’s computer crime statute, and the California common law of trespass.

LinkedIn sought certiorari; in the meantime, the Supreme Court decided another case concerning the CFAA, *Van Buren v. United States*, 141 S. Ct. 1648 (2021). In *Van Buren*, the Court decided that a police sergeant did not violate the CFAA’s complementary prohibition on “exceed[ing] authorized access” when he accessed a law enforcement database to obtain license-plate reader information for money. The Court read the CFAA to require a “gates-up-or-gates-down inquiry,” in which a user “either can or cannot access a computer system” (or “certain areas within the system”). As a result, the Court reasoned, the statute does not punish actors who simply have an “improper motive[.]” for using the access they otherwise have. The Justices warned, too, that a broader reading “would attach criminal penalties to a breathtaking amount of commonplace computer activity” that violates the purpose-based restrictions routinely embedded in website terms of service, including—in a nod to an amicus brief filed by the Reporters Committee for Freedom of the Press—routine “journalism activity.”

The strong hint seemed to be that terms of service that prohibit scraping cannot be the basis for CFAA liability. But the Supreme Court didn’t squarely resolve the question and, in the wake of *Van Buren*, granted LinkedIn’s petition for a writ of certiorari for the limited purpose of vacating the Ninth Circuit’s judgment and remanding the case for further consideration.

Ninth Circuit Ruling

On remand, LinkedIn urged that its gates were ‘down’ within the meaning of *Van Buren* after hiQ received its cease-and-desist letter, while hiQ argued that *Van Buren* had underlined the impermissibility of enforcing terms of service through the CFAA. The Reporters Committee again filed a friend-of-the-court brief—highlighting the power LinkedIn’s interpretation would give firms to quash data journalism—as did the Electronic Frontier Foundation. And the Ninth Circuit again sided with hiQ, affirming the district court’s preliminary injunction.

Addressing “[t]he pivotal CFAA question whether once hiQ received LinkedIn’s cease-and-desist letter, any further scraping and use of LinkedIn’s data was ‘without authorization’” within the meaning of the statute, the Ninth Circuit found that hiQ’s argument that “where access is open to the general public, the CFAA ‘without authorization’ concept is inapplicable” raised a serious question on the merits.

Reiterating its original analysis, Ninth Circuit noted that a prohibition on “access without authorization” suggested a baseline where access is generally not available and permission would be required. But “[w]here the default is free access without authorization,” the court explained, selective exclusion would more naturally be characterized as a ban than a lack of authorization, putting hiQ’s conduct outside of the scope of the statute.

When looking at the legislative history, the Ninth Circuit pointed out that the CFAA was enacted to prevent computer hacking, with lawmakers specifically analogizing “unauthorized access” as “breaking and entering.” Here, the Ninth Circuit found hiQ raised serious questions as to whether its scraping of LinkedIn’s data could be considered “breaking and entering” when there was no authentication requirement for a platform “made freely accessible on the Internet.”

And most importantly, the Ninth Circuit found that *Van Buren*'s "gates-up-or-down" inquiry reaffirmed its interpretation of the CFAA as contemplating three types of computer systems: (1) those that have no gates at all, (2) those whose gates are raised because a user has the requisite authorization, and (3) those whose gates are lowered because a user lacks the requisite authorization. In applying this analogy to LinkedIn, the Ninth Circuit found that a publicly available website has "no gates to lift or lower in the first place." Guided by *Van Buren*, then, the Ninth Circuit reaffirmed its conclusion that the CFAA's prohibition on accessing a computer system "without authorization" was inapplicable to public websites like LinkedIn.

As it had before, the Ninth Circuit favored this narrow interpretation of the CFAA to avoid "turn[ing] a criminal hacking statute into a 'sweeping Internet-policing mandate.'" And while the court highlighted alternative remedies LinkedIn could potentially pursue—from copyright infringement to trespass to chattels—its decision closed the door to wielding the CFAA for this purpose. The opinion will be an important guide to other courts confronting the question of what *Van Buren* means for scraping—and the other digital investigative techniques that increasingly power contemporary journalism.

Grayson Clary is Stanton Foundation National Security/Free Press Fellow and Gillian Vernick is Technology and Press Freedom Project Fellow at the Reporters Committee for Freedom of the Press. They are overseen by attorney and director of the Technology and Press Freedom Project, Gabe Rottman.

The opinion will be an important guide to other courts confronting the question of what *Van Buren* means for scraping—and the other digital investigative techniques that increasingly power contemporary journalism.

Online Safety: Work Needed to Improve UK Bill

By David Barker, Meghan Higgins and Rosie Nance

There is broad consensus that a greater degree of regulation of online content is necessary, but the aims of the proposed new Online Safety Bill in the UK could be undermined by a lack of clarity over the way the legislation is to be implemented and enforced.

The Bill will introduce a new and very broad regulatory framework in the UK which will impose extensive obligations on providers of certain classes of services that share content generated by users. Duties will also be imposed on search engines.

The proposals cover services that have links to the UK, either because they have a significant number of UK users or the UK is one of the target markets for the services, or because they are services capable of being accessed in the UK and there are reasonable grounds to believe there is a material risk of significant harm to individuals in the UK due to content on the service.

A Move Towards Greater Intervention

Implementing online safety regulation is a difficult task and policymakers across the world are grappling with achieving it in different ways. The new and much more interventionist approach represents a quite dramatic shift away from the position that has prevailed in the internet age, which we have explored previously.

A concept of safe harbours for internet intermediaries has existed since the late 1990s. In the EU, that consensus is reflected in the E-Commerce Directive which sets out a “notice and take down” regime for internet intermediaries and which, crucially, prohibits the imposition of any obligation on intermediaries to generally monitor the content which crosses their services. After Brexit, the default position remains that general monitoring cannot be required in the UK, but the government is free to legislate away from this in any specific area of its choosing. That is what it is planning to do with the Online Safety Bill. However, any change of this significance needs to be handled extremely carefully.

The obvious approach in this scenario would be for the government to proceed on a staged basis, and to avoid trying to do too much too quickly. In reality, though, the government is taking a different tack, with an expansive approach.

There is broad consensus that a greater degree of regulation of online content is necessary, but the aims of the proposed new Online Safety Bill in the UK could be undermined by a lack of clarity over the way the legislation is to be implemented and enforced.

This tendency to try to “fix everything” all at once persists in the Bill. There are problems with the government's approach that we hope can be resolved as the Bill is scrutinised as it passes through parliament.

Duty of Care

The government continues to trumpet the idea that the Bill creates some sort of “duty of care” owed by service providers to users. This is unhelpful messaging, and the Bill does no such thing. The concept of a duty of care exists primarily in the tort of negligence whereby a private right of action exists where Person A breaches their duty of care to Person B and Person B suffers damage as a result. Person A carelessly injuring Person B in a road traffic accident is a simple example. The importation of this concept into the government’s messaging ought to be dropped.

Indeed, a more suitable approach to the legislative scheme as a whole would be to set out duties around a concise set of principles – like the principles relating to processing of personal data under Article 5 of the General Data Protection Regulation (GDPR). The Bill includes online safety objectives in Schedule 4, which regulator Ofcom must follow when setting out codes of practice on how the duties are complied with. An obligation to comply with a concise set of objectives, set out at the beginning of the Bill, would be a more suitable approach to creating a regulatory framework.

Awful but Lawful

One of the more problematic aspects of the Bill is the proposed regime to regulate lawful but harmful content. This has also been colloquially referred to as “awful but lawful” content. Here the government is in a difficult position. Undoubtedly there is much public concern about the amount of content proliferating which is potentially damaging to some users but which is not in itself unlawful. By choosing to take on this challenge now, the government has produced legislation which is very complex. It seems unlikely that any additional benefit to be obtained through these provisions will outweigh the questions they raise.

The government’s approach targets different content by reference to the type of service (in terms of its functionality), the scale of the service (in terms of the number of users), and the demographic of users (particularly as to their age). As a consequence, it is more or less impossible to produce an easily accessible diagram or scheme of how different types of content are to be regulated in different contexts. Service providers are left having to navigate all of these levels of complexity in the Bill.

An example of the new and difficult-to-fathom concepts introduced by the Bill is “content of a kind which presents a material risk of significant harm to an appreciable number of adults in the UK”. Harm in this context means physical or psychological harm. Trying to navigate concepts

If the goal is to have an enforceable regime on a relatively quick timescale, legislators should look to simplify and to resist the temptation to respond to a difficult task with a complex solution.

like this will be a real challenge. Service providers will be making these very difficult assessments about the potential harm associated with particular types of speech, in various contexts which may or may not assist them, for the most part at scale.

Clearly the government is aware that there were other ways of targeting content that could be considered harmful. The most recent version of the Bill has introduced new communications-based criminal offences relating to certain types of content online, which we can assume the government considered the most egregious. The Bill has also added a new verification requirement and required services to give users more control over the other users they interact with.

Time will tell whether a better approach would have been to tackle lawful but harmful content in a second phase, offering the prospect of learning from what works well or badly with unlawful content in phase one.

Systems or Content?

There remains an ongoing tension in the Bill's focus: is it primarily concerned with the systems which service providers are to put in place, perhaps accepting that these will be imperfect, or is it primarily concerned with the type of content which is to be addressed?

Of course, systems and content are not mutually exclusive: it is impossible to put in place systems without some clarity on the type of content to be addressed. Still, despite assertions that the Bill will target systems, it is unclear from reviewing the Bill how that will work in practice. Most of the duties included in the Bill and the debate around it are about types of content. This perhaps appeals to the political desire for real world examples of the types of harm that will be addressed. We already know there will be difficulties identifying content that is covered by the Bill.

We think a focus on systems would be far more practical and useful to the service providers who will have to work out how to comply with this legislation. The larger platforms already have systems and processes around flagging or removing certain content. The Bill is a missed opportunity to provide some clarity and some consistency around what is required. These duties alone could form the basis for a Bill that would impose meaningful obligations on platforms and search engines around putting in place governance mechanisms to keep users safe.

New In-Scope Items

Late additions have been made to the Bill. These add to the Bill's unwieldiness. One of these is the introduction of a requirement for age verification measures for non-user-to-user pornography sites. Something similar was previously attempted and, frankly, bungled, under the Digital Economy Act 2017. It is now just another unstraightforward thing that must be achieved by the Bill, to add to everything else.

A further requirement has been imposed on providers of ‘Category 1’ services to provide adults with the option to verify their identities. Although the Bill does not specify how this verification process is intended to work or what type of information the service must collect, it does say that it need not require documentation. Separate provisions require providers of Category 1 services to include features to allow adult users tools to manage the content they encounter and avoid content presented by unverified users. The provisions are intended to address anonymous abuse online, but they will be challenging for service providers to implement in a way that does not create a barrier to some users getting online.

Along similar lines, the Bill now includes provisions applicable to Category 1 services and large search services requiring their providers to address online advertising which facilitates fraud.

Fraudulent advertising is a complex topic in its own right. Indeed, the government launched a consultation on online advertising on 9 March this year. The consultation document was updated on 17 March and mentions that the review “will work in conjunction with the measures being introduced through the forthcoming Online Safety Bill” which introduces “a standalone measure for in-scope services to tackle the urgent issue of fraudulent advertising”. The process of debating and implementing these provisions, however, might well have been more straightforward if done within the context of a consultation effort focused specifically on online advertising.

Leaving Difficult Issues Until Later

Reading the Bill, there is a sense that the government has tried to tackle so much that it must inevitably postpone engaging with much of the detail until after the Bill becomes law. The government has acknowledged that the Bill is complicated, but asserted that does not mean it will be overly complicated for service providers to comply with, as Ofcom’s codes of practice and guidance will provide detail and clarity for services as to how to comply with their legislative duties. That remains to be seen and, as things currently stand, providers are ill-equipped to prepare for the new obligations, as the detail on the duties is not set out in the Bill itself.

The Bill also leaves the crucial area of setting out the threshold conditions for Category 1, Category 2A, and Category 2B service providers to secondary legislation. Many of the Bill’s duties apply based on which of these categories a service provider falls under. At this stage, service providers are therefore unable to get a complete picture of which duties will apply to them, as well as being in the dark about how they will be expected to comply if they are caught by the thresholds.

Citizen Journalism

The mainstream media have understandably lobbied hard for exceptions to the new regime and have largely been successful in doing so. This has, however, left a notable divide between the way in which the Bill treats what might be termed as traditional journalism and the way in which it treats citizen journalism.

It is worth reflecting on just how much the internet has changed over the past 20 years. Web 2.0 did not exist in a mainstream sense in the early 2000s and yet the ability of everyone to participate in social sites/platforms, video sharing and the like is now a central part of how the internet is used. In the first Gulf War in the early 1990s, CNN reported live on US air-strikes on Baghdad from a hotel in the Iraqi capital. The US military effectively acknowledged that they were obtaining much of their immediate intelligence from the channel. Fast forward 30 years to the Russian invasion of Ukraine and much near real-time information is actually provided through citizen journalism on social media sites, not by the traditional media.

These changes come with significant challenges, from how to determine whether information is authentic, to where to draw the line on posting graphic content. Yet recognising the importance of public participation should not be underestimated, especially in an online world in which it has become difficult to work out who is actually offended, and who is feigning offence. How the risk of over-blocking plays out will be of real democratic importance.

The Risks to Freedom of Expression

Currently the Bill imposes duties on service providers to protect freedom of expression, but it is unclear how providers are required to balance this against the other duties set out in the Bill. The Bill's European Convention on Human Rights Memorandum sets out general commentary on why interference with Article 10 rights is said to be justified under the Bill.

The expansion in the harms covered, as discussed above, may lead to a trend towards providers removing content at scale out of concern for contravening their duties. The Bill does impose duties on all providers of user-to-user services to put in place complaint procedures which allow users to complain to the provider in relation to a decision to take down or restrict access to content. Similar complaints processes also apply to regulated search services.

According to the Bill's factsheet, "the largest social media platforms will no longer be able to arbitrarily remove harmful content". Whether this is happening currently may be contested. In any event, smaller providers caught by the legislation with fewer resources to moderate content may be more likely to take a conservative approach to taking down content.

Next Steps

The Bill has had its second reading in the Commons, with the Committee stage scheduled to conclude no later than the end of June. The report and third reading stage are then likely to be held together in the second week of July. Consideration by the Lords is unlikely to begin until after the summer recess, in September. Depending on the extent of any "ping-pong" between

Recognising the importance of public participation should not be underestimated, especially in an online world in which it has become difficult to work out who is actually offended, and who is feigning offence.

the Houses, the Bill could receive Royal Assent by February 2023. If important detail is to be left to secondary legislation and codes of practice, it may be a further year or more before enforcement activity can begin.

From a business perspective, numerous details need to be decided before we have an Act and accompanying secondary legislation, if applicable, that Ofcom can enforce. Parliament now has the opportunity to scrutinise this legislation and how it will work in practice. If the goal is to have an enforceable regime on a relatively quick timescale, legislators should look to simplify and to resist the temptation to respond to a difficult task with a complex solution.

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Ten Questions to a Media Lawyer: Tenaya Rodewald

Tenaya Rodewald is currently a partner in the Litigation and Privacy and Cybersecurity practices at Sheppard Mullin Richter and Hampton LLP in Silicon Valley.

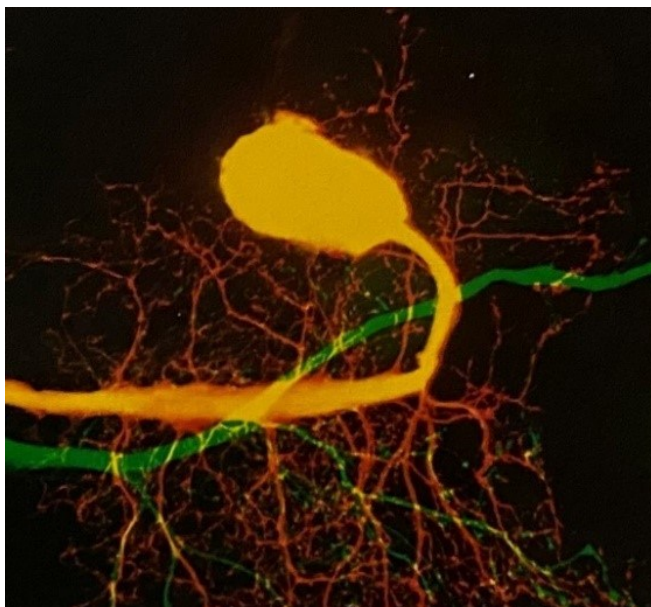
How'd you get interested in media law? What was your first job in the business?

I came into media law circuitously, and because of a general inability to pick only one kind of law.

In college I fell in love with neuroscience and wanted to figure out how brains and nervous systems work. I got a PhD in neuroscience, with the aim of doing basic science research. Neuroscience involved fascinating questions, cool equipment, comfortable clothing (debatable), and pretty pictures. I loved most of it, but I realized it had certain drawbacks, including that I became deeply disgruntled with a key research subject (mice).

Neuroscience also involved a lot of time alone, and I wanted to do something where I felt like my work mattered to other people on a more day-to-day basis. So I went to law school. (The truly cynical readers just snorted. I heard you.)

Even after a few years of law school, I still couldn't decide what I *really* wanted to do. I loved constitutional law (unique, I know), and civil procedure, and I knew I wanted to litigate. But litigate what? I thought environmental law was really important, but could I choose that over civil rights law, or anti-trust or consumer protection? I dithered. And, to make a long story short, over the next few years I came to realize that I was most comfortable doing media law



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because it made me feel like I didn't have to choose. I could fight for the people and organizations who were keeping me, and hopefully my fellow citizens, informed and engaged about *all* the topics I cared about.

My interest in the field was only part of the story however. I was also extremely lucky to have mentors and friends to show me the ropes and help me when I stumbled. Key among them are Judge Naomi Reice Buchwald of the S.D.N.Y., for whom I externed in law school. She encouraged an amazing amount of engagement and even debate



Rodewald with Judge Buchwald in 2004

from upstart law students like me, and was a fabulous and wise teacher because of it. Harry Olivar and Mike Zeller at Quinn Emanuel, where I worked right out of law school, started the arduous process of teaching me to be a litigator, and taught me early on to be unafraid of taking on major pro bono projects. Harry also tried to teach me how powerful succinct writing can be. I'm still grappling with that lesson. And my amazing mentor, James Chadwick, and my friend, David Snyder, brought me into the fold of media lawyers, did their best to fill me in on basics like prepub review, and continue to share their wisdom and humor with me.

What do you like most about your job? What do you like least?

What I like most about media law is that I really care about the work. And it's full of surprises and cool constitutional issues, and I learn something new all the time, and my family actually wants to hear about my media cases because they usually don't involve "boring" business issues.

What I like least about media law is that I sometimes care too much about the work, which can make life extremely stressful at times!

What was your highest profile or most memorable case?

Over the past three years I led a team of lawyers at Sheppard Mullin working to protect the press and public's right of access under California's new police transparency statute. For decades, California was one of the most secretive states when it came to information about police uses of force and misconduct. In 2019, Senate Bill 1421 came into effect, and for the first time in a generation provided a right of public access records relating to police misconduct

and serious uses of force. However, SB 1421 faced many obstacles, including police unions that filed numerous “reverse PRA” actions against local agencies claiming the law could not be applied “retroactively” and so no pre-2019 records could be disclosed, and local governments that dragged their feet, interpreted the law overly-narrowly, or simply refused to comply. On behalf of media clients and the First Amendment Coalition, we intervened in 8 of the police union’s

reverse PRA cases, involving 15 agencies up and down the State of California, first to make sure that the unions couldn’t kill the law, and then to seek rulings interpreting the law broadly and ensuring agencies were actually providing all the records they should be.

Along the way, we obtained two published appellate court opinions. One held that pre-2019 records had to be released and the other addressed the critical issue of attorney’s fees in reverse PRA actions. Several trial courts ruled that our media clients could only intervene in these cases and fight for public access if they forfeited any claims for attorney’s fees. When we prevailed on the merits in the San Diego case, we appealed the trial court’s order prohibiting our clients from seeking their attorney’s fees. Ruling on an issue of first impression, the court further stated that a trial court cannot prevent the media or other intervenors from seeking their attorney’s fees when they prevail in reverse PRA cases. I’m very proud of this ruling because it put a stop to a dangerous practice that was gaining momentum in California, threatening to greatly embolden reverse PRA plaintiffs by immunizing them from fee shifting, and severely undermined the media’s ability to fight reverse PRA litigation by ending fee recoveries in such cases.

These cases were an incredibly tough, long slog. (But we ended up collecting over \$1 million in attorney’s fees from our opponents, and that added zest to the victories.)

Are you able to maintain a decent work-life balance? What are some rules you follow?

Ha. What’s that? I am now trying to enforce two rules: (1) not working at all on at least one weekend day; (2) being outside for most of that day.



Rodewald and David Snyder of the First Amendment Coalition celebrating greater access to police records with local PBS affiliate KQED.

Fake news, Sullivan under attack, reporters under attack – will things get worse before they get better?

I am not sure that they will get worse, but I also don't see any near-term solutions for our current depressing situation. I am hopeful about what seems to be a growing number of small, nonprofit news rooms that are trying to fill the void in local journalism. But I wish there were a better funding model for professional journalism on a larger and more predictable scale. While not replicable in the U.S., and not without problems, I am intrigued by the funding experiments in Europe and Australia. I also like the idea of arguing for a distinct meaning for the press as a professional institution under the First Amendment and the law more broadly, but this will be a long campaign.

Media law can be a difficult industry to break into. What would you suggest to a young lawyer or student trying to do so?

Do pro bono! There are tons of opportunities to do media law and First Amendment pro bono, such as providing prepublication or contract review for nonprofit media entities, defending defamation or other claims against student newspapers, litigating public access issues, writing amicus briefs, etc. As well as being amazingly fulfilling work and serving an important need, most of these things can directly bolster or even kick-start your career as a media lawyer (or at least that's what I keep telling my law firm).

What's a book, show, song, movie, podcast or activity that's been keeping you entertained during the pandemic?

Cobra Kai, anything with David Attenborough, and an excessive number of audiobooks.

What's a typical weekday lunch?

Unfortunately I don't do lunch all that often (see work-life balance above).

Your most important client takes you out for karaoke. What do you sing?

I'd have to go with The 2 Live Crew's Pretty Woman, so we could segue into a drunken discussion of the state of fair use jurisprudence—and maybe figure it all out for once! Alas, since nobody would be able to remember it the next morning, I would be unable to share our insights with this august publication.

Where's the first place you'd like to visit post-pandemic?

My husband and I have a good friend who took a limited-time job in Australia right before the pandemic started and now he's almost finished with his time there. We'd love to visit him before he leaves, or go to Croatia or Portugal.