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YEAR IN REVIEW –

MEDIA AND ENTERTAINMENT LAW

JULY 2018 – JUNE 2019

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COPYRIGHT REGISTRATION REQUIRED TO BRING AN INFRINGEMENT ACTION

In *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. ___, 139 S.Ct. 881 (Mar. 4, 2019), the United States Supreme Court settled a split among Courts of Appeals regarding whether a copyright owner of a U.S. work can sue for infringement before the Copyright Office grants registration. Although rights in "original works of authorship fixed in any tangible medium of expression" attach as soon as the works are created, 17 U.S.C. §411(a) provides that "no civil action for infringement of the copyright in any United States work shall be instituted until…registration of the copyright claim has been made in accordance with this title." The parties in *Fourth Estate* disputed the statutory meaning of "registration."

Fourth Estate Public Benefit Corporation ("Fourth Estate"), a news organization, sued Wall-Street.com and its owner ("Wall-Street") for copyright infringement after Wall-Street failed to remove Fourth Estate's articles from its website despite having canceled the parties' license agreement. Before filing suit, Fourth Estate filed copyright applications for the articles, but the Copyright Office had not yet granted, or refused, registration when Fourth Estate filed suit.

Fourth Estate argued that "registration" for purposes of §411(a) occurs when a copyright owner submits the application, materials, and payment to the Copyright Office, a theory known as the "application approach." Wall-Street argued that the registration requirement is satisfied only when the Copyright Office grants registration.

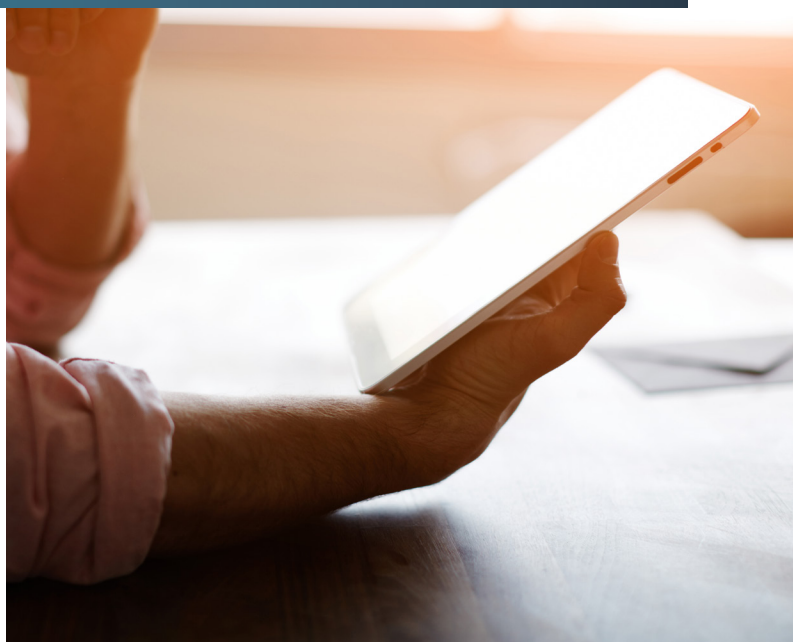
The Supreme Court unanimously agreed with Wall-Street, holding that "registration" in §411(a) "refers to the Copyright Office's act of granting registration, not to the copyright claimant's request for registration." The Court noted that the statute provides several exceptions to this rule—for example, owners of material susceptible to pre-distribution infringement may apply for preregistration, rights owners in live broadcasts may sue for infringement before obtaining a registration, and copyright owners may institute an infringement suit after the Copyright Office refuses registration. These exceptions, the Court reasoned, would be "superfluous" if a copyright application alone satisfied the requirements of §411(a).

Addressing Fourth Estate's concerns that the three-year statute of limitations could expire before the Copyright Office reviews an application, the Court noted that the seven-month average processing time for copyright applications "leaves ample time to sue after the Register's decision, even for infringement that began before submission of an application."

Thus, *Fourth Estate* clarifies that, except for the statutory exceptions, a copyright owner of a U.S. work may bring an infringement suit only after the Copyright Office grants registration.

The decision is important for copyright owners who may need to assert a claim quickly, but do not have a registration certificate. Because the Copyright Office can take seven months, or more, to grant on deny an application, Copyright owners who have not yet registered their works must either pay an expedited handling fee of $800 per work or wait to assert their claims until the Copyright Office has acted. This could result in the expiration of the statute of limitations, the disappearance of infringing goods, or the failure to enjoin an act of infringement. Therefore, copyright claimants who may need to enforce their rights through litigation should take early action to register their works before claims arise.

COPYRIGHT CLAIMANTS WHO MAY NEED TO ENFORCE THEIR RIGHTS THROUGH LITIGATION SHOULD TAKE EARLY ACTION TO REGISTER THEIR WORKS BEFORE CLAIMS ARISE.



STATES UPGRADE AND ADOPT ANTI-SLAPP LAWS TO SAFEGUARD FIRST AMENDMENT RIGHTS

ACROSS THE UNITED STATES, 31 STATES HAVE ENACTED SOME FORM OF STATUTORY ANTI-SLAPP PROTECTION, ENSURING THAT CITIZENS CAN SPEAK OUT FREELY ABOUT IMPORTANT TOPICS OF PUBLIC CONCERN.

This past year, state legislatures across the country have worked to enhance substantive protections of their citizens' First Amendment rights through the improvement or adoption of state anti-SLAPP laws. Anti-SLAPP statutes aim to protect individuals from the chilling impact of lawsuits brought in retaliation for the exercise of protected First Amendment activity. Across the United States, 31 states have enacted some form of statutory anti-SLAPP protection, ensuring that citizens can speak out freely about important topics of public concern. In the past year alone, there have been significant legislative updates to state anti-SLAPP laws in Texas, Tennessee, and Colorado. Efforts to improve existing anti-SLAPP statutes also remain ongoing in other states, such as Pennsylvania, Ohio and New York.

HB 2730: THE TEXAS CITIZENS PARTICIPATION ACT GETS A FACELIFT

On Sunday, June 2, 2019, Governor Greg Abbott signed HB 2730 into law, which makes several significant changes to the Texas Citizens Participation Act (Texas' Anti-SLAPP Statute). It goes into effect on September 1, 2019 and applies to actions filed on or after that date.

During the legislative process the original bill, which would have eviscerated the statute as drafted, changed substantially for the better, especially so for the media, as the result of significant stakeholder collaboration. Despite the problematic initial draft of the bill, the final bill preserves the integrity of the law and its key features including the automatic stay of discovery, the right to an interlocutory appeal, and mandatory attorney's fees for a successful movant. The changes in the final draft of the bill are generally constructive and approach reform from three different directions: changes to when the TCPA can be used, how it can be used, and who can use it.

How the TCPA can be used

One of the chief complaints about the existing anti-SLAPP law was the broad applicability of the statute, resulting from the expansive statutory definitions of the type of activity that triggered the protections of the TCPA. The TCPA currently defines "matter of public concern" with a non-exhaustive topical list of areas of discussion that had previously been determined by the courts to be of public concern. The new definition, taken in part from the United States Supreme Court case *Snyder v. Phelps,* provides a more generalized approach that more closely tracks established First Amendment jurisprudence.

The new law also narrows the protection for exercising one's "right of association" by tying its protection to matters relating to a governmental proceeding or a matter of public concern. HB 2730 also narrows the scope of the TCPA by removing the current provision that the action need only "relate to" a party's right to petition, free speech or right of association as defined by the TCPA. Instead, now, the action must be "based on" or "in response" to a party's exercise of those rights.

In addition to modifying the definitions, HB 2730 includes a laundry list of new exemptions to the TCPA to prevent its application in areas in which the statute was perceived to have been abused, including: trade secret misappropriation actions; enforcement of non-disparagement agreements or covenants not to compete in an employment or independent contractor relationship; family code cases and applications for

protective orders; claims under the Texas Deceptive Trade Practices Act; medical peer review cases; eviction suits; attorney disciplinary proceedings; and common law fraud claims.

Changes to How It Can Be Used

Another complaint about the existing anti-SLAPP law was the way in which lawyers were using the law as a sword in litigation rather than for its intended purpose. Lawyers were filing anti-SLAPP motions in response to anti-SLAPP motions, motions for sanctions, and various purely procedural matters. The new law modifies the definition of "legal action" to prevent this sort of gamesmanship by clarifying that one cannot file an anti-SLAPP motion in response to a procedural action, in an alternative dispute resolution proceeding, or in a post-judgment enforcement action. It also clarifies that the law *does* apply to lawsuits seeking declaratory relief – an issue about which Texas appellate courts are currently in conflict.

From an evidentiary standpoint, the new law makes clear that courts may consider the type of evidence that would be admissible in a summary judgment proceeding. It also provides a filing framework timeline that is consistent with Texas and local rules regarding other dispositive motions, including a movant providing 21 days' notice for a hearing and a nonmovant's response being due no later than 7 days before the hearing. In addition to the more structured framework, the new law provides some much needed flexibility for litigants to be able to agree to file an anti-SLAPP motion beyond the current 60-day deadline.

When applying the law, Texas has removed all references to "preponderance of the evidence" and now merely requires a movant to demonstrate that the legal action in question is covered by the TCPA. When a movant seeks to prevail on an affirmative defense, it requires a party show they are entitled to judgment as a matter of law. Finally, although the new law will maintain the mandatory attorney's fees award, it now makes the award of sanctions discretionary.

Changes to Who Can Use the TCPA

Finally, as the result of some troubling offensive uses of the TCPA by governmental entities, the new law expressly states that a governmental entity, agency, or an official or employee acting in an official capacity does not qualify as a party who can invoke the law's protections.

For media defendants and online business reviewers, the best part about the new law is that the media can invoke it any time the claim arises from the gathering, receiving or posting of information to the public in conjunction with the creation or dissemination of dramatic, literary, musical, political or journalistic works. It expressly covers motion pictures, television or radio programs, newspaper, website or magazine articles and provides the same protection for claims against those who communicate or post consumer opinions or commentary, evaluations of consumer complaints or reviews or ratings of businesses. None of the claims arising out of these communications must be related to matters of public concern. For these same groups, the new law also exempts them from the commercial speech exemption and the new exemptions for DTPA and fraud claims.

TENNESSEE ADOPTS A TEXAS-STYLE ANTI-SLAPP LAW

In April, Governor Bill Lee signed House Bill 777 into law. This law, known as the Tennessee Public Participation Act, was modeled in part on key provisions of Texas' anti-SLAPP law. Like the TCPA, this new Tennessee law was enacted to "encourage and safeguard the constitutional rights of persons

> NEW TENNESSEE LAW WAS ENACTED TO "ENCOURAGE AND SAFEGUARD THE CONSTITUTIONAL RIGHTS OF PERSONS TO PETITION, SPEAK FREELY, TO ASSOCIATE FREELY, AND TO PARTICIPATE IN GOVERNMENT TO THE FULLEST EXTENT PERMITTED BY LAW".

to petition, speak freely, to associate freely, and to participate in government to the fullest extent permitted by law."

The TPPA establishes a special procedure to petition the court to dismiss a legal action filed in response to a party's exercise of the right of free speech, right to petition, or right of association. Like its Texas analog, the initial burden is on the movant to establish the applicability of the statute; if the movant makes that initial showing, the burden switches to the nonmovant to establish a *prima facie* case for each essential element of the claim in the legal action. The TPPA also establishes an automatic stay of discovery, an automatic interlocutory appeal as a matter of right, and mandatory attorney's fees.

The TPPA will apply to any legal action commenced on or after July 1, 2019.

COLORADO ADOPTS ITS OWN ANTI-SLAPP STATUTE

With the enactment of House Bill 19-1324, Colorado became the 31st state to pass an anti-SLAPP statute. This measure, sponsored by Representatives Lisa Cutter and Shannon Bird and Senator Mike Foote, passed with strong support in both chambers, receiving votes of 60-2 in the House and 35-0 in the Senate on the last day of the General Assembly's term.

The Colorado statute, modeled after California's anti-SLAPP law, establishes a special motion to dismiss a cause of action against a person arising from that person's exercise of the right to petition or speech in connection with a public issue. That motion must be filed within 63 days of the original complaint, and a hearing on the motion must take place no later than 28 days after the filing of the motion. The statute establishes an interlocutory appeal right and provides that a prevailing defendant on a special motion to dismiss is entitled to recover attorney's fees and costs.

This statute represents a significant step forward in the advancement of First Amendment rights in Colorado. Prior to its enactment, Colorado's anti-SLAPP protections were extremely limited and solely based on Colorado common law.

The Colorado Act, which was signed on June 3, 2019, will apply to all actions filed on or after July 1, 2019.

LEGISLATIVE RECAP: BIG UPDATES TO TEXAS OPEN GOVERNMENT LAWS

The 2019 Session of the Texas Legislature was productive for government transparency advocates. The legislature passed several significant bills which will provide citizens with greater access to information regarding the functioning of government.

SB 943: CONTRACTING TRANSPARENCY

SB 943, sponsored by Senator Kirk Watson (D–Austin) and Representative Giovanni Capriglione (R–Southlake) aims to improve transparency regarding government contracting, primarily addressing issues created by the 2015 Texas Supreme Court case, *Boeing Co. v. Paxton*, which significantly limited public access to information about government contracting under the Texas Public Information Act (TPIA).

The Court's decision in *Boeing* greatly expanded a TPIA exception that prevented the release of commercially-sensitive information regarding private companies' business dealings with government entities. First, *Boeing* held that private, third-party entities—not just a governmental entity—may claim this "competitive bidding" exception, overturning decades of Attorney General's opinions. Second, the Court concluded that this exception can foreclose public access to contracting information upon a showing that the release of requested information would result in a competitive disadvantage to the company asserting the exception, even if the governmental body has completed a competitive bidding process and awarded a final contract.

Since it was handed down in 2015, *Boeing* has been cited in more than 2,700 Attorney General opinions foreclosing access to information under the TPIA. Many of those rulings involved TPIA requests for information regarding final contracts, effectively foreclosing access to even the most basic information about government contracting and expenditures.

SB 943 reverses some of the harmful effects of *Boeing* and ensures that government entities will be obligated to reveal the core elements of their contracts with private companies—including the final dollar amount of the contract, key contract provisions, and line-item pricing.

SB 944: CLOSING THE "CUSTODIAN LOOPHOLE"

In 2013, responding to several incidents in which government officials sought to circumvent public information laws by conducting official business through private email accounts and on privately-owned devices, the Texas Legislature passed a bill establishing that the content of a communication governed whether it was subject to public information requests, regardless of the device or server on which the communication was made. Since then, however, some government agencies have been unable to comply with TPIA requests for information maintained on private devices or through personal e-mail addresses because the agency does not maintain custody and control over the information and has no means of obtaining it.

A 2014 Third Court of Appeals' opinion, *City of El Paso v. Abbott*, highlighted this issue: "Our review of the PIA reveals no methods by which the City could compel the disclosure of public-information emails located on private email accounts, other than what the City did here—*i.e.*, request the documents from the targeted individuals and change the City's policy regarding public business on private emails. In fact, other than requiring that the governmental body 'promptly' produce public information for inspection, duplication, or both… the PIA provides no guidance regarding the efforts a governmental body must take to locate, secure, or make available the public information requested." SB 944, an omnibus TPIA reform bill also sponsored by Sen. Watson and Rep. Capriglione, closes this loophole by making clear that officers or employees of governmental bodies do not have personal property or privacy rights to public information created or received as part of their performance of official duties. Further, it requires that such employees and officers surrender privately held public information, and it gives a governmental body the ability and the responsibility to compel the surrender of any such information pursuant to a TPIA request, thereby closing the "custodian loophole."

SB 1640: "WALKING QUORUMS" UNDER THE TEXAS OPEN MEETINGS ACT

On February 27, 2019, the Court of Criminal Appeals partially struck down the portion of the Texas Open Meetings Act (TOMA) that prohibited "walking quorums," a practice by which government officials attempt to circumvent TOMA's open-meeting requirements. TOMA requires that when a quorum of a government body is present to discuss official business, it must adhere to TOMA's open-meeting

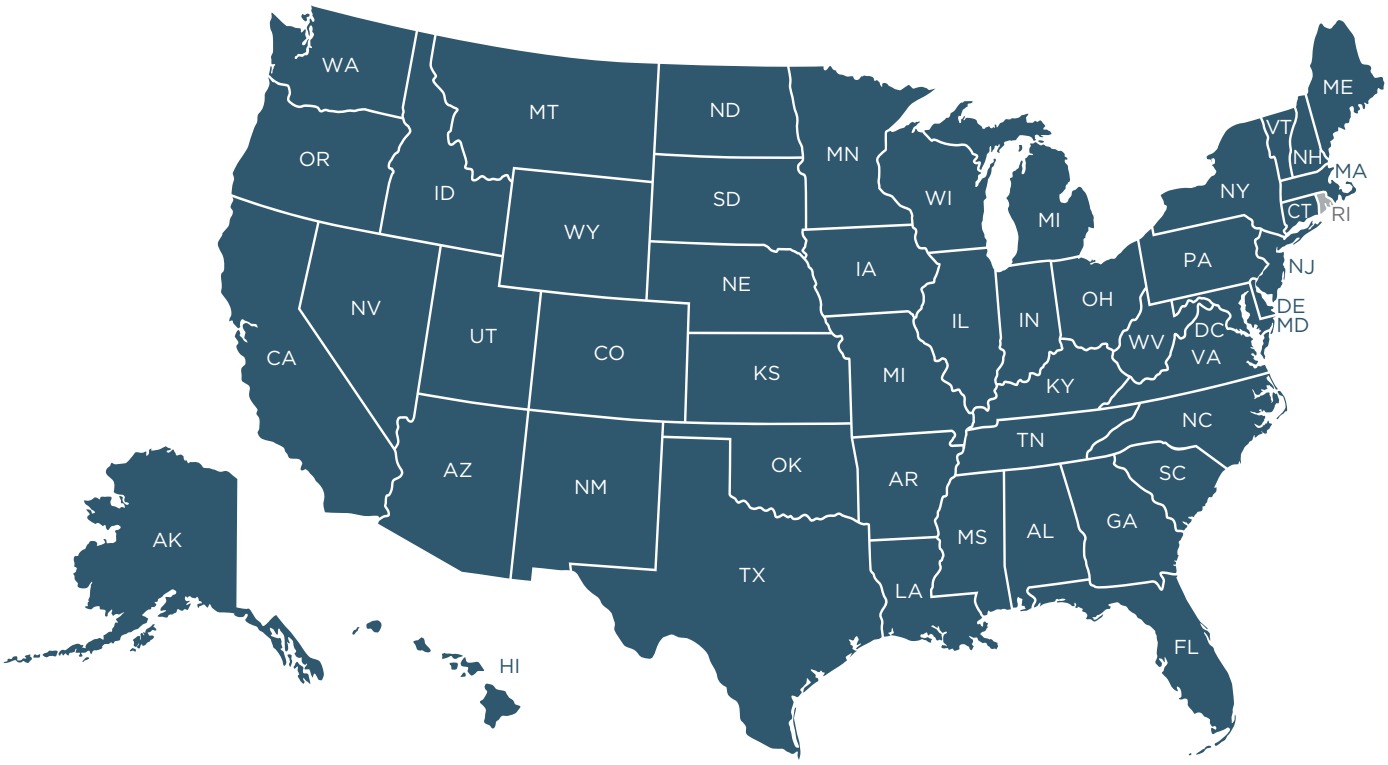
requirements. To circumvent these requirements, some public officials have engaged in "walking quorums," conducting business by meeting in a series of successive meetings in which a quorum is never achieved, thereby avoiding triggering TOMA notice requirements. TOMA contains a provision banning these walking quorums, but the Court of Criminal Appeals concluded that the criminal penalties associated with the provision are "hopelessly indeterminate by being too abstract" and struck down that portion of the statute.

To overcome the consequences of this decision, Sen. Watson and Representative Dade Phelan (R–Beaumont) obtained passage of SB 1640, which provides more detailed language on TOMA's walking quorum ban. The intent of the bill is to remedy the constitutional concerns while providing government officials with additional clarity regarding the limits of the law regarding the prohibition on walking quorums.

SB 494: OPEN GOVERNMENT DURING A DISASTER

Two Houston lawmakers, Senator Joan Huffman and Representative Armando Walle, sponsored SB 494 to address how the Texas Open Meetings Act would function in situations of natural or manmade disasters, or in the event of a terrorist attack. The bill was brought in response to the inability of some governmental entities to fully comply fully with TOMA and TPIA during Hurricane Harvey. Specifically, SB 494 reduces from two hours to one hour the length of notice which must be given for an "emergency meeting." Furthermore, the bill provides for a temporary suspension of TPIA obligations during a catastrophe if the governmental body involved passes a resolution establishing a temporary suspension and serves notice of a temporary suspension on the Office of the Attorney General.

HAYNES AND BOONE'S REPRESENTATIVE EXPERIENCE



Haynes and Boone has also represented clients in more than 77 countries worldwide.

STATES WHERE HAYNES AND BOONE HAS REPRESENTED CLIENTS

TEXAS ANTI-SLAPP MATTERS HANDLED BY HAYNES AND BOONE'S MEDIA AND ENTERTAINMENT PRACTICE GROUP	
Number of anti-SLAPP victories	29
Number of reported opinions in anti-SLAPP cases	15
Number of Texas Supreme Court opinions	2
Number of clients whose cases have been voluntarily dismissed by Plaintiff after anti-SLAPP motion threatened or filed	13
Number of Texas Courts of Appeals in which Haynes and Boone has handled anti-SLAPP cases	7 (of 14)
Number of amicus briefs filed in anti-SLAPP cases	6

SPEAKING ENGAGEMENTS

LAURA PRATHER

Investigative Reporters & Editors Conference
Panelist: "Media lawyers Q&A" and "Broadcast Track: The Lawyers"
June 14, 2019 | Houston, Texas

2019 FOI Summit
Panelist: "The Growing Role of Litigation for Government Transparency"
April 12, 2019 | Dallas, Texas

Texas State Bar's Advanced Trial Strategies CLE
Panelist: Anti-SLAPP and Rule 91a
February 14-15, 2019 | New Orleans, Louisiana

ABA Forum on Communications Law 24th Annual Conference
Moderator: "The Right to Privacy v. The First Amendment: A Current Look at Online Legal Protections"
January 31 - February 2, 2019 | Miami, Florida

MLRC Media Law Conference
Co-facilitator: Anti-SLAPP Breakout Session
September 27, 2018 | Reston, Virginia

Freedom of Information Foundation of Texas Annual Conference
Moderator: Sunshine Coalition: Why We Need It
September 21, 2018 | Austin, Texas

Online News Association: ONA18 Conference
Speaker: Media Law for Journalists
September 12, 2018 | Austin, Texas

TOM WILLIAMS

32nd Annual Media and the Law Seminar
Moderator: "Deep Fakes: Trust Not What Your Eyes Perceive"
May 3, 2019 | Kansas City, Missouri

Freedom of Information Foundation of Texas, Open Government Seminar
Speaker: "Texas Open Meetings Act"
November 15, 2018 | Brownsville, Texas

CATHERINE ROBB

Harris County Judges Civil Judicial Education Conference
Speaker: First Amendment Update
August 8, 2018 | Houston, Texas

WESLEY LEWIS

State Bar of Texas 2019 Annual Meeting
Speaker: "Legislative Update: Trends in Open Government"
June 14, 2019 | Austin, Texas

The Honorable Lee Yeakel Intellectual Property American Inn of Court
Speaker: Music Licensing and the Music Modernization Act
January 17, 2019 | Austin, Texas

RECENT RECOGNITIONS

Haynes and Boone Wins Broad Recognition in Chambers USA 2019
Laura Prather – First Amendment Litigation (USA - Nationwide)

First Amendment 'Hero' Laura Prather Selected for the National Freedom of Information Coalition's Open Government Hall of Fame

Anti-Defamation League Honors Haynes and Boone Partner Mark Erickson

Law360 Selects Jonathan Pressment and William Feldman as "Legal Lions" for NFL Win
Jonathan Pressment recognized for his role in securing a victory for the National Football League in Josh Finkelman v. National Football League

Nine Haynes and Boone Lawyers Featured in 2018 Fort Worth Top Attorneys List
Tom Williams – Litigation – First Amendment

Haynes and Boone Featured in 2019 'Best Law Firms' Listing
Haynes and Boone's First Amendment Litigation group was included in *U.S. News & World Report* and *Best Lawyers* "Best Law Firms" survey, ranking nationally and in the Dallas/Fort Worth region.

BTI Litigation Outlook lists Haynes and Boone Among Nation's Leading Firms

Laura Prather Received Freedom of Information Foundation James Madison Award

Haynes and Boone Recognized in Best Lawyers in America 2019
Tom Williams – Litigation – First Amendment, Commercial Litigation, and Litigation – Intellectual Property
Jason Bloom – Litigation – Intellectual Property

Haynes and Boone Lawyers Selected as Texas Rising Stars 2018
Jason Bloom – Intellectual Property Litigation

RECENT PUBLICATIONS

Changes to Texas Anti-SLAPP Statute
June 12, 2019
Laura Prather

5 Big Updates To Texas Government Transparency Laws
June 7, 2019
Laura Prather and Wesley Lewis

Texas Lets the Sunshine In
May 2019
Laura Prather and Wesley Lewis

Powerful Lobby Groups Take Aim at the Texas Anti-SLAPP Statute
April 2019
Laura Prather

U.S. Supreme Court Issues Two Decisions Impacting Copyright Owners in One Day
March 7, 2019
Jason Bloom, Wesley Lewis, and Katharyn Zagorin

Hot Topics: The Texas Citizens Participation Act and the Early Dismissal Rules
February 14 – 15, 2019
Laura Prather (co-authored with Hon. Jane Bland and Hon. Bob Pemberton)

Does the Texas Anti-SLAPP Law Apply in Federal Court? ... Stay Tuned
February 6, 2019
Laura Prather

U.S. Supreme Court's Denial of Actress's Petition Highlights First Amendment Protection of Docudramas
February 1, 2019
Chrissy Hocker

Data Privacy: What 2019 Holds for U.S. Companies
January 23, 2019
Laura Prather and Andrew Van Osselaer

Music Modernization Act Brings Mechanical Licensing into 21st Century
October 1, 2018
Wesley Lewis

NEWSLETTERS

Media, Entertainment and First Amendment Newsletter

May 2019

February 2019

November 2018

June 2018

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