Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 31 *XXXI*
Number 4

Article 1

2021

Free Speech in the Modern Age

fordhamiplj@gmail.com

Follow this and additional works at: https://ir.lawnet.fordham.edu/iplj

Part of the Civil Law Commons, Common Law Commons, Communications Law Commons, Constitutional Law Commons, Entertainment, Arts, and Sports Law Commons, First Amendment Commons, and the Intellectual Property Law Commons

Recommended Citation
fordhamiplj@gmail.com, *Free Speech in the Modern Age*, 31 Fordham Intell. Prop. Media & Ent. L.J. 978 (2021).
Available at: https://ir.lawnet.fordham.edu/iplj/vol31/iss4/1

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Free Speech in the Modern Age

Fordham Intellectual Property, Media & Entertainment Law Journal*

I. BANNED BOOKS: PREPUBLICATION REVIEW IN THE INTELLIGENCE COMMUNITY 978
II. HITTING BACK: SLAPP SUITS & ANTI-SLAPP STATUTES 984
III. KEYNOTE SPEECH: PUBLIC SQUARE 2.0: FREE SPEECH ON THE INTERNET 988
IV. CELEBRITY PARADOX: COPYRIGHT, SOCIAL MEDIA & PAPARAZZI PHOTOGRAPHY 992

I. BANNED BOOKS: PREPUBLICATION REVIEW IN THE INTELLIGENCE COMMUNITY

Moderated by Abner S. Greene,[1] the *Banned Books: Prepublication Review in the Intelligence Community* Panel discussed the tension between national intelligence agencies' prepublication review process and employees' First Amendment interests related to

---

* These summaries are brought to you by the staff and editors of the Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXXI. The Journal would like to extend a very special thank you to Claire Marie Ochse, IPLJ's Volume XXXI Symposium Editor, for organizing this 28th Annual Symposium. For their help creating these summaries, the Journal would like to thank the Symposium Committee: Alexandra Machado, Chrystel Yoo, Ilana Blumenthal, and Lu Yan. Further thanks to Rachel Morgan and Alex Jacinto for their help editing the final content of these summaries, as well as Katherine Ballington, Managing Editor of Volume XXXI, and David Devich, Editor-in-Chief of Volume XXXI, for compiling and finalizing the summaries. Finally, the Journal would like to thank all of the Symposium's Speakers, Panelists and Moderators. Videos of the entire Symposium can be found on the Fordham Intellectual Property, Media & Entertainment Law Journal's website here: http://www.fordhamiplj.org/2021/03/18/the-28th-annual-iplj-symposium-free-speech-in-the-modern-age-monday-march-8-2021/ [https://perma.cc/DD3C-GKGV].

[1] *Abner S. Greene*, FORDHAM U. SCH. OF L., https://www.fordham.edu/info/23141/abner_s_greene [https://perma.cc/T954-52YN].

classified information. Particularly, this panel focused on how nondisclosure agreements ("NDAs") signed by current or former national intelligence employees affected the publication of books written by high-profile government officials. For example, memoirs written by former U.S. National Security Advisor John R. Bolton[2] and former CIA employee Edward Snowden[3] not only drew public attention, but also prompted lawsuits by the U.S. Department of Justice alleging violations of NDAs.[4] These government NDAs require current and former national intelligence employees to submit any public statements or publications to the federal government for review prior to publication. The panel also discussed how to balance national security interests and the public's access to information. Panelists included Dr. Christopher E. Bailey, Associate Professor at National Intelligence University[5]; Mary-Rose Papandrea, Samuel Ashe Distinguished Professor of Constitutional Law at University of North Carolina Law School[6]; and Ramya Krishnan, Staff Attorney at Knight First Amendment Institute at Columbia University.[7]

Dr. Christopher Bailey addressed how the Senate Select Committee on Intelligence prepublication review process worked based on his career experience, with concerns that leaking credential in-

---

[2] Nicole Gaouette, *What we Learned from John Bolton's Eye-Popping Tale of Working with Trump*, CNN (June 18, 2020, 9:50 AM), https://www.cnn.com/2020/06/17/politics/bolton-book-what-we-learned/index.html [https://perma.cc/L9TL-XR4C].

[3] Jennifer Szalai, *In Edward Snowden's New Memoir, the Disclosures This Time Are Personal*, N.Y. TIMES (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/books/review-permanent-record-edward-snowden-memoir.html [https://perma.cc/6BKS-73F5].

[4] *See* Pete Williams & Dartunorro Clark, *DOJ Sues to Stop Former Trump National Security Adviser John Bolton's Tell-All Book*, NBC NEWS (June 17, 2020, 07:0 PM), https://www.nbcnews.com/politics/justice-department/doj-sues-stop-former-trump-national-security-advisor-john-bolton-n1231227 [https://perma.cc/E2NH-3A8F]; *see also* Michael Balsamo, *Justice Department Files Lawsuit Against Snowden Over Memoir*, PBS (Sept. 17, 2019, 2:15 PM), https://www.pbs.org/newshour/nation/justice-dept-files-lawsuit-against-snowden-over-memoir [https://perma.cc/9GN3-VAX5].

[5] *Christopher E. Bailey*, RESEARCH GATE, https://www.researchgate.net/profile/Christopher-Bailey-27 [https://perma.cc/HR6Y-BLBW].

[6] *Mary-Rose Papandrea*, UNC SCH. OF L., https://law.unc.edu/people/mary-rose-papandrea/ [https://perma.cc/JA6U-U2CM].

[7] *Ramya Krishnan*, KNIGHT FIRST AMENDMENT INST. AT COLUM. U., https://knightcolumbia.org/bios/view/ramya-krishnan [https://perma.cc/KU7P-83NJ].

formation from the government could potentially have significant damage to national security.[8] He first explained the government's authority to prevent unauthorized disclosure. This authority arises from federal statutes or presidential power, such as 50 U.S.C. § 3024(i)[9] or the President Executive Order 13526.[10] In addition, the prepublication review process applies to all government employees with access to classified information because they are obligated to sign a lifetime NDAs. Such obligation was upheld by the Supreme Court, holding that the NDA was a lawful restriction on First Amendment rights.[11] While federal statutes support the legality of these NDAs, the detailed prepublication review process is largely covered by state common law, which obscures clarity on certain issues.[12]

Bailey then outlined the general process of prepublication review, stating that the process can be quite lengthy depending on the quality of the product. Typically, a review team of three people will review around 600 materials a year. A review officer may directly approve prepublication review, but sometimes a subject matter expert is needed to determine what information is classified. There is a thorough filing system to keep track of disclosure requests, logging its progress through the system and allowing for collaboration across different offices. When a final review comes back to an author, it provides approval, or specifies changes that need to be made. Bailey also pointed out two general reasons for

---

8 The Senate Select Committee on Intelligence is comprised of 15 Senators and provides legislative oversight over U.S. intelligence activities. *Overview of the Senate Select Committee on Intelligence*, U.S. SENATE SELECT COMM. ON INTELLIGENCE, https://www.intelligence.senate.gov/about [https://perma.cc/J3HQ-42VR]

9 50 U.S.C. § 3024(i)(1) provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."

10 *See, e.g.*, Exec. Order No. 13,526, 3 C.F.R. § 1.3 (2010).

11 *See, e.g.*, United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (holding that the secrecy agreement executed by the employee at the commencement of his employment was not in derogation of his constitutional rights); *see also* Snepp v. United States, 444 U.S. 507, 513 (1980) (holding that a former agent breached fiduciary obligation by failing to submit material concerning CIA for prepublication review to ensure the protection and defense of the United States).

12 *See, e.g.*, Sarah Matthews et al., *A Reporter's Guide to Pre-Publication Review*, RCFP, https://www.rcfp.org/resources/pre-publication-review-guide/ [https://perma.cc/LEU4-Y5ZZ].

redaction of information: (1) the information is classified or (2) the information would impair employee performance, department performance, or U.S. foreign relations. Overall, Bailey believes that the prepublication process sufficiently balances an employee's freedom of speech with general national security concerns.

Mary-Rose Papandrea discussed the tension between national security and the First Amendment right by classifying the employees into either "insiders," those who have obtained classified information through employment, or "outsiders," who have no access to classified information. The First Amendment rights of Government "insiders" are nearly nonexistent regarding classified information.[13] Even if the information an "insider" leaks is of interest to the public, the Supreme Court in *Snepp v. United States* has embraced the notion that national security officers have relinquished First Amendment rights.[14] In contrast, courts appear to allow government "outsiders" to publish all information they have access to. In discussing government "outsiders," Papandrea focused on the *Pentagon Papers* case.[15] Papandrea further gave two examples involving government prosecution of third parties: *United States v. Rosen* and the Julian Assange case. In *Rosen*, two lobbyists were prosecuted by the government,[16] but the charges were dropped after the district court judge required the government to show bad faith.[17] The next example was the Julian Assange prose-

---

13 Although the Supreme Court in *Pickering v. Board of Education* ruled that the government must balance the interests of employee on commenting on matters of public concerns with their job responsibilities, this case has been significantly watered down and may not apply to national security. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

14 *Snepp*, 444 U.S. at 516.

15 New York Times Co. v. U.S., 403 U.S. 713, 719–20, 732 (1971) (emphasizing that prior restraints are presumptively unconstitutional and require the government to meet an extraordinarily high standard of showing "grave and irreparable" injury to public interest).

16 United States v. Rose, 445 F. Supp. 2d 602, 627 (E.D. Va. 2006) (holding that "the statute permits conviction only of those who 'willfully' commit the prohibited acts and do so with bad faith.").

17 *See* Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists*, WASH. POST (May 2, 2009), https://www.washingtonpost.com/wpdyn/content/article/2009/05/01/AR2009050101310.html?hpid=topnews [https://perma.cc/XX78-CKMG].

cution.[18] If the Assange case moves forward, the court may have the opportunity to address some open questions about prosecution of third party disclosers of classified information.[19] Papandrea ended the conversation by stating that NDA contracts are not the end of the issue, especially because government employees may not have negotiation powers.[20] She also suggested that the government could impose constructive trusts on books that do not go through prepublication review process.

Ramya Krishnan discussed the current prepublication review system and the Knight Institute's work on a case dealing with prepublication review. The prepublication review system was introduced during World War II and was implemented mainly to prevent inadvertent disclosures of secret wartime information.[21] Since then, the system has become increasingly dysfunctional.[22] Krishnan pointed out some issues with the prepublication review system today. First, many governmental agencies impose prepublication review obligations on employees without regard to whether the employees themselves have encountered classified information. Second, the submission requirements and review standards are confusing and overbroad. The review process can take multiple years, depriving the public of important information. Finally, she

---

[18] Charlie Savage, *Assange Indicted Under Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html [https://perma.cc/8RXT-R4ST].

[19] Papandrea briefly mention the possible effect of *Bartnicki v. Vopper* to the prosecution on Julian Assange. Some commentators believe *Bartnicki* may not apply because it is not a national security case. Bartnicki v. Vopper, 532 U.S. 514 (2001). In cases dealing with national security, courts will routinely defer to the executive branch. *Id.*

[20] For example, the unconstitutional conditions doctrine holds that that the government may not condition the availability of a government benefit on an individual's agreement to forego the exercise of such a right. This doctrine arises from the Constitution's prohibition against penalizing an individual for the exercise of a constitutional right. Thomas R. McCoy, *Unconstitutional Conditions Doctrine*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1026/unconstitutional-conditions-doctrine [https://perma.cc/VSZ9-NLRB].

[21] Alex Abdo et al., *How a New Administration—and a New Congress—Can Fix Prepublication Review: A Roadmap for Reform*, JUST SECURITY (Nov. 24, 2020), https://www.justsecurity.org/73531/how-a-new-administration-and-a-new-congress-can-fix-prepublication-review-a-roadmap-for-reform/ [https://perma.cc/KS3J-Q7XG].

[22] *Id.*

argued that even when agencies do issue decisions approving the release of information, they often appear arbitrary or motivated by political concerns rather than national security.

Next, Krishnan introduced a current case filed by the Knight Institute, on behalf of five former public servants, challenging the government's prepublication review system.[23] Krishnan critiqued that the court focused almost entirely on remedies, but did not address the scope and application of prepublication review or any procedural safeguards. Krishnan concluded by proposing the need for reform to the current prepublication review system. Currently, the Knight Institute is drafting a proposed executive order which, if signed by President Biden, would reform the prepublication system in three main ways.[24] First, the Knight Institute argues that the scope of the system should be narrowed, with the goal of shrinking the universe of people and the subject matter that fall into review. Second, it argues that future executive orders should establish new safeguards that narrow and define the criteria for review. A new system should impose clear deadlines for decisions and create an effective appeals process. Finally, the Knight Institute argues that the reform should improve transparency in the review process by requiring agencies to publish policies and institute a standardized, transparent process. Krishnan believes these reforms could strike a better balance between the U.S. government's national security interests and employees' First Amendment interests.

During the Q&A portion of the panel, the panelists touched on questions about overclassifying information and the lack of protection for whistleblowers. Bailey pointed that only employees who signed an NDA while holding a clearance were subject to the prepublication review. Krishnan disagreed, noting that the scope of those who fell under the review was broad. Papandrea added that national security is important and needs to be protected, but in the interests of democracy, the public also needs access to information. Regarding the whistleblower discussion, Papandrea mentioned that

---

[23] The lawsuit was filed by the Knight Institute and the American Civil Liberties Union. The case was appealed to the 4th Circuit. *See* Edgar v. Coats, 454 F. Supp. 3d 502 (D. Md. 2020); *see also Edgar v. Coats*, ACLU, https://www.aclu.org/cases/edgar-v-coats [https://perma.cc/7EJA-ALRQ].

[24] Abdo et al., *supra* note 21.

there was a lack of protection for whistleblower employees under the current system. She believes this area is largely underexplored and is worthwhile to address in the future. Bailey noted that the whistleblowers should be distinguished from leakers, because the former is motived by ethical obligation and the latter is driven by personal gain.

II. HITTING BACK: SLAPP SUITS & ANTI-SLAPP STATUTES

Moderated by Professor Olivier Sylvain,[25] the *Hitting Back: SLAPP Suits & Anti-SLAPP Statutes* Panel covered the implications of anti-SLAPP statutes. The Panel discussed the history and evolution of anti-SLAPP statutes, modern anti-SLAPP statutes across the states, and challenges to a federal anti-SLAPP statute. Panelists included Laura Lee Prather, Partner at Haynes and Boone LLP[26]; Evan Mascagni, Policy Director of the Public Participation Project[27]; and Kenneth Swezey, Partner at Cowan, DeBaets, Abrahams & Sheppard LLP.[28]

Laura Lee Prather began her segment with a brief overview of SLAPP suits. SLAPP stands for "Strategic Lawsuit Against Public Participation."[29] The term refers to a form of judicial harassment, in which meritless lawsuits are filed not for a victory in court, but with the intention of intimidating and silencing individuals who made certain public statements, and to deter others from engaging in similar actions or speech.[30] As an example, Prather described a case of a woman in Texas, whose brother was under the care of an assisted living facility. When she realized that her brother was re-

---

25 *Olivier Sylvain*, FORDHAM U. SCH. OF L., https://www.fordham.edu/info/23185/olivier_sylvain [https://perma.cc/M3HM-5MW7].

26 *Laura Lee Prather*, HAYNES & BOONE, https://www.haynesboone.com/people/p/prather-laura [https://perma.cc/6MLV-SGWF].

27 *Evan Mascagni*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/staff-evan-mascagni [https://perma.cc/CG3M-HFJ5].

28 *Kenneth Swezey*, CDAS, https://cdas.com/attorney/kenneth_swezey/ [https://perma.cc/VU2Q-D98N].

29 *Laura Prather Plays Leading Role in Adoption of Uniform Public Expression Protection Act*, HAYNES& BOONE (July 20, 2020), https://www.haynesboone.com/press-releases/adoption-of-uniform-public-expression-protection-act [https://perma.cc/24DG-UHZ8] [hereinafter *Laura Prather Plays Leading Role*].

30 *Id.*

ceiving suboptimal care, she filed a complaint with the Department of Health and Human Services and publicly posted a complaint about the facility on a website. As a result, the facility removed her brother and sued her. Just days prior to the trial, the facility offered to drop the suit if she deleted her public comment. However, by then, the damage had already been done; she brought the case to court, and under the strong anti-SLAPP statutes that Texas had in place, she was able to recover damages. As illustrated by this example, anti-SLAPP statutes are intended to protect free speech from such frivolous lawsuits.[31] In 1993, California was the first state to pass a strong, broad-based anti-SLAPP statute.[32] Their statute covered both oral and written statements made in public forums.[33] Some characteristics of broad-based anti-SLAPP statutes include expedited dismissal process, stay of discovery while the anti-SLAPP motion is pending, immediate review of the motions through the interlocutory appeals process, and possible recoupment of fees.[34] Around 2010, there was a wave of broad-based anti-SLAPP statutes being passed around the country, and existing statutes were expanded to cover more types of speech. Prather attributed the timing to the development of the Internet. Currently, thirty-two states, the District of Columbia, Guam, and some parts of Canada have made into law this type of anti-SLAPP statute.[35]

Evan Mascagni discussed modern day anti-SLAPP statutes across the states. Currently, over thirty states have passed some form of anti-SLAPP statutes, varying in strength and breadth.[36] Previously, New York had a relatively weak form of the statute, not because of its standard but because of its coverage: it only cov-

---

31 61 AM. JUR. 2D. PLEADING § 435 (2021).

32 CIV. PROC. § 425.16 et. seq (Cal.). For the history of California's statute, *see Code of Civil Procedure – Section 425.16 California's Anti-SLAPP Law*, CAL. ANTI-SLAPP PROJECT (Apr. 12, 2011), https://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16/ [https://perma.cc/M7ES-A5FA].

33 CIV. PROC. § 425.16.

34 *Laura Prather Plays Leading Role*, *supra* note 29.

35 *Id.*; *Public Participation: Anti-SLAPP*, CANADIAN CIV. LIBERTIES ASS'N, https://ccla.org/focus-areas/public-participation-anti-slapp/ [https://perma.cc/AH24-R3PT].

36 *Laura Prather Plays Leading Role*, *supra* note 29.

ered petition activity.[37] Now, the New York statute has been expanded to also protect speech.[38] Meanwhile, Arizona still only protects petition activity.[39] The most impressive is California, with the broadest range of coverage.[40] Circuits are currently split on whether these state laws should apply in federal courts.[41] There is no clear answer as to why states have such varying degrees of protection. One possible answer lies in the difference in strength of plaintiff's attorneys and trial lawyers across states. Their interests and strengths vary by state, resulting in different types of anti-SLAPP laws. Prather identified the strength of the bill sponsor as another possibility: stronger sponsors will be more likely to set up negotiations between interested parties, whereas weaker ones will act more like bystanders. States also vary on the standards they set for these statutes. "Clear and convincing" and "substantial basis in the law" standards are common. Mascagni identified two reasons why federal anti-SLAPP laws are necessary. The first is to address federal claims that fall under federal jurisdiction.[42] The second is to prevent forum shopping, which is when parties deliberately seek out courts which apply laws that are in their favor.[43]

Kenneth Swezey, addressed the current challenges in anti-SLAPP litigation. He started by noting that New York uses the "substantial basis in law" standard, yet it is not completely clear

---

[37] Julio Sharp-Wasserman, *New York's Anti-SLAPP Law Is Only a Slap on the Wrist. Will New Legislation Make It Sting?*, PUB. PARTICIPATION PROJECT (Dec. 4, 2019), https://anti-slapp.org/slapp-blog/2019/12/4/new-yorks-anti-slapp-law-is-only-a-slap-on-the-wrist-will-new-legislation-make-it-sting [https://perma.cc/9LA3-A8BQ].

[38] *Id.*

[39] *Arizona*, RCFP, https://www.rcfp.org/anti-slapp-guide/arizona/ [https://perma.cc/D3A7-UX6J].

[40] *California*, RCFP, https://www.rcfp.org/anti-slapp-guide/california/ [https://perma.cc/6BXR-FFF2].

[41] Katelyn E. Saner, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After* Shady Grove, 63 DUKE L.J. 781, 783 (2013).

[42] *Why Decisions in D.C. Illustrate the Need for a Federal Anti-SLAPP Law (Part 3)*, PUB. PARTICIPATION PROJECT (July 25, 2018), https://anti-slapp.org/slapp-blog/2018/7/23/why-decisions-in-dc-illustrate-the-need-for-a-federal-anti-slapp-law-part-3 [https://perma.cc/8YNG-BD37].

[43] *Id.*

what that means.[44] The first challenge is retroactivity—should these newer anti-SLAPP statutes apply to cases that were brought before they were enacted? At least one court has answered in the affirmative.[45] In this case, the court determined that the New York statute is "remedial" in nature, and it only makes sense for it to apply to previous cases.[46] A more recent case, *National Coalition on Black Civic Participation v. Wohl*,[47] has raised the question of what exactly constitutes covered speech. This case considered robocalls.[48] Here, defendants distributed false information to plaintiffs via robocalls to prevent them from voting by mail.[49] The court ruled that such robocalls fell outside the protection of the First Amendment.[50] The last challenge to federal anti-SLAPP litigation Swezey addressed was the risk of extensive appellate activity. If defendants continuously engage in the appeals process, it may outweigh the benefits of the early dismissal system.

Next, Prather discussed the Uniform Law Commission, whose goal is to implement uniform laws in all fifty states.[51] In 2020, after reviewing available state anti-SLAPP statutes, the Commission drafted a model law, called the Uniform Public Expression Protection Act ("UPEPA").[52] UPEPA is a broad-based law that covers the right of free speech, association, and petition, with very limited exceptions. The first exception is for government employees acting in an official capacity, with the rationale being that issues implicating an imminent threat to public health or safety should not be caught up in the interlocutory appeals process.[53] The second excep-

---

44 Daniel Novack & Christina Lee, *What Is a 'Substantial Basis' Under New York's Anti-SLAPP Law?*, NEW YORK LAW JOURNAL (Nov. 17, 2020), https://www.law.com/newyorklawjournal/2020/11/17/what-is-a-substantial-basis-under-new-yorks-anti-slapp-law/?slreturn=20210213201626 [https://perma.cc/XR84-Q7KY].

45 Palin v. New York Times, No. 17 Civ. 4853 (S.D.N.Y Dec. 29, 2020).

46 *Id.*

47 2021 WL 480818, at *1, *12 (S.D.N.Y. 2021).

48 *Id.* at *1.

49 *Id.*

50 *Id.* at *8.

51 See *About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/M39X-8MX5].

52 UNIFORM PUBLIC EXPRESSION PROTECTION ACT 3 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2020).

53 *Id.*at 6-7.

tion is for commercial speech, which generally receives less First Amendment protection.[54] Currently, implementation of this model law is being considered in at least eight different state legislatures.[55]

Mascagni then identified some objections to the federal law. Objections primarily come from trial lawyers, centering their concerns around the stay of discovery and mandatory attorney's fees.." The panelists briefly discussed the lawsuit filed by Bob Murray, then-CEO of Murray Energy, against John Oliver of HBO's "Last Week Tonight."[56] The lawsuit was initiated when John Oliver brought attention to certain activities tied to Murray Energy.[57] The panelists agreed that this was a classic case of reprisal and noted that HBO is likely equipped with insurance and other resources that ordinary citizens do not have access to.

III. Keynote Speech: Public Square 2.0: Free Speech on the Internet

Katherine M. Bolger, Partner at Davis Wright Tremaine LLP and adjunct professor at Fordham University School of Law,[58] argued that traditional First Amendment principles are insufficient to address speech on the internet. Bolger began by introducing four animating principles behind current First Amendment jurisprudence, based on those laid out by Professor Thomas Emerson in 1963.[59] These justifications, paraphrased, are that the First Amendment is necessary: (1) to protect self-fulfillment or self-expression; (2) to protect the "marketplace of free ideas"; (3) to participate in self-governance; and (4) to promote a stable community.[60] Bolger argued the necessity that the First Amendment mod-

---

54 *Id.* at 7.

55 *Id.*

56 Kathryn B. Klein, *What the Hell Happened: John Oliver's Secret Lawsuit*, THE HARVARD CRIMSON (Dec. 8, 2019), https://www.thecrimson.com/article/2019/12/8/wthh-john-oliver-bob-murray-lawsuit/ [https://perma.cc/P7FS-5ZYS].

57 *Id.*

58 *Katherine M. Bolger*, DAVIS WRIGHT TREMAINE LLP, https://www.dwt.com/people/b/bolger-katherine-m [https://perma.cc/P9RM-LYZ7].

59 *See generally* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

60 *See id.* at 878–79.

el embodied by these principles be adapted or amended in order to handle challenges presented by speech on the internet.

Bolger presented the four principles and discussed the beliefs underlying protection of First Amendment rights, noting that these principles first came into conception during the 20th century.[61] The first principle states that the First Amendment is necessary to protect speech, which assures individual self-fulfillment.[62] Bolger referred to this as the "sappy" First Amendment principle. The second principle posits that the First Amendment is necessary to protect the "marketplace of free ideas."[63] This principle was first proposed by John Milton,[64] and did not enter jurisprudence until a 1919 decision by Justice Holmes.[65] The third principle points to participation in self-governance as further justification.[66] Bolger explained the origination of this idea; it stems from the understanding that in democratic society, government power is derived from the people, thus, the people should be able to speak about it. The fourth and final First Amendment justification is that the Amendment is necessary to promote a stable community, as suppression of ideas of minorities will lead to greater conflict.[67] Bolger acknowledged that this final idea has resonated with her more as of late.

Bolger emphasized that this structure was not created with the Internet in mind and argued that speech on the internet greatly undercuts these principles. The current state of First Amendment jurisprudence emanates from the landmark 1997 Supreme Court decision in *Reno v. ACLU*, which challenged the Communications Decency Act ("CDA") as violating the First Amendment.[68] Here, the Supreme Court elected to regulate speech on the Internet in the same way as newspapers.[69] In doing so, it declined to regulate as it

---

61 *Id.* at 877.
62 *Id.* at 879–81.
63 *Id.* at 881–82.
64 *See* JOHN MILTON, AREOPAGITICA (1644).
65 Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).
66 *See* Emerson, *supra* note 59.
67 *Id.*
68 *See generally* Reno v. ACLU, 521 U.S. 844 (1997).
69 See *id.* at 869–70.

did with radio or television.[70] Bolger described the Supreme Court as adopting the ACLU's statement of facts about the Internet, leading to an expansive, speech-maximizing position. Additionally, Bolger stated that this decision led to the Internet as we know it—a virtually untouchable space for ideas. This has been helped along by Section 230 of the Communications Decency Act,[71] initially a small, overlooked section meant to protect companies, which has grown into the backbone of an almost entirely unregulated internet.[72] Citing Tim Wu, Bolger argued that First Amendment jurisprudence is based on a "scarcity" model of speech; however speech on the internet is abundant, and the sheer abundance of speech on the Internet has created a number of problems that the government currently has no way of addressing.[73]

In relation to Emerson's first principle, Bolger argued that there remains value in encouraging self-expression, but the unlimited speech that the Internet enables does not translate to individuals using their speech towards a common good. The current model of regulation does not lead to the best argument succeeding in the "marketplace of ideas." Bolger is unsure whether there is even a "marketplace," with silos of information becoming common and acting to reinforce preexisting ideas and opinions.[74] This lack of regulation, she argues, has allowed for the proliferation of conspiracy theories and misinformation, with QAnon as a prime example.[75] On this matter, Bolger stated that truth has no value in our social discourse. Bolger further discussed how internet speech is

---

[70] *See id.* at 869 ("Moreover, the Internet is not as 'invasive' as radio or television.").

[71] 47 U.S.C. § 230 (2018).

[72] *See CDA 230: Legislative History*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history [https://perma.cc/L2UH-8CEL].

[73] *See generally* Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018).

[74] *Id.* at 566–67 ("In an attention-scarce world, these kinds of methods are more effective than they might have been in previous decades. When listeners have highly limited bandwidth to devote to any given issue, they will rarely dig deeply, and they are less likely to hear dissenting opinions. In such an environment, flooding can be just as effective as more traditional forms of censorship.").

[75] *See* Joel Rose, *Even If It's 'Bonkers,' Poll Finds Many Believe QAnon And Other Conspiracy Theories*, NPR (Dec. 30, 2020, 5:00 AM), https://www.npr.org/2020/12/30/951095644/even-if-its-bonkers-poll-finds-many-believe-qanon-and-other-conspiracy-theories [https://perma.cc/W8K2-LJ5K].

extremely unstable and unsafe, referencing harassment on social media, which goes directly against the fourth principle espoused by Professor Emerson.

To combat these perceived failures, Bolger presented numerous proposed paths forward. The first path is to simply do nothing, maintaining the current structure of allowing platforms to self-regulate. Bolger recognized that some private companies, notably Facebook, have been de-platforming users and taking steps to police user content.[76] A drawback of this regime is the complete irrelevance of the First Amendment. Another path Bolger identified is repealing Section 230 of the CDA and requiring platforms to review all content posted on their platforms. Bolger recognized the difficulty in implementing such a system, given the quantity of information shared on platforms, and ultimately dismissed this as unworkable. A third proposal would have courts regulate consistent with public forum rules. The Public Forum Doctrine, as expanded upon in *Perry Education Association v. Perry Local Educators' Association*, gives a framework with sliding protections for expression: the closer it resembles a traditional public forum, the less regulation is constitutionally tolerable.[77] A fourth option is to regulate the internet with a modern version of the fairness doctrine, requiring equitable, fair, and balanced internet speech. Bolger opined that this idea would go the farthest towards correcting harm. While it has gained some momentum, but it still stems from a scarcity model, and speech on the Internet is not a scarce commodity. Moreover, Bolger was uncomfortable with having the Federal Communications Commission regulate fairness rather than journalists. But it's important to note, most people on the Internet are not journalists.

---

[76] *See* Wayne Rash, *Georgetown University Discusses The Great Deplatforming: Removing Trump From Social Media*, FORBES (Jan. 31, 2021, 9:00 AM), https://www.forbes.com/sites/waynerash/2021/01/31/georgetown-university-discusses-the-great-deplatforming-removing-trump-from-social-media/?sh=4ee5aca05926 [https://perma.cc/V8Q8-PMA2]; *Consider This: Deplatforming: Not A First Amendment Issue, But Still A Tough Call For Big Tech*, NPR (Jan. 26, 2021, 5:00 PM), https://www.npr.org/2021/01/22/959667930/deplatforming-not-a-first-amendment-issue-but-still-a-tough-call-for-big-tech [https://perma.cc/KQT6-ANE5].

[77] *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45-46 (1983); *see also* Marsh v. Alabama, 326 U.S. 501 (1946).

Finally, Bolger proposed her own solution: require all Americans to take civics classes. Bolger's hope is that this could encourage people to think critically about governance and our ability to verify information. While an incomplete solution, Bolger believes that requiring all Americans to pass the United States citizenship test could be a start to tackling the difficult questions about speech on the Internet.

IV. CELEBRITY PARADOX: COPYRIGHT, SOCIAL MEDIA & PAPARAZZI PHOTOGRAPHY

Moderated by Ron Lazebnik,[78] the *Celebrity Paradox: Copyright, Social Media & Paparazzi Photography* Panel discussed photography in a modern context, exploring the complex interplay between a photographer's presumed copyright to an image—as the author—and a celebrity's right of publicity—as the subject of the photo. Panelists included Daniel A. Schnapp, Partner at Nixon Peabody LLP;[79] Nancy E. Wolff, Partner at Cowan, DeBaets, Abrahams, & Sheppard LLP;[80] Angela Byun, CEO of AB WORLD and Adjunct Professor of Law at Fordham University School of Law;[81] and Julie Zerbo, Founder and Editor-in-Chief of The Fashion Law.[82]

Daniel A. Schnapp began the panel by sharing the facts of one of his more recent cases, *O'Neil v. Ratajkowski et al*,[83] that arose under the Copyright Act, 17 U.S.C. § 101 *et seq.* as amended (the "Copyright Act").[84] The lawsuit—which is currently pending be-

---

[78] *Ron Lazebnik*, FORDHAM U. SCH. OF L., https://www.fordham.edu/info/23156/ron_lazebnik/5479/full_bio [https://perma.cc/MFG6-MBC3].

[79] *Daniel A. Schnapp*, NIXON PEABODY, https://www.nixonpeabody.com/en/team/schnapp-daniel-a [https://perma.cc/HQ6D-F9MG].

[80] *Nancy E. Wolff*, CDAS, https://cdas.com/attorney/nancy_wolff/ [https://perma.cc/9FWF-3S5B].

[81] *Angela Byun*, LINKEDIN, https://www.linkedin.com/in/angiebyun/; *Angela Byun*, FORDHAM U. SCH. OF L., https://www.fordham.edu/info/23642/a_-_b/7801/angela_byun [https://perma.cc/KV89-UAA6].

[82] *Julie Zerbo*, LINKEDIN, https://www.linkedin.com/in/thefashionlaw/; *Julie Zerbo, Editor-in-Chief*, THE FASHION L., https://www.thefashionlaw.com/editor-in-chief/ [https://perma.cc/ME6R-TDCJ].

[83] O'Neil v. Ratajkowski et al., No. 1:19-cv-9769 (S.D.N.Y. Oct. 23, 2019).

[84] 17 U.S.C. § 101 (1976).

fore the United States District Court for the Southern District of New York—alleged that Schnapp's client, model and Instagram influencer Emily Ratajkowski, violated paparazzi photographer Robert O'Neil's copyright through the "unauthorized reproduction and public display" of an image of herself in downtown Manhattan.[85] Ratajkowski had stepped out to purchase a bouquet of flowers and, as she was walking back to her apartment, O'Neil trailed closely behind and snapped a series of photos of her. O'Neil subsequently uploaded the images to his news agency, Splash, who in turn made the photos available for licensing. Shortly thereafter, Ratajkowski, who has upwards twenty-six million followers on Instagram, posted one of these images to her story and added the caption "Mood Forever." Schnapp emphasized that Instagram stories are automatically deleted after 24 hours, and so, the photo at issue is no longer visible on the platform. During her testimony, Ratajkowski explicitly stated that this post was a means of expressing her frustration with the paparazzi for constantly invading her life and right to privacy. It is worth noting that, in this particular photo, Ratajkowski was concealing her face with the bouquet of flowers, making it impossible to tell who she was. Additionally, Ratajkowski was not wearing any clothing with observable labels, defeating the claim that the photo could have been used for sponsorship purposes.

Schnapp attributed the budding trend in "paparazzi v. celebrity" cases to "copyright trolls," that is individuals who file meritless suits for the purpose of making money through litigation.[86] Robert Liebowitz, the attorney who initiated the present suit on O'Neil's behalf, has been dubbed a copyright troll by the judges of the Southern District of New York.[87] Moreover, Schnapp's first argument considered whether the copyright had been validly registered. Schnapp then addressed whether the photograph itself demonstrat-

---

85 *Ratajkowski*, No. 1:19-cv-9769.

86 *Copyright Trolls*, THE FASHION L., https://www.thefashionlaw.com/resource-center/copyright-trolls/ [https://perma.cc/JPH7-D8G7].

87 *See* Mike Masnick, *World's Worst Copyright Troll, Richard Liebowitz, Suspended From Practicing Law*, TECHDIRT (Dec. 1, 2020, 12:10 PM), https://www.techdirt.com/articles/20201201/01325845794/worlds-worst-copyright-troll-richard-liebowitz-suspended-practicing-law.shtml [https://perma.cc/EN8Z-6XA5].

ed any indicia of artistic expression on the part of the plaintiff. This point proved rather difficult to make because, by virtue of U.S. copyright law, the individual who physically takes the photograph is automatically presumed to be its owner.[88] Here, however, Schnapp argued that this photo was not entitled to copyright protection because it was taken "in the moment," and O'Neil made minimal efforts to deal with lighting, cropping, or any other creative element associated with artistic expression. Next, Schnapp proposed that Ratajkowski had transformed the purpose and nature of the original photograph by adding a caption that expressed her personal feelings toward this invasion of privacy. Therefore, he argued, Ratajkowski's post qualifies as fair use. Lastly, Schnapp maintained that O'Neil was not entitled to actual or statutory damages because he could not prove that this particular image had earned him any net profits, thus, he had not sustained any recognizable loss. To conclude, Schnapp acknowledged that the law is unclear, highlighting the tension between a celebrity's right to their own image and a photographer's right to their original work. According to Schnapp, this fact pattern serves as a prime example of how the law lags behind developments in technology and social media.[89]

Nancy E. Wolff adopted a slightly different approach and contended that the law is not as unclear as Schnapp is suggesting. Wolff claimed that there is a clear distinction between a photographer's First Amendment rights and, conversely, a subject's right of privacy to their image. However, Wolff pointed out that, as it stands today, a photographer's First Amendment rights will generally outweigh, and thereby limit, that of the subject due to factors such as an artist's freedom of expression or the newsworthy exception.[90] As a general rule, Wolff stated that in the United States a person may be photographed while in a public place without con-

---

[88] *See* 17 U.S.C. § 201(a).

[89] *See* Julia Griffith, *A Losing Game: The Law is Struggling to Keep Up With Technology*, THE J. OF HIGH TECH. L. (Apr. 12, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology/ [https://perma.cc/DS8Q-JANU].

[90] *See Right of Publicity*, FINDLAW, https://corporate.findlaw.com/litigation-disputes/right-of-publicity.html [https://perma.cc/YGD8-N28V].

sent. Consequently, paparazzi photographers are incentivized to stalk celebrities and take their photos because those images will sell. Furthermore, pushing back on Schnapp's argument in *O'Neil v. Ratajkowski*, Wolff declared that the real danger lies in classifying a photo as unoriginal simply because a photographer took it "in the moment." Wolff held that this is a slippery slope because all photos, to some degree, possess artistic merit, including those of street photographers. The fact that a photo was taken on street, in a split second, does not deny the photographer of copyright protection, according to Wolff. Instead, she said that the actual problem is people enforcing copyright on photographs that should not be enforced in the first place, which may lead to the formation of bad law. Finally, Wolff asserted that celebrities do not have an absolute right to use any photo that is taken of them, but rather, the inquiry must fall under fair use. The dispute between Ratajkowski and O'Neil is no exception.

Angela Byun discussed the monetization of photo rights, as well as the legal consequences that may ensue if a third party publishes an image without a proper license, noting her extensive background in photography licensing. Byun began by challenging the notion that celebrities and paparazzi photographers have a highly contentious relationship. In fact, she stressed that these parties often work in tandem, with one advising the other of his or her whereabouts. Byun then looked more closely at the business of licensing photographs and discussed how a photo agency may authorize a third party to use or publish an image in exchange for a fee. Generally, the agency, or licensor, will draft an agreement that outlines the third party's rights and the manner in which the photo may be used. Yet, Byun asserted that it's the licensor's responsibility to ensure that the third-party is abiding by the licensing agreement and using the photo as was originally intended. In the case at issue, Byun suggested that there might have been a different outcome had Ratajkowski simply accredited the photographer, provided that the lack of accreditation is what largely gives rise to these kinds of lawsuits.

Julie Zerbo's segment addressed the originality component of copyright law and, noting that today virtually every individual owns a smartphone with a camera, deliberated where the line

should be drawn with regard to photographs, celebrities, and paparazzi. Zerbo believes we have reached an interesting turning point because, unlike the slew of similar cases that settled much earlier in the litigation cycle,[91] *O'Neil v. Ratajkowski* has persisted and may answer lingering questions about who ultimately owns the rights to an image in this context—the celebrity, who is the focal point of the photo, or the paparazzi photographer? Zerbo recalled that the first of these cases to catch her attention was in 2017 when Xposure Photos, a paparazzi agency, sued Khloe Kardashian for posting a photo of herself on Instagram without the agency's authorization or permission.[92] According to Zerbo, the reality star settled the case and paid "a large sum of money,"[93] which is the norm for many celebrities combatting copyright infringement suits. Zerbo also noted that, more recently, there has been a shift in who can act as a paparazzi or photographer. She partly attributed this shift to the ubiquity of smartphones, as aforementioned, emphasizing that celebrity-focused websites will compensate layman photographers for photos they casually capture on their phones. Zerbo maintained that the coronavirus has also been a contributing factor because, in a more professional capacity, models must now set up, style, and even photograph their own shoots using FaceTime or Zoom, since photographers, stylists, and makeup artists have been unable to gather in the same space.[94] With so many forces at play, Zerbo concluded that rethinking originality may be inevitable, especially now that there is potential for joint authorship.

---

[91] *See As The Number of Paparazzi v. Celebrity Copyright Cases Grows, How Big of a Problem is This Really?*, THE FASHION L. (July 15, 2019), https://www.thefashionlaw.com/as-the-number-of-paparazzi-v-celebrity-copyright-cases-continues-to-grow-how-big-of-a-problem-is-this-really/ [https://perma.cc/PWB9-C22Q].

[92] Xposure Photos (UK) LTD. v. Khloe Kardashian, No.: 2:17-cv-3088 (D. Cal. Apr. 25, 2017).

[93] *See The Kardashians' Instagram Fan Accounts Are Embroiled in a Copyright Mess*, THE FASHION L. (July 15, 2019), https://www.thefashionlaw.com/khloe-kardashian-named-in-copyright-infringement-suit-over-instagram-photo/ [https://perma.cc/8LE3-ANNQ].

[94] Mary Retta, *What It's Like to Be a Model Doing Virtual Photoshoots During COVID-19*, ALLURE (Apr. 21, 2020), https://www.allure.com/story/covid-19-models-virtual-photoshoots-terumi-murao, [https://perma.cc/9T2V-JE82].