



YEAR IN REVIEW –
MEDIA AND
ENTERTAINMENT LAW

2019 – 2020



A NEW MODEL FOR ANTI-SLAPP LAWS

The movement to better protect citizens' First Amendment rights won two big victories this year, when the Uniform Law Commission and the New York Legislature each approved new anti-SLAPP measures. Anti-SLAPP laws aim to safeguard individuals from the chilling effect of lawsuits brought in retaliation for the exercise of protected First Amendment rights. To date, 32 states and the District of Columbia have enacted some form of statutory anti-SLAPP protections.

The victories at the ULC and in New York came as legislators in eight states introduced anti-SLAPP measures over the past year. These proposals largely reflected a new consensus over the best ways to discourage SLAPP suits. Several of these bills are still being considered, and others, although not passed, garnered strong legislative support that could carry over into future sessions.

UNIFORM LAW COMMISSION

Members of the ULC overwhelmingly approved the Uniform Public Expression Protection Act at the commission's annual meeting in July. The ULC Act contains substantial protections for citizens who exercise their First Amendment rights, including a broad definition of public participation, automatic stays of discovery early in anti-SLAPP proceedings, interlocutory appeals of rulings on anti-SLAPP motions, and mandatory attorneys' fees upon dismissal of a SLAPP suit.

The process of developing the ULC Model Act took more than two years with commissioners, advisors and observers from all over and with vastly different levels of exposure to SLAPP suits. Now that it has been resoundingly approved, it will be promulgated and

an enacting committee will be formed to assist in its consideration by legislatures nationwide. The ULC Act will serve as an important model for states that have yet to enact anti-SLAPP legislation, and those that wish to strengthen their existing laws.

STRENGTHENING EXISTING ANTI-SLAPP LAWS

New York

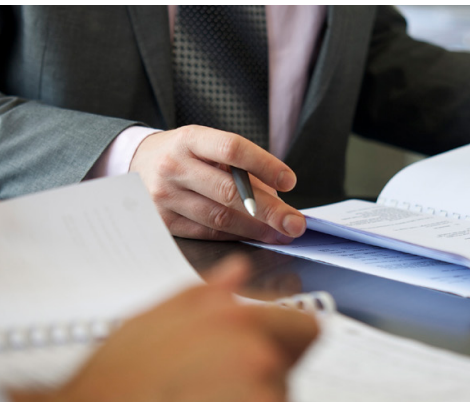
New York was one of several states with existing anti-SLAPP statutes that sought to strengthen its First Amendment protections this year. The state has had an anti-SLAPP statute for more than 25 years, but the existing law limits coverage to suits involving real estate and development.

The anticipated new law, co-sponsored by Assemblywoman Helene Weinstein and state Senator Brad Hoylman, greatly expands the scope of anti-SLAPP protections, and enacts many of the key provisions that were also included in the ULC Act. The bill broadens the scope of protection to include any communication in a public forum "in connection with an issue of public interest," or "any other lawful conduct" furthering the right to free speech and petition in connection with an issue of public interest. That expanded definition is especially significant in New York, where many of the nation's media companies did not enjoy anti-SLAPP protection under the old law. The new law also provides for a stay of discovery upon the filing of an anti-SLAPP motion and makes attorneys' fees mandatory when a judge finds the suit has "[no] substantial basis in fact and law." Because New York law already freely permits interlocutory appeals from denials of dispositive motions, it was not necessary for the bill to specifically address that issue.

The bill passed with strong support in both chambers, by votes of 116-26 in the Assembly, and 58-2 in the Senate. *The New York Times* editorialized in support of

the bill shortly before its passage, writing that an "effective anti-SLAPP statute for New York is long overdue and could well prod recalcitrant legislatures, including Congress, to take action."

At press time the Governor had not yet signed the bill.



THE MOVEMENT TO BETTER PROTECT CITIZENS' FIRST AMENDMENT RIGHTS WON TWO BIG VICTORIES THIS YEAR, WHEN THE UNIFORM LAW COMMISSION AND THE NEW YORK LEGISLATURE EACH APPROVED NEW ANTI-SLAPP MEASURES.

Maryland

In Maryland, a bill to strengthen the state's existing anti-SLAPP law passed the House of Delegates by a vote of 98-40. Maryland has had an anti-SLAPP statute in place since 2004, but the law requires a showing of "bad faith" — a difficult legal standard that is often unwieldy in practice.

The bill that passed the House of Delegates this year would have removed the "bad faith" requirement and expanded the scope of public participation covered by the act. The bill did not come to a vote in the state Senate before Maryland's legislature adjourned in March.

Pennsylvania

In Pennsylvania, legislators have proposed a bill to bolster their state's anti-SLAPP statute. The Pennsylvania bill, which cites a "disturbing increase" in SLAPP lawsuits in the state, would also add a discovery stay and mandatory attorneys' fees, along with broadening the law to cover more constitutionally protected communications. The bill also includes a right to appeal a dismissal that fails to include the mandatory attorneys' fees.

This bill has been stuck in committee since February and appears to be stalled.

STATE EFFORTS TO EXPAND ANTI-SLAPP PROTECTIONS

Virginia

Virginia has a very narrow anti-SLAPP statute. Unlike California and other states, the Virginia statute does not create a special procedure for filing anti-SLAPP motions requiring judges to conduct an early assessment of the plaintiff's probability of success; there is no presumptive limitation of discovery, and no provision for an interlocutory appeal when anti-SLAPP motions are denied. But under the law as it stands, claims for defamation and tortious interference (and similar theories) involving statements regarding matters of public concern that would be protected under the First Amendment and that are published to a third party are subject to an immunity defense unless uttered with "actual or constructive knowledge that they are false, or with reckless disregard for whether they are false." Further, when such claims are dismissed pursuant to this immunity, the plaintiff may be awarded reasonable attorneys' fees. The exception to the immunity has been slightly rephrased: it does not



THIS YEAR, THE VIRGINIA LEGISLATURE MADE CONSIDERABLE PROGRESS TOWARD FURTHER STRENGTHENING THE STATE'S ANTI-SLAPP STATUTE.

apply to "statements made with actual or constructive knowledge that they are false, or with reckless disregard for whether they are false."

This year, the Virginia legislature made considerable progress toward further strengthening the state's anti-SLAPP statute. Although Virginia had a short legislative session this year, both houses of the General Assembly passed anti-SLAPP bills, though a conference committee was unable to reconcile the two measures before the session concluded.

The two chambers did agree on a provision for mandatory attorneys' fees when a SLAPP suit is dismissed, and the sponsors of both bills have indicated they plan to re-introduce anti-SLAPP bills in the next session. In the meantime, Virginia's lack of broad protection continues to make it a magnet for high-profile defamation suits, including actions filed by Rep. Devin Nunes of California and the actor Johnny Depp.

Iowa

In Iowa, the House of Representatives unanimously approved a new anti-SLAPP measure that would have protected a wide swath of public participation. At a hearing on the bill, the co-owner of the *Carroll Times Herald* told legislators how his small newspaper was forced to spend \$140,000 in legal fees defending a libel suit that was ultimately dismissed. The paper's plight, which included a GoFundMe page to help cover its legal costs, drew national attention to the problem of SLAPP suits.



The bill attracted bipartisan support in the Iowa Senate, where a key committee recommended that it be passed. The measure ultimately failed to come to the Senate floor during the frantic end to a legislative session that was disrupted by the coronavirus, but it could be primed for approval in next year's session.

Ohio

Legislators in Ohio are in the process of considering an anti-SLAPP bill that would provide broad protection for First Amendment rights. A Senate hearing on the bill drew supportive testimony from representatives of the Ohio News Media Association, the *Cincinnati Enquirer*, Americans for Prosperity, and the Ohio Domestic Violence Network. The Ohio bill is still in the committee process, with the legislative session scheduled to conclude at the end of the year.

West Virginia and Kentucky

Legislators in West Virginia and Kentucky also introduced anti-SLAPP bills that would have provided significant protections for public participation, including discovery stays, interlocutory appeals and mandatory attorneys' fees upon dismissal of a SLAPP suit. Those measures did not emerge from committee before the end of their respective legislative sessions.

CONCLUSION

Given the increasing need for protection of one's ability to speak out about matters of public concern, it is not surprising that so many states are engaged in efforts to try to pass and/or expand their anti-SLAPP statutes. Now that the Uniform Law Commission has passed the Uniform Public Expression Protection Act, for those states who are looking for a model approved by a group of scholars (the same group that enabled the passage of the Uniform Commercial Code), this model will provide a strong template from which to draft legislation.

RESTRICTIONS ON OPEN GOVERNMENT AND PUBLIC INFORMATION DURING COVID-19

The COVID-19 pandemic has left government agencies scrambling to modify ordinary procedures aimed at ensuring the transparency of government in light of federal, state and local mandates to limit face-to-face contact. Almost without exception, these “temporary” measures have had the effect of reducing, or at least making more difficult, public access to government information. All states have public information and open meetings law, and throughout the pandemic, most, including Texas, have temporarily altered those laws in response to COVID-19. Each state’s open government laws are different, and so the temporary changes to those laws varies, but the changes that were seen in Texas, discussed below, illustrate the kinds of emergency measures that have been implemented across the country.

In addition, as the pandemic has progressed, the public has become more interested in obtaining information from governmental bodies about COVID-19 itself, in an effort to better understand and protect against the virus. There has been a corresponding rise in litigation related to the public’s access to COVID-19 data, which likely will continue after the pandemic subsides.

VIRTUAL MEETINGS AND TELECONFERENCES UNDER THE TEXAS OPEN MEETINGS ACT

On March 13, 2020, Texas Governor Greg Abbott declared a state of disaster for all counties in Texas due to COVID-19. This declaration was renewed each month and most recently on July 10, 2020. As in other states, a disaster declaration allows the Governor to suspend any state statute that prescribes procedures for conducting state business that would “in any way prevent, hinder or delay necessary action in coping with a disaster.”

The Texas Open Meetings Act (“Open Meetings Act”) requires most meetings of governmental bodies to be open to the public and be preceded by public notice of the time, place and subject matter of the meeting. Meetings by videoconference are allowed, but for most governmental bodies a quorum must be physically present at one location, the notice must

specify that location as the “place” of the meeting, and the videoconference must be both visible and audible at that location. On March 16, 2020, responding to a request from the Office of the Attorney General (“OAG”), Governor Abbott temporarily suspended:

- statutes requiring a quorum or presiding officer to be physically present at the specified location of the meeting (provided that a quorum must still participate);
- statutes that require physical posting of a meeting notice (provided that the online notice must include a toll-free dial-in number or free videoconference link along with an electronic copy of any agenda packet);
- statutes that require that the telephonic or videoconference meeting be audible to members of the public who are physically present at the specified location of the meeting (provided that the dial-in-number or video-conference link must allow for two-way communication, and, that the meeting must be recorded and made public); and
- statutes that may be interpreted to require face-to-face interaction between members of the public and public officials (provided that governmental bodies must provide alternative ways of communicating with public officials).

Thus, during the period this suspension, a meeting of a Texas governmental body may be truly remote with no two members of the governing body in the same location, and with no member of the “audience” in the same location.

THERE HAS BEEN A CORRESPONDING RISE IN LITIGATION RELATED TO THE PUBLIC’S ACCESS TO COVID-19 DATA, WHICH LIKELY WILL CONTINUE AFTER THE PANDEMIC SUBSIDES.



In theory, the Governor's declaration provided the public the same rights to access meetings of governmental bodies as before COVID-19, only that the access may be remote. However, it is not clear that all governmental bodies affected by the Open Meetings Act have the technical capabilities to comply with Governor Abbott's order. Further, under this suspension, "attending" a meeting of a governmental body requires access to at least an internet or telephone connection, since there is no longer a requirement for a fixed "meeting location" at which audio and video are provided, and that is something that may still present a barrier to attendance for interested citizens. And finally, as is well known to the many Americans who have attended Zoom meetings recently, a certain level of interaction and understanding is lost when meetings shift from in-person to remote means. While it may not be possible to quantify that difference, that could ultimately prove to be the most significant aspect of these changes.

And yet, while there are drawbacks to remote meetings, as the pandemic wore on, some governmental bodies found themselves criticized for *not* meeting remotely, as citizens who wish to speak at such meetings must themselves appear in person, potentially risking exposure to the virus. As with so many other questions raised by the pandemic, there are trade-offs at work regardless of how the governmental body chooses to meet, and often without an easy answer.

CATASTROPHE-SUSPENSIONS OF DEADLINES UNDER THE TEXAS PUBLIC INFORMATION ACT

The Texas Public Information Act ("TPIA") requires that a governmental body produce requested public information "promptly," which is defined as "as soon as possible under the circumstances, that is within a reasonable time, without delay." If an agency cannot produce public information within ten "business days" after the request, the TPIA requires it "to certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication."

In 2019, the Texas Legislature amended the TPIA to allow a governmental body to suspend the statute's requirements when it is impacted by a "catastrophe," defined as "a condition or occurrence that interferes with the ability of the governmental body to comply" with the TPIA, including an epidemic. The suspension may last for an initial period of up to seven consecutive days and may be extended once for up to another seven consecutive days. A request for public information received during a catastrophe-suspension period is considered to have been received on the first "business day" after the suspension period ends, and deadlines associated with all requests received before a catastrophe-suspension period are tolled until the first business day after the suspension period.

It is noteworthy that the maximum length of a "catastrophe suspension" is 14 days, which generally is sufficient for the types of catastrophes one normally sees, such as a hurricane, tornado or fire. But the COVID-19 catastrophe has obviously exceeded 14 days, and it is unclear whether additional restrictions on activity will be necessary in the future.

In March 2020, the OAG, having received dozens of inquiries about the TPIA's catastrophe-suspension procedure related to COVID-19, issued guidance stating that a catastrophe suspension is appropriate only when the governmental body is open for business



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AS THE PANDEMIC WEARS ON, A SIGNIFICANT GOVERNMENT TRANSPARENCY ISSUE HAS ARISEN OVER ACCESS UNDER PUBLIC RECORDS LAWS TO COVID-19 RELATED DATA, USUALLY INVOLVING INFORMATION ABOUT POSITIVE CASES.

but determines that a catastrophe has interfered with its ability to comply with TPIA, and is not necessary at all if the governmental body is not open for business. The guidance also noted that a “business day” for purposes of calculating TPIA deadlines does not include:

- skeleton crew days;
- a day on which a governmental body’s administrative offices are closed;
- a day on which the governmental body closes its physical offices because of a public health response, or, is unable to access its records on a calendar day, even if the staff is working remotely or the staff is onsite but involved directly in the public health response.

This interpretation of the term “business days,” which is not defined in the TPIA, is consistent with the OAG’s long standing practice. Normally, however, the effect on a TPIA deadline is minimal and limited to days that are not legal holidays but on which governmental offices customarily close (for example, the Friday after Thanksgiving), or days on which unforeseen circumstances, such as weather, require an office to close for a short period.

With some governmental bodies “closing” indefinitely (albeit working remotely) the beginning of a TPIA response period may effectively extend indefinitely. Then, upon “re-opening,” a governmental body could invoke the catastrophe declaration and potentially extend the response period for an additional 14 days, a far cry from the “prompt” production of public information the TPIA mandates.

Look for bills to be filed in the 2021 session of the Legislature addressing this issue, possibly by defining “business day” more precisely or by expressly providing that if a governmental body is available for business by remote means, that “remote” day is not to be excluded from the calculation of TPIA deadlines.

ACCESS TO COVID-19 DATA UNDER PUBLIC INFORMATION LAWS

As the pandemic wears on, a significant government transparency issue has arisen over access under public records laws to COVID-19 related data, usually involving information about positive cases. For example, in May, Raleigh’s The News & Observer, along with other media organizations, sued North Carolina Governor Roy Cooper and other state officials under North Carolina’s public records law regarding 26 outstanding records requests, including requests for the state’s data base on COVID-19 cases and copies of prison inspection reports. In June, The Bay Area News Group sued the Alameda County health department for data about COVID-19 cases and deaths at nursing homes and other long-term care facilities. In April, the Freedom of Information Foundation of Texas and others challenged an assertion from the Texas Health and Human Services Commission and local government officials that identifying which nursing homes have been impacted by the virus violated the TPIA or the federal Health Insurance Portability and Accountability Act (“HIPAA”).

Each state’s public information law is different, but, generally, those seeking the names and locations of certain facilities where there have been COVID-19 cases argue that the names and locations of those facilities is not protected health information (“PHI”). Requestors generally recognize that the *identity* of a person diagnosed with COVID-19 is typically PHI, but because nursing homes, prisons and similar facilities house dozens to hundreds of people, releasing this name and address of the facility would not normally reveal which residents actually have the virus.

In Texas, the Texas Health and Human Services Commission (“Commission”) denied reporters’ requests for the names of nursing homes and assisted-living facilities in Texas that had confirmed

COVID-19 cases or deaths, citing PHI concerns. The Commission later requested an opinion from the OAG on the issue.¹ In early July, the Attorney General issued its opinion concluding that the requested information did not consist of either PHI (which is defined under the TPIA in accordance with HIPAA) or a series of confidential documents about these facilities that are kept by the state (e.g., a statement of violations prepared after an inspection of a nursing home or a report of abuse or neglect). Thus, the requested information was subject to disclosure. See Tex. Att’y Gen. OR2020-16956 (July 6, 2020). In late July, the Commission started posting to its website COVID-19 case counts and deaths by facility for state supported living centers, state hospitals, and state-licensed nursing and assisted living facilities.

Those requesting this type of data have also disagreed over government’s timeline for responding. In *Am. Immigration Council v. U.S. Dep’t of Homeland Sec.*, the United States District Court for the District of Columbia granted a preliminary injunction to American Immigration Council (“AIC”), an organization seeking COVID-19 data about the U.S. Immigration and Customs Enforcement’s (“ICE”) response to the pandemic over the timing issue. See No. CV 20-1196 (TFH), 2020 WL 3639733, at *1 (D.D.C. July 6, 2020). AIC requested records in March under FOIA related to ICE’s protocols regarding medical screening, sanitization of facilities, and the number of detained individuals who have tested positive for the virus. The Department of Homeland Security (“DHS”), the federal agency over ICE, replied that it had identified 800 pages of potentially responsive documents, but was “unable to estimate” when it would be able to complete this review or production due to strained personnel and the impact of the pandemic. The court rejected DHS’s assertion, finding that producing these documents presented only a “minimal burden.” The court considered the importance of the data in helping AIC fulfill its mission of protecting the legal rights of noncitizens, as well as the time-sensitive nature of the issue, as justifying requiring DHS to produce these documents over the following two months.

One example of how COVID-data obtained through FOIA requests can be used to benefit the public comes from The New York Times’ suit against the Centers for Disease Control (“CDC”), filed after the CDC failed to respond to the Times’s request for demographic data on all positive COVID cases reported to the agency. The Times asserted that the data was necessary to understand the disproportional effects that the pandemic has had on low-income and minority communities, without which these

communities have not been able to address potential risks and inequities in healthcare. After the Times sued, the CDC turned over data on 1.45 million COVID cases, allowing the Times to publish a comprehensive analysis of racial disparities in virus contraction.

¹ The Commission submitted a representative sample of the specific information that was requested for the Attorney General’s review, presumably similar to the information requested by reporters and others during the pandemic.

TRENDS IN ISP AND PLATFORM LIABILITY: CDA SECTION 230 AND DMCA SAFE HARBORS

The internet as we know it today was made possible, in part, through the creation of a legal framework that permits platforms and internet service providers (ISPs) to host user-generated content without substantial risk of liability. Two significant statutes are collectively responsible for establishing this framework: The Communications Decency Act of 1996 (CDA) and The Digital Millennium Copyright Act (DMCA), enacted in 1998.

Without these two pieces of legislation, the internet would be a vastly different place than it is today. The CDA and DMCA both allow ISPs, social media platforms, and other online service providers (collectively referred to in this article as “service providers”) to act as conduits and repositories for user-generated content without liability for such content. This statutory civil immunity allows service providers to take a hands-off approach to user-generated content, obviating the need to conduct pre-publication moderation or review of content made available on or through their services. Without this protection, service providers would be less likely to host the third-party content we have come to expect on the internet—such as reader commentary on news sites, YouTube videos, and Instagram posts—lest they be exposed to liability for defamation, copyright infringement, or other causes of action arising from the user-generated content they host. Considering, for example, that an estimated 500 hours of video are uploaded to YouTube *per minute*,¹ service providers simply could not exist in their current form without Section 230 of the CDA and Section 512 of the DMCA

to protect them from liability arising from such content.²

Yet, despite their importance to the modern internet, Section 230 and the DMCA's safe-harbor provisions have been subject to increasing scrutiny and criticism from a variety of sources—particularly over the past year. Litigants, lawmakers, and even President Trump have all sought to limit or overcome the protections of Section 230 and the DMCA in an effort to hold service providers more accountable for user-generated content they host. Service providers should be cognizant of these developments and understand that Section 230 immunity and the safe harbor protections Section 512 of the DMCA are neither absolute nor indestructible in this rapidly changing legal landscape.

SECTION 230: CAUGHT BETWEEN A ROCK AND A HARD PLACE

Section 230 of the Communications Decency Act provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³ This provision has been called the “twenty-six words that created the Internet,”⁴ because it allows service providers to host user-generated content without being treated as the publisher or speaker of such content. Importantly, the CDA also allows online service providers to moderate objectionable content voluntarily, if done in “good faith.”⁵

Section 230 has been the subject of mounting public scrutiny, particularly over the last year. Earlier this year, the Trump Administration and some Republican members of Congress challenged Section 230 in response to a growing perception of anti-conservative bias on mainstream social media. In an apparent response to Twitter's decision to append fact-check warnings to several of his tweets, President Trump issued an executive order attacking the protection afforded by Section 230, suggesting that platforms that remove objectionable content in a biased manner should lose their Section 230 protections.⁶ Similarly, in response to allegations that social media websites are guilty of stifling conservative speech, Senator Josh Hawley (R-Missouri) introduced a bill that would require social media platforms to enforce their rules equally as a condition to receiving Section 230 immunity.⁷ Senator Hawley's proposed legislation, entitled the *Ending Support for Internet Censorship Act*, would strip platforms of Section 230 immunity unless they submit to an external audit

that establishes that their algorithms and content-removal practices are politically neutral.⁸ Finally, the Department of Justice released a report of proposed reforms to “realign the scope of Section 230 with the realities of the modern internet.”⁹ These proposals focus on limiting Section 230 immunity to place greater responsibility on online platforms to moderate their content and create specific “bad Samaritan” carve-outs for Section 230 immunity for providers that facilitate illicit content online and limit providers' ability to remove “objectionable” content.¹⁰

But criticism of Section 230 does not emanate exclusively from Republicans; notable Democrats have also called for either significant reform or wholesale repeal of the statute. Earlier this year, Democratic presidential candidate Joe Biden called for the repeal of Section 230, arguing that it allows social media networks to skirt their responsibility to combat the proliferation of fake or misleading news.¹¹ Similarly, House Speaker Nancy Pelosi recently reiterated

LITIGANTS, LAWMAKERS, AND EVEN PRESIDENT TRUMP HAVE ALL SOUGHT TO LIMIT OR OVERCOME THE PROTECTIONS OF SECTION 230 AND THE DMCA IN AN EFFORT TO HOLD SERVICE PROVIDERS MORE ACCOUNTABLE FOR USER-GENERATED CONTENT THEY HOST.



long-standing criticisms of Section 230, arguing that the law has allowed for the rampant spread of misinformation, online harassment and trolling.¹²

Thus, while their reasons may differ, politicians and government officials across the political spectrum have voiced concerns over Section 230's impact on the internet and society. And while President Trump's executive order and the Department of Justice's report on Section 230 are recommendations for future legislation and do not carry the force of law, Section 230 appears to be in a particularly precarious situation in light of the increasingly critical attention it is receiving. Internet service providers should monitor these developments and remain prepared to take appropriate actions to preserve immunity under the current statutory scheme.

DMCA SAFE-HARBOR PROTECTIONS: COX AND RELATED LITIGATION

Like Section 230, the Section 512 of the DMCA permits service providers to take a hands-off approach to third-party content, allowing ISPs and platforms to host and provide transmission channels for such content without fear of liability for copyright infringement. Specifically, Section 512 of the DMCA permits service providers who meet certain requirements to claim "safe harbor" immunity from civil liability for secondary or vicarious liability arising from the alleged copyright infringement of their users.¹³

Typically, ISPs avoid liability for the infringing conduct of their users by adhering to the statutory requirements of the "safe harbor" provisions of the DMCA. These requirements shield ISPs from liability if they are: (1) unaware of, or had no reason to suspect, specific acts of infringement; (2) receive and process takedown requests for allegedly infringing works; and (3) reasonably implement policies designed to terminate repeat infringers.¹⁴ ISPs failing to meet these requirements are at risk of failing to qualify for safe-harbor protection under the DMCA.

Cox Communications, the third-largest Internet and cable television provider in the United States, recently learned that lesson the hard way. In December 2019, a jury found Cox liable for \$1 billion in damages in a copyright infringement lawsuit brought by Sony Music, Universal Music Group, Warner Music Group and EMI.¹⁵ In a previous proceeding, the same court determined that Cox had failed to reasonably implement a repeat-infringer policy and was therefore ineligible to claim

safe harbor protection under the DMCA, a ruling the Fourth Circuit affirmed.¹⁶ As a result, Cox was exposed to extensive liability for secondary copyright infringement based on the alleged infringement of its users, with the massive verdict resulting from the jury's finding that Cox acted willfully and was subject to statutory damages of approximately \$100,000 for each of approximately 10,000 works.¹⁷

While Cox's eye-popping billion-dollar verdict grabbed the lion's share of the headlines, that lawsuit is just one of several brought against ISPs claiming secondary and vicarious liability for their users' copyright infringements.¹⁸ In recent years, copyright owners (in particular, record labels) have repeatedly sought to overcome DMCA safe-harbor protections for ISPs, claiming that the ISPs have not adequately established or implemented policies for terminating repeat infringers. These lawsuits are part of a larger trend of copyright owners attempting to hold ISPs accountable for the alleged infringement of their users. And, given the success of the Cox plaintiffs, the trend is likely to continue.

Cox and related litigation demonstrate that ISPs' safe-harbor protections are far from absolute, and a failure to comply with the DMCA's requirements can result in massive liability for secondary and vicarious copyright infringement. In this respect, service providers must be aware of the limitations of DMCA safe-harbor protections and how to maximize those protections, particularly considering recent successful efforts to overcome the DMCA's statutory safe-harbor protections against ISPs.

DMCA SECTION 512 UNDER FIRE FROM THE COPYRIGHT OFFICE

The DMCA's safe-harbor provisions also face mounting criticism from the United States Copyright Office itself. In May 2020, the Copyright Office published a long-anticipated report on Section 512 of the DMCA, concluding that the safe-harbor protections afforded to ISPs have become "imbalanced."¹⁹ In light of this perceived imbalance, the Copyright Office made several suggestions to adjust or clarify Section 512, specifically identifying areas "where current implementation of Section 512 is out of sync with Congress' original intent, including: eligibility qualifications for the service provider safe harbors, repeat infringer policies, knowledge requirement standards, specificity within takedown notices, non-standard notice requirements, subpoenas, and injunctions."²⁰



While the Copyright Office stopped short of recommending repeal or wholesale revision of the statute, it identified several areas of concern or “imbalance.” First, the Copyright Office recommended clarifying the eligibility requirements for entities entitled to claim safe-harbor protection under the DMCA. While Congress intended Section 512 to be construed broadly to account for technological advancement, the report cautions that courts may have taken an overly expansive view of the types of entities entitled to safe-harbor protection. Second, the report also suggests that recent judicial decisions have “set too high a bar” for the level of knowledge of infringing activity that an ISP must have to waive safe harbor protection; accordingly, the Copyright Office suggested lowering the amount of “red flag knowledge” of infringing activity that would result in a waiver of safe-harbor protections. Finally, the Copyright Office argued that the DMCA’s requirement that ISPs establish and reasonably implement a repeat infringer policy is unclear and suggested that Congress should better define “repeat infringer” and establish “minimum requirements” for a DMCA-compliant repeat-infringer policy.

CONCLUSION

Section 230 of the Communications Decency Act and the safe-harbor provisions of the DMCA remain important pieces of legislation. However, with rapid technological and societal change, these provisions are under increasing scrutiny and criticism.

Stakeholders, litigants, and government officials from a variety of backgrounds are challenging previously held attitudes regarding the extent to which service providers should be responsible for the user-generated content they host. Platforms and ISPs, while still entitled to Section 230 immunity and safe-harbor protection under the DMCA, must be cognizant that these protections are not absolute, and they certainly are not guaranteed.

- ¹ See *Hours of video uploaded to YouTube every minute as of May 2019*, STATISTA (Aug. 9, 2019).
- ² Of course, neither Section 230 nor the DMCA impact users’ liability for the content they post on the internet, nor does the CDA or DMCA shield service providers from liability for the content they create.
- ³ 47 U.S.C. § 230.
- ⁴ See Jeff Kosseff, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).
- ⁵ 47 U.S.C. § 230(c)(2)(A).
- ⁶ See [Executive Order on Preventing Online Censorship](#), WHITEHOUSE.GOV (May 28, 2020).
- ⁷ See [Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies](#), (June 19, 2019).
- ⁸ *Id.*
- ⁹ U.S. Dep’t of Justice, [Section 230—Nurturing Innovation or Fostering Unaccountability?](#) (June 2020).
- ¹⁰ *Id.*
- ¹¹ See Interview: Joe Biden, *THE NEW YORK TIMES* (Jan. 17, 2020) (“Section 230 should be revoked, immediately should be revoked, number one. For [Mark] Zuckerberg and other platforms.”).
- ¹² Taylor Hatmaker, [Nancy Pelosi warns tech companies that Section 230 is ‘in jeopardy’](#), TECHCRUNCH (Apr. 12, 2019).
- ¹³ 17 U.S.C. § 512.
- ¹⁴ See *id.*
- ¹⁵ *Sony Music Entm’t, et al. v. Cox Commc’ns, et al.*, No. 1:18-cv-00950 (E.D. Va.).
- ¹⁶ *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293 (4th Cir. 2018). As of the date of this writing, a final judgment has not yet been entered in the case.
- ¹⁷ In post-verdict motion practice, the district court recently upheld the jury’s statutory damage award on a per-work basis, but the parties are continuing to submit briefing regarding the total number of allegedly infringed works at issue in the lawsuit. Order, *Sony Music Entm’t, et al. v. Cox Commc’ns, Inc.*, Case No. 1:18-cv-00950 (E.D. Va. June 2, 2020), ECF No. 707.
- ¹⁸ See, e.g., *UMG Recordings, Inc. v. Grande Commc’ns Network, LLC*, No. 1:17-cv-00365-DAE (W.D. Tex. Apr. 21, 2017); *Warner Bros. Records Inc. v. Charter Commc’ns, Inc.*, Case No. 1:19-cv-00874-RBJ-MEH (D. Colo. Mar. 22, 2019); *UMG Recordings, Inc. v. Bright House Networks, LLC*, Case No. 8:19-cv-710-MSS-TGW (M.D. Fla. Mar. 22, 2019); *UMG Recordings, Inc. v. RCN Telecom Svcs., LLC*, Case No. 19-cv-17272 (D.N.J. Aug. 27, 2019).
- ¹⁹ [Section 512 of Title 17: A Report of the Register of Copyrights](#), UNITED STATES COPYRIGHT OFFICE (May 2020).
- ²⁰ [Section 512 Study](#), COPYRIGHT.GOV (May 21, 2020).



SPEAKING ENGAGEMENTS

LAURA PRATHER

Freedom of Information Foundation of Texas

Speaker: Government Transparency in the Age of a Pandemic
June 4, 2020 | Corpus Christi, Texas

ABA Forum on Communications Law 25th Annual Conference

Facilitator: Hot Issues in Anti-SLAPP and Other Legislation
February 7-8, 2020 | Austin, Texas

ABA Forum on Communications Law 25th Annual Conference

Panelist: Media Advocacy Lunch Panel: Texas Citizens Participation Act
February 6, 2020 | Austin, Texas

Texas Bar CLE's Advanced Civil Appellate Practice Course

Speaker: Texas Citizens' Participation Act and Anti-SLAPP: Hand Grenade or Rifle Shot?
September 5, 2019 | Austin, Texas

Texas Bar CLE Webcast

Speaker: Anti SLAPP Update: Recent Legislative and Case Law Developments
August 29, 2019 | Austin, Texas

The University of Texas at Austin School of Law

Speaker: Changes to Texas Anti-SLAPP Statute
August 13, 2019 | Austin, Texas

THOMAS J. WILLIAMS

University of Texas School Law Conference

Speaker: Defamation Claims in the School Setting
February 21, 2020 | Austin, Texas

ABA Forum on Communications Law 25th Annual Conference

Facilitator: Hot Issues in Ethics
February 6, 2020 | Austin, Texas

Texas Association of Broadcasters

Speaker: Southwest Broadcast Newsroom Workshop
November 16, 2019 | Arlington, Texas

LEE JOHNSTON

Colorado Bar Association's 18th Annual Rocky Mountain Intellectual Property & Technology Institute

Speaker: FTC Enforcement and False Advertising Law Updates
July 16, 23, 30 and August 6, 2020
Denver, Colorado

WESLEY LEWIS

ABA Forum on Communications Law 25th Annual Conference

Facilitator: Hot Issues in Access and Newsgathering
February 6, 2020 | Austin, Texas

RECENT RECOGNITIONS

Erin Hennessy, Laura Prather Among Shortlist Finalists for 2020 Euromoney Americas Women in Business Law Awards

Haynes and Boone Represents TV Production Company in Appellate Win

Haynes and Boone Prominently Featured in 2020 *Chambers USA* Directory

Laura Prather – First Amendment Litigation

Six Haynes and Boone Lawyers Featured in 2019 Fort Worth Top Attorneys Listing

Thomas J. Williams – Civil Law/ Litigation

***The American Lawyer* Selects Laura Lee Prather for Tony Mauro Media Lawyer Award**

Haynes and Boone Featured Among 2020 'Best Law Firms'

National Tier 3: Litigation – First Amendment

Metropolitan Tier 2: Litigation – First Amendment (Dallas/Fort Worth)

Haynes and Boone Counsel Catherine Robb Elected to PBS Board

Haynes and Boone Lawyers to be Honored with Texas Civil Rights Project Pro Bono Award

Wesley Lewis selected by the Texas Civil Rights Project (TCRP) to receive the Kristi Couvillon Pro Bono Award.

Haynes and Boone Broadly Recognized in 2019 *Texas Super Lawyers* Directory

Laura Prather – Media and Advertising
Thomas J. Williams – Business Litigation

Seven Haynes and Boone Lawyers Named 2020 "Lawyers of the Year"

Laura Prather: Litigation – First Amendment

Haynes and Boone Featured in 2020 *Best Lawyers in America* Guide

Laura Prather: Litigation – First Amendment

Thomas J. Williams: Commercial Litigation, Litigation – First Amendment, Litigation – Intellectual Property
Catherine Robb: Litigation – First Amendment

Free-Speech Advocate Laura Prather Named Finalist for Professional Excellence in Advocacy Awards

RECENT PUBLICATIONS

[Jason Bloom in *The IP Strategist*: States Win Some and Lose Some on Copyright Front at Supreme Court This Term](#)

August 6, 2020
Jason Bloom

[Copyright Office Finds Aspects of the DMCA "Unbalanced" in Favor of Online Service Providers](#)

May 27, 2020
Jason Bloom, Lee Johnston, Joseph Lawlor, and Wesley Lewis

[5 Tips for Brands Advertising in the COVID-19 Era](#)

May 13, 2020
Tiffany Ferris and Joseph Lawlor

[A Deep Dive Into the Tiger King Trademark Lawsuits](#)

April 23, 2020
Joseph Lawlor

[Transparency vs. Safety: Restrictions to Open Government During COVID-19](#)

April 20, 2020
Thomas J. Williams and Chrissy Long

[Recent Cases Highlight Growing Conflict Between AI and Data Privacy](#)

April 20, 2020
Lee Johnston

[Second Circuit Will Not Rehear First Amendment Twitter Suit against President Trump](#)

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[Striking a Balance](#)

April 2, 2020
Laura Prather

[Call for Creatives: United Nations Opens Submission Process for COVID-19 Messaging Work](#)

April 1, 2020
Tiffany Ferris

[Running a Micro-Influencer Campaign at Scale is Not for the Faint-Hearted](#)

February 27, 2020
Joseph Lawlor

[The Changing Landscape of the Texas Citizens Participation Act](#)

February 14, 2020
Laura Prather (co-authored with Robert Sherwin)

[Two Cases Raise New Copyright Infringement Concerns for Internet Linking](#)

January 21, 2020
Jason Whitney

[Federal Jury Slams Cox Communications with \\$1 Billion Verdict for Copyright Infringement](#)

January 21, 2020
Alexander Lutzky

[Sponcon Disclosure Lessons from *Teen Vogue*'s Facebook Article Controversy](#)

January 9, 2020
Joseph Lawlor

[Finding Out How Tax Dollars are Spent: New Law in Effect January 1, 2020](#)

January 3, 2020
Laura Prather

[The Changing Landscape of the Texas Citizens Participation Act](#)

September 4, 2019
Laura Prather

[Fifth Circuit Weighs in on Applicability of State Anti-SLAPP Statutes in Federal Court](#)

August 27, 2019
Laura Prather and Wesley Lewis

['Nothing Compares 2' a Warhol](#)

August 12, 2019
Wesley Lewis

MEDIA, ENTERTAINMENT
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July 2018 - June 2019](#)



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