EDITOR'S NOTE

Welcome to the third Issue of Volume 71 of the *Federal Communications Law Journal* ("*Journal*"), the official journal of the Federal Communications Bar Association (FCBA). The summer of 2019 signals a leadership transition for the *Journal*, as the Class of 2019 members have graduated from The George Washington University Law School. The Volume 72 board and staff have embraced their new roles, working with the outgoing board to produce the final piece of Volume 71. This Issue contains topics spanning from rethinking longstanding media ownership regulations to legalizing web scraping. For our Annual Review Issue, we are excited to present case briefs from our incoming board members that focus on paramount legal disputes in the communications field during the past year.

We are thrilled to feature a practitioner article penned by Christopher Terry, an assistant professor of media law in the Hubbard School of Journalism and Mass Communication at the University of Minnesota. Professor Terry's piece, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, argues for a regulatory shift away from relying on pure market competition as a proxy for enabling localism in media. Specifically, Professor Terry explores the historical shortcomings of the FCC's contemporary approach to safeguarding localism, culminating with the November 2017 Report and Order. His solution adopts Internet-based systems of community ascertainment and requires broadcasts of at least three hours of locally-produced programming each week to combat a growing threat to media localism.

Finally, the *Journal* is proud to publish the final three student Notes of Volume 71. In the first Note, Abigail Becnel advocates repealing both the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act to make Cuba the newest economic hotspot for telecommunications providers. The second Note is penned by Ayesha Syed, and addresses the mounting issue of copyright infringement in the social media realm, arguing that registration requirements under the Copyright Act should be relaxed to facilitate access to judicial protections for content creators. The final Note is authored by Tess Macapinlac who argues for an amendment to the Computer Fraud and Abuse Act to make web scraping of publicly available information legal.

The outgoing members of Volume 71 would like to thank both The George Washington University Law School and the FCBA for the help and support provided provided throughout the past year. We were honored and humbled to have had the opportunity to provide quality content throughout the year to an esteemed group of professionals in the communications field and beyond.

We welcome your feedback or questions to fclj@law.gwu.edu and we ask that article submissions be sent to fcljarticles@law.gwu.edu. The Annual Review issue and our archive will be available at www.fclj.org.

Stephen Conley
Editor-in-Chief

FEDERAL COMMUNICATIONS LAW JOURNAL

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

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Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the United States, its territories, and several other countries.

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ARTICLES

Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act

By Christopher Terry..327

The FCC's media ownership policy has become a legal quagmire. In an effort to promote three often mutually exclusive policy goals, competition, localism, and diversity simultaneously, the FCC has struggled to implement a coherent policy. In place of trying to achieve all three, the FCC currently relies on competition as a proxy for diversity in a conceptual approach that lacks both a consistently logical application and meaningful empirical support. Meanwhile, localism, the third objective, has been undermined by ownership consolidation and the application of economy of scale. Required by the Telecommunications Act to review media ownership regulations every four years, the FCC has moved through a series of reviews and rule changes, only to be blocked by a panel of the 3rd Circuit in a series of cases led by the Prometheus Radio Project. As the FCC tries to answer a series of previously remanded rule changes and launches its mandated 2018 Quadrennial Review, this Article proposes that in order to break the stalemate, the FCC needs to shift its focus away from an unsupportable application of the competition and diversity relationship in order to use localism as the functional metric for media ownership policy. After tracing the history of localism in FCC ownership policy, the Article explores the failed application of the three-objective approach to media ownership before proposing that a renewed focus on localism is a solution to market failure that will increase competition and diversity and ultimately provide a path out of the current legal maze.

NOTES

Telecommunications in Cuba: Repeal of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act

By Abigail Becnel 355

For over 50 years, Cuba, which is only 90 miles off the coast of Florida, was off limits to Americans wanting to do business with the island or travel there for pleasure. However, United States-Cuban policy has changed significantly in the last four years because of restored diplomatic relations, which took effect under the Obama Administration. Changes also occurred in the telecommunications sector when the FCC removed Cuba from its Exclusion

List. President Trump's administration rolled back some of the U.S.-Cuban policy changes made under Obama's presidency, but the Trump Administration has similar policies to that of President Obama in regard to Internet access for the Cuban people.

The Cuban Democracy Act of 1992 and the Cuban Liberty and Democratic Solidarity Act of 1996 codified the United States embargo on Cuba and prohibited trade and business with the island nation. Despite the removal of Cuba from the FCC's Exclusion List, as long as the Cuban Democracy Act and Cuban Liberty and Democratic Solidarity Act are still in effect, telecommunications providers risk violating federal law if they set up telecommunications facilities in Cuba. These acts have not been successful and have never accomplished what they set out to do, which was to establish democracy in Cuba. These unsuccessful acts should be repealed or at least partially repealed in an effort to establish democracy in Cuba through engagement and to allow American telecommunications companies to do business with Cuba legally. Eager telecommunications providers should wait for Congress to act before setting up telecommunications facilities in Cuba rather than violating federal laws.

Making Protection Against Copyright Infringement More Accessible in the Social Media Era

By Ayesha Syed 375

This Note provides a potential solution to the issue many copyright owners face as a result of posting their work on social media and falling victim to copyright infringement without having access to adequate mechanisms to enforce their copyright protection rights or to obtain relief. Although this Note is intended to apply to social media in general, to some extent, its focus is on Twitter. However, the proposal presented here is applicable to other social media platforms as well, given they are similar to Twitter. This Note first lays out the basic workings of Twitter followed by examples that illustrate how creators on Twitter are being harmed and infringed upon. Next, the Note examines the factual and legal background surrounding the copyrightability of works posted on Twitter as well as the current remedies available to copyright owners who have suffered copyright infringement. Finally, it proposes a reform of the Copyright Act of 1976 regarding its requirement that registration be established before a copyright owner can bring a copyright infringement lawsuit and the fact that copyright owners cannot recover statutory damages or costs and attorney's fees without registration. The reform involves taking a new look at registration and allowing the actual Twitter post ("tweet") or other social media post to serve as registration in circumstances where the information provided by these posts is sufficient. The Note ends with policy considerations that look at why such a reform would be beneficial to copyright owners on social media and in general.

The Legality of Web Scraping: A Proposal

By Tess Macapinlac 399

The Computer Fraud and Abuse Act is often considered the hacking law – but does the CFAA exclusively cover hacking, or have the rises in technology and the ambiguous terms in the law allowed it to extend past its original intentions?

Web scraping public pages refers to the copying and saving of information from other publicly available websites, which is often synthesized for another company's business purposes. Multiple companies have been successfully sued under the CFAA for scraping, on the basis that this access is "without authorization." But can an entity not have the authorization to access a website that is available to the public? Is such an act worthy of federal charges? This note proposes that scraping should not be considered under the jurisdiction of the CFAA and lays out legislation that would amend the CFAA to render the web scraping of public pages not punishable under the CFAA.

FCLJ ANNUAL SYMPOSIUM

Communications Law: Annual Review

By Staff of the Federal Communications Law Journal 423

Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act

Christopher Terry*

TABLE OF CONTENTS

I. INTRODUCTION 328
II. THE INITIAL REGULATORY FOCUS ON LOCAL CONTENT 331
III. MEDIA OWNERSHIP AS A FOCUS OF REGULATION 334
IV. A FLAWED UNDERSTANDING OF DIVERSITY 338
V. THE FCC AND THE COURTS 343
VI. LOCALISM AS A REMEDY FOR MARKET FAILURE 347
A. Media Localism 348
B. Requiring Localism 350
VII. CONCLUSION 352

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I. INTRODUCTION

In 2016 the U.S. Court of Appeals for the Third Circuit, in a decision that has come to be known as *Prometheus III*,[1] expressed frustration with the FCC's failure to comply with the terms of two previous remands from the same court in cases known as *Prometheus I*[2] and *Prometheus II*.[3] After cataloguing what it saw as the shortcomings in the FCC's most recent actions, the court appeared resigned to still more litigation over the FCC's broadcast ownership rules. The last paragraph of the opinion of the court noted:

> This is our third go-round with the [FCC]'s broadcast ownership rules and diversity initiatives. Rarely does a trilogy benefit from a sequel. To that end, we are hopeful that our decision here brings this saga to its conclusion. However, we are also mindful of the likelihood of further litigation.[4]

The court's prediction was correct; its decision did not bring the long litigation saga to a conclusion. In November 2017 the FCC, with a new Republican majority in the wake of the election of Donald J. Trump as president, abolished several rules limiting ownership of radio and television stations, while relaxing other restrictions on ownership.[5] In early 2018, Prometheus Radio Project returned to the Third Circuit with yet another challenge.[6] The journey to a decision that will no doubt be known as *Prometheus IV* began.

To borrow a phrase from baseball immortal Yogi Berra, it was déjà vu all over again.[7]

The inconclusive nature of the litigation means that fundamental issues underlying media ownership policy remain unsettled. What is the relationship between economic competition and diversity of broadcast content? Does greater competition among station owners lead to greater diversity of news and entertainment content, or not? As local ownership of radio and television stations becomes increasingly rare, what is the relationship between economic competition and locally-produced content? Since the enactment of the Telecommunications Act of 1996,[8] and especially since Prometheus Radio Project filed its initial challenge to relaxed restrictions on broadcast

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1. Prometheus Radio Project v. FCC, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*).
2. Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*).
3. Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*).
4. *Prometheus III*, 824 F.3d at 60.
5. *See generally*, FCC Modernizes Broadcast Ownership Rules, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd 9802 (11) (2017) [hereinafter *MBOR Order*].
6. Petition for Review of an Order of the FCC, FCC No. 17-156, 32 F.C.C.R. 9802 (2017). Prometheus Radio Project v. FCC, No. 18-1092 (3d Cir. Jan. 16, 2018).
7. ALLEN BARRA, YOGI BERRA: ETERNAL YANKEE xxxiv (2009).
8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

ownership in 2003,[9] questions about competition and its relationship to the concepts of diversity and localism have been at the heart of discussion and debate over broadcast ownership policy in the United States. Meanwhile, as policymakers, interest groups, and judges wrestle with these questions, the economic and technological environment for American broadcasting is in a state of constant change.

The result of all of this uncertainty is that Prometheus, the FCC, and the U.S. Court of Appeals for the Third Circuit have been trapped in a maze of seemingly endless litigation since 2003. They are like the characters in Jean Paul Sartre's famous play *No Exit*, condemned to be with each other for all eternity in a locked room.[10] The repetitive pattern of the cases—rule changes from the FCC followed by challenges to the changes from Prometheus followed by a remand back to the FCC from the Third Circuit (rinse and repeat)—evokes not only the well-known American movie *Groundhog Day*[11] but also popular culture's pithy definition of insanity: Doing the same thing over and over, but expecting a different result.[12]

There has to be a better way. And, as this Article shows, there is a better way.

American law does not look kindly upon mazes of endless litigation.[13] This Article proposes a way for the FCC to escape the legal labyrinth without sacrificing its long-standing policy goals of competition, localism, and diversity.[14] The FCC should shift its regulatory focus from issues of media ownership to issues of media production—specifically, to local media production. Such a shift would acknowledge the reality that the modern media environment by itself, with no need for intervention by the FCC, provides a

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9. Petition for Review, Prometheus Radio Project v. FCC, 2003 WL 22340470 (2003).

10. JEAN-PAUL SARTRE, NO EXIT (Paul Bowles trans., Samuel French, Inc., 1958) (1945).

11. GROUNDHOG DAY (Columbia Pictures 1993) features a TV weatherman who is doomed to endlessly relive Groundhog Day (Feb. 2nd), a minor holiday that he finds pointless and aggravating, until he reevaluates his life priorities. After the release of the film, the phrase "groundhog day" became common in American vernacular. It refers to a situation in which events are, or appear to be, continually repeated. *See* OXFORD LIVING DICTIONARY (2018), https://en.oxforddictionaries.com/definition/groundhog_day [https://perma.cc/7ZP5-PHJA] (last visited July 21, 2018).

12. Although the quote is often attributed to Albert Einstein, its true source is unknown. ALBERT EINSTEIN, THE ULTIMATE QUOTABLE EINSTEIN 474 (ALICE CALAPRICE ED., 2010).

13. Concerns about "mazes of endless litigation" have a long history in American law. *See*, *e.g.*, Fitler v. Fossard, 7 Pa. 540, 542 (1848); ELWOOD MEAD, REPORT OF IRRIGATION INVESTIGATIONS IN CALIFORNIA 182 (1901); Chris Hamby, *Coal Industry's Go-To Law Firm Withheld Evidence of Black Lung, at Expense of Sick Miners*, THE CTR. FOR PUB. INTEGRITY (Oct. 29, 2013), https://www.publicintegrity.org/2013/10/29/13585/coal-industrys-go-law-firm-withheld-evidence-black-lung-expense-sick-miners [https://perma.cc/BD6K-EQLU] (last updated Aug. 6, 2014, 5:53 PM).

14. In NBC v. United States, 319 U.S. 190 (1943), the Court accepted the FCC's determination that the principles of competition and localism fall within the scope of the public interest. In FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978), the Court held that the public interest standard included the goal of the "widest possible dissemination of information from diverse and antagonistic sources" (quoting AP v. United States, 326 U.S. 1, 20 (1945)).

high level of economic competition among owners of broadcast stations across the United States, as well as a vast diversity of viewpoints about national and international issues. The unregulated marketplace falls short, however, in providing local content to citizens of many American communities.[15] The proposal this Article presents accepts the economic and technological environment within which radio and television stations exist, while being readily adaptable to future changes in that environment.[16] The proposal would apply only in situations when market forces have failed to supply adequate competition, diversity, and localism.

Over the past several decades, the FCC has come to rely on theories that assume that economic competition among media outlets is a meaningful proxy for diversity of content and localism. Research has failed to validate such theories, not only leaving many of the FCC's media ownership decisions resting on an empirically unstable foundation that fails to satisfy the judges of the Third Circuit, but also ignoring the fact that the aspect of the media most important to citizens and to democracy is the content, not the ownership.[17]

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15. STEVEN WALDMAN, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 5 (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf [https://perma.cc/EWU6-4E27].

16. As of the end of July 2018, uncertainty reigned in a number of areas relating to economic competition in American broadcasting. A challenge to the FCC's decision to reinstate the UHF "discount" that allows companies which operate UHF television stations to count only half of the households in the stations' coverage areas for purposes of calculating the proportion of American homes reached by a company's stations was under consideration by the Court of Appeals for the D.C. Circuit. *See* Free Press v. FCC, No. 17-1129 (D.C. Cir. 2017). The UHF discount was central to Sinclair Broadcast Group's proposed $3.9 billion purchase of Tribune Media Co.'s forty-two television stations in thirty-three markets. *See* Sinclair & Tribune, MB Docket 17-179, https://www.fcc.gov/transaction/sinclair-tribune [https://perma.cc/3WG8-73C3] (last visited July 21, 2018). Without the UHF discount, Sinclair's purchase of Tribune's stations would enable Sinclair to reach 72% of American households, far exceeding the 39% ownership cap set by Congress. *See* David Vance, *Common Cause Joins Public Knowledge in Requesting FCC Delay Review of Sinclair-Tribune Merger Pending D.C. Circuit Case*, COMMON CAUSE (June 28, 2018), https://www.commoncause.org/media/common-cause-joins-public-knowledge-in-requesting-fcc-delay-review-of-sinclair-tribune-merger-pending-d-c-circuit-case/ [https://perma.cc/YKJ5-797X]. As of late July 2018, the fate of the Sinclair-Tribune deal was uncertain. *See* John D. McKinnon et al., *FCC Moves to Prevent Sinclair-Tribune Deal*, WALL ST. J. (July 17, 2018) at B1, https://www.wsj.com/articles/fcc-chairman-has-serious-concerns-with-sinclair-tribune-deal-1531755740 [https://perma.cc/29R5-TQFD]; Edmund Lee, *Sinclair Deal Is in Doubt as Tribune Reconsiders*, N.Y. TIMES (July 20, 2018) at B6, https://www.nytimes.com/2018/07/19/business/media/sinclair-tribune-fcc.html [https://perma.cc/2K33-PLSC]. Meanwhile, the National Association of Broadcasters asked the FCC to relax rules about the number of radio station one company could own in a local market. *See* David Oxenford, *NAB Asks for Changes in FCC Local Radio Ownership Rules – What's Next?*, BROAD. L. BLOG (June 18, 2018), https://www.broadcastlawblog.com/2018/06/articles/nab-asks-for-changes-in-fcc-local-radio-ownership-rules-whats-next/ [https://perma.cc/6D7U-XY7R].

17. *See* David Pritchard et al., *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy,* 13 COMM. L. & POL'Y 1, 27 (2008) ("It is important to remember that the vital social, political[,] and cultural functions of the media ultimately flow from their content, not from their ownership structure.").

Section II of this Article documents the strong emphasis on locally-produced media content during the first several decades of broadcast regulation in the United States. Section III outlines how a regulatory concern about the structure of media ownership, in individual communities as well as nationally, supplanted the previous focus on content. Section IV examines the relationship between patterns of media ownership and the FCC's principal content goal, diversity. Section V provides detail about the litigation over media ownership rules brought about by the enactment of the Telecommunications Act of 1996. Section VI presents a proposal for a new rule that will survive legal challenge and put an end to the FCC's long-running litigation with Prometheus.

II. THE INITIAL REGULATORY FOCUS ON LOCAL CONTENT

At the time of the passage of the Radio Act of 1927[18] and for several decades thereafter, American broadcasting's regulators not only granted licenses and allocated frequencies but offered broadcasters frequent guidance on the kind of content that would serve the public interest.[19] Cities were thought of as communities rather than media markets. Individuals were conceptualized as citizens in a democracy rather than as consumers in a free-market economy. Broadcasters were expected to use the limited space on public airwaves not in their own private interest, but rather as trustees with licenses to serve the public interest, as a 1929 decision by the Federal Radio Commission (the forerunner of the FCC) demonstrated.

The case, Great Lakes Broadcasting Co. v. FRC,[20] involved three radio stations in the Chicago area that were in conflict over frequencies and hours of operation assigned by the FRC. To evaluate their claims and any similar claims that other license holders might make in the future, the FCC developed a set of criteria to guide stations in meeting their public interest obligations.[21] The criteria encouraged stations to use local talent for locally-produced original programming, and to air informational programming such as news, weather, and religious programs, among other things.[22] Despite these guidelines, which stressed serving local communities with locally originated

18. Radio Act of 1927, 47 U.S.C. § 81 (2012).

19. JAMES BAUGHMAN, TELEVISION'S GUARDIANS: THE FCC AND THE POLITICS OF PROGRAMMING 1958-1967 (1985). *See also* NEWTON N. MINOW, EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST (1964); Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Thomas W. Hazlett & David W. Sosa, *Chilling the Internet: Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35 (1997).

20. Great Lakes Broad. Co. v. Fed. Radio Comm'n, 3 F.R.C. ANN. REP. 32 (1929), *aff'd in part and rev'd in part*, 37 F.2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930).

21. Public Service Responsibility of Broadcast Licensees, *Report*, FCC 95462 FCC (1946).

22. *Id.*; *see also* Victor Pickard, The Battle Over the FCC Blue Book: Determining the Role of Broadcast Media in a Democratic Society, 1945-8, 33 MEDIA, CULTURE & SOC'Y 2 (2011).

programming, in the 1930s many stations turned away from a local approach and became increasingly dependent on national radio networks for programming.[23] The increase in network control was coupled with an agreement among the major radio networks and newspapers to limit the production of radio news, further reducing local content.[24] What little local news and public affairs content radio stations did air often took the form of one-sided commentary that reflected only the opinions and interests of the station owners.[25] Because the FCC deemed such content not to serve the public interest, in 1940 it essentially prohibited editorializing by radio stations.[26] The FCC's decision stated, "Truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably."[27]

In 1941, the FCC issued its *Report on Chain Broadcasting*, adopting a set of regulations that limited networks' control over stations with which they had contracts.[28] One of the practices prohibited by the regulations was unlimited "network option time," which enabled networks to require stations to air network programming up to 24 hours a day.[29] The FCC sharply criticized the practice because it reduced the amount of local content stations produced:

> A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.[30]

The FCC determined that unlimited network control over local station affiliates contravened the public interest.[31] The NBC network challenged the regulations, arguing that the FCC was authorized only to consider technical matters such as frequency allocation and hours of operation.[32] The Supreme Court upheld the FCC's position, saying that the congressional delegation of authority to the FCC required the agency not only to keep the pathways of

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23. BRUCE LENTHALL, RADIO'S AMERICA: THE GREAT DEPRESSION AND THE RISE OF MODERN MASS CULTURE 12 (2007).
24. *See* George E. Lott, Jr., *The Press-Radio War of the 1930s*, 14 J. BROAD. 275, 281 (1970).
25. Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941).
26. *Id.*
27. *Id.*
28. Chain Broadcasting, *Report*, FCC 37-5060 (1941).
29. *Id.*
30. *Id.* at para. 63.
31. *Id.* at para. 30-45.
32. Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

communication open, but also placed a burden upon the FCC to consider the content of what was broadcast.[33]

The Supreme Court's decision strengthened the FCC's confidence in its authority to regulate broadcast content. In response to requests from broadcasters for clarity on how to apply the public interest standard, in 1946 the FCC released the "Blue Book," a set of guidelines for stations to follow to meet their public interest obligations.[34] The Blue Book favored the production of live local programs and programs devoted to the discussion of local public issues.[35] The guidelines also emphasized the desirability of airing unsponsored programs and avoiding excessive advertising.[36] Broadcasters were opposed to several of the provisions in the Blue Book, especially its limitations on advertising and editorializing.[37]

The FCC responded to the broadcasters in 1949, declaring that "one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day."[38] The FCC stated that stations should "devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station."[39] In addition, the FCC adopted what it called the Fairness Doctrine, which allowed editorializing by broadcasters.[40] The Fairness Doctrine consisted of two obligations. The first was that a broadcast licensee had a duty to cover issues of public importance, including "important controversial issues of interest in the community served by the licensees."[41] The second required that a licensee who presented one side of a controversial issue of public importance also had to present contrasting views.[42] The FCC expanded the doctrine in 1967 by adding rules requiring radio and television stations to offer free air time to people who wished to respond to personal attacks or political editorials that a station had aired.[43]

In the mid-1960s, a small radio station in Pennsylvania challenged the FCC's authority to enforce the Fairness Doctrine. The station argued that the doctrine abridged its First Amendment rights to freedom of speech and

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33. *Id.* at 215–16.
34. Public Service Responsibility of Broadcast Licensees, 11 FCC Rcd 1458 (1946).
35. *Id.* at 36-39.
36. *Id.* at 43-47.
37. VICTOR PICKARD, AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM 71-75 (2015).
38. Editorializing by Broadcast Licensees, *Report*, 13 FCC Rcd 1246, 1249 (1949).
39. *Id.*
40. *Id.*; *see also* General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 146 (1985).
41. *See* General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 146 (1985).
42. *Id.*
43. Personal Attacks; Political Editorials, 32 Fed. Reg. 10,303 (1967).

freedom of the press.[44] In 1969 the Supreme Court unanimously disagreed with the station's argument, holding that the free speech rights of broadcasters were secondary to the rights of listeners: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[45]

III. MEDIA OWNERSHIP AS A FOCUS OF REGULATION

Shortly after the decision upholding the Fairness Doctrine, the FCC's interest in content regulation ebbed as it increasingly came to use the level of economic competition in a media market to assess the level of viewpoint diversity and localism broadcast by stations in the market. In 1975, the FCC adopted a so-called "structural" regulation that prohibited future local newspaper/broadcast cross-ownerships.[46] On the surface, the newspaper/broadcast cross-ownership rule did no more than prohibit a certain kind of media ownership. The FCC's explicit justification for the rule, however, was not to increase economic competition in and of itself, but rather to foster viewpoint diversity in communities or, as the FCC was increasingly calling them, markets.[47] Media companies mounted a legal challenge to the newspaper/broadcast cross-ownership rule, noting that many studies showed considerable diversity of viewpoints within the content of commonly-owned newspapers and broadcasting stations.[48] Nonetheless, the Supreme Court once again upheld the FCC.[49] The Court said, "Notwithstanding the inconclusiveness of the rulemaking record, the [FCC] acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[50]

The Supreme Court's validation of the FCC's use of diversity of ownership—in other words, economic competition—as a way to assess viewpoint diversity came at the beginning of an unprecedented era of deregulation in American history.[51] Henceforth, the FCC would ease, if not outright eliminate, many of its content regulations in the belief that structural regulations that encouraged greater economic competition among media

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44. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

45. *Id.*

46. Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1085 (1975). Economic regulation is often called "structural" because it attempts to influence the structure of media markets on the theory that market structure influences media content. Structural factors that political economists believe influence media content include the size of a media company, the amount of direct and indirect competition it has, its level of horizontal and vertical integration, and the extent of the company's reliance on advertising. *See* ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999).

47. Newspaper-cross Ownership Ban, FCC 18110, Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 F.C.C. 2d 1046 (1975).

48. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 794 (1978).

49. *Id.*

50. *Id.* at 796.

51. *See*, *e.g.*, Sam Peltzman et al., *The Economic Theory of Regulation after a Decade of Deregulation,* 1989 BROOKINGS 1 (1989).

owners would lead to content that featured a broader diversity of viewpoints and a stronger focus on stations' local communities. In 1981 newly-elected President Ronald Reagan appointed Mark Fowler to chair the FCC.[52] Fowler openly favored laissez-faire economics over regulations on broadcast content.[53] During Fowler's tenure, the FCC reversed its long-standing "audience first" commitment, stating that regulations on content designed to promote viewpoint diversity limited the free speech of broadcasters, and in turn, reduced the quantity of news and public affairs programming.[54] Fowler's FCC not only allowed companies to own more stations than ever before, but it also limited the enforcement of content regulations such as the Fairness Doctrine,[55] which then it finally abolished.[56] Although the FCC has eliminated most of the content regulations that it had originated, it continues to enforce federal statutes that require or prohibit certain kinds of content.[57] For example, the FCC adopts and administers rules about candidate appearances and advertising on radio and television,[58] about indecency in broadcasting,[59] and about the congressional mandate that television stations serve the educational and informational needs of children.[60]

The FCC's gradual easing of limits on the number of stations individual companies could own was superseded by the Telecommunications Act of 1996, which directed the FCC to allow individual corporations to own large

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52. *Commissioners from 1934 to Present*, FCC, https://www.fcc.gov/general/commissioners-1934-present [https://perma.cc/N6HA-SK8A] (last visited Mar. 10, 2019).

53. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1981).

54. *Id.*

55. Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557 (2001).

56. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

57. 18 U.S.C. § 1464 (indecency regulation); 47 U.S.C. § 303a (Children's Television).

58. 47 U.S.C. §§ 312(a)(7), 315 & 317. *See also* FCC, *Statutes and Rules on Candidate Appearances & Advertising* (Dec. 10, 2015), https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising [https://perma.cc/XV9U-BJD4].

59. Broadcasting Obscene Language, 18 U.S.C. § 1464. ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.") *See also* FCC, *Consumer Guide: Obscene, Indecent and Profane Broadcasts* (Sept. 13, 2017), https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts [https://perma.cc/52E3-94RX].

60. Children's Television Act of 1990, 47 U.S.C. §§ 303(a)-(b) (2006). *See also* Children's Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rulemaking*, 19 F.C.C.R. 22943, para. 2 (2004). In June 2018, the FCC opened a rulemaking procedure to consider easing the requirement that stations broadcast at least three hours every week of programming that serves the educational and informational needs of children. *See* Modernization of Media Regulation Initiative: Children's Television Programming Rules, *Notice of Proposed Rulemaking*, MB Docket Nos. 17-105 & 18-202 (2018), https://docs.fcc.gov/public/attachments/DOC-351864A1.pdf [https://perma.cc/E2EZ-3LLM].

numbers of radio and television stations nationwide.[61] A firm could own as many stations as it wanted, subject only to limits on the number of radio stations in any individual market (up to eight radio stations in a market, depending on the number of other commercial stations in the community[62]) and on the percentage of the national television audience that a company's television stations could reach (the law initially set the upper limit at 35% of the national audience; the limit has since been increased to 39%[63]). The effect of these changes was a shift in the focus of American broadcasting from a business model based on locally-produced content to a business model based on national production.

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61. Telecommunications Act of 1996, Pub. L. No. 104-104 (202(b) contains the radio limits: "(b) LOCAL RADIO DIVERSITY- (1) APPLICABLE CAPS- The [FCC] shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that-- (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market." Section 202(c) contains the television limits: "(c) TELEVISION OWNERSHIP LIMITATIONS- (1) NATIONAL OWNERSHIP LIMITATIONS- The [FCC] shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)-- (A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and (B) by increasing the national audience reach limitation for television stations to 35 percent. (2) LOCAL OWNERSHIP LIMITATIONS- The [FCC] shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market. (d) RELAXATION OF ONE-TO-A-MARKET- With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the [FCC] shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity. (e) DUAL NETWORK CHANGES- The [FCC] shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of-- (1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are `networks' as defined in section 73.3613(a)(1) of the [FCC] regulations (47 C.F.R. 73.3613(a)(1)); or (2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service)").

62. 47 C.F.R. § 73.3555(a)(1)(i) (2016).

63. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629(1) (2004).

The Telecommunications Act required the FCC to review its ownership rules every two years (since increased to every four years[64]) to "determine whether any of such rules are necessary in the public interest as the result of competition."[65] The implication was that the competition among media conglomerates enabled by the act would eliminate the need for at least some of the rules that placed limits on media ownership.

The requirement of frequent reviews of ownership rules placed the FCC in a difficult position. On the one hand, the Communication Act of 1934 required the FCC to ensure that stations served the public interest; numerous court decisions had upheld its authority to take bold measures, including requiring stations to air a variety of viewpoints and placing limits on media ownership, to do so.[66] On the other hand, the Telecommunications Act of 1996 seemed to equate the public interest with minimal limits on media ownership. The FCC reacted by adopting a regulatory approach that tried to balance its three policy objectives of competition, localism, and diversity simultaneously.[67] Although the agency clearly preferred regulating ownership rather than regulating content directly, it continued to pay lip service to the idea of localism through a lengthy, though ultimately fruitless, rulemaking proceeding,[68] while at the same time claiming that content diversity was the most important of the three policy goals.[69]

In June 2003, responding to the Telecommunications Act's requirement of regular reviews of its ownership rules, the FCC released a revised set of rules that relaxed media ownership limits.[70] Prometheus Radio Project and others challenged the less stringent limits.[71] In June 2004 the U.S. Court of Appeals for the Third Circuit blocked implementation of most of the rules

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64. *Id.* § 629(3). In 2004, Congress revised the then biennial review requirement to require such reviews quadrennially. Congress also eliminated the national television multiple ownership rule from the quadrennial review requirement. 2004 Consolidated Appropriations Act, 118 Stat. at 3. 2006 Quadrennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 23 F.C.C.R. 2010.

65. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h).

66. NBC v. United States, 319 U.S. 190, 225-226 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 395 (1969).

67. 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003).

68. Broadcast Localism, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324 (2008) (No action was taken, and the proceeding was concluded).

69. *See*, *e.g.,* 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking,* 18 F.C.C.R. 13620, para. 19 (2003) [hereinafter *2002 Biennial Regulatory Review*] ("a diverse and robust marketplace of ideas is the foundation of our democracy").

70. *Id.* at para. 501.

71. Prometheus Radio Project v. FCC, 373 F.3d 372, 388-389 (3d Cir. 2004) (Prometheus I).

because the FCC had failed to provide an adequate basis for its decisions, and the matter was remanded to the FCC.[72]

The judges of the Third Circuit could not have imagined that their court would still be dealing with the same issues and the same litigants more than fourteen years later.

IV. A FLAWED UNDERSTANDING OF DIVERSITY

Since the 1940s, the FCC has regularly linked the public interest standard that provides the foundation for broadcast regulation in the United States[73] with the idea that broadcast news and information about politics and public affairs is vital to representative democracy.[74] Unfortunately, neither the Communications Act nor the FCC has defined the concept of "public interest" in any concrete way, leading to challenges that the standard is unconstitutionally vague. Although the Supreme Court has rejected such challenges,[75] the FCC has come to rely on three policy goals less abstract than "public interest" to guide regulation of broadcasting—competition, diversity, and localism.[76] The FCC explicitly renewed its commitment to those goals in its November 2017 Report and Order.[77]

The FCC attempts to foster the goal of competition through restrictions on the proportion of the national television audience that any one owner's stations can reach, as well as by limits on the number of television and radio stations a single entity may own in individual media markets.[78] The economic competition that results from the FCC's ownership rules is presumed to lead to content diversity both nationally and locally, as well as greater localism.[79]

Although the FCC has long considered diversity to be an important policy goal, the concept applies so broadly as to be meaningless. A widely cited article published in 1999 identified eight different definitions of diversity used somewhat interchangeably by media policymakers.[80] One

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72. *Id.* at 435.

73. Communications Act of 1934, 47 U.S.C. §§ 151–1473 (2016). On the history of the public interest standard in regulation of broadcasting in the United States, *see* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605 (1998); Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813 (2008); Drew Simshaw, *Survival of the Standard: Today's Public Interest Requirement in Television Broadcasting and the Return to Regulation,* 64 FED. COMM. L.J. 401 (2012).

74. *E.g.*, The Mayflower Broadcasting Corp., 8 F.C.C. 333, 340; Public Service Responsibilities of Broadcast Licensees, 11 F.C.C. 1458.

75. *E.g.*, NBC v. United States, 319 U.S. 190, 225-226 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 395 (1969).

76. *MBOR Order*, 32 FCC Rcd at para. 15.

77. *Id.*

78. Reconsideration and Notice of Proposed Rulemaking, *Order*, 32 FCC Rcd 9802, para. 1 (2017).

79. *Id.*

80. Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7 (1999). *See also* Benjamin W. Cramer, *Unasked Questions and Unquestioned Answers: The Perils of Assuming Diversity in Modern Telecommunications Policy*, 17 COMM. L. & POL'Y 265 (2012).

scholar expressed concern about "the fetishization of diversity as a policy principle."[81] Another noted that the FCC has "usually soft-pedaled the conceptual difficulties associated with diversity, sticking to generic praise of the policy."[82] Still another scholar concluded that "no one has been able to develop a working definition of diversity—not the content providers, not the policymakers, not the scholars, and not the courts."[83] Even the D.C. Court of Appeals observed that "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."[84]

When policymakers talk about means of regulation to foster content diversity, they frequently use an economic metaphor—the "marketplace of ideas."[85] Despite the fact that judges and policymakers fail to define the marketplace-of-ideas concept clearly or use it in a consistent fashion,[86] the metaphor has an undeniable rhetorical power that leads to an antitrust model of regulating the marketplace. Such a model confuses the social goal of diverse media content with the economic goal of fair market competition, creating "an incoherent regulatory standard ripe for judicial reversal."[87]

The FCC's whole-hearted embrace of the marketplace-of-ideas metaphor led it to view regulation for viewpoint diversity through the lens of antitrust logic; more competition among owners would inevitably produce a greater diversity of viewpoints, ensuring competition in the marketplace of ideas. Economic theory describes a well-performing market as one in which the output of a product approaches the output that would be attained under ideal conditions of competition.[88] Monopoly is undesirable because it leads to "suboptimal output."[89] However, the normative standards of economic markets "simply do not work well with the production of viewpoints," one scholar noted.[90] He added: It seems absurd to talk about a "well-performing"

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81. Sandra Braman, *The Limits of Diversity*, *in* MEDIA DIVERSITY AND LOCALISM: MEANING & METRICS 139, 139 (Philip M. Napoli ed., 2007).

82. Robert B. Horowitz, *On Media Concentration and the Diversity Question*, 21 THE INFO. SOC'Y 181, 183 (2005).

83. MARA EINSTEIN, MEDIA DIVERSITY: ECONOMICS, OWNERSHIP AND THE FCC 6 (2004).

84. Nat'l Citizens Comm. for Broad. v. FCC, 555 F.2d 938, 961 (D.C. Cir. 1977).

85. The marketplace of ideas metaphor was introduced into American jurisprudence in a famous dissent by Justice Oliver Wendell Holmes, who wrote "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

86. For an overview of how the Supreme Court of the United States has used the marketplace of ideas metaphor *see* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996). On the FCC's use of the metaphor, *see* Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMM. 151 (1999).

87. Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1547 (2008).

88. R. JAYARAM & NAMITA R. KOTWANI, INDUSTRIAL ECONOMICS AND TELECOMMUNICATION REGULATIONS 53-55 (1st ed. 2012).

89. *Id.* at 1563.

90. *Id.*

marketplace of ideas. While more viewpoints are perhaps better than fewer, the market's efficiency standard does not tell you when there are "enough" viewpoints, given that both their cost of production and utility is obscure.[91]

Perhaps because media scholars' understanding of media content is grounded less in abstract theory and more in empirical studies of media production and consumption, they readily recognize the shortcomings of economic theory as a means of understanding media behavior. As Yan and Napoli wrote, "Economics alone . . . is not sufficient for explaining the behavior of media organizations, which operate simultaneously as both economic and political/cultural institutions."[92]

The FCC has said that the principal goal of its ownership rules is to foster diversity of content.[93] It is far from clear, however, that diversity of ownership produces diversity of content either locally or nationally. In fact, concentration of ownership in a media market may produce more programming diversity and more viewpoint diversity in a market than would a greater number of owners. For many, such a statement is rank heresy. But it fits the evidence quite well.

The argument that fewer owners may actually produce *more* diversity—more programming formats, more viewpoints—has a long history. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit outlined the argument in a 1992 decision; his reasoning merits quotation at length:

91. *Id*. at 1563-64.

92. Michael Zhaoxu Yan & Philip M. Napoli, *Market Competition, Station Ownership, and Local Public Affairs Programming on Broadcast Television*, 56 J. COMM. 795, 799 (2006).

93. *See*, *e.g.*, Review of the [FCC]'s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Rulemaking*, 17 F.C.C.R. 18503, 18518 (2002).

> It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity. If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group. For that would be the strategy that maximized the size of the station's audience. Suppose, as a simple example, that there were only two television broadcast frequencies (and no cable television), and that 90 percent of the viewers in the market wanted to watch comedy from 7 to 8 p.m. and 10 percent wanted to watch ballet. The monopolist would broadcast comedy over one frequency and ballet over the other, and thus gain 100 percent of the potential audience. If the frequencies were licensed to two competing firms, each firm would broadcast comedy in the 7 to 8 p.m. time slot, because its expected audience share would be 45 percent (one half of 90 percent), which is greater than 10 percent. Each prime-time slot would be filled with "popular" programming targeted on the median viewer, and minority tastes would go unserved. Some critics of television believe that this is a fair description of prime-time network television.[94]

Media scholars give the label "rivalrous imitation" to the phenomenon Posner described. A leading media researcher noted, "Strong competition for audiences across a TV network's schedule has resulted in rivalrous imitation, which, in turn, has led to homogeneous content."[95] The phenomenon has been noted in radio as well as in television. In Milwaukee, Wisconsin, for example, two powerful news-talk AM stations compete vigorously for audience share. One station, WTMJ, features locally-produced news and opinion programming from 5 a.m. until 6 p.m. each weekday.[96] The other station, WISN, also features local production and a similar weekday schedule except for three hours of Rush Limbaugh's nationally syndicated program every day.[97] The intense competition between Milwaukee's two news-talk AM stations, each owned by a different national media company, might suggest that one of the stations would highlight politically conservative programming, while the other would target a more liberal audience. But that is not the case. Both stations have had a strong conservative orientation for at least two

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94. Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1054 (7th Cir. 1992).

95. John Dimmick, *Media Competition and Levels of Analysis*, *in* HANDBOOK OF MEDIA MANAGEMENT AND ECONOMICS 355 (Alab B. Albarran et al. eds., 2006).

96. WTMJ's programming schedule can be found here: https://www.wtmj.com/schedule [https://perma.cc/EGF4-WL88] (last visited July 21, 2018).

97. WISN's programming schedule can be found here: https://newstalk1130.iheart.com/schedule/ [https://perma.cc/ML76-TAPC] (last visited July 21, 2018).

decades,[98] despite the fact that Milwaukee County is overwhelmingly Democratic.[99] The situation is an excellent example of how intense competition leads to rivalrous imitation that ignores the interests of a large segment of the local audience.

In contrast, concentration of ownership in a community avoids rivalrous imitation because the commonly-owned media outlets are not rivals. Staying with the Milwaukee example demonstrates the point. While the two powerful AM stations mentioned in the previous paragraph compete for listeners interested in locally-produced conservative talk radio—a large but limited segment of the audience—the cluster of six local stations owned by iHeartRadio (formerly Clear Channel) casts a much broader net. As of July 21, 2018, the conglomerate's Milwaukee stations targeted the audience for conservative talk (WISN-AM), sports (WOKY-AM), top 40 music (WRNW-FM), country music (WMIL-FM), urban contemporary music (WKKV-FM), and oldies (WRIT-FM).[100] In short, a single media owner's six different stations provided considerable programming diversity in Milwaukee. Research has also documented viewpoint diversity in the political news and opinion content disseminated by local newspaper-television-radio cross-ownerships during the 2000 presidential campaign in Chicago, Dallas, and Milwaukee[101] and during the 2004 presidential campaign again in Chicago and Milwaukee, as well as in Dayton, Ohio.[102]

Meanwhile, in Wisconsin's capital city, Madison, national radio conglomerate Clear Channel (now iHeartRadio) owned and operated two stations with news-talk formats from 2004 to 2016. Although historically almost all of Clear Channel's news-talk programming has been conservative,[103] it made no sense for Clear Channel to compete with itself by running two conservative news-talk stations in Madison. Accordingly, while the stations shared a newsroom and news production staff, one station (WIBA-AM) focused on conservative talk, while the other (WXXM-FM)

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98. Christopher Terry, *Milwaukee's Radio News Trinity: Clear Channel, Journal Communications and Wisconsin Public Radio and Coverage of the 2004 Election* (2005).

99. For example, although Republican candidate Donald Trump won the 2016 Presidential contest in Wisconsin, in Milwaukee County he lost to Democratic candidate Hillary Clinton by a large margin, with Clinton getting 66.4% of the county's vote to Trump's 29%. *2016 Wisconsin Presidential Election Results*, POLITICO (Dec. 13, 2016), https://www.politico.com/2016-election/results/map/president/wisconsin/ [https://perma.cc/SKJ3-3C3A]. The last time Milwaukee County voted for the Republican candidate for President was 1956. David Leip, *Atlas of U.S. Presidential Elections*, https://uselectionatlas.org/RESULTS/ [https://perma.cc/94HL-69F5] (last visited July 21, 2018).

100. Our Stations, IHEARTMEDIA, https://www.iheartmedia.com/iheartmedia/stations?city=Milwaukee [https://perma.cc/8XYR-NGFJ] (last visited July 21, 2018).

101. David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 FED. COMM. L. J. 31 (2001).

102. David Pritchard et al., *supra* note 17, at 27.

103. *See generally* ALEC FOEGE, RIGHT OF THE DIAL: THE RISE OF CLEAR CHANNEL AND THE FALL OF COMMERCIAL RADIO (2008).

highlighted progressive/liberal talk.[104] Overall, a considerable body of research on different forms of media in many different media markets across the United States fails to support the assumption that greater competition among media owners leads to greater diversity of content.[105]

The previous paragraphs' examples of programming and viewpoint diversity within commonly-owned media in individual markets undermine the longstanding contention of the FCC that one owner equals one media "voice."[106] Competition between media owners both nationally and locally often reduces content diversity, while commonly-owned media outlets often provide a broad range of programming and/or viewpoint diversity. One of the reasons that the FCC has been unable to extricate itself from the mire of litigation over media ownership rules is that it has been reluctant to accept this obvious reality of the modern media environment.

V. THE FCC AND THE COURTS

For most of the 20th Century, courts gave considerable deference to the decisions of the FCC in matters of broadcast regulation. The Supreme Court of the United States led the way, regularly upholding the FCC's decisions about broadcasting in the face of numerous challenges. To cite just a few examples from the past fifty years, the Court upheld the constitutionality of the FCC's Fairness Doctrine,[107] its ruling that broadcasters were not required to accept editorial advertisements,[108] its ban on local cross-ownerships involving daily newspapers and broadcast stations,[109] its decision not to consider proposed changes in entertainment programming when it considered whether to renew a station's license,[110] its interpretation of Section 312 (a) (7) of the Communications Act,[111] and its policies that gave preference to owners from racial and ethnic minority groups.[112]

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104. Christopher Terry, *Reviewing the 2010 Review: Radio News Production and a Three Market Data Solution* 1 (2013).

105. *See*, *e.g.*, PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS: A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY (2003); Jeffrey Milyo et al., *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (2007); Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study,* 61 STAN. L. REV. 781 (2009); Adam D. Rennhoff & Kenneth C. Wilbur, *Market-Based Measures of Viewpoint Diversity*, 26 INFO. ECON. & POL'Y 1 (2014).

106. *See*, *e.g.*, *FCC Broadcast Ownership Rules*, FCC (Dec. 27, 2017), https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules [https://perma.cc/3TCM-P7DL] (defining a "media voice" as an independently-owned full power TV station or radio station, a major newspaper, or a cable system in a given market).

107. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969).

108. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

109. FCC v. National Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

110. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

111. CBS v. FCC, 453 U.S. 367 (1981).

112. Metro Broad. v. FCC, 497 U.S. 547 (1990).

For the Supreme Court during this era, siding with the FCC was something of a no-brainer, as it explained in 1981: "The [FCC] is the experienced administrative agency long entrusted by Congress with the regulation of broadcasting," and thus its construction of the Communications Act is "entitled to judicial deference" unless there are compelling reasons to believe that an FCC decision was arbitrary and capricious or at odds with the language and/or the purpose of the statute.[113]

But then the Telecommunications Act of 1996 was enacted.[114] The statute ended the era of judicial deference to the FCC by shifting the burden of proof with respect to media ownership rules. Before 1996, FCC action on ownership rules could be overturned only if a challenger could show that a decision of the FCC had been "arbitrary and capricious."[115] The Telecommunications Act, in contrast, required the FCC to review each of its media ownership rules and to "determine whether any of such rules are necessary in the public interest as the result of competition."[116] The statute added: "The [FCC] shall repeal or modify any regulation it determines to be no longer in the public interest."[117] In other words, parties challenging FCC actions with respect to media ownership no longer had to show that a rule was arbitrary or capricious. Instead, the FCC had to affirmatively demonstrate that the rule was necessary for the public interest.

The new standard made a huge difference. In 2001 and 2002, the Court of Appeals for the D.C. Circuit not only overturned a cable-broadcasting cross-ownership rule,[118] but also sent three other rules (the national cable limits,[119] the national television ownership caps,[120] and the local television ownership rule[121]) back to the FCC for justification in light of the standards set forth in the Telecommunications Act.

The Prometheus line of cases, which were assigned to the Third Circuit by lot after challenges to the FCC's revised media ownership rules were filed in multiple circuits in 2003,[122] illustrated the FCC's difficulty in adapting to an environment where the burden of proof fell on the FCC rather than on parties who challenged its actions. Applying the new standard, the Third Circuit's Prometheus I opinion contained several comments harshly critical of certain FCC decisions. Among them:

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113. *CBS*, 453 U.S. at 390.

114. Telecommunications Act of 1996, Pub. L. No. 104-104.

115. Fox Television Stations v. FCC, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

116. Pub. L. No. 104-104 § 202(h).

117. *Id.* The act initially required the FCC to review each of its rules every two years. In 2004 Congress changed the requirement to a review every four years. Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (amending secs. 202(c) and 202(h) of the Telecommunications Act of 1996).

118. *Fox Television Stations*, 280 F.3d at 1049–53.

119. Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1144 (D.C. Cir. 2001).

120. *Fox Television Stations*, 280 F.3d at 1040–44.

121. Sinclair Broad. Group v. FCC, 284 F.3d 148, 169 (D.C. Cir. 2002).

122. Prometheus Radio Project v. FCC, 373 F.3d 372, 388-389 (3d Cir. 2004) (Prometheus I).

- "(T)he [FCC]'s Cross-Media Limits employ several irrational assumptions and inconsistencies."[123]
- "(T)he [FCC] gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results."[124]
- "A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality."[125]
- "No evidence supports the [FCC]'s equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share. The modified rule is similarly unreasonable in allowing levels of concentration to exceed further its own benchmark for competition . . . a glaring inconsistency between rationale and result."[126]

Writing after the initial Prometheus decision (but before Prometheus II), a law professor who had been an attorney with the FCC observed that "courts, in rejecting virtually every FCC media ownership regulation in recent years, have recoiled at the FCC's inconsistent, unprincipled answers."[127]

A few years later, the Prometheus II[128] decision was scathing with respect to what the court saw as the FCC's procedural laxness. For example:

- "(T)he procedures followed by the [FCC] were irregular."[129]
- "While the new rule varies limits depending on characteristics of markets—specifically, market size and the number of media voices—it was not clear from the *FNPR* [authors' note: Further Notice of Proposed Rulemaking] which characteristics the [FCC] was considering or why."[130]
- "The *FNPR* also did not solicit comment on the overall framework under consideration, how potential factors might operate together, or how the new approach might affect the FCC's other ownership rules. These were significant omissions."[131]
- "Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership . . . the [FCC] has in

123. *Id.* at 402.
124. *Id.* at 404.
125. *Id.* at 408.
126. *Id.* at 420.
127. Adam Candeub, *supra* note 89, at 1551.
128. Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*).
129. Prometheus Radio Project v. FCC, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*).
130. *Id.* at 450.
131. *Id.*

> large part punted yet again on this important issue . . . This is troubling . . . ."[132]

The Third Circuit's patience was wearing thin by the time it decided *Prometheus III*[133] in 2016. After noting that nearly a decade had passed since the [FCC] had last completed a review of its broadcast ownership rules, an exasperated court wrote:

> Although federal law commands the [FCC] to conduct a review of its rules every four years, the 2006 cycle is the last one it has finished; the 2010 and 2014 reviews remain open. Several broadcast owners have petitioned us to wipe all the rules off the books in response to this delay—creating, in effect, complete deregulation in the industry. This is the administrative law equivalent of burning down the house to roast the pig, and we decline to order it. However, we note that this remedy, while extreme, might be justified in the future if the [FCC] does not act quickly to carry out its legislative mandate.[134]

The court pointed out that the FCC's delaying "keeps five broadcast ownership rules in limbo."[135] As an example, the court noted that the 1975 ban on local cross-ownership of daily newspapers and broadcast stations remained in effect even though the FCC had determined more than a decade earlier that the ban was no longer in the public interest.[136] The delay in justifying a change in the rule "has come at significant expense to parties that would be able, under some of the less restrictive options being considered by the [FCC], to engage in profitable combinations."[137] The court also observed that the FCC's delay "hampers judicial review because there is no final agency action to challenge."[138]

The FCC's Report and Order in November 2017 represented final agency action. It abolished several ownership rules, including the Newspaper/Broadcast Cross-Ownership Rule,[139] the Radio/Television Cross-Ownership Rule,[140] and the Television Joint Sales Agreement Attribution Rule.[141] In addition, the Report and Order modified the Local Television

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132. *Id.* at 471–472.
133. Prometheus Radio Project v. FCC, 824 F.3d 33, 37 (3d Cir. 2016) (*Prometheus III*).
134. *Id.*
135. *Id*. at 51.
136. 2006 Quadrennial Regulartory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order, 23 FCC Rcd 2010(3), para. 13.
137. *Id.* at 52.
138. *Id.*
139. FCC Modernizes Broadcast Ownership Rules, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd 9802, para. 2.
140. *Id*. at 9824.
141. *Id*.

Ownership Rule by eliminating the requirement that a television market have at least eight independently-owned television stations before any entity may own two television stations in that market.[142] Prometheus Radio Project's challenge to the FCC's broad deregulation of media ownership all but ensures a *Prometheus IV* decision, with no guarantee that it will be the last in the series.

VI. LOCALISM AS A REMEDY FOR MARKET FAILURE

The FCC has been trapped in lengthy litigation with Prometheus Radio Project for two related reasons. First, after decades of deference from the courts prior to the passage of the Telecommunications Act of 1996, the FCC has had a difficult time adapting to the post-Telecommunications Act reality in which it has the burden of proving that media ownership rules serve the public interest, a major shift from the previous requirement that challengers could succeed only if they demonstrated that an ownership rule was arbitrary and capricious.[143] Second, the FCC has based most of its ownership rules upon economic theories that assume that content characteristics such as diversity and localism can be inferred from patterns of ownership. Because such theories lead to inaccurate descriptions of the relationship between media ownership structures and media content,[144] they fail to provide an empirically sound basis for the required public interest justification for the FCC's ownership rules. The FCC will not be able to extract itself from the *Prometheus* line of litigation until it stops depending on theories that prevent it from gaining a true understanding of competition, diversity, and localism in the modern media environment.

This Article's proposal for helping the FCC find its way out of the labyrinth is based on an uncomplicated chain of logic:

1. Since the 1920s, broadcast stations in the United States have been required to serve the public interest, convenience, and necessity.[145]
2. The FCC has been given the responsibility for infusing the vague phrase "public interest" with concrete meaning, so that it can serve as a regulatory standard.[146]
3. The FCC for decades has defined the public interest in terms of three concrete policy objectives—competition, diversity, and localism.[147]
4. The Telecommunications Act of 1996 requires the FCC to review its ownership rules in the context of the public interest (i.e., in the context of competition, diversity, and localism), allowing such rules

142. *Id.*
143. *See supra* notes 115-24 and accompanying text.
144. *See supra* notes 97-109 and accompanying text.
145. The Radio Act of 1927 §§ 9, 11.
146. FCC v. Pottsville Broad., 309 U.S. 138 (1940).
147. *2002 Biennial Regulatory Review*, 18 F.C.C.R. 13620, para. 8; cited with approval in 373 F.3d at 386.

only when the FCC can demonstrate that they are needed because competitive market forces have failed to serve the public interest.[148]

5. The modern environment—including not only broadcast content but also content from print, cable, satellite, and web-based outlets—is characterized by vigorous economic competition and a broad diversity of viewpoints about a vast range of topics of national and international interest. Accordingly, the FCC's November 2017 Report and Order abolishing or substantially modifying ownership rules related to competition and diversity was consistent with the regulatory standard of the Telecommunications Act because market forces were achieving the policy goals of competition and diversity.[149]
6. Localism was the loser in the FCC's November 2017 Report and Order. The satellite, cable, and web-based outlets that provide so much competition and viewpoint diversity on national and international subjects provide very little content about local communities outside of the largest metropolitan areas.[150] The FCC's assumption that greater economic competition among media outlets will result in a greater amount of content focused on communities served by radio and television stations is not empirically valid, especially in an era when fewer and fewer stations are locally-owned and operated.[151]
7. The unavoidable conclusion is that in many small and medium-sized American communities, market competition among media outlets is not fostering localism. If the FCC continues to consider localism to be a fundamental component of the public interest, it has an obligation to remedy this market failure with appropriate regulations.

The remainder of this Section will (a) establish the continued importance of media localism, (b) present a proposal for ensuring localism in broadcasting, and (c) consider possible objections to the proposal.

A. Media Localism

In the first few decades of regulation, the regulators actualized the concept "public interest" largely in terms of localism, especially the broadcast of locally-produced content about news and events in a station's home community.[152] Over time, the FCC's vision of what constituted the public interest evolved into what an FCC commissioner called the "three pillars of

148. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h).
149. *See supra* notes 141-45 and accompanying text.
150. Philip M. Napoli et al., *Local Journalism and the Information Needs of Local Communities*, 11 JOURNALISM PRACTICE 373-395 (2017).
151. *Local TV News Fact Sheet*, PEW RES. CTR. (July 12, 2018), http://www.journalism.org/fact-sheet/local-tv-news/ [https://perma.cc/2EYQ-YJ8V].
152. *See supra* notes 18-34 and accompanying text.

the public interest"—competition, diversity, and localism.[153] In recent decades, unfortunately, the FCC has focused far more on competition (via rules about the economic structure of media markets) and various forms of diversity than on localism. In 2015, one scholar wrote that localism "has been the least understood and the subject of the least amount of research" of the FCC's policy goals.[154]

The FCC's neglect of localism limits its understanding of the relationship between broadcasting and democratic processes in the United States, whose citizens get their news more from local television than from any other source.[155] Locally-produced news and public affairs content is crucial because local government has always been more important in the United States than in any other major country.[156] In the first half of the nineteenth century, Tocqueville saw strong local government as an essential foundation of democracy in America.[157] More recently, longtime Congressman Thomas P. "Tip" O'Neill, Jr., of Massachusetts—speaker of the U.S. House of Representatives from 1977 to 1987—famously noted that "all politics is local."[158]

Democracy requires informed citizens, but as the journalistic workforce shrinks, fewer and fewer stories are covered.[159] The effect was apparent in 2011, when a federal study about local journalism noted that the "shortage of reporting manifests itself in invisible ways: stories not written, scandals not exposed, government waste not discovered, health dangers not identified in time, local elections involving candidates about whom we know little."[160]

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153. Michael J. Copps, *Remarks to the Alliance for Community Media and the New America Foundation* (Oct. 11, 2011).

154. *See* Danilo Yanich, *Local TV, Localism, and Service Agreements*, 28 J. MEDIA ECON 162, 163 (2015). *See also* Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL'Y STUD J. 372, 372 (2001).

155. *Local TV News Fact Sheet*, *supra* note 153.

156. Robert T. Gannett, *Tocqueville and Local Government: Distinguishing Democracy's Second Track*, 67 REV. POL 721 (2005).

157. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed., George Lawrence trans., Harper & Row, 1988) (1835).

158. TIP O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME (1994).

159. Employment in American newspapers dropped from 424,000 people in 2000 to 183,300 in mid-2016, a decline of roughly 56%. Paul Farhi, *The City that Never Sleeps Finds that It's Running out of Reporters to Report*, Wash. Post (July 23, 2018), https://www.washingtonpost.com/lifestyle/style/the-city-that-never-sleeps-finds-that-its-running-out-of-reporters-to-report/2018/07/23/d4c9410e-8e8f-11e8-bcd5-9d911c784c38_story.html?utm_term=.50c43bfde03e [https://perma.cc/S23N-JG9Q].

160. WALDMAN, *supra* note 15, at 30. *See also* Paul Farhi, *What happens to localnNews when there is no local media to cover it?*, WASH. POST (July 17, 2017), https://www.washingtonpost.com/lifestyle/style/what-happens-to-local-news-when-there-is-no-local-media-to-cover-it/2017/07/17/84e0692c-4649-11e7-98cd-af64b4fe2dfc_story.html?utm_term=.251328923956 [https://perma.cc/F5WD-ELLS].

B. Requiring Localism

Despite the abundance of diverse content on topics of national and international scope in the media environment, satellite, cable, and web-based media outlets do not provide diverse content about local issues in most American communities.[161] The market's failure to furnish such crucially important content creates an obligation for the FCC to intervene with rules requiring radio and television stations to (a) adopt Internet-based systems of community ascertainment, and (b) broadcast at least three hours of locally-produced programming each week. Such requirements would not only bring the policy goal of localism to life throughout the United States, but they would also provide a pathway out of the bog of the long-running *Prometheus* line of cases.

The proposed community ascertainment requirement would take a form somewhat different from the ascertainment mandate the FCC adopted in 1971, when it began requiring radio and television stations to engage in regular ascertainment of the "problems, needs, and interests" of the communities they were licensed to serve.[162] Although the ascertainment process provided an important connection between stations and local citizens, the requirement was dropped in the 1980s when the FCC moved into deregulatory mode.[163]

With fewer and fewer stations being locally-owned, ensuring that connection becomes more and more important. The community meeting style of ascertainment of the 1970s was sometimes seen as costly and cumbersome, especially for independent owners and operators of smaller broadcast groups. In the broadband era, however, the FCC could require that stations use a system that allows citizens to communicate with one of their local stations through the station's existing website. Stations operated from out of market would then have a line of communication to the local audiences they are licensed to serve. This kind of online ascertainment system could be deployed at minimal cost and effort, with communications from citizens being

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161. Danny Hayes & Jennifer L. Lawless, *The Internet Isn't Saving Local News. Here's How That's Hurting Democracy.*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/13/the-internet-isnt-saving-local-news-heres-how-thats-hurting-democracy/?utm_term=.4900cfb37083 [https://perma.cc/RG8U-SURX]. *See also* Adam Hersh, *Slowing Down the Presses: The Relationship Between Net Neutrality and Local News*, CIS (Dec. 2017), 3 ("The most serious threat to local news in a world without net neutrality would occur incidentally, as the collateral damage of a regime that favors large, established online players and makes it harder for new entrants to break through."). The FCC's elimination of net neutrality rules became effective in June 2018. FCC Releases Restoring Internet Freedom Order, *Declaratory Ruling, Order, Report and Order*, 33 FCC Rcd 311 (2018).

162. Primer on Ascertainment of Community Problems by Broadcast Applicants, *Report and Order*, 27 F.C.C. 2d 650, 682-83 (1971).

163. Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 F.C.C. 2d 1076 (1984).

maintained as part of a station's public file, accessible to all via the FCC's website.

Because the essence of localism is content, the FCC should also require radio and television stations to broadcast at least three hours of locally-produced content each week. The programming could take any of many forms (e.g., local news, high-school sports, city council meetings, audience-participation shows). Stations would not be required to produce the content themselves; they could satisfy the requirement by broadcasting local content produced by others.

The requirement to devote a minimum of three hours (of the 168 hours in a week) to locally-produced content would be akin to the current requirement that broadcast television stations air at least three hours a week of educational programming for children.[164] Many radio and television stations already have more than three hours of locally-produced programming on their regular schedules. Those that do not—for example, stations being operated remotely—would have to identify local sources of programming for the local audiences that they are licensed to serve.

While informational or public affairs programming would be most likely to meet the FCC's policy goals, First Amendment considerations would prevent the FCC (or any other public entity) from regulating the content of the locally-produced programming. Stations would be free to choose whatever local content they judged most appropriate. Stations might seek locally-produced content that is consistent with their regular programming. A remotely-programmed country music radio station, for example, could satisfy the proposed requirement by broadcasting three hours of locally-produced country music each week.

Interestingly, the massive consolidation of media ownership since the passage of the Telecommunications Act of 1996 makes this proposal less burdensome than it would have been before 1996. The FCC could develop the rule so that it applies across commonly-owned radio and television stations in each market. In other words, rather than each station in a commonly-owned local cluster of stations being forced to produce its own programming, the FCC could allow a cluster to satisfy the requirement by having one of its stations broadcast all of the cluster's required locally-produced programming. If a company owned eight stations in a market, for example, a single station producing 24 hours of local content each week would satisfy the requirement for all eight stations.

Possible alternatives to the market failure that is at the root of this Article's localism proposal might include greater regulatory focus on public-access channels on local cable systems and/or greater resources for local public radio and television stations. With respect to cable public-access channels, current federal law allows, but does not require, local franchising authorities to require cable operators to set aside channels for public,

164. Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. III 1991)).

educational, or governmental use.[165] However, the public-access channels on cable systems tend to be underutilized, often featuring amateur programming of uncertain quality. Optimizing their use in various ways could conceivably promote localism,[166] though only large, politically-progressive metropolitan areas seem to be willing to devote the resources needed to produce high-quality local programming on public-access channels.[167]

Victor Pickard has argued that the solution to the kind of market failure we have identified is to direct additional resources to public media.[168] This idea is not without merit. However, in the current regulatory environment, the premise that additional resources for public media constitutes a sufficient response to the market's failure to provide adequate localism is both ideological and idealistic.

The FCC and many media reform advocates claim to seek a robust and diverse media environment featuring a broad range of content. Unfortunately, debate over media ownership policy has become the realm of administrative law nerds arguing over measures of consolidation, the legitimacy of "discounts" for certain sections of spectrum, or the levels of acceptable ownership limits. Little attention has been paid to serving communities with locally-produced content.

VII. CONCLUSION

Overall, the FCC's attempts to promote localism via restrictions on media ownership have failed. Some may be nostalgic for the days of direct content regulation that characterized much of the first five decades of American broadcast regulation, but a better solution is this Article's proposal for an uncomplicated quantitative requirement for locally-produced content that leaves decision making about the format and structure of the programming to the licensee. The FCC's long-standing focus on economic competition implemented through ownership limits has restricted its ability to achieve important goals, including increasing the quantity and quality of local news and public affairs programming.

The proposal presented in this Article is a practical regulatory solution that (a) would generate locally-produced content of the kind long considered to be in the public interest, (b) would be consistent with existing legal precedent and statutory delegations of authority, and (c) would even allow for additional ownership consolidation. In addition, the proposal would enable the FCC to escape the mire of litigation caused by its empirically suspect assumptions about the competition-diversity and competition-localism relationships. The result would be policy that relies on market competition to

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165. 47 U.S.C. § 611.

166. *See* Note, *Tilling the Vast Wasteland: The Case for Reviving Localism in Public Interest Obligations for Cable Television*, 126 HARVARD L. REV. 1034, 1041 (2013)

167. *See*, *e.g.*, Martha Fuentes-Bautista, *Rethinking Localism in the Broadband Era: A Participatory Community Development Approach*, 31 GOV'T INFO. Q. 65 (2014) (discussing Austin, Texas); Siddhartha Menon, *The Role of Civil Society Groups in Improving Access to the DC-CAN*, 19 INFO. SYS. FRONTIERS 361 (2017) (discussing Washington, D.C.).

168. PICKARD, *supra* note 39, at 221-223.

achieve the long-standing policy goals of competition, diversity, and localism whenever possible, as required by the Telecommunications Act of 1996. When the market fails, however, the FCC has the authority and the obligation to intervene.

Telecommunications in Cuba: Repeal of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act

Abigail Becnel*

TABLE OF CONTENTS

I. INTRODUCTION 357

A. *Overview of Thesis* *358*

II. BACKGROUND 358

A. *History of the United States Embargo on Cuba* *359*

1. The Cuban Democracy Act of 1992 360
2. The Cuban Liberty and Democratic Solidarity Act of 1996 361
3. U.S.-Cuban Relations Under the Obama Administration . 362
4. U.S.-Cuban Relations Under the Trump Administration .. 363

B. *Telecommunications and Cuba* *364*

1. The FCC's Removal of Cuba from Its Exclusion List 365
2. Telecommunications Between the United States and Cuba 366

III. ANALYSIS 367

A. *United States Code 22 Section 6004(e)(2) Creates Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba* *367*

B. *United States Code 22 Section 6061(14) and Section 6065 of the Cuban Liberty and Democratic Solidarity Act Create Problems*

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for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba *368*

C. United States Code 22 Section 6032(g) Also Creates Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba *369*

IV. PROPOSAL 369

A. Repeal or Redefine United States Code 22 Section 6004(e)(2)of the Cuban Democracy Act *370*

B. Repeal United States Code 22 Section 6061(14) and Section 6065 of the Cuban Liberty and Democratic Solidarity Act *371*

C. Repeal United States Code 22 Section 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act *372*

D. The Benefits of Repealing These Sections of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act Outweigh the Possible Drawbacks *372*

V. CONCLUSION 374

I. INTRODUCTION

Cuba should be the latest hot spot for telecommunications providers. In 2015, only 40 percent of Cuba's 11.5 million people had access to the Internet.[1] More than half of Cubans who use Cuba's national telecommunications service, Empresa de Telecomunicaciones de Cuba S.A. (ETECSA), travel up to three miles to get Wi-Fi.[2] The United States' telecommunications providers should be eager to remedy these problems and set up telecommunications facilities in Cuba, since President Obama announced restored diplomatic relations between the United States and Cuba in December of 2014.[3] And while President Trump has since reversed some actions on travel and trade taken by the Obama Administration, he has not announced that he would break diplomatic relations.[4] In fact, the Trump Administration has stated that it plans to increase telecommunications and Internet access for the Cuban people.[5] On January 15, 2016, the FCC removed Cuba from its Exclusion List,[6] allowing companies to provide telecommunications services to Cuba without separate approval from the FCC and making Cuba seem even more appealing for telecommunications providers.[7] Although Cuba's untapped telecommunications market and recently restored diplomatic relations with the island may make Cuba look

1. *See Freedom on the Net 2017 Cuba Country Profile*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-net/2017/cuba [https://perma.cc/NK8G-FJ5V] (last visited Apr. 6, 2018) [hereinafter *Freedom on the Net*].

2. *See* Abel Fernandez, *How Do Cubans Use the Internet and Smartphones on the Island?*, MIAMI HERALD, http://www.miamiherald.com/news/nation-world/world/americas/cuba/article89199142.html [https://perma.cc/GEN4-XVUU] (last updated Oct. 24, 2016).

3. *See Statement by the President on Cuba Policy Changes*, OBAMA WHITE HOUSE ARCHIVES (Dec.17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes [https://perma.cc/DCZ4-FAJL] [hereinafter *Statement by the President*].

4. *See* Claire Felter et al., *U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/us-cuba-relations [https://perma.cc/X58D-V8MG] (last updated Mar. 7, 2019).

5. *See Look for Tech, Telecom to Survive Trump's Cuba Rollback*, POLITICO (June 16, 2017, 10:00 AM), https://www.politico.com/tipsheets/morning-tech/2017/06/16/look-for-tech-telecom-to-survive-trumps-cuba-rollback-220885 [https://perma.cc/R65S-8MUD] [hereinafter *Look for Tech*].

6. *See* Removing Cuba from the Exclusion List for Int'l Section 214 Authorizations, *Order*, 31 FCC Rcd 194(1), para. 1 (2016) [hereinafter *Removing Cuba from the Exclusion List*].

7. *See* Roger Yu, *FCC to Allow U.S. Telecom Services to Cuba*, USA TODAY (Jan. 15, 2016), https://www.usatoday.com/story/money/2016/01/15/fcc-allows-us-telecom-companies-provide-services-cuba-without-agency-approval/78866114/ [https://perma.cc/XS4A-DHZW].

like the ideal location for telecommunications companies,[8] these companies risk violating federal laws by getting involved in telecommunications in Cuba.[9]

A. Overview of Thesis

Congress should repeal the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in an effort to restore trade relations with Cuba, allowing telecommunications providers to conduct business with Cuba legally. Most importantly, Congress should repeal or redefine United States Code 22 Section 6004(e)(2) of the Cuban Democracy Act and repeal United States Code 22 Sections 6061(14), 6065, and 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act in an effort to increase telecommunications services in Cuba and the free flow of information between the U.S. and Cuba.

First, this Note will give a brief history of the United States' trade embargo on Cuba. Second, it will explain the implications of the Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, and the FCC's 2016 decision to remove Cuba from its Exclusion List. Then, it will describe recent telecommunications issues in Cuba, the latest changes made under the Obama and Trump administrations, and the current state of telecommunications in Cuba. Next, this Note will analyze the current state of telecommunications between the United States and Cuba and the problems that U.S. telecommunications providers face by setting up facilities in Cuba. This Note will propose legislative action that should be taken to allow telecommunications companies to provide service to Cubans without violating federal law. Lastly, this Note will explain some of the unintended consequences that could occur if the recommended legislative proposals are implemented and why Congress should act despite the potential drawbacks.

II. BACKGROUND

In order to understand the obstacles facing companies wishing to establish telecommunications services in Cuba, it is important to understand the history of U.S.-Cuban relations and the legislation that has kept the trade embargo in place. The circumstances surrounding the United States breaking off ties with Cuba, a country once significantly tied to American business and tourism, is an important aspect of the diplomatic history that has led to the

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8. *See* Mark Walsh, *US Telecom Businesses Struggling to Make Connections as Cuba Opens Up*, GUARDIAN (Mar. 23, 2016, 7:00 AM), https://www.theguardian.com/world/2016/mar/23/us-telecom-businesses-cuba-relations-etecsa [https://perma.cc/927B-AJGS].

9. Claire Suddath, *U.S.-Cuba Relations*, TIME (Apr. 15, 2009), http://content.time.com/time/nation/article/0,8599,1891359,00.html [https://perma.cc/F83L-WQYQ].

current state of business relations and telecommunications between the United States and Cuba. The history of the United States embargo on Cuba can be understood through the Cuban Democracy Act of 1992[10] and the Cuban Liberty and Democratic Solidarity Act of 1996.[11] It is important to understand the recent changes made in United States-Cuban policy and telecommunications by the Obama Administration, the Trump Administration, and the FCC in order to understand the current state of telecommunications in Cuba and the problem with United States telecommunications providers setting up facilities in Cuba for U.S. companies.

A. History of the United States Embargo on Cuba

Fidel Castro came to power in Cuba on January 1, 1959 when he overthrew United States-backed President General Fulgencio Batista.[12] Castro established a socialist state in Cuba, allied and backed by the Soviet Union.[13] His new government quickly "seized private land [and] nationalized hundreds of private companies, including several local subsidiaries of U.S. corporations," and imposed heavy taxes on imports from the United States.[14] Over the past 50 years, the United States has implemented policies and legislation intended to isolate Cuba economically and diplomatically until democracy is restored on the island.[15]

On October 19, 1960, President Eisenhower's State Department responded to Castro's actions by imposing the first trade embargo on Cuba, which "covered all U.S. exports to Cuba except for medicine and some foods."[16] Then, in 1962, President Kennedy issued Presidential Proclamation No. 3447, which expanded the embargo to U.S. imports from Cuba and cut diplomatic ties with the island.[17] However, it was not until the 1990s that the trade embargo was enacted into law with the passage of the Cuban Democracy Act of 1992[18] and the Helms-Burton Act of 1996.[19] Although relations between the United States and Cuba were reexamined and partially opened under the Obama Administration, the trade embargo is still in place by law and "an act of Congress is required to remove it."[20]

The trade embargo that the United States imposed on Cuba forced Cuba's economy to "rely on the Soviet Union as [the island's] primary trade

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10. 22 U.S.C. §§ 6001 - 6010 (1992).
11. 22 U.S.C. §§ 6021 - 6091 (1996).
12. *See* Suddath, *supra* note 9.
13. *See* Felter, *supra* note 4.
14. *See* Suddath, *supra* note 9.
15. *See* Felter, *supra* note 4.
16. *See* Merrill Fabry, *The U.S. Trade Embargo on Cuba Just Hit 55 Years*, TIME (Oct. 19, 2015), http://time.com/4076438/us-cuba-embargo-1960/ [https://perma.cc/RD2B-GBK5].
17. *See* Embargo on all Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 3, 1962).
18. 22 U.S.C. §§ 6001 - 6010.
19. 22 U.S.C. §§ 6021 - 6091.
20. *See* Fabry, *supra* note 16.

partner."[21] The island nation's undiversified economy depended on annual subsidies from the Soviet Union.[22] However, when the Soviet Union collapsed in the early 1990s, so did Cuba's economy.[23] The recession that Cuba faced in the early 1990s came to be known in Cuba as the "Special Period in Peacetime."[24] During this time, Cuba lost over 80 percent of its foreign trade.[25] A quarter of the country became unemployed, and food, medicine, and transportation became scarce.[26] As the Cuban people and Cuban economy suffered, the United States saw this as an opportunity to oust Fidel Castro and bring democracy to Cuba.[27] During Cuba's Special Period in Peacetime, the United States tightened its economic sanctions on Cuba by passing the Cuban Democracy Act of 1992 and the Cuban Liberty and Democratic Solidarity Act of 1996.[28]

1. The Cuban Democracy Act of 1992

The Cuban Democracy Act of 1992,[29] also known as the Torricelli Act, was signed into law by President Bush on October 23, 1992.[30] The passage of the Cuban Democracy Act was the first step toward making the United States' embargo on Cuba an official law, rather than an executive policy upheld by successive administrations.[31] The act sought to transition Cuba to democracy through the use of sanctions that were "directed at the Castro government."[32] The sanctions restricted the issuing of licenses for transactions between U.S.-owned or controlled firms in third countries and Cuba,[33] prohibited certain vessels from entering the United States' ports,[34] and restricted remittances to Cuba.[35] The act also directed the President to encourage countries that conduct trade with Cuba to restrict their trade[36] and applied sanctions to any

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21. *See Helms-Burton Act: Resurrecting the Iron Curtain*, COUNCIL ON HEMISPHERIC AFFAIRS (June 10, 2011), http://www.coha.org/helms-burton-act-resurrecting-the-iron-curtain/ [https://perma.cc/D99C-EBKU] [hereinafter *Helms-Burton Act*].
22. *See* Brendan Dolan, *Cubanonomics: Mixed Economy in Cuba During the Special Period*, http://history.emory.edu/home/documents/endeavors/volume1/Brendans.pdf (last visited Apr. 7, 2018).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015).
28. *Id.*
29. 22 U.S.C. §§ 6001-6010.
30. *See* Jason Bell, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77, 79 (1993).
31. *See Helms-Burton Act*, *supra* note 21.
32. *See* 22 U.S.C. § 6002(1).
33. *See id.* § 6005(a).
34. *See id.* § 6005(b).
35. *See id.* § 6005(c).
36. *See id.* § 6003(a).

country that provides assistance to Cuba.[37] The act states that the sanctions implemented by the Cuban Democracy Act are to continue as long as the Castro regime "refuse[s] to move toward democratization and greater respect for human rights."[38]

United States Code 22 Section 6004(e),from the Cuban Democracy Act, specifically addresses telecommunications services and facilities between the United States and Cuba.[39] Section 6004(e)(4) explains that nothing in Section 6004(e) supersedes the authority of the FCC.[40] Section 6004(e)(1) of the act allows telecommunications services between the United States and Cuba,[41] but Section 6004(e)(2) of the act authorizes telecommunications facilities in Cuba only in the "quantity and quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba."[42]

Section 6004(e)(5) of the act prohibits any United States person from contributing funds to or for a domestic telecommunications network within Cuba.[43] Finally, Section 6004(e)(6) requires the president to submit to Congress a report detailing payments made to Cuba by any United States person as a result of the provisions of telecommunications services that are authorized in Section 6004(e)(1) on a semiannual basis.[44]

2. The Cuban Liberty and Democratic Solidarity Act of 1996

The Cuban Liberty and Democratic Solidarity Act of 1996,[45] also known as the Helms-Burton Act, was signed into law by President Clinton on March 12, 1996.[46] The act went even further than the Cuban Democracy Act of 1992 in its efforts to isolate Cuba by putting more restrictions on trade, making it harder to remove the embargo, and applying the embargo to foreign countries that traded with Cuba.[47] The act also strengthened the Cuban Democracy Act by reaffirming some of its sections; for example, United States Code 22 Section 6032(a) from the Cuban Liberty and Democratic Solidarity Act reaffirmed United States Code 22 Sections 6003(a) and Section 6003(b) from the Cuban Democracy Act, directed the president to encourage countries that conduct trade with Cuba to restrict their trade, and applied sanctions to any country that provides assistance to Cuba.[48]

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37. *See id.* § 6003(b).
38. *See id.* § 6002(6).
39. *See id.* § 6004(e).
40. *See id.* § 6004(e)(4).
41. *See id.* § 6004(e)(1).
42. *See id.* § 6004(e)(2).
43. *See id.* § 6004(e)(5).
44. *See id.* § 6004(e)(6).
45. 22 U.S.C. §§ 6021-6091.
46. *See Helms-Burton Act*, *supra* note 21.
47. *See* 22 U.S.C. § 6032(h).
48. *See id.* § 6032(a).

United States Code 22 Section 6061(14) from the Cuban Liberty and Democratic Solidarity Act allows the United States to eventually take steps toward removing the economic embargo on Cuba, but only when the president "determines that a transition to a democratically elected government in Cuba has begun."[49] However, the conditions for establishing a democratically elected government in Cuba are difficult to meet.[50] Section 6065(a) lists the requirements for determining a transition government in Cuba.[51] Some of the requirements for a transition government in Cuba include a government that: "has legalized all political activity,"[52] "has ceased any interference with Radio Marti or Television Marti broadcasts,"[53] "does not include Fidel Castro or Raul Castro,"[54] "has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations,"[55] "has dissolved the Department of State Security in the Cuban Ministry of the Interior,"[56] and has taken "appropriate steps to return to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban Government from such citizens and entities on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property."[57]

Section 6032(g) explains that Americans are not authorized to invest in the domestic telecommunications network within Cuba and explains that an investment in the domestic telecommunications network within Cuba includes the "contribution (including by donation) of funds or anything of value to or for, and the making of loans to or for, such network.[58] The language in this section is vague and leaves many questions unanswered, such as what exactly qualifies as a "domestic telecommunications network" and whether a new wireless network constitutes a "domestic telecommunications network."[59]

3. U.S.-Cuban Relations Under the Obama Administration

Diplomatic ties between the United States and Cuba had been broken for over 50 years, when on December 17, 2014, President Obama announced

49. *See id.* § 6061(14).
50. *See Helms-Burton Act*, *supra* note 21.
51. *See* 22 U.S.C. § 6065(a).
52. *Id.* § 6065(a)(1).
53. *Id.* § 6065(a)(5).
54. *Id.* § 6065(a)(7).
55. *Id.* § 6065(a)(2).
56. *Id.* § 6065(a)(3).
57. *Id.* § 6065(b)(2)(d).
58. *Id.* § 6032(g)(5).
59. *See* Eduardo Guzman, *Telecommunications in Cuba and the U.S. Embargo: History, Opportunities, and Challenges,* DRINKERBIDDLE GLOBAL (Feb. 4, 2015), https://files.drinkerbiddle.com/Templates/media/files/Memos%20And%20Newsletters/International/Telecommunications-in-Cuba.pdf.

diplomatic changes to U.S.-Cuban relations.[60] Under the Obama Administration, diplomatic relations with Cuba were restored and embassies were reopened after being closed since 1961.[61] Direct flights and mail service between the United States and Cuba became available again.[62] Initiatives were implemented between the United States and Cuba to cooperate on health, agriculture, education, and law enforcement.[63] The Obama Administration also eliminated limits on remittances to allow Cubans to have more access to resources from family members in the United States.[64]

While President Obama was able to make some policy changes regarding relations between the United States and Cuba and start conversations with the Cuban government, the trade embargo put limits on what the Obama Administration alone could do.[65] President Obama called on Congress to lift the embargo codified by the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act during his presidency.[66] While Congress has not lifted the embargo, President Obama's diplomatic changes made it easier for Americans to travel to and do business in Cuba.[67] Changes in telecommunications also developed during the Obama Administration when the FCC removed Cuba from its Exclusion List.[68]

4. U.S.-Cuban Relations Under the Trump Administration

President Trump and his Administration have rolled back some of the policy changes to United States travel and business with Cuba that were put in place by President Obama.[69] On November 9, 2016, the U.S. Department of State released a list of entities and sub-entities that Americans are banned from doing business with because they are either controlled by or act on behalf of the Cuban military, intelligence, or security services.[70] The list includes stores, hotels, holding companies, and travel agencies, among others.[71] Similarly, the Trump Administration believes that blocking Americans from

60. *See Statement by the President*, *supra* note 3.
61. *See id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *See Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 5.
69. *See* Alan Gomez, *Trump Cracks down on U.S. Business and Travel to Cuba. Here's What's Changing*, USA TODAY, https://www.usatoday.com/story/news/world/2017/11/08/trump-cracks-down-u-s-business-and-travel-cuba/843419001/ [https://perma.cc/SK6K-SJ6M] (last updated Nov. 9, 2017).
70. *List of Restricted Entities and Subentities Associated With Cuba as of November 9, 2017*, U.S. DEP'T OF STATE (Nov. 8, 2017), https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/275331.htm [https://perma.cc/3G5S-VXPM].
71. *Id.*

doing business with Cuban businesses run by the military will move Cuba closer toward democracy and will grow Cuba's private sector.[72] President Trump's Cuban policy involves strictly enforcing United States law (the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act), and the Trump Administration has promised not to lift sanctions on the Cuban regime until all Cuban political prisoners are freed.[73] The Trump Administration is also changing the types of businesses that are defined as part of the Cuban military, and this affects United States companies' abilities to operate in Cuba.[74]

The Obama Administration sought to get Cubans online in the hopes that connectivity would have a momentum of its own.[75] President Trump has the same goal of getting more Cubans connected to telecommunications and subsequently information not controlled by the Castro government.[76] Under the Trump Administration, the Department of State has created a Cuba Internet Task Force "composed of U.S. government and non-government representatives to examine technological challenges and opportunities for expanding [I]nternet access in Cuba."[77] The Cuba Internet Task Force will also consider "expanding federal support to programs and activities that encourage freedom of expression through independent media and [I]nternet freedom so that the Cuban people can enjoy the free and unregulated flow of information."[78]

B. *Telecommunications and Cuba*

Cuba's communist government makes the island nation one of the world's most repressive countries for information and telecommunications.[79] In 2016, there were only 4.5 million Internet users in a country of 11.5 million

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72. *See* Gomez, *supra* note 69.

73. *Fact Sheet on Cuba Policy,* THE WHITE HOUSE (June 16, 2017), https://www.whitehouse.gov/articles/fact-sheet-cuba-policy/ [https://perma.cc/STX7-S597]; Adam Fisher, *Trump 'Canceling' Obama's Cuba Policy but Leaves Much in Place*, ABC NEWS (June 17, 2017, 4:09 AM), http://abcnews.go.com/Politics/trumps-cuba-policy/story?id=48058622 [https://perma.cc/UNV6-KMNL].

74. *See* Fisher, *supra* note 73 ("The White House explained in a fact sheet released earlier today that the policy aims to keep the Grupo de Administración Empresarial (GAESA), a conglomerate managed by the Cuban military, from benefiting from the opening in U.S.-Cuba relations. 'The profits from investment and tourism flow directly to the military. The regime takes the money and owns the industry,' Trump said. 'The outcome of last administration's executive action has been only more repression and a move to crush the peaceful democratic movement. Therefore, effective immediately, I am canceling the last administration's completely one-sided deal with Cuba.'").

75. *See id.*

76. *See* Nora Gamez Torres, *Trump Administration Wants to Expand Internet Access in Cuba*, MIAMI HERALD (Jan. 23, 2018), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article196234369.html [https://perma.cc/PSN9-WSX5].

77. *Id.*

78. *Id.* (internal quotation marks omitted).

79. *See Freedom on the Net*, *supra* note 1.

people.[80] That is 40 percent of Cuba's population; however, this number includes users who can only access the government-controlled intranet.[81] Experts believe that a much smaller percentage of Cubans have regular access to the Internet.[82] Only 4.3 million Cubans own mobile lines.[83]

Cuba's telecommunications service provider, Empresa de Telecomunicaciones de Cuba S.A. (ETECSA) is owned by the Cuban government.[84] The repressive telecommunications environment stems from high prices for Internet access, prohibition of home connections, and a national email system.[85] For Cubans, access to the Internet is not easily accessible due to the high costs and limited availability.[86] For years, Cubans were either completely denied Internet access or sent to a government-controlled intranet.[87] The government-controlled intranet consists of "a national email system, a Cuban encyclopedia, a pool of educational materials and open-access journals, Cuban websites, and foreign websites that are supportive of the Cuban government."[88]

1. The FCC's Removal of Cuba from Its Exclusion List

Cuba was the last country remaining on the FCC's Exclusion List, when in January 2016, the FCC's International Bureau removed Cuba from its Exclusion List for International Section 214 Authorizations.[89] Section 214 of the Communications Act of 1934 requires any person or entity seeking to provide United States-international common carrier service to obtain approval from the FCC by filing an International Section 214 Application.[90] The FCC's Exclusion List identifies countries and facilities that are not covered by a Section 214 application and requires a separate international Section 214 application filed by those countries and facilities,[91] along with approval from the U.S. Department of State.[92]

With guidance from the U.S. Department of State, the FCC has licensed and regulated telecommunications services between the United

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 1.
90. *See* 47 U.S.C. § 214(6) (1934).
91. *Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 1, 3.
92. Sean Spivey, *¡Bienvenidos a Cuba! FCC Removes Cuba from its Exclusion List for International Section 214 Authorizations*, HOGAN LOVELLS (Jan. 27, 2016), https://www.hlregulation.com/2016/01/27/bienvenidos-a-cuba-fcc-removes-cuba-from-its-exclusion-list-for-international-section-214-authorizations/ [https://perma.cc/B48B-7BGD].

States and Cuba since 1993.[93] On October 26, 2015, the State Department recommended that the FCC remove Cuba from the FCC's Exclusion List for International Section 214 Authorizations and allow all carriers to provide telecommunications services under a regular Section 214 application.[94] On January 15, 2016, the FCC removed Cuba from its Exclusion List for International Section 214 Authorizations.[95] The FCC's position is that the removal of Cuba from its Exclusion List will "make it easier for U.S. facilities-based carriers to initiate service to Cuba, promote open communications, and help foster bilateral communications between the United States and Cuba."[96] Removing Cuba from the FCC's Exclusion List also streamlines the Section 214 authorization process by eliminating the requirement that carriers have to file a separate application and receive approval from the U.S. Department of State.[97] Despite the FCC's action,[98] the legal restrictions on trade and business in Cuba remain federal law under the Cuban Democracy Act[99] and the Cuban Liberty and Democratic Solidarity Act.[100]

2. Telecommunications Between the United States and Cuba

Besides the legal restrictions that U.S.-based telecommunications providers interested in doing business with Cuba face, United States companies also have to deal with ETECSA, the telecommunications service provider owned by the Cuban government.[101] Foreign companies have to abide by the communist government's laws and restrictions.[102] The Cuban government is expected to watch the recent changes made by the FCC carefully "in terms of the kind of access to outside information that this allows their population to have access to," as Cuba is still a "controlled economy."[103] Fifty years of isolation and distrust between the United States and Cuba have also made telecommunications with Cuba problematic.[104]

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93. *Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 3.
94. *Id.* at para. 1.
95. *Id.*
96. *Id.* at para. 5.
97. *Id.*
98. *See* Spivey, *supra* note 93.
99. 22 U.S.C. §§ 6001-6010.
100. 22 U.S.C. §§ 6021-6091.
101. *See* Lydia Beyoud, *FCC Lifts Cuban Restriction, Opening Door for U.S. Telecoms*, BLOOMBERG (Jan. 19, 2016), https://www.bna.com/fcc-lifts-cuban-n57982066350/ [https://perma.cc/H5A3-ESEK].
102. *Id.*
103. *Id.*
104. *See* Walsh, *supra* note 8 ("While other deals are in the offing, with Google, AT&T and others all looking keenly at Cuba, the string of agreements masks a lingering distrust between the two countries that has so far made it difficult to close larger-scale agreements to provide telecommunications services and equipment within Cuba.").

III. ANALYSIS

Telecommunications companies risk violating federal laws by setting up telecommunications facilities in Cuba.[105] However, since the announcement of restored diplomatic relations with Cuba, talk about opportunities for telecommunications providers has been abundant.[106] But despite efforts by both the Obama and Trump administrations to increase telecommunications services in Cuba,[107] the United States' embargo on Cuba is still in effect and only an act of Congress can lift it.[108]

A. United States Code 22 Section 6004(e)(2) Creates Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba

Section 6004(e)(1) of the Cuban Democracy Act allows for telecommunications services between the United States and Cuba,[109] but Section 6004(e)(2) authorizes telecommunications facilities in Cuba only "in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services between the United States and Cuba."[110] The language of Section 6004(e)(2) is left incredibly vague and does not define what is considered "efficient and adequate telecommunications services."[111] The language of Section 6004(e)(2) could mean that only minimal telecommunications facilities are allowed. It could also mean that a relatively large number of telecommunications facilities is necessary to provide efficient and adequate services in today's well-connected and technology-reliant world.

The vague language of Section 6004(e)(2) is problematic for United States telecommunications providers that want to provide telecommunications facilities in Cuba because if they are "in such quantity"[112] or "of such quality"[113] that is deemed unnecessary "to provide efficient and

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105. *See* 22 U.S.C. § 6004(e); 22 U.S.C. § 6032(g).

106. *See* Guzman, *supra* note 59 ("Since President Obama announced the United States' new policy to normalize relations with Cuba, talk about opportunities for U.S. telecommunications companies has flourished. That reaction only intensified when the Treasury Department and the Commerce Department published amended rules on January 16, 2015, implementing these policy changes, which authorize commercial telecommunications services linking third countries and Cuba (as well as within Cuba), services incidental to Internet-based communications, and the export of communications items.").

107. *See* Torres, *supra* note 77.

108. *See* Jeremy Diamond, *U.S.-Cuban Relations: 10 Questions on the Embargo, Embassies and Cigars*, CNN, https://www.cnn.com/2014/12/17/politics/cuban-embargo-questions-answers/index.html [https://perma.cc/8QN4-MZ32] (explaining why the President cannot end the embargo altogether) (last updated July 1, 2015).

109. 22 U.S.C. § 6004(e)(1).

110. *Id.* § 6004 (e)(2).

111. *Id.*

112. *Id.*

113. *Id.*

adequate telecommunications services between the United States and Cuba,"[114] then they could be in violation of Section 6004(e)(2) of the Cuban Democracy Act.

B. United States Code 22 Section 6061(14) and Section 6065 of the Cuban Liberty and Democratic Solidarity Act Create Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba

United States Code 22 Section 6061(14) of the Cuban Liberty and Democratic Solidarity Act requires the president to determine that a transition to a democratically-elected government has begun before the economic embargo on Cuba can be removed,[115] and Section 6065 of the act lists the arbitrary requirements the president must consider in determining a transition government in Cuba.[116] Many of the requirements and factors are difficult to meet and vague in their meaning, making it difficult to lift the economic embargo. For example, Section 6065(a)(8) states that a transition government in Cuba is a government that "has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people."[117] This language is unclear and also requires that Cuba meet a standard that the United States has not always met itself during natural disasters and other times of crises.[118] Another example is Section 6065(a)(5), which requires that Cuba's government "has ceased any interference with Radio Marti or Television Marti[119] broadcasts."[120] This section also requires that Cuba meet a standard that the United States itself does not follow by having the FCC monitor United States television and radio and prohibiting obscene, indecent, and profane broadcasts.[121] While many of the requirements and factors in this section are vague and challenging to meet, as long as sections 6061(14) and 6065 remain in effect, American companies—

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114. *Id.*
115. 22 U.S.C. § 6061(14).
116. *Id.* § 6065(a).
117. *Id.* § 6065(a)(8).
118. *See*, *e.g.*, Scott Shane, *After Failures, Government Officials Play Blame Game*, N.Y. TIMES (Sept. 5, 2005), https://www.nytimes.com/2005/09/05/us/nationalspecial/after-failures-government-officials-play-blame-game.html [https://perma.cc/2RWP-JGDQ] (explaining how the government failed to adequately provide speedy and efficient assistance after Hurricane Katrina).
119. TV/Radio Martí is a U.S. funded, broadcasting network "aimed at Cuba. It is meant to provide information for Cubans on the island, who don't have much access to the Internet and must rely on state-controlled media." *See What is TV Marti?*, HISTORYOFCUBA.COM, http://www.historyofcuba.com/history/funfacts/TVmarti.htm [https://perma.cc/ARB9-T8AC] (last visited Mar. 13, 2019).
120. 22 U.S.C. § 6065(a)(5).
121. *See Obscene, Indecent and Profane Broadcasts*, FCC, https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts [https://perma.cc/9KAZ-N4HN] (last updated Sept. 13, 2017).

including telecommunications companies—risk violating federal law if they set up facilities in and do business with Cuba.

C. United States Code 22 Section 6032(g) Also Creates Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba

Section 6032(g) of the Cuban Liberty and Democratic Solidarity Act explains that Americans are not authorized to invest in the domestic telecommunications network within Cuba and explains that an investment in the domestic telecommunications network within Cuba includes the "contribution (including by donation) of funds or anything of value to or for, and the making of loans to or for, such network."[122] However, Section 6032(g) of the act does not define or identify what qualifies as the "domestic telecommunications network."[123] It is unclear if this language means Cuban, government-run networks or any telecommunications network that is set up in Cuba. This vague language is particularly problematic for telecommunications providers that want to set up telecommunications services and facilities in Cuba. Because the statute does not make clear what is considered a domestic telecommunications network, United States telecommunications providers risk violating Section 6032(g) of the Cuban Liberty and Democratic Solidarity Act if they start setting up facilities in Cuba.[124] Telecommunications providers that attempt to set up facilities in Cuba and invest in the telecommunications network could be particularly at risk depending on the political environment and the presidential administration in the United States. For instance, President Trump has stated that his administration will enforce United States laws regarding investments in Cuba.[125]

IV. PROPOSAL

In an effort to increase the flow of information between the United States and Cuba, end a diplomatic policy that has failed for over fifty years, and allow American companies to operate in Cuba legally, Congress should repeal the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in their entireties. These acts have been repressive to the Cuban people, harmful to innovation, and ineffective in achieving the United States' goals from when these pieces of legislation were passed.[126] Most importantly, however, Congress should repeal or redefine Section 6004(e)(2) of the Cuban Democracy Act and repeal sections 6061(14), 6065, and 6032(g) of the Cuban

122. 22 U.S.C. § 6032(g)(5).
123. *Id.*
124. *See id.*
125. *See* Fisher, *supra* note 74.
126. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015) (explaining the lack of success of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in achieving democracy in Cuba and ousting the Castro government).

Liberty and Democratic Solidarity Act in an effort to increase telecommunications services and the free flow of information between the United States and Cuba. This proposal will also allow United States telecommunications providers to set up facilities in Cuba without the risk of violating federal laws. While there could be some drawbacks in repealing these sections, the benefits of these proposals outweigh those drawbacks.

A. *Repeal or Redefine United States Code 22 Section 6004(e)(2)of the Cuban Democracy Act*

If Congress does not repeal the Cuban Democracy Act in its entirety, it should repeal or redefine Section 6004(e)(2) of the act, which only authorizes telecommunications facilities in Cuba that are of "such a quantity and quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba," without defining or setting the qualifications for efficient and adequate services.[127] Section 6004(e)(2) should either be repealed altogether so that even the highest quality telecommunications facilities can operate in Cuba, or it should be amended to define what constitutes the "quantity and . . . quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba."[128] Repealing this section altogether so that the highest quality telecommunications facilities can operate in Cuba would further both President Obama and President Trump's goals of increasing Internet and information access for the Cuban people and increasing telecommunications services between the United States and Cuba. Amending Section 6004(e)(2) to redefine what constitutes the "quantity and . . . quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba"[129] would also give United States telecommunications providers a better idea of whether they can set up facilities in Cuba without violating federal law.

While Congress could redefine Section 6004(e)(2) to allow the highest quality telecommunications facilities to operate in Cuba, the downside of this proposal is that Congress could also choose to tighten the existing embargo and define "efficient and adequate telecommunications services" in a way that only allows minimal telecommunications facilities to exist.[130] However, if Congress redefines this section, it should keep in mind the goals of President Obama and President Trump, both of whom have shaped modern day United States-Cuban policy. With these goals in mind, Congress should refine Section 6004(e)(2) so that it allows the highest quality telecommunications facilities to operate in Cuba.

127. 22 U.S.C. § 6004(e)(2).
128. *Id.*
129. *Id.*
130. *Id.* § 6004(e)(2).

B. Repeal United States Code 22 Section 6061(14) and Section 6065 of the Cuban Liberty and Democratic Solidarity Act

If Congress does not repeal the Cuban Liberty and Democratic Solidarity Act in its entirety, Congress should at least repeal Section 6061(14), which requires the president to determine that a transition to a democratically-elected government has begun before the economic embargo on Cuba can be removed[131] and Section 6065, which lists the requirements for the president to consider in assessing whether a transition government exists in Cuba.[132] Some of the requirements and factors of Section 6065 for a transition government in Cuba include a government that: "has legalized all political activity,"[133] "has ceased any interference with Radio Marti or Television Marti broadcasts,"[134] "does not include Fidel Castro or Raul Castro,"[135] and "has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people."[136]

Sections 6061(14) and 6065 of the Cuban Liberty and Democratic Solidarity Act make conducting business in Cuba particularly problematic, and repealing these sections would allow for the greatest changes in ending the United States' embargo on Cuba. By repealing these sections, the United States could begin trading with Cuba without having to wait for the president's determination that Cuba has met the difficult and arbitrary steps of transitioning to a democratically-elected government. For example, Section 6065(a)(7) of this act explains that Cuba will not meet the criteria for having transitioned to a democratically-elected government as long as Fidel or Raul Castro are part of the Cuban government.[137] Without repealing this section of the act, trade with Cuba cannot yet take effect because Raul Castro is currently part of the Cuban government, controlling the Communist Party and the armed forces.[138] Therefore, Cuba does not meet the requirements of Section 6065.[139]

By repealing these sections, United States companies such as telecommunications providers could conduct business with Cuba without Cuba having to meet the requirement that it has begun transitioning to a democratically-elected government. While this proposal would seem to negatively impact Cubans, legislators should be reminded that the diplomatic approach of isolation that the United States has taken with Cuba has failed for

131. *See* 22 U.S.C. § 6061(14).
132. *See id.* § 6065(a).
133. *Id.* § 6065(a)(1).
134. *Id.* § 6065(a)(5).
135. *Id.* § 6065(a)(7).
136. *Id.* § 6065(a)(8).
137. *Id.* § 6065(a)(7).
138. *See* Ana Quintana, *This Is Not the 'End of an Era' in Cuba*, THE ATLANTIC (Apr. 20, 2018), https://www.theatlantic.com/international/archive/2018/04/cuba-diaz-canel/558566/ [https://perma.cc/28HA-L3BU].
139. 22 U.S.C. § 6065(a)(7).

over 50 years.[140] By repealing these sections and allowing trade with Cuba, the United States could achieve its goal of establishing democracy in Cuba through engagement, as opposed to strangling its economy and forbidding trade. The Obama and Trump administrations have both said that increasing access to the Internet and other forms of telecommunications and information for regular Cuban people is one of the best ways to encourage Cubans to demand democracy on their own.[141]

C. *Repeal United States Code 22 Section 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act*

If Congress does not repeal the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in their entireties, Congress should at least repeal United States Code Section 6032(g)(5), which forbids United States persons from investing in the domestic telecommunications network within Cuba.[142] By repealing this section, United States persons could invest in telecommunications services and facilities in Cuba and increase the free flow of information between the U.S. and Cuba. Allowing United States persons to invest in this market could improve the telecommunications network in Cuba and increase business and investment opportunities for Americans interested in doing business in the telecommunications sector in Cuba.

While repealing Section 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act would be beneficial for American investors, information flow between the United States and Cuba, and telecommunications in Cuba, it could also have the unintended consequence of supporting a repressive, government-run telecommunications network in Cuba. However, the Cuban government has shown significant improvements in increasing telecommunications access for the Cuban people by establishing hundreds of cybercafés and public Wi-Fi hotspots in Cuba.[143] Therefore, the benefits of repealing this section outweigh the possible unintended consequences.

D. *The Benefits of Repealing These Sections of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act Outweigh the Possible Drawbacks*

Repealing the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act could be difficult to achieve because of the

140. *See Statement by the President*, *supra* note 3.
141. *See Look for Tech*, *supra* note 5.
142. 22 U.S.C. § 6032(g)(5).
143. *See Freedom on the Net*, *supra* note 1.

bipartisan efforts it would require in Congress.[144] Repealing these acts could also have the unintended consequence of pushing Cuba further from transitioning into a democratic state, which is what the acts were intended to achieve from the start. By repealing these acts and lifting the embargo, Cuba could continue down a path of a Communist government and not accept efforts to transition toward free and fair elections along with the other goals outlined in the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act.[145] This could mean that any investment in telecommunications would be less useful to the average Cuban because it would be more susceptible to censorship by an oppressive regime.

However, Cuban President Raul Castro stepped down as President of Cuba in April of 2018 and was replaced by Miguel Diaz-Canel.[146] This means that while Raul Castro still controls Cuba's communist party as its first secretary, for the first time in over 50 years, a member of the Castro family is not serving as the president of Cuba.[147] President Diaz-Canel is open to increased telecommunications in Cuba and has even met with U.S. telecommunications executives.[148] He has stated that the main obstacle in achieving his telecommunications goals for Cuba is the U.S. embargo.[149]

Regardless of the potential difficulty in repealing these acts and the possible unintended consequences, all efforts should still be made to repeal these acts. Repealing these acts will improve telecommunications services between the United States and Cuba, allow United States telecommunications companies to operate in Cuba without violating federal laws, and increase Internet access for the Cuban people, which has been a goal of both presidents Obama and Trump.

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144. *See* Carlos Alberto Montaner, *Cuba Doesn't Deserve Normal Diplomatic Relations*, N.Y. TIMES, https://www.nytimes.com/roomfordebate/2014/10/12/should-the-us-normalize-relations-with-cuba/cuba-doesnt-deserve-normal-diplomatic-relations ("There's . . . a bipartisan consensus in Washington against the Castro regime. All three Cuban-American senators and four Cuban-American representatives, Democrats and Republican, agree that sanctions should be maintained. They are the best interpreters of the opinion of the almost three million Cubans and descendants of Cubans living in the United States.") [https://perma.cc/S7PE-ASEK] (last updated Oct. 13, 2014).

145. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015) (explaining the uncertainties surrounding repeal of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act as they pertain to business, personal freedoms, and economic opportunities in Cuba).

146. *See* Quintana, *supra* note 135.

147. *Id.*

148. *See* Nora Gamez Torres, *Cuba's new leader meets with American business executives and politicians in NYC*, MIAMI HERALD (Sept. 25, 2018), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article219003055.html.

149. *Id.*

V. CONCLUSION

Cuba has great potential in the telecommunications arena. The country has among the lowest access to the Internet in the world, but the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act stand in the way of increased trade and the free flow of information between the United States and Cuba. These acts should be repealed, at least partially, so that United States telecommunications providers who set up facilities in Cuba do not violate federal laws. These acts have been repressive to the Cuban people, harmful to innovation, and ineffective in achieving the goals that the United States had when passing these pieces of legislation.[150] The possibility of increasing Internet access for the Cuban people and increasing business opportunities for United States telecommunications providers greatly outweigh any potential drawbacks. Therefore, these unsuccessful acts should be repealed in an effort to establish democracy in Cuba through engagement and to allow American telecommunications companies to do business with Cuba legally. Eager telecommunications providers should wait for Congress to act before setting up telecommunications facilities in Cuba.

150. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015) (explaining the lack of success of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in achieving democracy in Cuba and ousting the Castro government).

Making Protection Against Copyright Infringement More Accessible in the Social Media Era

Ayesha Syed*

TABLE OF CONTENTS

I. INTRODUCTION 377

II. BACKGROUND 379

A. *The Following Section Provides an Overview of the General Mechanics of Twitter as Well as a Few Examples That Illustrate the Issue This Note Addresses.* *379*

B. *Current Legal Framework* *383*

1. Copyrightability of Tweets 383
2. Copyright Infringement 384

C. *Current Remedies for Infringement, and Why They Are Not Always Applicable/Effective* *385*

D. *A Look at Registration* *387*

E. *The Following Section Provides Background Information on the CASE Act.* *390*

III. NEED FOR REFORM 391

IV. SOLUTION 392

A. *Prong I: Eliminate the Registration Requirement to Collect Statutory Damages and Costs and Attorney's Fees in Instances Where the Publication of the Content on Twitter and/or Other Social Media Platforms Serves the Purpose the Copyright Registration Would Have Served.* *392*

1. The Amendment in Prong I Should Include a Maximum Amount of Damages to Be Collected. 395

B. *Prong II: The CASE Act Should Award Prevailing Plaintiffs Attorney's Fees in Cases Where the Defendant Prefers to Have*

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the Case Heard in Court as Opposed to Having It Heard in the Small Claims Court Proposed by the Bill. *395*

1. Congress Should Adopt Prong I Without Any Contingencies and Adopt Prong II Contingent Upon the Passing of the CASE Act. 396

V. POLICY NEED 397

VI. CONCLUSION 398

I. INTRODUCTION

With the increased use of various social media platforms like Twitter and Instagram, the process of sharing ideas has become progressively easier and more widespread. These platforms have also become spaces where creators can publish their work.[1] Whether it be a comedian sharing originally written jokes, a writer sharing stories, or an artist posting a graphic, these platforms have become creative hubs for artists having access to fast publication of their work.[2] While these forums are pretty remarkable ways to create and consume culture, they also create problems.[3]

One of the problems created by this method of sharing is social media users taking the original works of other users, commercializing them, and profiting off this commercialization without any attribution to or compensation for the original authors.[4] The current mechanisms in place for collecting damages for copyright infringement are either impractical or inapplicable for Twitter users who do not seek to obtain registration for the works they publish through the social media platform and other platforms like it due to the high cost of attorney's fees.[5]

As the way we create and consume culture changes, the nature of the mechanisms we have in place for protecting original content creators against copyright infringement must change as well. One barrier that needs to be eliminated to better protect these authors is the registration prerequisite for

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1. *See* Haydn Symons, 3 *Expert Tips to Showcase Your Art on Twitter*, AGORA GALLERY (June 27, 2018), https://www.agora-gallery.com/advice/blog/2018/06/27/3-expert-tips-to-showcase-your-art-on-twitter/ [https://perma.cc/44DM-BNGZ] (providing tips to artists who share their work on Twitter).

2. *See* Erik Abriss, *The 15 Funniest Twitter Accounts of 2017*, VULTURE (Dec. 26 2017), https://www.vulture.com/2017/12/the-15-funniest-twitter-accounts-of-2017.html [https://perma.cc/AN9Z-NVC5] (providing a list of well-known and up and coming comedians on Twitter along with examples of joke tweets they've posted); MJ Franklin, *18 Twitter Short Stories that Prove Tweets Can Be Literary Too*, MASHABLE (Oct. 2, 2014), https://mashable.com/2014/10/02/twitter-short-stories-bone-clocks/#wE3l2Eipy5qA [https://perma.cc/U9EZ-U969]; Anna Washenko, *9 Amazing Artists to Follow on Twitter*, MASHABLE (Feb. 1 2014), https://mashable.com/2014/02/01/twitter-artists-to-follow/#BW4OLWDSrPqn [https://perma.cc/SBM5-PWUJ].

3. *See* Samuel P. Kovach-Orr, *What You Should Know Before Posting Your Art to Social Media*, BURNAWAY (Aug. 28, 2017), https://burnaway.org/feature/posting-art-social-media/ [https://perma.cc/Y6B4-CV2B] (discussing potential infringement of artists' intellectual property rights as a result of posting their work on social media).

4. *See* Daniel Kreps, *Frank Ocean T-Shirt at Center of Debate Over Tweet Copyright*, ROLLING STONE (Aug. 2, 2017), https://www.rollingstone.com/music/music-news/frank-ocean-t-shirt-at-center-of-debate-over-tweet-copyright-200235/ [https://perma.cc/B9K9-2B89].

5. *See* 17 U.S.C. § 412 (stating that copyright holders without registration are precluded from collecting statutory damages and costs and attorney's fees); *see also* Terrica Carrington, *A Small Claims Court is On the Horizon for Creators*, THE COPYRIGHT ALLIANCE BLOG (Oct. 4, 2017), https://copyrightalliance.org/ca_post/small-claims-on-the-horizon/ [https://perma.cc/Y3TX-9FS7] (pointing to the high cost of copyright infringement litigation lawsuits as one reason for the creation of a small claims court).

copyright owners to collect statutory damages and attorney's fees under the Copyright Act of 1976.[6] Authors will be better protected if this barrier is eliminated because they will have easier access to adequate relief. The collection of attorney's fees specifically would enable authors who couldn't previously bring suit due to financial concerns to bring suit once the barrier is eliminated. This Note will present complementary approaches aimed at amending the registration requirement in order to eliminate this barrier. Congress should create an exception to the registration requirement in the Copyright Act in instances where commercialization of the content of a stolen tweet has occurred. In these cases, the tweet itself usually offers the information a registration of the work would require, thereby serving the purpose of registration of "establishing a public record of a copyright claim"[7] without obtaining actual registration from the Copyright Office. It is also necessary to consider a new bill, titled the CASE Act, aimed at creating a small claims court for copyright holders when attempting to eliminate the registration barrier.[8] As part of the approach presented in this Note, eliminating the registration barrier would also involve providing an alternative to plaintiffs in situations where cases qualify to be tried in the CASE Act-presented small claims court[9] but are instead tried in front of a jury due to the defendant's preference. If a defendant were to opt for a jury trial instead, the plaintiff would have to bear the cost of an attorney in a situation where she would not have had been required to have the case tried in a small claims court.[10] Therefore, this proposal aims to allow prevailing plaintiffs to collect attorney's fees for cases tried in federal court that could have instead been tried in the small claims court presented by the CASE Act bill to avoid attorney's fees to begin with.

Although the problem discussed in this Note is prevalent among a variety of social media platforms, the focus will be on how the issue of copyright infringement has manifested through the use of Twitter. However, the solutions presented in this Note could be applicable to a variety of social media platforms and should not be limited to the scope of Twitter. While applying this Note's proposal to other social media platforms would need more analysis and research, for the purposes of this Note, it is important to keep in mind that the implications of the proposals presented may extend beyond Twitter.

Due to the increasing ability of creators to share their works online on social media platforms, Congress must amend the registration requirement of

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6. *Id.*

7. *Circular 1: Copyright Basics*, U.S. COPYRIGHT OFF., 5 https://www.copyright.gov/circs/circ01.pdf#page=7 [https://perma.cc/W3WH-4WG7] (last visited Jan. 27 2018) [hereinafter *Circular 1: Copyright Basics*].

8. H.R. Rep. No. 3945 1,1 (2017) https://www.scribd.com/document/360778251/Copyright-Alternative-Small-Claims-Enforcement-Act#fullscreen&from_embed [https://perma.cc/5XBX-4HTM] [hereinafter CASE Act].

9. *See* Michael Zhang, *House Bill Introduced for Copyright Small Claims*, PETAPIXEL (Oct. 5, 2017), https://petapixel.com/2017/10/05/house-bill-introduced-copyright-small-claims/ [https://perma.cc/LRS9-ZH46].

10. *See id.*

Copyright Act in order to better protect copyright owners against infringement and to provide access to better enforcement of their copyright protection rights. This Note will first lay out the issue of commercialization of tweets without compensation for or attribution to their original authors. Next, it will briefly discuss the legal basis surrounding the copyrightability of content posted on Twitter followed by an in-depth discussion of the current legal framework in place meant to protect original content creators in these instances and why they are insufficient. Finally, it will present a two-pronged solution aimed at relaxing the registration requirement to provide creators with access to the courts and attorney's fees in the event of a lawsuit, enabling creators to defend themselves against copyright infringement even without formal registration of their work. The first prong proposes that Congress amend the Copyright Act to allow a social media post like a tweet to serve as informal registration that allows the plaintiff to bring suits and have access to the other benefits of registration, such as the awarding of attorney's fees, until formal registration can be obtained. The second prong proposes that, even if the CASE Act passes, the prevailing plaintiff may still be awarded attorney's fees without formal registration if the defendant prefers to have the case heard in a federal court rather than the small claims court created by the bill. In order to eliminate the registration barrier that prevents many individual creators who post their work on social media from bringing suit against infringers, Congress must first amend the Copyright Act to allow creators' social media posts, such as tweets, to serve as registration for the purpose of filing infringement lawsuits and second provide a way for prevailing plaintiffs to recuperate attorney's fees in certain cases tried in the small claims court proposed by the CASE Act should the bill pass.

II. BACKGROUND

The following Section will illustrate relevant factual and legal background to provide a better understanding of the issue this Note attempts to resolve. The first Subsection will provide general information on how Twitter works along with examples of creators' work posted on social media being commercialized without their permission. The second Subsection will then go into the relevant legal background surrounding the current legal mechanisms available to creators like those who post their work on social media.

A. *The Following Section Provides an Overview of the General Mechanics of Twitter as Well as a Few Examples That Illustrate the Issue This Note Addresses.*

The social media platform Twitter is a website where users sign up, free of charge, to create accounts where they are able to post (or "tweet") whatever they wish within the limits of 280 characters and Twitter's terms and conditions.[11] Twitter users have the option of setting their Twitter profiles as private, where only the people they have allowed to follow them can view the content they post, or public, where anyone, regardless of whether they follow the account, is able to view the content they have posted.[12] When a Twitter user ("tweeter")'s profile is public, other users are able to "retweet" that user's tweet so that it is reposted on the retweeter's page for all of her followers to view as well.[13] This process enables users who may not follow the original tweeter to view the tweet.[14] This retweeting process is one way for a Twitter user to reach a wide-spread audience. It may also be relevant to know that Twitter gives a portion of its users, such as celebrities, public figures, and news accounts, a blue checkmark next to their Twitter names to indicate that user's authenticity.[15]

The content posted on Twitter varies tremendously. For example, companies use Twitter to advertise, news agencies use the platform to break stories, celebrities tweet to maintain an online presence, and other individuals use the platform to interact with online phenomena and post both original and unoriginal content.[16] The focus of this Note is primarily on the last group of Twitter users. The type of content these individuals post varies further. Many users limit themselves to posting thoughts or observations, which range from being insightful or witty to simply being ridiculous.[17] On the other hand, many use Twitter as a public forum to showcase their talents.[18] These talents come in the form of carefully crafted jokes, poems, original sayings, original graphics, links to original music, original lyrics, and more.[19] For many artist

11. *See Twitter Rules*, TWITTER, https://support.twitter.com/articles/18311 [https://perma.cc/KR8F-YP38] (last visited Nov. 21, 2017); Aliza Rosen, *Tweeting Made Easier*, TWITTER BLOG (Nov. 7, 2017), https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html [https://perma.cc/L6HE-QU2J].

12. *See About Public and Protected Tweets*, TWITTER: HELP CENTER, https://help.twitter.com/en/safety-and-security/public-and-protected-tweets [https://perma.cc/VF2U-5KAN] (last visited March 27, 2019).

13. *See id.*

14. *See Retweet FAQs*, TWITTER, https://help.twitter.com/en/using-twitter/retweet-faqs [https://perma.cc/6CAW-MFPX] (last visited Nov. 11, 2018).

15. *See* Hamza Shaban, *Twitter Wants to Open Verification to Everyone*, THE SWITCH (Mar. 9, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/03/09/twitter-says-it-will-open-verification-to-everyone/?utm_term=.21724832ed04 [https://perma.cc/7Q8L-BR4L].

16. *See About Different Types of Tweets*, TWITTER: HELP CENTER, https://help.twitter.com/en/using-twitter/types-of-tweets [https://perma.cc/R2NZ-MG3D] (last visited Mar. 27, 2019); *see also* Aaron Mak, *How Twitter is Changing to Become More Relevant for News and Sports*, SLATE (June 13, 2018), https://slate.com/technology/2018/06/how-twitter-changing-timeline-relevant-news-sports.html [https://perma.cc/APD3-DXPZ]; Megan Donley, *Fans Connect With Celebrities on Twitter*, SOUTH SOURCE (Feb. 2011), http://source.southuniversity.edu/fans-connect-with-celebrities-on-twitter-32784.aspx [https://perma.cc/VLL6-3JB7].

17. *See supra* note 2.

18. *Id.*

19. *Id.*

Twitter users, Twitter serves as important mechanism they can use to reach a wide audience quickly through the spread of their work.[20]

Although it is rather remarkable how artists can publish their work on online platforms with the click of a button, this fast publication process has also resulted in problems that can ultimately harm the original author of the work being shared. Because so many people have access to the content of a tweet once it is shared, it can be easy for other users, or even people outside of Twitter who have seen the content of the tweet elsewhere, to then steal that content and use it for their own commercial gain without asking for permission, attributing the work to the original author, or providing the original author with compensation.[21]

A recent example of this is when teenager Kayla Robinson lifted the content of Twitter user Brandon Male's tweet and printed it on t-shirts she sold for profit.[22] Renowned R&B artist Frank Ocean later wore one of these t-shirts during a performance, which resulted in the sales of the shirt skyrocketing.[23] The phrase on the t-shirt read, "Why be racist, sexist, homophobic, or transphobic, when you could just be quiet."[24] Male's tweet, from 2015, read, "Why be racist, sexist, homophobic, or transphobic, when you could be quiet?"[25] Male reached out to Robinson's company, Green Box, after seeing that a photo of someone wearing the shirt had gone viral prior to Frank Ocean wearing the shirt.[26] This attempt at some sort of resolution resulted in Green Box informing Male he was given credit for the saying on the company's Instagram page without offering Male anything else.[27] The second time Male tried to resolve the matter after seeing Frank Ocean wearing the t-shirt, Robinson paid Male $100 by way of Venmo.[28] As Robinson was selling each shirt for $18.99,[29] this payment hardly seems adequate to compensate Male for his work. Male and Robinson eventually came to an arrangement on their own to settle the matter without legal recourse.[30] Although the two were able to resolve the matter, this may not always be the

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20. *See supra* note 1.

21. *See* De Elizabeth, *Twitter Suspends Accounts Known for Stealing Tweets*, TEEN VOGUE (Mar. 11, 2018), https://www.teenvogue.com/story/twitter-suspends-accounts-known-for-stealing-tweets [https://perma.cc/AUN8-WZJX]; *see also* Carla Herreria *Twitter Bans Popular Accounts Accused of Stealing Jokes and Selling Retweets*, HUFFINGTON POST (Mar. 10, 2018), https://www.huffingtonpost.com/entry/twitter-suspends-accounts-stolen-tweets-sell-retweets_us_5aa44bc0e4b086698a9e427e [https://perma.cc/6MHN-8A67].

22. *See* Daniel Kreps, *Frank Ocean T-Shirt at Center of Debate Over Tweet Copyright*, ROLLING STONE (Aug. 2, 2017), https://www.rollingstone.com/music/music-news/frank-ocean-t-shirt-at-center-of-debate-over-tweet-copyright-200235/ [https://perma.cc/4AVX-VFUR].

23. *Id.*

24. *Id.*

25. Brandon Male (@avogaydro), TWITTER (Aug. 8 2015 11:43 AM), https://twitter.com/avogaydro/status/630056636523094016 [https://perma.cc/NAR3-MZ8L].

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

case for other creators. Robinson and Male were able to talk the matter over amicably,[31] but this Note attempts to provide a solution for individuals who are unable to do so. It may be more difficult to come to an amicable solution without using legal mechanisms when the dispute occurs within a more inequitable dynamic, for example, between an individual creator and a large company such as an online magazine, where the parties would have access to very different resources.

Writer Ayesha Siddiqi has garnered a robust following on Twitter due to her brilliantly crafted and often hilarious tweets.[32] On multiple occasions, Siddiqi's followers have pointed her attention to merchandise displaying her tweets without her permission, such as tote bags with her tweets printed on them.[33] Siddiqi also knows people have printed her original tweets on artwork sold on Etsy.[34] When asked if the legal mechanisms proposed in this Note would be of interest to content creators like herself, Siddiqi was rather receptive to the idea.[35] Although Siddiqi has not taken action against the individuals who have used her tweets for their own commercial gain, she can imagine why some content creators who may not have a job or other source of income outside their content creation would want to be compensated in such instances.[36] Siddiqi has expressed that because she does not rely on Twitter for her livelihood, she does not feel the need to go after those who have infringed upon her works.[37] However, she does believe the mechanism proposed here would be useful for people whose creation of art serves as their livelihood.[38]

Another area of Twitter where this issue is present is the world of popular Twitter accounts, such as those with a following of over 100,000.[39] Owners of these popular accounts will often take the tweets of other Twitter users who have less of a following and post the tweets on their own accounts as though they were the original owners of the tweets.[40] Often, these larger Twitter accounts make a profit off these other accounts through a phenomenon known as "tweetdecking," where owners of larger accounts receive payment from brands and individuals in exchange for posting tweets

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31. *See id.*
32. Sara Galo, *Interview: Ayesha Siddiqi: 'We need to stop waiting for permission to write'*, THE GUARDIAN (Dec. 9, 2014), https://www.theguardian.com/books/booksblog/2014/dec/09/ayesha-siddiqi-we-need-to-stop-waiting-for-permission [https://perma.cc/9YJR-5NDH].
33. Telephone Interview with Ayesha Siddiqi, writer (Nov. 20, 2017).
34. *Id*.
35. *Id*.
36. *Id.*
37. *Id.*
38. *Id.*
39. This number does not come from any particular source but is just an observation from using Twitter and seeing that most users have significantly less than 100,000 followers; *see also* Cent Muruganandam, *Average Number of Twitter Followers is 208: Twitter Stats Infographic*, BLOGGING & INFOGRAPHICS (Jan. 4, 2016), https://yourescapefrom9to5.com/average-number-of-twitter-followers-is-208-infographic [https://perma.cc/YA6Q-65LT].
40. *See supra* note 18.

and retweets.[41] This Note takes the position that using other people's tweets without permission, attribution, or contribution to attract a large following and maintain the popularity of Twitter pages, thereby attracting more advertisements, is an unfair use of other users' original content. An example of a Twitter account that uses others' original content is the "Common White Girl" Twitter account run by the Twitter handle @girlhoodposts.[42]

The widespread use of Twitter and other social media platforms like it have resulted in unintended consequences such as the infringement on copyright illustrated by the examples above. As the online social media universe is still relatively new, the legal world has some catching up to do when it comes to governing the use of these platforms and their unintended consequences. The current legal framework that individuals like Male and Siddiqi have access to is either impractical or inapplicable, requiring legal minds to find and implement a solution.

B. Current Legal Framework

The following Subsection will outline the relevant legal background to provide a better understanding of the current legal mechanisms available to creators and why they are inadequate. Specifically, this Section discusses the copyrightability of tweets, copyright infringement as it relates to tweets, registration of copyrights, and the current legal mechanisms available to protect creators against copyright infringement.

1. Copyrightability of Tweets

First, it is important to establish that the scope of copyright-protected works for the purposes of this Note includes both tweets of the actual work, such as Male's tweet discussed above,[43] and tweets that provide a link to the actual work, such as instances when a creator has tweeted a link to the photo or music she has created. Although the copyrightability of tweets is beyond the focus of this Note, it will be useful to provide a brief overview of what, if any, legal framework is available to assess whether tweets can be protected. The issue of whether tweets are considered protectable under copyright law is not one that has been legally resolved. Although there is currently no case law or statute governing the matter of tweets' copyrightability specifically, many have written about the copyrightability of tweets in legal academia, providing compelling cases for why tweets may be protectable under

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41. *See id.*; *see also* Julia Reinstein, *"Tweetdecking" is Taking Over Twitter. Here is Everything You Need to Know.*, BUZZFEED NEWS (Jan. 12, 2018), https://www.buzzfeednews.com/article/juliareinstein/exclusive-networks-of-teens-are-making-thousands-of-dollars [https://perma.cc/Q9K4-LJT7].

42. Common White Girl (@GirlHoodPosts), TWITTER, https://twitter.com/girlhoodposts [https://perma.cc/VEC2-DX3F].

43. Brandon Male (@avogaydro), TWITTER, (Aug. 8 2015, 11:43 AM), https://twitter.com/avogaydro/status/630056636523094016 [https://perma.cc/3YMZ-QGBS].

copyright law.[44] Additionally, the recent decision by the United States District Court for the Southern District of New York in *Goldman v. Breitbart News Network, LLC* seems to suggest that a tweet could be copyrightable, as the court's decision held that an unauthorized display of a tweet on a news website is in violation of the copyright owner's exclusive right to publicly display her work.[45]

In order to establish copyright protection of her works, an author must fix the works "in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated."[46] Thus, the author owns copyright of her original work as soon as she fixes the work in a tangible medium.[47] A work is arguably fixed in a tangible medium when it is published as a tweet on Twitter with the tweet itself being the tangible medium. However, there are some limitations as to what is considered copyrightable. For example, copyright usually does not protect "words and short phrases,"[48] which must be taken into account here. Additionally, it is unlikely that jokes posted on Twitter would be protected by copyright because many copyright academics believe this type of content is instead protected by social norms.[49] This is not to say jokes are never copyrightable, only that it may be more difficult to obtain copyright protection for jokes posted on Twitter when many academics believe copyright protection of jokes in the comedy world to be thin.[50] However some jokes may still be protected in some instances.[51] Taking these limitations and the current literature surrounding the copyrightability of tweets into account, this Note assumes that the courts would find an original author of a tweet would have copyright ownership of her tweets.

2. Copyright Infringement

Assuming that a court would find the content at issue copyrightable, the violation of any of the exclusive rights granted to the content's copyright owners would result in infringement of copyright.[52] Although the violation of any of the exclusive rights granted to a copyright owner would result in

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44. *See generally* Stephanie Teebagy North, *Twitteright: Finding Protection in 140 Characters or Less*, 11 J. HIGH TECH. L. 333 (2011).

45. *See generally* Goldman v. Breitbart News Network, LLC, No. 17-CV-3144 (KBF), 2018 WL 911340 (S.D.N.Y. Feb. 15, 2018).

46. 17 U.S.C. § 102(a).

47. *Id.* § 102.

48. *See* Copyright Off., Copyright Compendium Chapter 300- Copyright Authorship: What Can Be Registered (2014).

49. *See generally* Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA L. REV. 1787 (2008) (claiming that social norms such as mutual respect among comedians serves as protection for jokes).

50. *Id.* at 1802.

51. *See* Scott Alan Burroughs, *Surely, You Jest: Copyright and Comedy*, ABOVE THE LAW (Sept. 20, 2017), https://abovethelaw.com/2017/09/surely-you-jest-copyright-and-comedy/ [https://perma.cc/LX6N-SQ2Z].

52. *See* 17 U.S.C. § 501(a).

copyright infringement,[53] it may be useful to take a look at some of the rights most relevant to Twitter users who have had their content stolen and commercialized. The first exclusive right granted to a copyright owner is the right "to reproduce the copyrighted work in copies or phonorecords."[54] This right is most clearly violated when owners of Twitter accounts like "Common White Girl" repost content created by others and pass it off as their own.[55] The second exclusive right granted to copyright owners is the right "to prepare derivative works based upon the copyrighted work."[56] In the context of this Note, the exclusive right of reproduction is most clearly violated when individuals take content from the original author, slightly alter the content, and commercialize it by putting it on a t-shirt, tote bag, or other merchandise. The third exclusive right granted is the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[57] This exclusive right would be violated in instances such as those illustrating the violation of Section 106(1) and 106(2) rights,[58] where the infringer obtains commercial benefit from the sale or rental of the copy or its derivatives.

Additionally, while the right of attribution is not an exclusive right guaranteed by Section 106 of the Copyright Act, it is a moral right recognized by The Berne Convention ("Convention"), of which the United States is a member.[59] Under this section of the Convention, the United States is obligated to recognize the author's right to "claim authorship of the work."[60]

C. *Current Remedies for Infringement, and Why They Are Not Always Applicable/Effective*

Generally, under Title 17, Chapter 5 of the Copyright Act of 1976, the remedies for a plaintiff who prevails on her claim of copyright infringement are as follows: an injunction that prevents the respondent from continuing to infringe; disposition and impounding of the products made through infringement; general damages, which are calculated by looking at the profits the respondent made by selling the infringed works; statutory damages; and

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53. *See id.*
54. 17 USCA § 106(1).
55. Common White Girl (@GirlHoodPosts), *supra* note 42.
56. 17 U.S.C. § 106(2).
57. *Id.* § 106(3).
58. *See id.* § 106(1) (stating that the copyright owner has the exclusive right "to reproduce the copyrighted work in copies or phonorecords*"); id.* § 106(2) (stating that the copyright owner has the exclusive right "to prepare derivative works based upon the copyrighted work").
59. *See* The Berne Convention, art. § 6*bis*. This is an international convention among various countries containing provisions focused on protecting the works and rights of creators of the country parties to the Berne Convention. *See Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELLECTUAL PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/ [https://perma.cc/QWS6-KTNF] (last visited Mar. 27, 2019).
60. *Id.*

costs and attorney's fees.[61] As a result of the current system in place, copyright owners who have obtained registration for their works with the Copyright Office can make use of all of these remedies.[62] However, original authors who have not registered their works prior to bringing suit against an infringer are precluded by Section 412 of the Copyright Act from receiving statutory damages and costs and attorney's fees as remedies for infringement.[63] Because it is unlikely that most Twitter users will be registering the works they tweet with the Copyright Office before someone steals them and makes a profit, these individuals would not have access to remedies that require the registration of copyright.

However, seeing that the original author would still have access to the other remedies available, such as general damages and injunctions, one may wonder why it matters whether or not they are also eligible for statutory damages and attorney's fees.

At first glance, this may not seem like much of an issue. While these copyright holders are unable to obtain statutory damages, they still have the option of obtaining actual damages, which can be calculated from looking at how much profit the infringer has made off of the copyright owner's work.[64] Under Section 501 of the Copyright Act, if a copyright owner chooses to accept statutory damages in lieu of actual damages, she can receive anywhere from $750 to $30,000, but no more, contingent on what the court finds to be appropriate for the infringement.[65] If the copyright owner is able to prove that the infringer willfully infringed upon her works, she could be awarded up to $150,000 in statutory damages depending on what the court finds is appropriate.[66]

However, there is no substitute for retaining the costs and attorney's fees that come with bringing a copyright infringement suit. Unless a plaintiff is able to find an attorney to litigate the matter on a pro-bono basis, a plaintiff must pay the costs and attorney's fees inherent in the litigation process. Thus, it is this remedy that highlights the problem with the current legal framework for compensating those whose works have been infringed. Many individuals who tweet their original content on Twitter likely do not have the resources or capacity to bring copyright infringement suits in court.[67] Having to bear the cost of bringing such a lawsuit and paying for an attorney likely deters individuals whose works have been infringed upon from going up against the infringer in court for just compensation. This factor may also be one of the

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61. *See* 17 U.S.C. §§ 502-505.
62. *See id.* § 412.
63. *See id.*
64. *See* 17 U.S.C. § 504.
65. *See id.*
66. *See id.*
67. *See* Balganash Shyamkrishna, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) [hereinafter Copyright Infringement Markets]; *see also* Shannon Greenwood et al., *Social Media Update 2016: Facebook Usage and Engagement Is on the Rise, While Adoptions of Other Platforms Remain Steady*, PEW RES. CTR. (Nov. 11, 2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/ [https://perma.cc/FP9M-C53E].

reasons we have yet to see individuals bringing suits in these instances. As a result, costs and attorney's fees could end up indirectly excluding these individuals from the remedies they should have access to without obtaining registration.

In some cases, statutory damages may be greater than those calculated by the amount of profit made for the purposes of actual damages.[68] Thus, in cases where the plaintiff did not register her work, she may have to settle for less than she would otherwise be entitled to by statute.[69] Even so, the lack of attorney's fees is more problematic and one of the main motivations behind this Note's proposal to restructure the way we view registration. Bringing a copyright infringement suit in federal court for litigation can cost anywhere between $384,000 and $2,000,000.[70] Based on the high cost of litigation, it is unlikely that low-income creators with a lack of resources who post their work on social media will be able to afford litigation. A Pew Research Center study that examined the demographics of social media users found that both Twitter and Instagram users are more likely to be younger adults than older adults.[71] According to Business Insider, as of April 2017, the average annual salary for 16-19 year-olds was $21,840, and it was $27,456 for 20-24 year-olds, $39,416 for 25-34 year-olds, and $49,400 for 35-44 year-olds.[72] Given these statistics, it is likely that users of Twitter and other social media sites who seek infringement remedies for their original works would have a difficult time litigating their cases in federal court.[73] Without access to attorney's fees as a remedy, bringing a suit for copyright infringement in federal court would be impractical. The remedies plaintiffs would have access to without registration are then also effectively barred if the plaintiff cannot afford an attorney. These high costs are likely discouraging to young creators seeking a remedy for infringement, and therefore they likely indirectly act as a deterrent for such creators who seek to litigate their cases.

D. A Look at Registration

Due to this barrier, this Note proposes that The Copyright Act should be amended so that registration is no longer a barrier for individuals who own

68. These are situations in which the possible actual damages was less than the statutory damages amount, which ranged from $750 to $30,000, as outlined in 17 U.S.C. § 504.

69. This Note concedes the point that creators' need for attorney's fees is much stronger than their need for statutory damages, given that they are still entitled to actual damages without registration as permitted by 17 U.S.C. § 504. Despite this concession, this Note still advocates that having access to statutory damages can sometimes provide more appealing relief than actual damages would, and creators should therefore have the option of obtaining statutory damages.

70. *See* Copyright Infringement Markets, *supra* note 67 at 2280 (citations omitted).

71. *See* Greenwood et al., *supra* note 67.

72. *See* Amelia Josephson, *The Average Salary for Americans at Every Age*, BUS. INSIDER (Apr. 28, 2017), http://www.businessinsider.com/the-average-salary-for-americans-at-every-age-2017-4 [https://perma.cc/G6AP-XDV6].

73. *Id.*

copyrights of the works they have posted on Twitter and other similar social media platforms.[74] This Note proposes a few different ways that work together to eliminate the registration requirement barrier, but before doing so, it would be helpful to look at copyright registration in further detail.

Obtaining copyright registration requires filing a registration application with the Copyright Office indicating: "the title of the work, the author of the work, the name and address of the claimant or owner of the copyright, the year of creation, whether the work is published, whether the work has been previously registered, and whether the work includes preexisting material."[75] Along with this application, the registration applicant must pay a registration filing fee that is nonrefundable and deposit a copy of the work they are registering with the Copyright Office.[76] Registration filing fees range from $25 to $400[77] depending on what is being registered and the type of registration. [78]After all these components are given to the Copyright Office, the office either issues a certificate of registration or refuses to grant the registration to the applicant.[79] If a certificate is issued, this signifies that the author's registration application is in a public record that others can access through a request.[80] Such a registration certificate is valuable in copyright infringement litigation suits because it serves as prima facie evidence that the plaintiff bringing suit owns a valid copyright in her original work.[81]

Although this may sound rather simple, it is not. Processing a registration application and coming to a decision of granting or denying a registration certificate can take up to, on average, six months and can be

74. How to determine what social media platforms are like Twitter is out of the scope of this Note, but it is unlikely that Congress would consider amending the Copyright Act to consider Twitter users only and specifically. Thus, this Note proposes including other social media platforms as Congress sees fit. The focus of this discussion is on Twitter, but Instagram is mentioned as well because of the likenesses between the platforms in terms of creators posting their work.

75. *Circular 2: Copyright Registration*, U.S. COPYRIGHT OFF., 1 https://www.copyright.gov/circs/circ02.pdf [https://perma.cc/2HX7-6D2M] (last visited Jan. 27, 2018).

76. *Circular 1: Copyright Basics*, *supra* note 9.

77. Although these fees may not seem excessive to some, it is important to consider that these fees would stack up if a copyright owner on Twitter or anther social media platform was required to pay a registration filing fee for each tweet or post.

78. *Circular 4: Copyright Office Fees*, U.S. COPYRIGHT OFF., 7 https://www.copyright.gov/circs/circ04.pdf [https://perma.cc/M875-MR4Y] (last visited Nov. 11, 2018).

79. *Circular 2: Copyright Registration*, U.S. COPYRIGHT OFF., 6 https://www.copyright.gov/circs/circ02.pdf [https://perma.cc/2WFY-SRKF] (last visited Jan. 27, 2018).

80. *Id.* at 1.

81. *Id.*

significantly longer depending on the method of registration.[82] This time period is important because a copyright owner cannot bring suit "until preregistration or registration has been made."[83] If an original creator trying to bring a copyright infringement suit against an infringer has to wait, on average, six months before being able to do so, that is six more months of potential infringement harm the original owner could suffer. Another issue with the registration approach is that, because the statute of limitations to bring a copyright infringement lawsuit is three years,[84] cases in which a plaintiff is late to register her work may result in the statute of limitations running out before her registration application is granted or denied. This issue is precisely why there is a circuit split among courts regarding when a copyrighted work is considered to be registered for the purposes of filing suit.[85]

In a case called *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, the Ninth Circuit took what is referred to as the application approach, which considers the application of registration to be proof of registration.[86] Conversely, the Tenth and Eleventh Circuits have opted to take what is referred to as the registration approach,[87] which stands for the proposition that only the Copyright Office's approval of a registration application can serve as proof of registration.[88] The benefit of the application approach is that the plaintiff wanting to file suit would not have to wait through the entire processing period before being able to file suit. This could thereby prevent the infringer from continuing to infringe during the processing period.[89] The question of which approach is the correct one resurfaced in the *Fourth Estate Public Benefit Corp. v. Wall-Street.com* case, which was decided by the Eleventh Circuit Court in May of 2017.[90] If the Supreme Court were to decide that the registration approach is the proper approach, this could intensify the need for the proposal presented by this Note because creators would have to wait the on average six-month period to get their registration approved before bringing

82. *See Registration Processing Times* (as of Oct. 2, 2018), U.S. COPYRIGHT OFFICE, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf [https://perma.cc/LC2K-HNE6] (last visited Mar. 27, 2019); *see also Frequently Asked Questions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/ [https://perma.cc/UL5B-7552] (last visited Jan. 27 2018); *Registering a Work*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-register.html#length [https://perma.cc/UG74-LDPR] (last visited Mar. 27, 2019).

83. 17 U.S.C. § 411(a).

84. *Id.* § 507(b).

85. *See* Fourth Estate Pub. Benefit Corp. v. Wall-Street.Com, LLC, 856 F.3d 1338, 1339 (11th Cir. 2017) (reflecting the position of the Tenth and Eleventh Circuit Courts that only the Copyright Office's approval of registration can serve as proof of registration); Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F.3d 612, 619 (9th Cir. 2010) (standing for the proposition on the other side of the circuit split that considers application of registration to be proof of registration).

86. *See Cosmetic Ideas, Inc*, 606 F.3d at 619.

87. *See Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1339.

88. *See id.*

89. *See id.* at 1342.

90. *See Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1338.

suit, opening their work up to further instances of potential infringement during this waiting period.

Although this Note's purpose is not to determine when registration is considered effective, the question is still generally relevant to this Note, because the decision of when registration is established affects the harm suffered by a creator. The longer it takes to establish registration, the longer the period in which other users can infringe upon the creator's work before the creator can file an infringement suit. Such potential for infringement due to the long registration processing period further illustrates the need for the solution presented in this Note. Even if the Supreme Court were to decide the application approach is the correct approach, the need for the solution presented by this Note would still exist because registration would remain a precondition to filing a lawsuit.

E. *The Following Section Provides Background Information on the CASE Act.*

Part of the solution presented by this Note to eliminate the registration barrier ties into the proposed legislation, the CASE Act, for creating a small claims court for copyright disputes.[91] This bill proposes to create a small claims court as a branch inside the Copyright Office where claim officers, as opposed to a federal judge, would preside over copyright cases brought by copyright owners.[92] The bill is meant to propose an alternative to the costly federal litigation route that is currently available to creators seeking to resolve their copyright claims.[93] As previously mentioned, copyright owners choosing this route would be able to receive up to $30,000 in damages if they are able to prove their claim.[94] Seeking an amount higher than this requires the claimant to use the regular federal litigation route to find relief.[95] Although the CASE Act would be beneficial to the copyright community, there are still barriers to relief presented by this solution that this Note's proposal hopes to address. For example, although attorneys are not required to present copyright owners' cases to the small claim courts, each party is allowed representation by either an attorney or student attorney.[96] If a copyright owner choses to have representation in either of these ways, the cost of that representation is to be covered by each respective party.[97] Thus, if a copyright owner does not feel like she can present her own case and elects to be represented by an attorney, she is again faced with the high cost of attorney's fees.

The registration requirement remains a precondition to bringing a claim in the small claims court.[98] Furthermore, the proposed bill specifically states

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91. CASE Act of 2017, H.R. 3945, 115th Cong. (2017).
92. *See* Zhang, *supra* note 9.
93. *See id.*
94. *Id.*
95. *Id.*
96. CASE Act § 1405(d).
97. *Id.* § 1403 (e)(1)(D).
98. *Id.* § 1404(a).

that registration will only be considered sufficient to bring suit if the Copyright Office register has issued a certificate granting registration or a denial.[99] Here, the issue of having to wait six months or more before being able to bring suit remains. Finally, the limited damage recovery amount of $30,000[100] may be an issue for copyright owners suffering infringement of a higher value.

If the CASE Act were to pass, it would be relevant to this proposal because it too proposes an alternative to the current federal litigation method for copyright infringement suits.[101] Another barrier presented by the bill is that both parties in the copyright claim are to agree to have their case heard in the small claims court in order to use this dispute resolution method.[102]

III. NEED FOR REFORM

Reform is necessary to honor the purpose of copyright protection itself. The purpose of copyright protection is to promote creativity and the sharing of ideas.[103] Without such protection, creators would likely be more reluctant to share their work and ideas because of a concern about the risk of people infringing on their work and profiting off of it.[104] Social media platforms like Twitter allow creators who may not have other resources or connections to have their work seen by a wide audience that would otherwise not be accessible. If United States society chooses not to afford these creators with appropriate, practical protection, we risk suffering the consequences of creators not sharing their work, a general disregard for copyright law, and reduced incentive for creators to continue creating. This is problematic if we, as a society, hope to perpetuate a rich culture that we and other societies can learn from, produced by creators who are confident that there are mechanisms in place to protect their work from infringement. This confidence can, in turn, give creators the opportunity to make a living off the content they produce. If the amendment proposed in this Note seems drastic, it is because the recent changes in the way we consume and create culture have also been drastic.[105] It is unlikely that the people drafting Copyright Act in 1976 and those who have amended it since could have foreseen the presence and impact social media has today, as there is no mention of such platforms in the Copyright

99. *Id.* at 17–18.

100. *Id.* at 16–17.

101. For clarification, this Note is not proposing a separate small claims court. The solution presented in this Note only builds upon the small claims court proposal of the CASE Act, as it is relevant to the issue addressed here.

102. *See* CASE Act at 10.

103. *See U.S. Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF. INFO. CTR, https://www.copyright.gov/circs/circ1a.html [https://perma.cc/T5KN-SC84] (last visited Nov. 21, 2017).

104. *See id.*

105. *See* Serena Kutchinksky, *Has Technology Changed Cultural Taste?*, THE GUARDIAN (Oct. 31, 2014), https://www.theguardian.com/culture-professionals-network/2014/oct/31/-sp-technology-cultural-taste-youtube-vloggers-vice [https://perma.cc/F3TE-6LHG].

Act.[106] Further, courts have not yet really dealt with the copyright issues that have arisen from widespread use of social media.[107]

Another important consideration for why such a reform is now necessary is the recent increase in the character limit of tweets by Twitter.[108] Prior to the increase, tweets could only consist of 140 characters, whereas now, the new limit is 280 characters.[109] With the increased character limit, it is possible that we may be seeing more copyrightable works that need protection against infringement. According to Chapter 300 of the Copyright Compendium, copyright protection is generally not awarded to works considered to be "words and short phrases."[110] This compendium did not address tweets specifically at the time it was written.[111] Thus, as previously discussed, it is still unclear if a 140-character tweet, without a graphic or a link to a graphic or song or other work, would be protectable on its own. Now, with the increased character limit, tweets may be considered by courts to be more than just "words and short phrases."[112] The character limit increase and its possible implications make now a good time to reevaluate how content creators are able to enforce copyright protections.

IV. SOLUTION

Congress should relax the registration requirement that acts as a potential barrier to creators who want to file legal claims against individuals who have infringed upon the works they have published on social media.

A. *Prong I: Eliminate the Registration Requirement to Collect Statutory Damages and Costs and Attorney's Fees in Instances Where the Publication of the Content on Twitter and/or Other Social Media Platforms Serves the Purpose the Copyright Registration Would Have Served.*

One way to eliminate this barrier is to eliminate the registration requirement to collect statutory damages and costs and attorney's fees in instances where the publication of the content on Twitter and/or other social media platforms serves the purpose the copyright registration would have served. The purpose of registering a copyright with the Copyright Office is

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106. *See id.*

107. *See generally* U.S.C.: Title 17- Copyrights.

108. Angela Watercutter, *280 Characters Are Forcing Twitter Users to be Creative All Over Again (Kinda)*, WIRED (Nov. 9, 2017), https://www.wired.com/story/twitter-280-characters-creativity/ [https://perma.cc/MTM3-VSTW].

109. *Id.*

110. *Copyright Compendium Chapter 300- Copyright Authorship: What Can Be Registered*, U.S. COPYRIGHT OFF., (2014).

111. *Id.*

112. *See id.* (hypothesizing the idea that because tweets can be longer now, they may not be considered "words and short phrases" that are not copyrightable).

largely so that the ownership of the copyright can be on public record.[113] This way, when an author of an original work goes to file suit for infringement, the registration can be referred to in order to verify the "validity of the copyright."[114] However, it would be useful to know whether the social media platform allows retroactive editing because the potential for people tampering with the date of the post would make ascertaining the actual date of the post more difficult. When an someone posts a tweet on Twitter, the tweet shows who posted the actual content, as well as the date and time the content was posted.

An issue here may be that although the tweet itself does indicate who posted it, that indication may be the individual's Twitter name or handle as opposed to her actual name. In these cases, however, this issue could be resolved by the copyright owner showing proof that the account is hers, given she has the proper Twitter account information such as the Twitter account login information and access to the email address linked to the account. Whether or not a user is Twitter verified could also help here. However, verification would not be required in this situation under this proposal, because although Twitter verification would help show the authenticity of the copyright owner, Twitter is also able to verify who owns an account through the account owner's account information. Unlike actual registration, the tweet does not include the address of the original author, whether the content includes preexisting material, or whether the work has been published. However, the fact that the content was posted on Twitter for the public to view and access could serve as an indication that the content was published.[115] Courts may not consider tweets from accounts on private settings[116] to be published because the tweets are not actually available to the general public.[117] This issue depends on whether a post on a private account would constitute distribution to the public under the Copyright Act,[118] which is beyond the scope of this Note.

In cases where the individual's account is on the public setting, the definition of publication[119] would likely be met,[120] given that the tweet would be available to the general public. Therefore, with respect to the information formal registration provides, only the address of the copyright owner and whether the content includes preexisting material are not provided by the

113. *See Circular 1: Copyright Basics*, *supra* note 9 at 5.

114. *Id.*

115. *See Definitions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq-definitions.html [https://perma.cc/T2MQ-QTSZ] (last visited Jan. 27, 2018) (stating "[g]enerally, publication occurs on the date on which copies of the work are first made available to the public").

116. Courts may not consider tweets from accounts on private settings, meaning only those who follow the account can view the user's tweets, to be published because the tweets are not actually available to the general public. *See id.* (stating "[g]enerally, publication occurs on the date on which copies of the work are first made available to the public").

117. *See id.*

118. *See* 17 U.S.C. § 106(3).

119. *See id.* § 101.

120. *See id.* § 101.

tweet. The address of the copyright owner does not seem particularly useful in determining whether copyright infringement exists. In any case, this is also information that could be easily obtained before filing the lawsuit if needed.

Trying to address whether the content posted includes preexisting material[121]—a question traditional registration proposes to answer—is more complicated. This information is likely relevant to whether the author's copyrighted work is original, which is a requirement for copyrighted works,[122] and perhaps it is relevant in determining whether the work is a derivative work. Although this information is important, it is likely that this information would be addressed in the actual suit itself when the original owner proves her ownership of the original work. Therefore, although whether the content posted contains preexisting material is valuable information, the main purpose of registration with Copyright Office—creating a public record of who posted the work and when she posted it[123]—can be achieved without this piece of information by looking at the information provided by the tweet or social media post.

This Note proposes that Congress should amend chapter four of the Copyright Act[124] so that a tweet or social media post can serve as evidence of registration in instances in which each of the following conditions are met:

> (1) It is clear who (the author of the tweet) is claiming copyright. The name of the author
>
> can be learned from author's Twitter handle or account information.
>
> (2) It is clear when the tweet was published. This can be observed from the time and date stamp that is automatically denoted on the tweet once it is posted.
>
> (3) There is proof that the content of the tweet has been published. Here, the posting of the tweet would serve as publication.

In using this method, the copyright would not be on record with the Copyright Office. This issue can be resolved by requiring the copyright owner to provide this information to the Copyright Office or file formal registration at some time during the proceeding. This way, the Copyright Office can have the information for its own records and feel comfortable knowing the unofficial registration—the information provided by the post or tweet—was sufficient for the purposes of filing a copyright infringement suit.

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121. *See Circular 1: Copyright Basics*, *supra* note 9 at 5.
122. 17 U.S.C. § 102.
123. *See Circular 1: Copyright Basics*, *supra* note 9 at 5.
124. 17 U.S.C. § 412 (This section of the Copyright Act deals with registration.).

1. The Amendment in Prong I Should Include a Maximum Amount of Damages to Be Collected.

In order to encourage creators to protect their more lucrative works by registering early on, this proposed amendment should also include a cap on the amount of damages a creator could collect if the work has not been registered. The rationale here is that a stolen tweet accumulating an outrageously large sum of money may reflect that the original author of the tweet failed to assert her rights to the tweet; therefore, content creators should register in instances where a large amount is at stake. One way to set the maximum damage amount would be to choose a number between actual damages and statutory damages. The actual damages suffered will differ case by case depending on the actual profits made by the infringer. The damage amounts found in the Copyright Act and the CASE Act proposal indicate a wide, varying range of damages a copyright owner could recover. [125] Therefore, determining a damage amount creators would be satisfied with, for the purposes of the solution presented here and in cases where social media publication has replaced traditional registration is beyond the scope of this Note. Thus, this Note proposes forming a committee that could conduct the proper economic analysis required to determine what amount of damages a plaintiff would be entitled to if she were able to show actual damage.

In cases where a large amount of actual damages is likely to be accrued, it does not seem fair to say that the original copyright owner neglected to assert her rights. Because of the nature of Twitter and social media in general, most people probably do not see Frank Ocean wearing a t-shirt with your tweet on it as a foreseeable consequence of the tweet. It is difficult to know whether, if at all, your tweet will be popular until you actually tweet it and see the public's reaction. Therefore, rather than choosing an arbitrary number based on the damage amounts provided in the Copyright and CASE Acts,[126] it seems more appropriate for a committee of individuals to analyze the economics of potential actual damages that can accrued from the commercial misuse of tweets and other posts.

B. *Prong II: The CASE Act Should Award Prevailing Plaintiffs Attorney's Fees in Cases Where the Defendant Prefers to Have the Case Heard in Court as Opposed to Having It Heard in the Small Claims Court Proposed by the Bill.*

This Note proposes that in instances where a copyright infringement case qualifies to be heard in the small claims court but the defendant refuses to have it heard through this method and prefers to take the matter to trial to

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125. *See* 17 U.S.C. § 504 (providing damage amounts awarded under Title 17); *see also* CASE Act at 14-17 (providing damage amounts that would be awarded under CASE Act if passed).

126. CASE Act at 14-17.

have the input of a jury, the plaintiff could retain the costs and attorney's fees should she prevail, despite not having copyright registration. In this type of case, if the tweet or social media post served the purpose of registration as discussed earlier in Section IV of this Note,[127] the plaintiff would be able to recuperate the cost of attorney's fees if she were to prevail in the federally-litigated suit. The reasoning behind this proposal is that if the defendant decides to make the case more difficult by requiring attorneys, it is not fair to make the plaintiff bear the burden of paying for an attorney, especially in instances where the defendant clearly and willfully infringed upon the plaintiff's original work. Some may argue that in cases where the defendant is facing $30,000 in damages or more in a matter governed by federal law, she should have the right to be heard in federal court. However, this proposal and the small claims court do not take away the right of the defendant to do so; they only intend to provide protections to plaintiffs who would be effectively forced out of litigating the matter because of the costs of litigation.

On the other hand, the defendant would also be able to receive attorney's fees should she prevail. Allowing plaintiffs to collect attorney's fees is intended to make it easier for copyright owner plaintiffs to bring suits against infringers. At the same time, however, not awarding attorney's fees to defendants should they prevail may encourage frivolous lawsuits, and awarding attorney's fees to prevailing defendants could serve as a disincentive to bringing such suits.

1. Congress Should Adopt Prong I Without Any Contingencies and Adopt Prong II Contingent Upon the Passing of the CASE Act.

As both prongs presented address different aspects of the issue, this Note advocates for the adoption of both. The second prong, which is dependent on the CASE Act, will only be applicable if the proposed legislation passes, and it would not need to be adopted if the bill does not pass. Although it is impossible to say whether the bill will pass, it does currently have the support of Representatives Hakeem Jeffries, Ted Lieu, Lamar Smith, Judy Chu, Doug Collins, and Tom Marino,[128] as well as the support of several artist groups and trade associations such as the American Society of Media Photographers[129] and the Copyright Alliance.[130] Regardless of whether the CASE Act passes, this Note urges Congress to amend the Copyright Act to

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127. *Supra* Section IV. Solution (A) Prong I: Eliminate the Registration Requirement to Collect Statutory Damages and Costs and Attorney's Fees in Instances Where the Publication of the Content on Twitter and/or Other Social Media Platforms Serves the Purpose the Copyright Registration Would Have Served.

128. *See* Zhang, *supra* note 9.

129. *See id.*

130. *See* *Copyright Small Claims*, COPYRIGHT ALLIANCE, http://copyrightalliance.org/news-events/copyright-news-newsletters/copyright-small-claims/ [https://perma.cc/QGG7-X7DR] (last visited Jan. 27, 2018).

relax the registration requirement for the purpose of bringing suit so that a tweet or post could be sufficient for the registration precondition.

V. POLICY NEED

The policy need for the solution presented by this Note is largely grounded in the need to promote a society that values culture and the individuals who create it.

Some people may believe that prohibiting others from using an original author's tweet to create derivative works stifles creativity. However, this isn't a matter of preventing the creation of derivative works but a matter of ensuring the original author has given permission and will receive just compensation in the event derivative works are created.[131] Requiring the permission of the original author before creating a derivative work is not something new; it is something that has always been required of those who want to create derivative works based off an original copyrighted work.[132] Creating derivative works requires obtaining a license to use the original work.[133] Therefore, adopting this proposal would not stifle creativity, and instead it would ensure creators of tweets and other social media posts receive protection already afforded to original authors by the Copyright Act.

In the same vein, some may think adopting the proposal would too strictly regulate a social media platform. However, this measure would not regulate Twitter itself, and instead it would provide an option for authors of original works to protect their work should they want or need this protection. Additionally, it seems unreasonable to make a creator to suffer thousands of dollars of harm for the sake of trying to limit regulation while allowing other users to profit off work that is not theirs.

Finally, some have made the argument that using an original author's content in this way constitutes fair use.[134] However, it is difficult to make a blanket statement saying that all instances of this type of use would constitute fair use. Determining if something is fair use requires assessing each infringed work case by case using the four factors of fair use, which look at: "the purpose and character of your use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market."[135] An analysis of each of these factors would have to be done in each instance of infringement to determine if such use was fair use.[136] However, even without knowing the specific situation, it seems like

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131. *See* 17 U.S.C. § 102.

132. *See id.*

133. *See id.*

134. *See generally* Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697 (2012).

135. 17 U.S.C. § 107; *see Measuring Fair Use: The Four Factors*, COPYRIGHT & FAIR USE CTR., https://fairuse.stanford.edu/overview/fair-use/four-factors/ [https://perma.cc/97EV-J5GE] (last visited Jan. 27, 2018).

136. *Id.*

the third factor, "the amount and substantiality of the portion used in relation the copyrighted work as a whole,"[137] and the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work,"[138] would cut against fair use for the examples discussed in this Note. This is relevant because the solution proposed by this Note is limited to commercial uses. In looking at the third factor, the entire amount of the tweet is usually taken. A significant amount of the original work taken cuts against fair use, while taking smaller portions tends to suggest fair use.[139] Considering the fourth factor, if an infringer were to take an entire tweet and put it on a t-shirt or tote, such a product would likely displace any subsequent similar product made by the original author. Displacing the original author's place in the market also cuts against fair use.[140] However, again, not much else can be said without individually assessing each case of infringement for fair use.

VI. CONCLUSION

Due to the impracticality and inapplicability of the current mechanisms in place to protect individuals against copyright infringement, the registration requirement as a prerequisite to collecting statutory damages and costs and attorney's fees should be restructured. The registration requirement should be eliminated in cases where the purpose of registration is served by the publication of the tweet or social media post, and, should the proposed CASE Act legislation pass, when the defendant refuses to have the case assessed in a copyright small claims court.

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137. *More Information on Fair Use*, U.S. COPYRIGHT OFF.: COPYRIGHT.GOV https://www.copyright.gov/fair-use/more-info.html [https://perma.cc/NA2G-2TP6] (last visited Nov. 11, 2018).

138. *Id.*

139. *See id.*

140. *Id.*

The Legality of Web Scraping: A Proposal

Tess Macapinlac*

TABLE OF CONTENTS

I. INTRODUCTION 400
II. A BASIC UNDERSTANDING OF WEB SCRAPING AND THE CFAA ... 402
  A. *Web Scraping* *402*
  B. *The Computer Fraud and Abuse Act* *403*
III. WEB SCRAPING CASES 407
IV. WEB SCRAPING SHOULD NOT BE UNDER CFAA JURISDICTION ... 408
  A. *Public Information Is Not Subject to Hacking* *408*
  B. *Web Scraping Allows Competition in the Marketplace* *410*
  C. *Proportionality, Vagueness, and Alternative Legal Avenues* .. *412*
V. PROPOSAL: AMENDING THE COMPUTER FRAUD AND ABUSE ACT 414
  A. *Supporters* *416*
    1. Scraping Businesses and Academics 416
    2. Legislators and Policy Groups 417
    3. Online and Technology Communities 418
  B. *Opponents* *419*
    1. Scraped Businesses 419
    2. Consumer Privacy Advocates 420
VI. CONCLUSION 421

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I. INTRODUCTION

When people think of hacking, many may think of people using computers to break into government databases or city records, like in a scene from a television show like *Arrow*.[1] The scene often involves hurried typing, furrowed brows, instant results, and often, very few punishments for hacking. Hacking, which may feel like a modern innovation due to continual improvements in technology, has been infused into pop culture for years. Certainly, newer television shows like *Mr. Robot*, *Scorpion*, and *Blacklist* show hacking in a variety of lights and taking place in a variety of circumstances.[2] Even in the 1997 movie *Independence Day*, a satellite technician saves the world by hacking into an alien mothership.[3] Prior to that, *Jurassic Park* showed a juvenile hacker taking on a UNIX system to reactivate security measures in a dinosaur park gone berserk.[4]

Others may think of hacking as they see it in the news. For instance, the infamous Ashley Madison hack revealed the identities and contact information of the site's users, who frequented the Ashley Madison website with the intention of having discreet extramarital affairs.[5] The Home Depot hack is another infamous incident, where the credit card numbers of almost fifty million customers were revealed.[6] Reports show that over five thousand breaches occurred in 2017, compromising almost eight billion records.[7]

This image of hackers sitting in a dark room, bent over computers, furiously typing complicated computer code is the image that many people tend to associate with the term hacking.[8] Personal information revealed, secrets unleashed, and access to information a person was never supposed to

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1. *See* Jessica Conditt, *High-Tech TV: How Realistic Is the Hacking in Prime-Time TV Shows?*, ENGADGET (Apr. 6, 2015), https://www.engadget.com/2015/04/06/high-tech-tv/ [https://perma.cc/URC6-MYLJ].
2. *See* Forbes Technology Council, *'Hackers' on TV: Popular Shows That Get Technology Right*, FORBES (Oct. 26, 2016, 9:00 AM), https://www.forbes.com/sites/forbestechcouncil/2016/10/27/hackers-on-tv-popular-shows-that-get-it-right/#7570307e6f05 [https://perma.cc/PFM7-3W54].
3. INDEPENDENCE DAY (Twentieth Century Fox 1996).
4. JURASSIC PARK (Universal Pictures 1993).
5. *See* Robert Hackett, *What to Know About the Ashley Madison Hack*, FORTUNE (Aug. 26, 2015), http://fortune.com/2015/08/26/ashley-madison-hack/ [https://perma.cc/92TD-VLGT].
6. Paul Gil, *The Greatest Computer Hacks*, LIFEWIRE, https://www.lifewire.com/the-greatest-computer-hacks-4060530 [https://perma.cc/CX9A-SJZ4] (last updated Nov. 8, 2017).
7. Daniel Solove, *Data Security Is Worsening:2017 Was the Worst Year Yet*, TEACHPRIVACY: PRIVACY + SECURITY BLOG (Feb. 16, 2018), https://teachprivacy.com/data-security-is-worsening-2017-was-the-worst-year-yet/ [https://perma.cc/7NMH-EDXT].
8. *See* Forbes Technology Council, *supra* note 2.

have are all ideas equally associated with hacking.[9] With so much personal data given over to companies and held in electronic formats,[10] people are right to be concerned with hackers and the damage they can do.

However, a lot of this hacking rides on the idea of secrecy. Whether it is information that is given to a company with the condition of confidentiality or unknown information relating to the computer system on an alien spaceship, hacking relies on the idea that the hacker isn't supposed to know or be able to get the information that they are taking.[11] Thus, the idea of hacking publicly available information does not fit into either of these categories. Companies promise to do their best to keep consumer information safe and private.[12] However, if certain information is public, then by definition, all people should have access, and none of it should be a secret. Regardless, a practice known as web scraping is considered hacking under the Computer Fraud and Abuse Act ("CFAA"), codified at 18 U.S.C. § 1030 (2012).[13] Web scraping is the act of pulling data from a website's output and saving it to a file or database.[14]

This Note focuses on the scraping of publicly available information and how this particular act should not be considered illegal under the CFAA. First, this Note will more thoroughly explore the technicalities and benefits of web scraping, as well as the relevant sections of the CFAA. Next, it will examine some of the prominent cases that have used the CFAA to prosecute web scraping. It will then examine why web scraping should not be punishable under the CFAA. It will go on to present a proposed amendment and the thought process that went into its language. Finally, it will consider the potential supporters and opponents of the proposed amendment. At its core, this Note is a proposal to add an amendment to the CFAA that would legalize the web scraping of publicly available websites.

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9. *See Data Breaches 101: How They Happen, What Gets Stolen, and Where It All Goes*, TREND MICRO (Aug. 10, 2018), https://www.trendmicro.com/vinfo/us/security/news/cyber-attacks/data-breach-101 [https://perma.cc/3TEA-CXRT] (listing the types of information that have been involved in hacks throughout history).

10. *See id.*

11. *See id.* (explaining that hacking occurs when a cybercriminal looks for weaknesses in a company's security system, attacks the network, and extracts information).

12. *See*, *e.g.*, *Making Technology for Everyone Means Protecting Everyone Who Uses It*, GOOGLE, https://safety.google/ [https://perma.cc/L2ZQ-QYT7] ("We protect you online with industry-leading security."); *U.S. Online Privacy Statement*, AMERICAN EXPRESS, https://www.americanexpress.com/us/legal-disclosures/online-privacy-statement.html [https://perma.cc/S637-2YXF] ("At American Express, we are committed to safeguarding your privacy."); *Facebook's Commitment to Data Protection and Privacy in Compliance with the GDPR*, FACEBOOK, https://www.facebook.com/business/news/facebooks-commitment-to-data-protection-and-privacy-in-compliance-with-the-gdpr [https://perma.cc/V7X5-RXDJ] ("Facebook takes data protection and people's privacy very seriously . . . ").

13. 18 U.S.C. § 1030 (2012).

14. *See* Geoff Boeing & Paul Waddell, *New Insights into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Rental Listings*, 37 J. PLAN. EDUC. & RES. 457, 459 (2016).

II. A BASIC UNDERSTANDING OF WEB SCRAPING AND THE CFAA

A. Web Scraping

The method in question is known as web scraping. A web scraper is a piece of computer code that translates into an automated bot.[15] This bot then accesses web pages, finds specific data, extracts it from the web page, and saves it on a computer or similar device.[16] A person can then access the data and use it for a variety of purposes, such as in research or business.[17] Web scraping is useful for anyone who needs a large amount of information from a large number of websites; while everything this kind of bot does can be done manually, the work is done faster and more efficiently by utilizing web scraping.[18] Web scraping is not an uncommon practice, as bots account for nearly a quarter of all Internet traffic, due to businesses, researchers, and others using web scraping for different reasons.[19]

Web scraping can be used for a variety of purposes. One of the most common examples is search engines, which use scraping to link users to pertinent webpages.[20] Since search engines play an important role in the online ecosystems for both users and companies alike, the stigma associated with search engine web scraping activities is situational and limited.[21] Academia is another field that may utilize web scraping. For instance, Geoff Boeing and Paul Waddell built their own web scraper to scrape data for their paper concerning rental housing markets.[22]

Another common form of web scraping takes place on budgeting apps, like Mint.[23] In order to use Mint, a user uploads authorization to access their different bank accounts.[24] The app then scrapes the account information so that users can track their budgeting and spending habits from a single app.[25]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See* Tiffany Hu & Aaron Rubin, *Data for the Taking: Using the Computer Fraud and Abuse Act to Combat Web Scraping*, SOCIALLY AWARE (July 21, 2014), https://www.sociallyawareblog.com/2014/07/21/data-for-the-taking-using-the-cfaa-to-combat-web-scraping/ [https://perma.cc/X4DW-C2E2].
20. Jeffrey Kenneth Hirshey, *Symbiotic Relationships: Pragmatic Acceptance of Data Scraping*, 29 BERKLEY TECH. L.J. 897, 898 (2014).
21. *See id.*
22. Boeing & Waddell, *supra* note 14.
23. Mary Wisniewski, *Is It Time to End Screen Scraping?*, AM. BANKER (Nov. 7, 2014, 3:55 PM), https://www.americanbanker.com/news/is-it-time-to-end-screen-scraping [https://perma.cc/7YNH-LNL8].
24. *See How It Works*, MINT, https://www.mint.com/how-mint-works/security [https://perma.cc/6WXZ-ZCNT] ("We use [your login user names and passwords] to establish a secure connection with your financial institution or credit card company. This enables us to download and categorize your transaction information securely and automatically.").
25. *See* Wisniewski*, supra* note 23.

Even journalists utilize web scraping for a variety of online investigations, to the point where both lawyers and journalists make suggestions on how to do so in an ethical and legal fashion.[26] Journalist Nael Shiab points to his own career as an example of web scraping for journalistic purposes.[27] However, many cases involving web scraping and the CFAA focus on businesses that use web scraping as a part of their business models, rather than search engines or academia.[28]

B. The Computer Fraud and Abuse Act

In 1984, Congress passed the Comprehensive Crime Control Act, codified in 18 U.S.C. §1030, in order to combat the growing threat of computer crime and hacking.[29] Over the next two years, Congress continued to investigate issues presented by computer crimes and how federal statutes could tackle such crimes.[30] In order to address such issues, Congress held hearings on potential bills focused on computer crimes, which, in 1986, culminated in Congress passing the Computer Fraud and Abuse Act, which amended various parts of 18 U.S.C. §1030.[31]

At the time the CFAA was brought into effect, the government and various financial institutions were the primary entities that used computers and thus were most vulnerable to hackers.[32] As such, the CFAA was designed with classified information and credit or financial information in mind.[33] Eventually, as computers and the Internet became widely used by civilians, definitions in the CFAA were expanded to cover computers that could be involved in interstate commerce, which implicated any computer connected to the Internet.[34]

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26. *See generally* Rachel Goodman, *Tips for Data Journalism in the Shadow of an Overbroad Anti-Hacking Law*, AM. CIVIL LIBERTIES UNION (Oct. 13, 2017, 1:00 PM), https://www.aclu.org/blog/privacy-technology/internet-privacy/tips-data-journalism-shadow-overbroad-anti-hacking-law [https://perma.cc/4T37-ETKE] (providing advice for journalists who want to avoid liability when webscraping); *see generally* Nael Shiab, *On the Ethics of Web Scraping and Data Journalism*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (Aug. 12, 2015), https://gijn.org/2015/08/12/on-the-ethics-of-web-scraping-and-data-journalism/ [https://perma.cc/6WFM-KJXS] (information about web scraping and ethics).

27. Nael Shiab, *Web Scraping: A Journalist's Guide*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (Aug. 11, 2015), https://gijn.org/2015/08/11/web-scraping-a-journalists-guide/ [https://perma.cc/6WFM-KJXS]] ("For example, I created [a web scraper] to compare the alcohol prices between Quebec and Ontario.").

28. *See* hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099 (N.D. Cal. 2017) (order granting preliminary injunction); Craigslist Inc. v. 3Taps, 964 F. Supp. 2d 1178 (N.D. Cal. Aug. 16, 2013); Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927 (E.D. Va. Sept. 15, 2010).

29. *See* 18 U.S.C. § 1030; H. MARSHALL JARRETT ET. AL., PROSECUTING COMPUTER CRIMES 1 (2d ed. 2015).

30. JARRETT ET. AL., *supra* note 29.

31. *Id.*

32. *See* 18 U.S.C. § 1030(a)(2)(A); 18 U.S.C. § 1030(a)(2)(B); *hiQ Labs, Inc.*, 273 F. Supp. 3d at 1109 (order granting preliminary injunction); JARRETT ET. AL., *supra* note 29, at 1.

33. *See* 18 U.S.C. § 1030(a)(2)(A); 18 U.S.C. § 1030(a)(2)(B); JARRETT ET. AL., *supra* note 29, at 1.

34. JARRETT ET. AL., *supra* note 29, at 2.

In the context of the CFAA, hacking occurs when a person "intentionally accesses a computer without authorization or exceeds authorized access."[35] In this case, the relevant hacking occurs when a person accesses a "protected computer." [36] For these purposes, a "protected computer" is defined to include a computer "which is used in or affecting interstate or foreign commerce or communication."[37] Notably, the user does not have to use the computer for interstate or foreign commerce or communication; rather, the computer simply has to be capable of doing so.[38] Thus, any computer connected to the Internet could be considered a protected computer under the CFAA.[39]

The CFAA defines "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to so obtain or alter."[40] The CFAA does not define the term "without authorization," but experts interpret the term as referring to a person who is an outsider of the institution, like a hacker, as opposed to an insider, who would have access in the first place.[41]

The CFAA has long been criticized for its hefty punishments and vague definitions.[42] The CFAA's vague definitions can make a simple act like lying about your age online fall under the definition of hacking.[43] Additionally, a single act can violate different parts of the CFAA, resulting in a compounded sentence for a single act.[44] In fact, some CFAA violations carry more severe punishments than an aggravated assault charge.[45]

The criticism surrounding the CFAA reached a high point during the criminal case against Aaron Swartz. Swartz, known for helping to launch Reddit, broke into an electrical closet at the Massachusetts Institute of Technology, wired his laptop into MIT's system, and proceeded to download academic articles from the online database JSTOR.[46] In the District Court for the District of Massachusetts, Swartz was tried for eleven violations of the CFAA,[47] as well as wire fraud, which could have led to thirty-five years in

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35. 18 U.S.C. § 1030(a)(2).
36. *Id.* § 1030(a)(2)(C).
37. *Id.* § 1030(e)(2)(B).
38. JARRETT ET. AL., *supra* note 29, at 4.
39. *Id.*
40. 18 U.S.C. § 1030(e)(6).
41. JARRETT ET. AL., *supra* note 29, at 5.
42. *See* Seth Rosenblatt, *Where Did The CFAA Come From, and Where is It Going?*, THE PARALLAX (Mar. 16, 2016), https://www.the-parallax.com/2016/03/16/where-did-the-cfaa-come-from-and-where-is-it-going/ [https://perma.cc/A2AT-7HHH].
43. *Id.*
44. *See* Sam Gustin, *Aaron Swartz's Father Praises 'Aaron's Law' Proposal*, TIME (June 27, 2013), http://business.time.com/2013/06/27/aaron-swartzs-father-praises-aarons-law-proposal/ [https://perma.cc/WQL2-LYNK].
45. Rosenblatt, *supra* note 42.
46. Nick Bilton, *Internet Activist Charged in M.I.T. Data Theft*, N.Y. TIMES: BITS (July 19, 2011, 12:54 PM), https://bits.blogs.nytimes.com/2011/07/19/reddit-co-founder-charged-with-data-theft/?_r=0 [https://perma.cc/Y7DN-HNUV].
47. Rosenblatt, *supra* note 42.

prison and a million dollar fine.[48] However, the charges were never resolved, as Swartz took his life prior to any resolution.[49] Several House representatives accused the prosecution of "act[ing] too aggressively" in their suit against Swartz.[50]

The extreme charges and tragic ending in Swartz's case resulted in Aaron's Law, a bill introduced by Rep. Zoe Lofgren of California and Senator Ron Wyden of Oregon in 2013.[51] This bill focused on three revisions of the CFAA: (1) a violation of terms of service could not be prosecuted under the CFAA, (2) eliminating redundancies from various sections of the CFAA, and (3) rewriting CFAA penalties to be proportionate to the crime.[52] This bill received praise from various entities, such as the Electronic Frontier Foundation.[53] However, the bill was stalled in Congress and never passed.[54] The case against Swartz remains a hallmark CFAA case.[55]

Several federal courts have ruled on cases involving the CFAA, with particular focus on authorization.[56] While the following cases have not involved web scraping, they show courts' evolving opinions on authorization.[57] This examination begins in the Northern District of California, with the case *United States. v. Nosal* ("*Nosal I*"). David Nosal was a high-level executive at a renowned recruitment firm, Korn/Ferry International ("KFI").[58] Nosal left KFI to open a competing firm.[59] However, two people at KFI helped set up Nosal's competing firm by using their employee credentials to obtain trade secrets and other valuable information

48. Ryan Singel, *Feds Charge Activist as Hacker for Downloading Millions of Academic Articles*, WIRED (July 19, 2011, 2:55 PM), https://www.wired.com/2011/07/swartz-arrest/ [https://perma.cc/8CEH-B8WK].

49. Brendan Sasso & Jennifer Martinez, *Lawmakers Slam DOJ Prosecution of Swartz as 'Ridiculous, Absurd'*, THE HILL (Jan. 15, 2013, 10:52 PM), http://thehill.com/policy/technology/277353-lawmakers-blast-trumped-up-doj-prosecution-of-internet-activist [https://perma.cc/2VMC-4M35].

50. *Id.*

51. Aaron's Law Act of 2013, H.R. 2454, 113th Cong. (2013); *see* Gustin, *supra* note 44.

52. Aaron's Law Act of 2013, H.R. 2454, 113th Cong. (2013); Aaron's Law Act of 2013, S. 1196, 113th Cong. (2013).

53. Cindy Cohn, *Aaron's Law Reintroduced: CFAA Didn't Fix Itself*, ELEC. FRONTIER FOUND. (Apr. 29, 2015), https://www.eff.org/deeplinks/2015/04/aarons-law-reintroduced-cfaa-didnt-fix-itself?page=12 [https://perma.cc/R3WV-GCTN].

54. Ruth Reader, *3 Years After Aaron Swartz's Death, Here's What Happened to Aaron's Law*, MIC (Jan. 11, 2016), https://mic.com/articles/132299/3-years-after-aaron-swartz-s-death-here-s-what-s-happened-to-aaron-s-law#.XhPbkciIR [https://perma.cc/BKU8-CG7P].

55. Kim Zetter, *The Most Controversial Hacking Cases of the Past Decade*, WIRED (Oct. 26, 2015, 7:00 AM), https://www.wired.com/2015/10/cfaa-computer-fraud-abuse-act-most-controversial-computer-hacking-cases/ [https://perma.cc/B2HG-7NR4].

56. *See* LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009); United States v. Nosal, No. CR 08-00237 MHP, 2010 WL 934257 (N.D. Cal. Jan. 6, 2010) [hereinafter *Nosal II*]; United States v. Nosal, NO. CR 08-00237 MHP, 2009 WL 981336 (N.D. Cal. Apr. 13, 2009) [hereinafter *Nosal I*].

57. *See LVRC Holdings LLC*, 581 F.3d 1127; *Nosal II*, 2010 WL 934257; *Nosal I*, 2009 WL 981336.

58. *Nosal I*, 2009 WL 981336, at *1.

59. *Id.*

and send them to Nosal.[60] Nosal, along with one of the employees who helped him, were indicted on several counts, including eight violations of the CFAA.[61]

Nosal moved to dismiss the CFAA charges based on the argument that the CFAA's discussion of the terms "without authorization" and "exceeds authorized access" does not cover misuse or misappropriation of information that was lawfully obtained.[62] The court found this argument unconvincing, noting that the judicial view of "authorization" under the CFAA was expanding and that because the case was still in its pleading stage, the evidence presented by the government was sufficient to allow the charges.[63] The motion to dismiss the CFAA charges was denied.[64]

After this came the case *LVRC Holdings LLC v. Brekka*.[65] Christopher Brekka, an employee of LVRC Holdings ("LVRC"), emailed a number of LVRC documents from his LVRC computer to his and his wife's personal email accounts.[66] Brekka later stopped working for LVRC, but because he had emailed the documents to personal email accounts, the documents remained on his computer.[67] He also continued to access personal documents using his former employee credentials.[68] LVRC filed suit, claiming that Brekka had violated the CFAA both when he emailed documents to himself and when he accessed LVRC records after his employment there ceased.[69] The district court granted summary judgment for Brekka, and LVRC appealed the decision.[70] The Ninth Circuit Court of Appeals interpreted "without authorization" and "exceeds authorized access" more narrowly than the court in *Nosal I* and affirmed the decision of the district court.[71]

After the appellate decision from the *Brekka* case was announced, Nosal filed another motion for dismissal, claiming that the court's earlier denial to dismiss the CFAA charges was now contradictory to its decision in *Brekka*.[72] In this case ("*Nosal II*"), the court examined the definition of "exceeds authorized access" and decided that the CFAA phrase "obtain or alter information in the computer that the accesser is not entitled so to obtain or alter" cannot be expanded to cover a corporation's policies regarding

60. *Id.*
61. *Id.* at *1-2.
62. *Id.* at *4.
63. *Id.* at *6-7.
64. *Id.* at *7.
65. *LVRC Holdings LLC*, 581 F.3d 1127.
66. *Id.* at 1129-30.
67. *Id.* at 1130.
68. *Id.*
69. *Id.*
70. *Id.*
71. *See id.* at 1133-35.
72. *See* United States v. Nosal, No. CR 08-00237 MHP, 2010 WL 934257, at *1 (N.D. Cal. Jan. 6, 2010) [hereinafter *Nosal II*].

misappropriation of information.[73] Thus, the court dismissed five of the CFAA charges.[74]

The government appealed *Nosal II*.[75] The court found that the government's proposed interpretation of "exceeds authorized access" would "transform the CFAA from an anti-hacking statute into an expansive misappropriation statute."[76] The court found the district court's narrow interpretation more convincing and affirmed.[77] These are just a few of the cases that have spoken on the meaning of authority in the CFAA, and they demonstrate the confusion behind the language of the CFAA.

III. WEB SCRAPING CASES

Several cases that have come before federal courts demonstrate these courts' attempts to determine what the CFAA says regarding hacking and web scraping. In the case *Craigslist v. 3Taps*, a company called 3Taps scraped Craigslist pages in order to aggregate and republish Craigslist's ads.[78] Despite Craigslist's various efforts to stop 3Taps from doing so, 3Taps continued scraping the website, and Craigslist filed suit against 3Taps, claiming that this was a form of hacking under the CFAA.[79]

One course of action that Craigslist took was to block all IP addresses associated with 3Taps, so that no one using those IP addresses could access Craigslist.[80] 3Taps was able to bypass that barrier through technological means in order access Craigslist.[81] The United States District Court for the Northern District of California found that because 3Taps was banned from accessing the site and then maneuvered around that ban, the web scraping that followed the ban was hacking under the CFAA.[82] 3Taps' access had been revoked, and so further scraping constituted unlawful access.[83] Without that ban and barrier, 3Taps' actions may not have been considered hacking under the CFAA.[84]

In the case *Cvent, Inc. v. Eventbrite, Inc.*, a company called Eventbrite[85] scraped the Cvent website to get information about events, which Eventbrite then made available on its own site, as a competitor of Cvent.[86] However, the

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73. *Id.* at *7.
74. *Id.* at *8 .
75. United States v. Nosal, 676 F.3d 854, 856 (9th Cir. 2012) [hereinafter *Nosal III*].
76. *Id.* at 857.
77. *Id.* at 864.
78. Craigslist Inc. v. 3Taps, 964 F. Supp. 2d 1178, 1180 (N.D. Cal. Aug. 16, 2013).
79. *Id.* at 1180-81.
80. *Id.* at 1181.
81. *Id.*
82. *Id.* at 1185.
83. *Id.*
84. *See id.*
85. Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927, 930 (E.D. Va. Sept. 15, 2010) (Eventbrite "maintains an online event planning, sales, and registration service hosted on its website, www.eventbrite.com.").
86. *Cvent, Inc.*, 739 F. Supp. 2d at 930.

District Court for the Eastern District of Virginia found that this web scraping did not constitute hacking, as the Cvent website was accessible "without requiring any login, password, or other individualized grant of access."[87]

Finally, the *hiQ Labs, Inc. v. LinkedIn, Inc.* case is currently pending in the District Court for the Northern District of California[88] and may have great bearing on this issue. A company called hiQ scraped public profiles on LinkedIn, a networking website.[89] hiQ provided employers with aggregated information from these public profiles and indicated what skills employees had, as well as which employees could potentially be recruited to work elsewhere.[90]

LinkedIn sent hiQ a cease-and-desist letter, stating that hiQ's access to LinkedIn had been restricted and that further scraping could result in a suit under the CFAA.[91] In response, hiQ filed suit seeking an affirmative declaratory ruling of rights regarding its ability to access publicly available LinkedIn profiles.[92] hiQ also filed a request for an order to allow it to continue the web scraping while the suit proceeded.[93] The court allowed hiQ to continue web scraping while the suit proceeded, as it found that the public nature of the profiles made the CFAA's relevance to the case questionable.[94] Additionally, the court weighed the need for hiQ to continue to operate while the suit was ongoing.[95] Because scraping LinkedIn profiles was such an integral part of the operation, the court allowed hiQ to continue its practice for the duration of the suit.[96]

These cases represent a small sample of web scraping suits brought under the CFAA. They show that the legislative world is ready for the law to make a firm decision on web scraping and its relationship to the CFAA.

IV. WEB SCRAPING SHOULD NOT BE UNDER CFAA JURISDICTION

A. Public Information Is Not Subject to Hacking

First, public information, such as profiles that are freely accessible to the public, cannot be "hacked" in any traditional sense and thus should not be under the CFAA's jurisdiction. Looking to the legislative history, the court in *hiQ* pointed out that the CFAA was not created to police access to publicly

87. *Id.* at 932-34.
88. hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099 (N.D. Cal. 2017) (order granting preliminary injunction).
89. *See id.* at 1104.
90. *Id.*
91. *Id.*
92. *Id.*
93. *See id.*
94. *Id.* at 1120.
95. *Id.* at 1105.
96. *Id.* at 1120.

available websites on the Internet, as the Internet did not exist yet.[97] Rather, it was meant to prevent hackers from getting into "private, often password-protected mainframe computers."[98] Indeed, aside from protected computers, as defined earlier, the CFAA points directly to computers related to financial institutions and departments or agencies of the United States government.[99] The people who wrote these laws could not have fathomed the widespread nature of computers and the Internet today. The CFAA needs to be brought into today's world, with all of its modern technologies.

Others compare the CFAA to a trespass statute that applies the Internet, instead of the physical world. In his article *Norms of Computer Trespass*, Orin Kerr states it succinctly: "Unauthorized access statutes are computer trespass statutes."[100] He points out that the Internet and the websites on it are the equivalent of an "open public square in the physical world."[101] In the physical world, a locked door with a limited number of keys would be akin to a website that requires a password or other authorization for access.[102] But a public website, being akin to a public square, is open for anyone to enter and observe and learn as they will.[103] There is no need for a key or additional authorization to witness the happenings in the public square.[104]

Kerr's analysis, cited in the court's order in the *hiQ* case, points towards a need for clarification on this topic.[105] Kerr's public square[106] versus locked door argument[107] echoes the sentiment that the CFAA should not cover information that is publicly available on the Internet. Clarification of the CFAA could also include language that would allow the amendment to fall in line with current case law. For instance, if the CFAA were amended to fall in line with Kerr's thinking, then the final verdict in the *Cvent* case would be preserved—the web scraping would not be considered hacking under the CFAA because Cvent's site did not require a login or password for access.[108]

A change to the CFAA's language could also prevent, in Kerr's hypothetical,[109] the potential legality of a person stealing a key, using that key to enter a private home, and learn and observe what is going on in that home at will. In the online world, this would be equivalent to a hacker stealing a password and using that password to access an otherwise inaccessible

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97. *Id.* at 1109.
98. *Id.*
99. *See* 18 U.S.C. § 1030(a)(2)(A); 18 U.S.C. § 1030(a)(2)(B).
100. Orin Kerr, *Norms of Trespass*, 116 COLUM. L. REV. 1143, 1153 (2016).
101. *Id.* at 1163.
102. *Id.* at 1153.
103. *Id.* at 1163.
104. *See id.* at 1163 ("A person who connects a web server to the Internet agrees to let everyone access the computer much like one who sells his wares at a public fair agrees to let everyone see what is for sale.").
105. hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099, 1112 (N.D. Cal. 2017).
106. Kerr, *supra* note 100, at 1163.
107. *Id.* at 1153.
108. *See* Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927, 932 (E.D. Va. Sept. 15, 2010).
109. Kerr, *supra* note 100, at 1153.

website. With careful writing of new CFAA language, this action would not be legal, which fits well with Kerr's parallel of the public Internet as the online version of "an open public square in the physical world."[110]

The *hiQ* order fits very well with the concept of publicly available information not being subject to the CFAA. Notably, hiQ only scraped LinkedIn profiles that were public.[111] As the court in *hiQ* notes, LinkedIn users can limit the people to whom a profile is made public.[112] For instance, a profile can be made public to direct connections on LinkedIn, all LinkedIn members, or the entire public.[113] hiQ did not scrape private profiles; it only scraped data from users who chose to make their information public to the entire Internet.[114] To use Kerr's analogy, hiQ just spent time in the open public square.[115] hiQ did not try to get into any locked doors to get its information.[116]

The CFAA needs to be changed in order to bring the law up to speed with some aspects of the Internet. As people put more of their information and lives on the Internet, it is only natural for people and companies to begin raising privacy concerns. Changes to the CFAA would help both people and companies address those privacy concerns. Companies like hiQ would have a bright-line rule to follow for web scraping practices and business models. Companies like LinkedIn could use that same bright-line rule to educate their consumers about their privacy options and the implications of public information and make technical adjustments to their websites to protect consumer privacy. Consumers, in turn, could better understand the privacy implications of their online information and make better-informed decisions for themselves.

B. Web Scraping Allows Competition in the Marketplace

Web scraping allows smaller companies to compete with other players in the online marketplace. In a world where technology moves fast and information moves faster, it seems that whoever works the most efficiently has the advantage.[117] Scraping allows people to automate tedious work and spend their time on other pursuits.[118] This speed may give businesses an opportunity to efficiently compete with the leaders in their respective fields.[119] This argument helped carry the day in the court's analysis of the *hiQ* order.[120]

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110. *Id.* at 1163.
111. hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099, 1104 (N.D. Cal. 2017).
112. *Id.*
113. *Id.*
114. *Id.*
115. Kerr, *supra* note 100, at 1163.
116. *See generally id.* at 1163 (explaining the locked door analogy).
117. Kimberly Amadeo, *What Is Competitive Advantage? Three Strategies that Work*, THE BALANCE, https://www.thebalance.com/what-is-competitive-advantage-3-strategies-that-work-3305828 [https://perma.cc/HV44-GU3K] (last updated Mar. 19, 2019).
118. Boeing & Waddell, *supra* note 14, at 459.
119. Amadeo, *supra* note 117.
120. hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099, 1118 (N.D. Cal. 2017).

The court determined that there are serious concerns that LinkedIn, as the main entity in the online professional networking market, may be using its significant weight for anticompetitive purposes.[121]

Clarifying the CFAA could provide a solid compromise between LinkedIn and hiQ. If additional language were phrased correctly, then under the CFAA, hiQ could legally scrape the profiles that users have actively chosen to make public to all users on the Internet. LinkedIn could educate users to what a completely public profile might mean, particularly in regard to companies like hiQ. By educating consumers about this aspect of their profiles, LinkedIn may be able to encourage, in a less anticompetitive fashion, users to keep their profiles public only to those within the LinkedIn network. By giving consumers a fuller picture of the online professional marketing landscape, LinkedIn could help users more fully understand who views their profiles and has access to their information.

However, the *Craigslist* case could present serious issues for such changes to the CFAA, as well as its potential interpretations. The court in the *Craigslist* case found that 3Taps' measures to get around the IP block made the ensuing web scraping constitute hacking under the CFAA.[122] This IP address block was a part of the ban that Craigslist enacted against 3Taps.[123] Depending on the language of the CFAA clarification, such bans may be permissible, particularly if the CFAA is clarified in line with Kerr's trespass analysis.[124] Under Kerr's analysis, passwords, logins, and other similar access or authorization mechanisms are acceptable methods of preventing access.[125]

A ban may not be an acceptable method of preventing access. The problem with a ban is that it could hinder competition, leaving the main entity in the industry with power and providing smaller companies with few avenues to remedy the situation. Companies could potentially ban rivals from visiting their site. For instance, Kerr uses the example of a news website sending letters to reporters for other news agencies to stop viewing their website.[126] By leaving open the option of banning some entities from viewing their websites, companies would not only place themselves in the crosshairs of antitrust suits, they could also create a gray area in the definition of "public."

Kerr argues that if companies want to truly limit the people who view their websites, they should actively use a password for all viewers to clearly state that the information on the sites is not, in fact, public information.[127] While this would clear up the idea of public versus private information in the CFAA's language, this may not be the most feasible option for companies.

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121. *Id.*
122. Craigslist Inc. v. 3Taps, 964 F. Supp. 2d 1178, 1184-86 (N.D. Cal. Aug. 16, 2013).
123. *Id.* at 1180-81.
124. *See generally* Kerr, *supra* note 100, at 1153-61.
125. *See id.* at 1171-73.
126. Timothy B. Lee, *LinkedIn: It's Illegal to Scrape Our Website Without Permission*, ARS TECHNICA (July 31, 2017, 8:00 AM), https://arstechnica.com/tech-policy/2017/07/linkedin-its-illegal-to-scrape-our-website-without-permission/ [https://perma.cc/7UKL-7RFH].
127. *Id.*

However, banning companies from utilizing what is, to all other Internet users, completely public information is anti-competitiveness at its finest. So, while changes to the CFAA could have great implications for marketplace competition, the changes must be written to prevent any loopholes that would allow companies to get around the intent of this new language by introducing bans against all of their competitors.

Another potential obstacle is the common industry practice known as robots.txt. This is a text file embedded in a website's directory that instructs scraping bots on how to scrape available pages.[128] Search engines utilize web scraping to gather information that will show up on the search engine page.[129] A robots.txt notes which pages a bot can and cannot scrape.[130] Web scraping bots from other parties would also run into the robots.txt and be held to the same restrictions as web scrapers from search engines.[131]

However, it is unlikely that companies would use the robots.txt to block web scrapers focused on business from accessing pages. Presumably, a company would want web scraping bots from search engines to have access to public pages in order to increase the number of pages appearing in various searches and by extension the likelihood of a person using a search engine clicking on those web pages.

It seems doubtful that companies would sacrifice potential search engine hits to hinder another company from scraping pages for business or research purposes. The CFAA could likely be amended to include language that makes the robots.txt permissible, because all scraping bots, whether they come from search engines or competing companies, are not allowed to see certain pages.[132]

C. *Proportionality, Vagueness, and Alternative Legal Avenues*

The CFAA has been criticized for enacting punishments that are not proportional to the crime at hand.[133] This disproportionate punishment stems from the CFAA's redundancies.[134] A single crime can violate multiple sections of the CFAA, resulting in hefty prison sentences and fines.[135] A common example of this is the Swartz case, where his violations of the CFAA could have resulted in thirty-five years in jail and a million dollar fine.[136] The CFAA allows people or entities to file suit if they have suffered damage or

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128. Stephan Spencer, *A Deeper Look at Robots.txt*, SEARCH ENGINE Land (Apr. 16, 2009, 8:00 AM), https://searchengineland.com/a-deeper-look-at-robotstxt-17573 [https://perma.cc/Q8Y5-2HD2].

129. *See* Hirshey, *supra* note 20, at 898.

130. *See* Spencer, *supra* note 128.

131. *See id.*

132. *See* Spencer, *supra* note 128.

133. *See* Gustin, *supra* note 44.

134. Zoe Lofgren & Ron Wyden, *Introducing Aaron's Law, A Desperately Needed Reform of the Computer Fraud and Abuse Act*, WIRED (June 20, 2013, 9:30AM), https://www.wired.com/2013/06/aarons-law-is-finally-here/ [https://perma.cc/6EFN-3BC6].

135. *Id.*

136. Singel, *supra* note 48.

loss by violation of the CFAA.[137] However, the CFAA defines "loss" to mean "any reasonable cost to any victim, including . . . restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."[138]

Some complain that this gives prosecutors too much leeway that can lead to excessive punishments.[139] Additionally, because so few cybercrimes have been prosecuted, judges have no precedent to look to, which forces them to look directly to the CFAA's loose standards for guidance regarding punishment.[140] To an extent, some courts have addressed the CFAA's vagueness. In *Nosal I* and *II*, as well as *Brekka*, the courts grappled with expansive and narrow interpretations of the CFAA.[141] In both *Brekka* and *Nosal II*, the court eventually settled on a narrower interpretation of definitions in the CFAA.[142] In *Nosal II*, the court noted that expanding the CFAA to cover misappropriation could mean that "describing yourself as 'tall, dark and handsome,' when you're actually short and homely, will earn you a handsome orange jumpsuit."[143] Courts are rightfully wary of interpreting this vague language, which continues to present issues in current, and likely future, cases. Congress needs to clarify some of that vague language and openly state its intent, so lawyers and judges do not have to guess at what the legislature meant by its choice of words.

Of course, web scraping should not be legal in all circumstances. Private profiles, or profiles that require a password login for access are not web pages that are scrapable under the principles outlined above.[144] Notably, making web scraping legal in certain circumstances under the CFAA would not make web scraping legal in every circumstance. There is no reason that a company could not prohibit web scraping without prior consent in its Terms of Use.

Under this method, web scraping without permission from the scraped company would result in a breach of contract; the scraped company could file a civil suit against the web scraping party. This suit could result in the payment of damages, which is a far more reasonable punishment than a

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137. 18 U.S.C. § 1030(g).

138. *Id.* § 1030(e)(11).

139. Katie Bo Williams, *Judges Struggle with Cyber Crime Punishment*, THE HILL (Jan. 9, 2016, 9:54 AM), http://thehill.com/policy/cybersecurity/265285-judges-struggle-with-cyber-crime-punishment [https://perma.cc/KL6H-QB7J].

140. *Id.*

141. LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1131-35 (9th Cir. 2009); United States v. Nosal, No. CR 08-00237 MHP, 2010 WL 934257, at *3-6 (N.D. Cal. Jan. 6, 2010) [hereinafter *Nosal II*].

142. *See* United States v. Nosal, 676 F.3d 854, 857, 862-63 (9th Cir. 2012) [hereinafter *Nosal III*]; *see also LVRC Holdings LLC*, 581 F.3d at 1133-35.

143. *Nosal III*, 676 F.3d at 862.

144. *See supra* notes 109-110 and accompanying text.

potential sentence of "not more than ten years," which could be combined with a fine for a first-time offender of the CFAA.[145]

V. PROPOSAL: AMENDING THE COMPUTER FRAUD AND ABUSE ACT

As a solution to the CFAA's improper jurisdiction over web scraping, this Note proposes an amendment to the Computer Fraud and Abuse Act.[146] The proposed amendment would add a subsection to 18 U.S.C. § 1030 (e) and clarify that web scraping a publicly accessible website is not a form of hacking.

Specifically, the proposed amendment would define the ambiguous term "without authorization"[147] to mean "(1) to access a publicly available computer, website, or online service that has been effectively locked through means of a password or a similar mechanism without authorization and use such access to obtain or alter information in the computer that the accesser is not entitled to so obtain or alter, or (2) to access a private computer that a person was not given authorization to access and use such access to obtain or alter information in the computer that the accesser is not entitled to so obtain or alter. (3) The term 'a password or similar mechanism' does not include bans or blocks of particular entities."

Much of the language mirrors that of the CFAA's definition of the term "exceeds authorized access," which is done purposefully.[148] By mirroring the language of the "exceeds authorized access" definition, lawyers and courts would be able to better understand the nuanced differences between the two terms. This amendment would be an appropriate addition to the CFAA, as web scraping should not be considered to be a form of hacking under the CFAA.

The purpose of the proposed amendment is to clearly state that web scraping is not a form of hacking. Notably, by including that the computer, website, or online service is "locked through means of a password or a similar mechanism," the definition does not allow the people controlling web scrapers to scrape whatever they please. This definition limits them to web pages that are available to any member of the public, or more specifically, any page that is accessible without a login or a password is fair game for a web scraper.

Ultimately, this proposed amendment focuses on the importance of not considering web scraping to be a form of hacking or unauthorized access under the CFAA. This matters to the businesses that rely on web scraping for their livelihoods; even the presiding judge in the *hiQ* case allowed hiQ to continue web scraping during the course of the case, because without it, hiQ

145. 18 U.S.C. § 1030(e)(2)(B).
146. *Id.* at § 1030.
147. *Id.* at § 1030(a)(1).
148. *See id.* at § 1030(e)(6).

would no longer be able to function and would cease to exist.[149] The CFAA, as it currently stands, can make a person who web scrapes face multiple years in prison.[150] A small business operation should not face felony charges under the CFAA for web scraping, particularly when that same method is used to operate commonly known and widely used search engines like Google.[151] While the act of web scraping in certain circumstances may be punishable, it should not necessitate the level of punishment associated with a violation of the CFAA. This proposed amendment attempts to both clarify an ambiguous phrase in the CFAA and remove the unnecessarily harsh punishments associated with web scraping.

Subsection one of the proposed amendment focuses on computers, websites, and online services that are available to the public without the need for a login, password, or similar locking mechanism. This cuts to the core of the driving force behind the proposed amendment. Web scraping publicly available websites should not be considered access "without authorization."[152] If the information on the website is available to the entirety of the public without needing a password, then it should be scrapable under the CFAA.

Subsection two focuses on both public and private computers, websites, and online services that are effectively locked through a password or login mechanism. Under subsection two of the proposed amendment, scraping a website that has been effectively locked through a password may be illegal under the CFAA if the person scraping the site was not the person given the authority to access the website. This is to ensure that under the CFAA and this proposed amendment web scrapers would only be able to scrape websites that are publicly available to everyone. This is meant to protect the companies that offer passwords and logins as a means of privacy and the consumers who choose to take advantage of these privacy protections. The term "effectively" also forces companies to take actual steps toward reasonable protection, rather than simply complying by using the password "password" to get protection under the proposed amendment.

For instance, if LinkedIn were the website being scraped, only publicly available profiles could be scraped under the proposed amendment to the CFAA. If a scraper had stolen the login information of a LinkedIn user and used that information to access private profiles, that scraper could be convicted under the CFAA, since that information was not "given" to him personally. Should a scraper make their own LinkedIn profile and use their own login information to access and scrape private profiles, that would violate an existing section of the CFAA regarding a person who "exceeds authorized access."[153] This proposed amendment is not intended to make web scraping legal under all circumstances; it is simply intended to clearly state that web

149. hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099, 1104 (N.D. Cal. 2017) (order granting preliminary injunction).
150. *See* 18 U.S.C. § 1030(c).
151. *See* Hirshey, *supra* note 20, at 898.
152. *See* 18 U.S.C. § 1030(a)(1).
153. *See id.* at § 1030(e)(6).

scraping websites available to the public should not be considered hacking under the CFAA.

Noticeably, subsection three of the proposed amendment states that only passwords, logins, and other similar access or authorization mechanisms are acceptable barriers to access. Something like the blocking of a particular IP address, like what happened in the *Craigslist* case, would not be a permissible access barrier under the proposed amendment.[154] Should such a case take place under the proposed amendment, the blocking of the IP address would not trigger the protection of the CFAA.

A. Supporters

1. Scraping Businesses and Academics

Some of the biggest supporters of the proposed amendment would be businesses and academic researchers who use web scraping in their respective lines of work. Their business models rely on the ability to do this, and the removal of the harsh punishments associated with the CFAA would make their businesses less risky. Academic researchers who use web scraping to access data for various research projects would likely want to do so without the potential for a federally mandated punishment.[155]

Some academics may be hesitant to pursue particular projects if they require web scraping. This proposed amendment may remove some of that hesitation and lead to ground breaking studies and innovation. Both parties have a lot to gain from this proposed amendment and could use their business clients or academic circles to garner support for the proposed amendment.

Some people may say that academics have nothing to fear, as it's unlikely that the government would go after a researcher who scrapes websites purely for the purposes of a study. Indeed, in *Nosal II*, when the government pushed for an expanded interpretation of "exceeds authorized access," the government claimed that it would not prosecute minor violations of the CFAA.[156]

But are people willing to risk their freedom relying on the one-time promise of a few lawyers from one state's Attorney General's office? One person may believe that their violation of the CFAA is minor, while another person, perhaps a prosecutor or a judge, may disagree. Even in court, a person cannot say, "This is a minor violation of the CFAA, and at least one lawyer from one Attorney General's office in one state claimed that they would not prosecute minor violations of the CFAA, so this case should be dismissed." First and foremost, that person is actively admitting that their actions were in violation of federal law, which is highly unadvisable. Next, a judge may find

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154. *See* Craigslist Inc. v. 3Taps, 964 F. Supp. 2d 1178, 1186 (N.D. Cal. Aug. 16, 2013)..

155. *See* Casey Fiesler, *Law and Ethics of Scraping: What HiQ v LinkedIn Could Mean for Researchers Violating TOS*, MEDIUM (Aug. 15, 2017), https://medium.com/@cfiesler/law-ethics-of-scraping-what-hiq-v-linkedin-could-mean-for-researchers-violating-tos-787bd3322540 [https://perma.cc/7Y6K-Y3PE].

156. United States v. Nosal, 676 F.3d 854, 857, 862 (9th Cir. 2012) [hereinafter *Nosal III*].

that the lawyer's claims are not something that people can rely upon, or that the violation is not minor, or that it does not matter that the violation is minor because it remains a violation. Businesses and academics need clear-cut definitions showing that web scraping is legal under the CFAA. Otherwise, "[t]he difference between puffery and prosecution may depend on whether you happen to be someone an AUSA [Assistant United States Attorney] has reason to go after."[157]

2. Legislators and Policy Groups

The community of supporters in Congress for the proposed amendment may include Senator Ron Wyden of Oregon and Representative Zoe Lofgren of California.[158] They presented Aaron's Law to the Senate and the House, respectively.[159] Both are familiar with the issue of vagueness in the CFAA and may support a bill that looks to clarify the CFAA. Their support could draw media and public attention to problematic parts of the CFAA.

The supporting members of Congress could draw on the narrow scope of the proposed amendment as a strength for its success. Short, simple bills could be seen as low-hanging fruits that are easy to get through Congress.[160] Some may consider this a weakness, since if it faces opposition in Congress and compromise is required, there may not be enough substance in this proposed amendment that could be compromised. A solution could be adding this proposed amendment to a larger package of bills that have more substance and therefore, more space for potential compromises.

The Electronic Frontier Foundation ("EFF") is an organization that was also part of the community that followed Aaron Swartz's case and supported Aaron's Law.[161] The EFF could help rally support from the online and technologically inclined community, as it has done in the past for Aaron's

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157. *Id.*

158. *See Wyden, Lofgren Paul Introduce Bipartisan, Bicameral Aaron's Law to Reform Abused Computer Fraud and Abuse Act*, U.S. SENATOR RON WYDEN OF OR. (Apr. 21, 2015), https://www.wyden.senate.gov/news/press-releases/wyden-lofgren-paul-introduce-bipartisan-bicameral-aarons-law-to-reform-abused-computer-fraud-and-abuse-act- [https://perma.cc/6JHB-BRYE].

159. Aaron's Law Act of 2013, H.R. 2454, 113th Cong.; Aaron's Law Act of 2013, S. 1196, 113th Cong.

160. *See*, *e.g.,* Burgess Everett, *Not The Onion: Congress Set to Pass Bills*, POLITICO (Aug. 1, 2018), https://www.politico.com/story/2018/08/01/congress-republicans-bills-agenda-753296 [https://perma.cc/7GNB-LLDF] (noting that Congress is passing smaller appropriations bills with little resistance, rather than a larger spending bill).

161. *See* April Glaser, *Aaron Swartz's Work, Computer Crime Law, and 'The Internet's Own Boy'*, ELEC. FRONTIER FOUND. (Aug. 27, 2014), https://www.eff.org/deeplinks/2014/08/aaron-swarts-work-internets-own-boy [https://perma.cc/SCP8-C9MJ]; Kurt Opsahl & Trevor Timm, *Aaron's Law Introduced: Now is the Time to Reform the CFAA*, ELEC. FRONTIER FOUND. (June 20, 2013), https://www.eff.org/deeplinks/2013/06/aarons-law-introduced-now-time-reform-cfaa [https://perma.cc/EQP2-SBAZ].

Law.[162] The EFF has called for CFAA reform many times in the past.[163] Perhaps the EFF would support the proposed amendment.

The EFF has a long relationship with scholars, such as Orin Kerr, as well as other potentially interested parties, such as the American Civil Liberties Union, the Center for Democracy and Technology, and Stanford's Center for Internet and Society.[164] The EFF's past work could be useful in rallying that base again and could provide support in a multitude of ways. When writing opinions or orders, judges can cite to academic articles as support for a particular ruling.[165] Interested parties could also write amicus briefs expressing the position of various players in the online ecosystem and how such rulings could affect these parties.[166]

Supporting members of Congress could call on other interested members or entities like the EFF and discuss the possibility of adding additional amendments to the CFAA, as additional amendments may provide more room for compromise with opposing congresspeople. For instance, the EFF has long been a proponent of reforming the CFAA's excessive and redundant criminalization.[167] That, among other things, could be added to the proposed amendment to add additional material for inevitable compromises. However, such additions would have to be added carefully, as no one likes to see important policy implications treated like potential bargaining chips.

3. Online and Technology Communities

Some parties may also turn to the public and online communities for support. For instance, when working on a draft of Aaron's Law, Representative Lofgren sought feedback on Reddit, which has significant ties

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162. *See* Adi Kamdar, *Calling All Engineers and Technologists: We Need Your Help to Reform the CFAA*, ELEC. FRONTIER FOUND. (Apr. 9, 2013), https://www.eff.org/deeplinks/2013/06/aarons-law-introduced-now-time-reform-cfaa [https://perma.cc/G3SL-J8UA].

163. *See*, *e.g.*, *id.*; Kurt Opsahl & Trevor Timm, *Aaron's Law Introduced: Now is the Time to Reform the CFAA*, ELEC. FRONTIER FOUND. (June 20, 2013), https://www.eff.org/deeplinks/2013/06/aarons-law-introduced-now-time-reform-cfaa [https://perma.cc/EQP2-SBAZ].

164. *See* Cindy Cohen et al., *EFF's Initial Improvements to Aaron's Law for Computer Crime Reform*, ELEC. FRONTIER FOUND. (Jan. 17, 2013), https://www.eff.org/deeplinks/2013/01/effs-initial-improvements-aarons-law-computer-crime-reform [https://perma.cc/5C53-FP45].

165. *See, e.g.,* hiQ Labs, Inc. v. LinkedIn, Inc., 273 F. Supp. 3d 1099, 1111-13 (N.D. Cal. 2017) (order granting preliminary injunction) (court examination of an academic article).

166. Interested parties can join together to write a single amicus brief. *See*, *e.g.*, Brief of Amici Curiae Electronic Frontier Foundation et al. in Support of Plaintiff-Appellee, hiQ Labs, Inc., No. 3:17-CV-03301-EMC, 2017 WL 5757674 (9th Cir. 2017) (No. 17-16783).

167. Lee Tien, *Why the CFAA's Excessive Criminalization Needs Reform*, ELEC. FRONTIER FOUND. (Apr. 2, 2013), https://www.eff.org/deeplinks/2013/04/cfaas-excessive-criminalization [https://perma.cc/7YPD-LN7R].

to Swartz.[168] Additionally, rallying the technologically inclined community may be helpful in ensuring that the proposed amendment does not accidentally disallow some technologies that are commonly used and are also not intended to be the targets of the CFAA.

For instance, technologists or engineers could assist with wording in order to ensure that robots.txt are not expressly prohibited under the proposed amendment. These technologists could come from the interested entities' experts, as well as other interested parties. For instance, there is an entire Reddit thread dedicated to web scraping.[169] Between the Reddit ties to Aaron Swartz and the community consisting entirely of people who are interested in or actively choose to do web scraping, there is a large group of people who would be affected by a proposal like this and who may be waiting for an opportunity to discuss the realities of a proposed amendment.

B. *Opponents*

1. Scraped Businesses

The companies that are being scraped would be opponents of the proposed amendment. Naturally, these would be the companies that are presumably losing business to other businesses that use web scrapers to utilize the scraped company's information and potentially undercut their profits. However, it is worthwhile to note that this amendment would not necessarily allow web scraping to occur anywhere on any website. Private profiles would still be protected under the proposed amendment, and so the scraping of private web pages would be illegal under the proposed amendment. Additionally, these scraped companies could prohibit web scraping in their Terms of Use and sue scraping companies for breach of contract. The goal of this amendment is not to make the Internet and all information on it a free-for-all; one goal is simply to prevent web scrapers from having to face the harsh penalties associated with the CFAA.

These scraped companies may also argue that technological measures like the blocking of IP addresses should be enough to trigger the protections of the CFAA. Adding a provision to the Terms of Use that the company reserves the right to block IP addresses could add another level of damages to a breach of contract suit against a web scraping party. Additionally, the company may have protections under 17 U.S.C. § 1201 (2012), which protects against a person "circumvent[ing] a technological measure that effectively controls access to a work protected under this title."[170] However, this protection only comes into effect if the information in question is

168. Zoe Lofgren, *I'm Rep Zoe Lofgren, Here Is a Modified Draft Version of Aaron's Law Reflecting the Internet's Input*, REDDIT: AMA (Feb. 1, 2013), https://www.reddit.com/r/IAmA/comments/17pisv/im_rep_zoe_lofgren_here_is_a_modified_draft/ [https://perma.cc/W89L-X2RL].

169. r/scrapinghub, https://www.reddit.com/r/scrapinghub/ [https://perma.cc/DDU8-E3EJ] (last visited Dec. 1, 2017).

170. 17 U.S.C. § 1201(a)(1)(A) (2012).

copyrighted.[171] Other statutes protect an entity against a multitude of potential harms that redundantly reappear in the CFAA, making the CFAA ripe for reform.[172] Another potential solution is for companies to reserve the rights to utilize a robot.txt in their Terms of Service.

2. Consumer Privacy Advocates

Another party that might oppose the proposed amendment is consumer privacy advocates, who may voice concern that this win for businesses and researchers would come at the cost of consumer privacy. The cases presented earlier reflect companies doing fairly responsible business; their focus on web scraping data related to event days and times, advertisements, and employment.[173] Another company may not be so reasonable. In an article concerning the *hiQ* order and ethics, Casey Fiesler points out that the context of privacy must be considered.[174] For instance, a widely publicized event urging people to attend may not have particularly high privacy implications. A dating profile that was made public may have far higher privacy concerns regarding personal matters like sexual orientation.[175] Data collection can present a serious privacy concern, and web scrapers may not be taking that into account.[176]

While this proposed amendment cannot force web scrapers to behave ethically, companies and consumers have other methods of recourse. Particularly private online interactions, such as those on dating websites, should be made completely private, either by the user's choice or the company's online construction. However, some consider that privacy by default may be the right choice for consumers, who can then open up their websites and profiles at their own discretion.[177] Companies could also release PSAs regarding public online profiles and what other companies can do with public information.

Should the proposed amendment become law, companies at high risk for scraping could also set up banner notifications warning their users about these new laws and their implications for public profiles and directing users to the websites' privacy settings. This would place choice in the consumers' hands; given the information, consumers could then make their own informed decisions regarding their online presence and privacy. By understanding the risks and taking the necessary steps to ensure their own privacy, consumers and companies could work to protect their privacy interests. Alternatively,

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171. *Id.*

172. *See* 18 U.S.C. § 2511 (2012) (protects against the interception of electronic communications); 18 U.S.C. § 1832 (2012) (protects against the theft of trade secrets); 18 U.S.C. § 2701 (2012) (protection against the unlawful access to stored communication).

173. *See supra* notes 78-145 and accompanying text.

174. Fiesler, *supra* note 155.

175. *Id.*

176. *Id.*

177. *See*, *e.g.*, Sam Pfeifle, *"Privacy by Default" May Be Big Post-Regulation Issue*, INT'L ASS'N OF PRIVACY PROF'LS (Sept. 30, 2013), https://iapp.org/news/a/privacy-by-default-may-be-big-post-regulation-issue/ [https://perma.cc/2FY9-98H6].

companies at high risk for scraping could change all settings to private and put up a similar banner notification informing consumers of the change. In this situation, all consumers would be protected by default and then would be able choose to open their information up to others at whatever level they choose.

VI. CONCLUSION

Pop culture has played a bigger role in cybersecurity and the public perception of hacking than many may think. The 1983 movie *War Games* involved a teenager hacking into the North American Aerospace Defense Command and nearly starting World War III.[178] After watching the film, President Reagan brought the plot up with his national security advisors to see if this was something that could happen in real life.[179] This began the cybersecurity and hacking laws that we know of today.[180] Some television shows show hacking in a more realistic, modern light.[181] Other classics push hacking as the solution to protect the world from aliens or a few people from the human error that puts them in a dinosaur's path.[182]

Yet hacking has become bigger and more harmful than pop culture could have imagined. These breaches are very real and can reveal the personal information of people around the world.[183] The legal definition of hacking[184] may not be nearly as glamorous sounding, as invasive, or as detrimental to the public. Some hackers are prosecuted on a federal level, as though they had attempted to access a government computer without authorization.[185]

People who utilize web scraping are some of these parties who are prosecuted at a high level and face the high punishments associated with the CFAA.[186] The CFAA was originally meant for people who tried to unlawfully access computers belonging to financial institutions or the United States Government.[187] Web scrapers who access web pages that are available to the general public are not the community that the CFAA was originally intended to target. There was no way for lawmakers at that time to even conceive of the idea of web scrapers. How could they possibly build a law for something they never knew was possible?

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178. WAR GAMES (MGM Studios Inc. 1983).

179. Fred Kaplan, *'WarGames' and Cybersecurity's Debt to a Hollywood Hack*, N.Y. TIMES (Feb, 19, 2016), https://www.nytimes.com/2016/02/21/movies/wargames-and-cybersecuritys-debt-to-a-hollywood-hack.html [https://perma.cc/D6F7-NYEA].

180. *See id.*

181. Forbes Technology Council, *supra* note 2.

182. *See* INDEPENDENCE DAY (Twentieth Century Fox 1996); *see also* JURASSIC PARK (Universal Pictures 1993).

183. *See* Jeff John Roberts, *Here are 10 of the Biggest Corporate Hacks in History*, FORTUNE (June 22, 2017), http://fortune.com/2017/06/22/cybersecurity-hacks-history/ [https://perma.cc/V3SA-XGSD].

184. *See supra* note 35 and accompanying text.

185. *See* 18 U.S.C. § 1030(a)(3).

186. *See id.*

187. *See id.* at § 1030(a)(2)(A); *see also id.* at § 1030(a)(2)(B).

Thus, it is up to today's world to update the Computer Fraud and Abuse Act to protect those who the CFAA can harm due to ambiguous language and the failure to update as technologies and practices have changed. Between the history, the rises in technology, and the recent and current court cases surrounding the CFAA and the act of web scraping, the time is right for the legislation to reflect the significant technological changes that have occurred since 1986.

The above proposed amendment is the first step in modernizing a potentially outdated CFAA to reflect the practices of today's technologically advanced world. The amendment not only acknowledges that information generally available to the public is truly available to all people and entities, even business competitors; it also protects those who want to work and grow in this world without facing federal punishments as a result. It is time for Congress to clarify the CFAA and relaunch it as a modern law in line with a modern world.

Communications Law: Annual Review

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TABLE OF CONTENTS

CARPENTER V. UNITED STATES……...……………………………………424

DOMINGUEZ V. YAHOO, INC. ……………………………………………..431

CITIZENS TELECOMMS. CO. OF MINN., LLC V. FCC……………………...435

NAT'L LIFELINE ASS'N V. FCC……………………………………………438

STOLZ V. FCC……………………………………………………………..443

UNITED STATES V. AT&T, INC. …………………………………………..447

WORLDCALL INTERCONNECT, INC. V. FCC………………………………452

Carpenter v. United States

Davina Anderson

138 S. CT. 2206 (2018)

In *Carpenter v. United States*, the United States Supreme Court reversed and remanded the Sixth Circuit's judgment that the petitioner, Timothy Carpenter, lacked a reasonable expectation of privacy in his cell-site location information (CSLI) collected by the Federal Bureau of Investigations (FBI), because he voluntarily shared that information with his wireless carriers.[1] The Supreme Court held that Carpenter had a legitimate privacy interest in his CSLI and that the Government should have obtained a warrant for Carpenter's CSLI under the Fourth Amendment, instead of relying solely on a court order under the Stored Communications Act (SCA).[2]

I. BACKGROUND

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[3] According to the Court, "the basic purpose of [the Fourth] Amendment, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[4] Thus, when an individual seeks to preserve something as private, and his expectation of privacy is reasonable, official intrusion generally requires a warrant supported by probable cause.[5]

CSLI is a time-stamped record generated whenever a phone connects to a cell site.[6] Cell phones continuously scan their environments looking for the best signal, which generally comes from the closest cell site.[7] Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features.[8] With the development and technological expansion

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1. Carpenter v. United States, 138 S.Ct 2206, 2209 (2018).
2. *See id.* at 2211.
3. U.S. Const. amend. IV.
4. *Carpenter,* 138 S.Ct. at 2213 (quoting *Camara v. Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523, 528 (1967)).
5. *See id.* at 2209.
6. *See id.* at 2211.
7. *See id.*
8. *See id.*

of cell-sites, wireless carriers can pinpoint a phone's location within 50 meters.[9]

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In 2011, police officers arrested four men suspected of robbing a series of Radio Shacks and T-Mobile stores in Detroit.[10] One of the suspects confessed that over a period of four months, the group had robbed nine different stores in Michigan and Ohio.[11] During interrogation, the suspect identified several accomplices and gave the FBI their cellphone numbers.[12] Based on the information given by the suspect, the Government applied for court orders under the SCA Section 2703(d) for petitioner, Timothy Carpenter, and several other suspects.[13] Section 2703(d) of the SCA "permits the Government to compel the disclosure of certain telecommunications records when it 'offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought are 'relevant and material to an ongoing criminal investigation.'"[14] Under the SCA, the Government obtained 152 days of CSLI from MetroPCS and seven days' worth of CSLI from Sprint.[15] From the 152 days of CSLI, the Government obtained "12,898 location points cataloging Carpenter's movements[,]" averaging 101 data points per day.[16] Carpenter moved to suppress the CSLI because he believed that the Government's seizure of the cell-site records without a warrant violated the Fourth Amendment.[17]

In *Carpenter*, the Court grappled with how to apply the Fourth Amendment to a "new phenomenon"—personal location information maintained by a third party—because it does not fit neatly under any existing precedent.[18] The Court ultimately addressed the question: "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements"[19]

II. ANALYSIS

To determine whether the Fourth Amendment applies, the Court first determined whether Carpenter sought to preserve his CSLI as private and

9. *Id.* at 2219.
10. *See id.* at 2212.
11. *See id.*
12. *See id.*
13. *See id.*
14. *Id.*
15. *See id.*
16. *Id.* at 2212.
17. *See id.* at 2209.
18. *Id.* at 2214, 2216.
19. *Id.* at 2211.

whether his expectation of privacy is one that society recognizes as reasonable.[20] Although there is no clear-cut definition of what society should recognize as reasonable privacy expectations, the Court looked to "historical understandings 'of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.'"[21] The Court mentioned that one of the aims of the Framers of the Constitution when drafting the Fourth Amendment was to limit police surveillance.[22] Keeping the intentions of the Framers in mind in regard to limiting police surveillance, the Court looked at two issues in this case (1) whether Carpenter has an expectation of privacy in his physical location and movements; and (2) whether Carpenter has an expectation of privacy in the CSLI that is shared with his wireless carrier(s).[23]

A. Does Carpenter have an expectation of privacy in his CSLI records?

The Court relied on its prior ruling in *United States v. Jones* to aid in its decision on this issue.[24] In *Jones*, FBI agents installed a GPS tracking device on Jones' vehicle and tracked him for 28 days.[25] The Court held that, because GPS tracking devices track every movement an individual makes in that vehicle, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy – regardless whether those movements were disclosed to the public at large."[26]

Here, the Court, by comparing GPS and cell phone location information, held that CSLI presents greater privacy concerns than GPS monitoring because CSLI gives the Government "near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers."[27] Furthermore, unlike GPS tracking that can be left in the car, a person carries their cellphone everywhere, causing the Government to access pertinent, timely information.[28] CSLI surveillance provides an "intimate window into a person's life, revealing not only his particular movements, but his 'familial political, professional, religious, and sexual associations.'"[29]

Therefore, similar to the ruling in *Jones*, the Court held that Carpenter's reasonable expectation of privacy regarding his physical

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20. *See id.* at 2213.
21. *See id.* at 2214.
22. *See id.*
23. *See id.* at 2209.
24. *See* United States v. Jones, 565 U.S. 400 (2012).
25. *See id.* at 403.
26. *See Carpenter*, 138 S.Ct 2206, 2215 (quoting *Jones,* 565 U.S. at 430).
27. *Id.* at 2210.
28. *See id.* at 2218.
29. *See id.* at 2217-18.

movements were violated when the Government accessed his CSLI from MetroPCS and Sprint.[30]

B. Is Carpenter's Expectation of Privacy Reasonable by Society?

The Court analyzed whether Carpenter has an expectation of privacy through prior rulings in both *United States v. Miller* and *Smith v. Maryland*. In *Smith*, the Court held that an individual does not have an expectation of privacy in information voluntarily turned over to third parties.[31] The Court extended *Smith's* ruling in *Miller*, when they held that no expectation of privacy exists "even if the information is revealed on the assumption that it will be used for a limited purpose."[32] As a result of both rulings, collectively known as the "third-party doctrine," the Government is typically allowed to obtain third-party information through a subpoena without triggering Fourth Amendment concerns.[33]

Despite its prior rulings in *Smith* and *Miller*, the Court did not extend these ruling to cover the new circumstances in *Carpenter*.[34] The Court stated that *Smith* and *Miller* was about limited personal information (i.e., pen registers and bank records), whereas the present case handles exhaustive personal data collected by wireless carriers.[35] Thus, according to the Court, *Carpenter* implicates privacy concerns far beyond those considered in both *Smith* and *Miller*.[36]

In *Carpenter*, the Court also discussed the "voluntary exposure" rationale under the third-party doctrine. The Court held that cell phone location information is not voluntarily shared because (1) cell phones are an "insistent part of daily life" and given the advancement in technology, it is unreasonable for an individual to not have one; and (2) cell phones always generate CSLI, without any "affirmative act on the part of the user beyond powering up."[37] The Court also stated that "[a]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data."[38]

Therefore, unlike the rulings in *Smith* and *Miller*, the fact that the Government obtained CSLI from a third party does not overcome Carpenter's claim to Fourth Amendment protection.[39] The Government's possession of

30. *See id.* at 2219.
31. *See id.* at 2216 (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)).
32. *Id.* (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)).
33. *See id.* at 2216
34. *See id.* at 2217.
35. *See id.* at 2219.
36. *See id.* at 2220.
37. *Id.* at 2220.
38. *Id.*
39. *Id.*

the CSLI was a search within the meaning of the Fourth Amendment and therefore a warrant was required.[40]

Given that the Court ruled that acquisition of Carpenter's CSLI by the Government was a search, the Court held that the Government should have obtained a warrant.[41] The acquisition of CSLI issued through a court order under SCA Section 2703(d) was not enough because the "reasonable grounds" standard required under the SCA falls short of the "probable cause" required for a warrant.[42] While the Court held that moving forward the Government will need a warrant to access CSLI, they realized that case-specific exceptions may occasionally apply.[43] For example, "one well-recognized exception applies when 'the exigencies of the situation' make the needs for law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[44] Exigencies include: "the need to pursue a fleeing suspect, protect individuals threatened with imminent harm, or prevent the imminent destruction of evidence."[45] The rule set forth in regard to obtaining a warrant for CSLI does not limit law enforcement's ability to respond to an ongoing emergency.[46]

III. CONCLUSION

The Supreme Court held that because of the unique nature of CSLI, information held by a wireless carrier (third party) does not by itself overcome a claim to Fourth Amendment protection.[47] The Court also held that an individual has an expectation of privacy in his or her CSLI information. As such, the CSLI gathered from Carpenter's wireless carriers was the product of a search, thus requiring a warrant.[48] The Court also makes it clear that their decision is a narrow one, meaning that it does not express views on matters unrelated to CSLI or "tower dumps."[49]

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Kennedy, J., Thomas, J., & Alito, J., dissenting: The Court's ruling puts lawful and "congressionally authorized" criminal investigations at risk and places undue restrictions on law enforcement.[50] Justice Kennedy stated

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40. *See id.* at 2221.
41. *See id.*
42. *See id.*
43. *See id.* at 2222.
44. *Id.* at 2223.
45. *Id.*
46. *See id.*
47. *See id.* at 2217
48. *See id.*
49. *See id.* at 2220 (tower dumps are a download of information on all devices connected to a particular cell site during a particular interval).
50. *See id.* at 2223.

that cell-site records are no different than other kinds of business records (i.e., pen registers and bank records) that the Government has a right to obtain without a warrant from a third party.[51] While the majority does not rely on its prior rulings in *Smith* and *Miller*, in both of those cases, the Court held "defendants could 'assert neither ownership nor possession' of records because the records were created, owned and controlled by companies."[52] That is similar to the facts here, and therefore Carpenter did not have a "reasonable expectation of privacy in the information that was 'voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business.'"[53] The Court should not have rejected a straightforward application of *Smith* and *Miller*.[54]

Also discussed in the dissent was a more stringent view on whose property was searched and what a search entails. Justice Thomas points out, "[t]his case should not turn on 'whether' a search occurred, [] it should turn, instead, on *whose* property was searched. By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property."[55] Furthermore, Carpenter does not explain how he has a property right in the companies' records.[56] To be eligible for Fourth Amendment protections, Carpenter must prove that the CSLI are his.[57] Justice Thomas also stated that the major problem within this case is the Court's use of the "reasonable expectation of privacy test," which was first used in *Katz v. United States*.[58] The "reasonable expectation of privacy test[,]" now known as the *Katz* test, "invites courts to make judgments about police and not the law."[59] The *Katz* test strays from the Fourth Amendment because it focuses on the "concept of 'privacy,' … [which] does not appear in the Fourth Amendment."[60] Regarding the search, the Court "ignores the basic distinction between an actual search … and an order merely requiring a party to look through its own records and produce specified documents."[61] Not every subpoena needs to be supported by probable cause.[62] If that were the case, crimes such as "terrorism, political corruption, white collar crime, and many other offenses" would be hindered.[63] The Court should not have allowed a defendant to object to the search of a third party's property, because doing so destabilizes long-established Fourth Amendment doctrine.[64] The Fourth Amendment

51. *See id.*
52. *See id.* at 2227.
53. *Id.*
54. *See id.* at 2230.
55. *Id.* at 2235.
56. *See id.* at 2242.
57. *See id.*
58. *See id.* at 2236.
59. *See id.*
60. *See id.* at 2239.
61. *See id.* at 2247.
62. *See id.*
63. *See id.*
64. *See id.*

guarantees "the right of the people to be secure in *their* [own] persons, houses, papers, and effects."[65]

Justice Gorsuch in his separate dissent poses an interesting question; what is left of the Fourth Amendment?[66] His three responses to his question are: first, ignore the problems and maintain the third-party doctrine of *Smith* and *Miller*.[67] Second, set the rulings in *Smith* and *Miller* aside and analyze cases under the *Katz* "reasonable expectation of privacy" standard.[68] In order to do so, *Katz's* problems with the Fourth Amendment should be understood by the courts.[69] He further explains that, "[t]he Amendment's protections do not depend on the breach of some abstract 'expectation of privacy,' whose contours are left to the judicial imagination."[70] Third, Justice Gorsuch explains to look for answers elsewhere.[71] Unlike in *Katz*, the right to assert a Fourth Amendment claim should not depend on an individual's ability "to appeal to a judge's personal sensibilities about the 'reasonableness' of your expectations of privacy."[72] It should be tied to the law, rather than their own policy judgments and/or biases.[73]

65. *Id.* at 2257.
66. *See id.* at 2262.
67. *See id.*
68. *See id.*
69. *See id.* at 2264.
70. *Id.*
71. *See id.*
72. *See id.* at 2267.
73. *See id.* at 2268.

Dominguez v. Yahoo, Inc.

Colin Williams

894 F.3D 116 (3D CIR. 2018)

I. INTRODUCTION

In *Dominguez v. Yahoo, Inc.*,[1] the Third Circuit Court of Appeals affirmed the district court's grant of summary judgment dismissing the Plaintiff's lawsuit alleging that Yahoo had violated the Telephone Consumer Protection Act (TCPA) by inundating him with thousands of text messages without his consent.[2] In doing so, the court applied the D.C. Circuit's recent decision in *ACA International v. FCC*, which was issued while the appeal of this case was pending.[3]

II. BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of . . . automatic dialers."[4] The Act delegated to the FCC the authority to promulgate additional regulations as necessary.[5] The FCC has subsequently issued declaratory rulings to clarify its interpretation of the statute.[6]

In December 2011, the Plaintiff purchased a cell phone and new telephone number.[7] The telephone number was previously used by a subscriber to Yahoo's email-notification service, which texted users whenever an email was sent to the subscriber's email address.[8] The telephone number's prior owner never changed the forwarding information for the email-notification service, and, consequently, the Plaintiff received all text messages related to his the Yahoo subscription.[9]

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1. 894 F.3d 116 (3d Cir. 2018).
2. *Id.* at 121.
3. ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018).
4. S. REP. NO. 102-178, at 1 (1990).
5. 47 U.S.C. § 227(b)(2).
6. *See, e.g.*, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (*2003 TCPA Order*), 18 FCC Rcd 14014, 14115; *2015 TCPA Order*, 30 FCC 7961, 7694, ¶ 16.
7. Dominguez v. Yahoo, Inc., 629 Fed. Appx. 369, 370 (3d Cir. 2015).
8. *Id.*
9. *Id.*

The Plaintiff tried a number of options to stop the messages, but they were all to no avail. He initially replied "stop" and "help" to the messages, followed by contacting Yahoo's customer service line directly with his grievances, but Yahoo informed him that they could not stop the messages.[10] He even called Yahoo's customer service again with a representative from the FCC, but this was unsuccessful as well.[11] Having exhausted his options, the Plaintiff filed complaints with the FCC and FTC.[12]

The Plaintiff received 27,809 text messages over the course of the 17 months with his new cell phone and reassigned telephone number.[13] In order to stop the calls, the Plaintiff decided to file a putative class action lawsuit under the TCPA.[14] The Act makes it unlawful to send calls or text messages "using any automatic telephone dialing system … to any telephone number assigned to a … cellular telephone service" without the owner's prior express consent.[15] The key inquiry in this case was whether the system Yahoo used to contact the Plaintiff constituted an automatic telephone dialing system (ATDS) for the purposes of the TCPA.[16]

In order to be classified as an ATDS, a device must have the capacity to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers.[17] The District Court granted Yahoo's motion for summary judgment on the grounds that their email-notification service did not fit within the prescribed definition.[18] The Plaintiff subsequently appealed.[19] However, the FCC issued a declaratory ruling (2015 TCPA Order), which held that "the capacity of an [ATDS] is not limited to its current configuration but also its potential functionalities."[20] In light of this ruling, the Third Circuit remanded the case to consider whether the email-notification service was an ATDS based on its potential capacity.[21]

The Plaintiff amended his complaint to allege that the email-notification service was an ATDS based on its potential capacity.[22] He also included expert reports to demonstrate the latent capacity of Yahoo's service to function as an ATDS.[23] Nonetheless, the District Court granted Yahoo's

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10. *Id.* at 370-71.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. ACA Int'l v. FCC, 885 F.3d 687, 692 (D.C. Cir. 2018) (quoting 47 U.S.C. § 227(b)(1)(A)(iii)).
16. *See* Dominguez v. Yahoo, Inc., 894 F.3d 116, 117 (3d Cir. 2018).
17. 47 U.S.C. § 227(a)(1)(A)-(B).
18. Dominguez v. Yahoo, Inc., 629 Fed. Appx. 369, 371 (3d Cir. 2015).
19. *Id.*
20. *2015 TCPA Order*, 30 FCC Rcd 7961, 7974, ¶ 16.
21. *Dominguez*, 629 Fed. Appx. at 373 ("Because this is an issue of heightened importance in light of the 2015 FCC Ruling, and the District Court did not previously have the benefit of the FCC's ruling in addressing the issue, remand is appropriate to allow that Court to address more fully in the first instance whether Yahoo's equipment meets the statutory definition.").
22. Dominguez v. Yahoo, Inc., 2017 U.S. Dist. LEXIS 11346, at *9 (E.D. Pa. Jan. 27, 2017).
23. *Id.* at *8.

motion for summary judgment again on the grounds that Yahoo's service still did not qualify as an ATDS under the FCC's current interpretation of "capacity."[24] The Court also excluded the reports on the grounds that they were inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*[25] Dominguez appealed his case once again, and just as before, a critical decision was issued while it was pending before the Third Circuit.

In *ACA International v. FCC*, the D.C. Circuit held that the FCC's declaratory ruling and interpretation of the "capacity" of ATDS was far too expansive.[26] The Court particularly took issue with the argument that any smartphone could conceivably become an ATDS by downloading a random-number-generating application.[27] In light of the public policy concerns, the D.C. Circuit invalidated the 2015 TCPA Order.[28]

III. ANALYSIS

The Third Circuit applied the D.C. Circuit's holding to this appeal.[29] It therefore rejected any arguments put forth by the Plaintiff alleging that Yahoo's email-notification service could be considered an ATDS based on its potential capacity to function as such a device.[30] Therefore, the issue for the Court was whether the Plaintiff provided evidence to prove that Yahoo's service constituted an ATDS based on its current configurations.[31]

The Third Circuit affirmed the District Court's decision to exclude the expert reports from evidence because they only focused on the latent capacity of Yahoo's email notification service to function as an ATDS.[32] The Plaintiff was unable to provide any evidence to prove the current capacity of the service to function in this manner, so he failed to create a genuine issue of material fact to overcome the grant of summary judgment.[33]

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24. *Id.* at *3, *8.
25. *Id.* at *8 (citing 509 U.S. 579 (1993)).
26. ACA Int'l v. FCC, 885 F.3d 687, 699 (D.C. Cir. 2018) ("[T]he Commission's interpretation of the term 'capacity' in the statutory definition of an ATDS is 'utterly unreasonable in the breadth of its regulatory [in]clusion.'").
27. *Id.* at 701.
28. *Id.* at 703.
29. *See* Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018) ("In light of the D.C. Circuit's holding, we interpret the statutory definition of an [ATDS] as we did prior to the issuance of [the] 2015 Declaratory Ruling.").
30. *Id.* ("Dominguez can no longer rely on his argument that the Email EMS Service had the latent or potential capacity to function as [an ATDS].").
31. *Id.* (deferring to D.C. Circuit's rationale opposing the 2015 TCPA Order's interpretation of the ATDS clause).
32. *Id.* at 120 ("The reports are founded upon the exact type of hypothesizing that is foreclosed by *ACA International*").
33. *Id.* at 121.

IV. CONCLUSION

In sum, the Third Circuit affirmed the District Court's grant of summary judgment in favor of Yahoo and rejected all arguments that their email notification service fit within the statutory definition of an ATDS.

Citizens Telecomms. Co. of Minn., LLC v. FCC

Abbey Taylor

901 F.3D 991 (8TH CIR. 2018)

I. INTRODUCTION

In an opinion written by Judge L. Steven Grasz, the U.S. Court of Appeals for the Eighth Circuit vacated a portion of a 2017 Order from the FCC regarding a new regulation of time division multiplex services for the telecommunications industry.[1] Though a variety of Petitioners advanced numerous technical arguments, the Order was sent back to the FCC for further proceedings consistent with the Court's opinion regarding a singular issue.[2]

II. BACKGROUND

Two different groups challenged a 2017 FCC Order[3] that changed the regulations concerning business data services.[4] The Incumbent Local Exchange Carriers (ILECs) challenged the new price cap rates specifically, while the Competitive Local Exchange Carriers (CLECs) challenged the rest of the changes in the Order on grounds of inadequate notice and on the merits.[5]

The FCC Order under review is *Business Data Services in an Internet Protocol Environment* (*2017 Order*).[6] Among other things, the *2017 Order* created a Competitive Market Test under which lower bandwidth time division multiplex (TDM) channel termination services were to be scrutinized.[7] The *2017 Order* resulted from a Further Notice of Proposed Rulemaking published by the FCC in 2016 (*2016 FNPRM*).[8]

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1. Citizens Telecomms. Co. of Minn., LLC v. FCC, 901 F.3d 991, 1006 (8th Cir. 2018).
2. *Id.*
3. Business Data Services in an Internet Protocol Environment, 32 FCC Rcd. 3459 (2017).
4. Citizens Telecomms. Co. of Minn., LLC, 901 F.3d at 996.
5. *Id.* at 996-98.
6. *See* Business Data Services in an Internet Protocol Environment, 32 FCC Rcd. 3459 (2017).
7. *Id.*
8. *See* Business Data Services in an Internet Protocol Environment, 31 FCC Rcd. 4723 (2016).

III. ANALYSIS

The CLEC Petitioners advanced five arguments regarding "(1) the adequacy of the notice, (2) the ending of *ex ante* regulations for transport services, (3) the Competitive Market Test, (4) the rules regarding Ethernet services, and (5) the Interim Wholesale Access Rule."[9] The argument regarding adequate notice was the only successful argument in the case.[10]

First, regarding notice, the CLEC Petitioners began by arguing that the *2016 FNPRM* and *2017 Order* were not compatible because the FNPRM sought comment on a "*heightened* regulatory scheme while the *2017 Order* was broadly *deregulatory*."[11] The Court rejected this argument and stated that the CLEC Petitioners were incorrect in their reading of the *2016 FNPRM* and that the plain language provided readers "adequate notice of large scale deregulation."[12] The CLEC Petitioners next argued that the specific standards that the FCC adopted in the Competitive Market Test differed from, and in fact were not proposed in, the *2016 FNPRM*.[13] The Court rejected this assertion as well, stating that the *2016 FNPRM* used broad terminology that encompassed the results of the *2017 Order*.[14] However, the CLEC Petitioners did prevail on their argument that they had "no notice of the complete deregulation of transport services."[15] The *2016 FNPRM* did not give adequate notice that the *2017 Order* would completely deregulate transport services and this violated the requirements of the Administrative Procedure Act.[16] Specifically, the Court held that "[b]ecause the FCC did not propose completely ending *ex ante* regulation of transport services, it did not allow for informed participation by interested parties in that portion of the rulemaking, and its notice was insufficient."[17] Further, even though the FCC issued a draft of the *2017 Order* a few weeks prior to the final release, that action did not "cure the harm from inadequate notice."[18] In sum, the Court denied all of the CLEC Petitioners' requests aside from one.[19] The Court vacated the section of the final rule in the *2017 Order* regarding transport services and required the FCC to conduct further proceedings.[20]

Second, while the CLEC Petitioners also argued against the merits of the *2017 Order* specifically regarding transport services, the Court held that since the notice for transport services was deemed inadequate, they need not discuss the argument.[21] Third, the Court did walk through the CLEC Petitioners' claim taking issue with the new Competitive Market Test.[22] The

9. Citizens Telecomms. Co. of Minn., LLC, 901 F.3d at 1001.
10. *See id.* at 1015.
11. *Id.* at 1001 (emphasis in original).
12. *Id.* at 1002.
13. *Id.*
14. *Id.* at 1003-04.
15. *Id.* at 1004.
16. *Id.* at 1005.
17. *Id.*
18. *Id.* at 1006.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1006-07.

Test was challenged on three different grounds: (1) economic theory with a merits-based analysis, (3) the reasonableness of the criteria, and (3) the adequacy of the "cost benefit analysis in the test."[23] But since the Court determined that even though the FCC's final order incorporated "competing evidence," it did not violate the Administrative Procedure Act because it was neither arbitrary nor capricious.[24] Fourth, the CLECs argued that the "FCC unreasonably excluded low bandwidth Ethernet BDS from price caps."[25] However, the Court determined that this argument was without basis since there was no evidence the FCC acted "arbitrarily and capriciously in its choice of whether to exclude Ethernet services from price caps."[26] Fifth and finally for the CLEC Petitioners, regarding the extension of the Interim Wholesale Access Rule, the court immediately and succinctly declined "the CLEC Petitioners' invitation to adopt their characterization of the relevant 'community' in 47 U.S.C § 214(a) because the argument invites proxy review of an order not before us."[27]

Though the ILEC Petitioners also advanced a single argument, the Court quickly refuted it by agreeing with the FCC that they neither acted arbitrarily nor capriciously.[28]

IV. CONCLUSION

The Eighth Circuit Court of Appeals vacated the section of the final rule in the *2017 Order* regarding TDM transport services specifically.[29] The Court remanded that portion of the rule to the FCC for further proceedings.[30]

23. *Id.*
24. *Id.* at 1011.
25. *Id.*
26. *Id.* at 1012-13.
27. *Id.* at 1013.
28. *Id.* at 1010.
29. Citizens Telecomms. Co. of Minn., LLC v. FCC, 901 F.3d 991, 1006 (8th Cir. 2018).
30. *Id.*

Nat'l Lifeline Ass'n v. FCC

Amanda Townsend

915 F.3D 19 (D.C. CIR. 2019)

I. INTRODUCTION

Upon timely petition for review, the Court of Appeals for the District of Columbia Circuit granted petitioners' motion for a judicial stay on the *2017 Lifeline Order*[1] because "petitioners ha[d] demonstrated a likelihood of success on the merits of their arguments that the [Tribal Facilities Requirement] and [Tribal Rural Limitation] . . . [were] arbitrary and capricious."[2]

II. BACKGROUND

In the Communications Act of 1934, Congress specified that one of its goals was to make wire and radio communication services available at reasonable rates.[3] The Telecommunications Act of 1996 reinforced this goal by stating that all consumers in all regions, including low-income consumers, should have access to telecommunications and information services.[4] In response to these goals, the FCC created the Lifeline program in 1985 and later transformed the program to become a "stand-alone universal service program" in 1997.[5] The Lifeline program was created "to ensure that low-income consumers had access to affordable, landline telephone service following the divesture of AT&T."[6]

The Lifeline program operates by offering eligible telecommunications carriers (ETCs) subsidies if the ETCs provide their customers with a discount of $9.25 on a wireline or wireless voice and broadband service plan.[7] In 2000, the FCC "established the Tribal Lifeline program to provide an enhanced monthly subsidy of $25 for residents of federally recognized Tribal lands."[8] This decision was in response to alarming

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1. Bridging the Digital Divide for Low-Income Consumers et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd. 10475 (released Dec. 1, 2017) ("*2017 Lifeline Order*"), 83 Fed. Reg. 2075 (Jan. 16, 2016).
2. Nat'l Lifeline Ass'n v. FCC, 915 F.3d 19, 27 (D.C. Cir. 2019).
3. *Id.* at 23.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 23–24.
8. *Id.* at 24.

statistics that revealed that Tribal lands had the lowest telephone subscribership in America.[9] Before adopting the Tribal Lifeline program, the FCC committed to consulting "with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."[10]

In 2005, major carriers withdrew from the Lifeline program because the program was no longer profitable.[11] The FCC responded by granting a blanket forbearance on the "own facilities" requirement found within the ETC definition for non-facilities-based providers.[12] Non-facilities-based providers do not have their own infrastructure, but instead buy "wholesale minutes, data, and text from major carriers" to resell to consumers under a different name.[13] The FCC allowed a blanket forbearance because these "resellers play[ed] a critical role in the Lifeline program: by 2015 about two-thirds of eligible low-income consumers on Tribal lands relied on non-facilities-based providers for their Lifeline services."[14]

In 2015, the FCC initiated proceedings to comprehensively restructure the Lifeline and Tribal Lifeline programs because expenditures for the program had substantially increased within fourteen years.[15] However, the FCC decided to maintain current Tribal-specific eligibility programs because the program had experienced success in increasing the adoption of Lifeline services.[16] But the FCC decided to consider a proposed facilities requirement and rural limitation at a future proceeding.[17]

On October 26, 2017, the FCC "released a draft order adopting a facilities requirement and rural limitation for the Tribal Lifeline program."[18] The Tribal Facilities Requirement limited the enhanced Tribal Lifeline to facilities-based Lifeline service providers whose facilities cover all or a portion of the Tribal lands' service area, which effectively excluded non-facilities-based providers.[19] Additionally, the Tribal Rural Limitation limited the enhanced Tribal Lifeline support to residents of "rural" areas on Tribal lands.[20] Rural areas are defined as an area with less than 25,000 people.[21] This draft order was open for public comment and lobbying from interested

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9. *Id.*
10. *Id.*
11. *Id.* at 25, 30.
12. *Id.* at 25-26 ("Under the 1996 Act, an ETC must 'offer the services that are supported by Federal universal service support mechanisms' 'either using its own facilities or a combination of its own facilities and resale of another carrier's services.'").
13. List of United States Mobile Virtual Network Operators, Best MVNO, https://bestmvno.com/mvnos/#what-is-an-mvno (last visited Apr. 14, 2019).
14. Nat'l Lifeline Ass'n v. FCC, 915 F.3d 22, 25 (D.C. Cir. 2019).
15. *Id.* at 26.
16. *Id.* at 26.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 27.
21. *Id.* at 27.

persons from October 26, 2017 to November 9, 2017.[22] It was then approved on November 16, 2017.[23]

III. ANALYSIS

Petitioners contended that the 2017 Lifeline Order, the Tribal Facilities Requirement, and the Tribal Rural Limitation were arbitrary and capricious.[24] The petitioners also argued that the FCC "failed to provide sufficient notice of the proposed changes . . . [and] . . . violated its own procedural requirements by failing to consult Indian tribes in advance."[25]

A reviewing court will set aside agency action if the action is found to be arbitrary or capricious.[26] To not be arbitrary or capricious, an agency must provide a "satisfactory explanation for its action including [a] rational connection between the facts found and the choice made."[27] Additionally:

> [A]gency action is arbitrary and capricious if the agency 'has relied on factors which Congress has intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[28]

The court began its analysis by reviewing whether the decision to enact the Tribal Facilities Requirement was arbitrary and capricious.[29] Then the court analyzed whether the decision to enact the Tribal Rural Limitation was arbitrary and capricious.[30] Finally, the court reviewed whether the FCC violated procedural requirements.[31]

A.

The court held that the Tribal Facilities Requirement was arbitrary and capricious for three reasons.[32] First, the court found that the FCC ignored the substantial negative impact that the Tribal Facilities Requirement would have on affordability and access of subscribership for Tribal lands, which is

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22. *Id.* at 26.
23. *Id.*
24. *Id.* at 27.
25. *Id.*
26. *Id.* (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)).
27. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
28. *Id.*
29. *See infra* Section A.
30. *See infra* Section B.
31. *See infra* Section C.
32. *Id.* at 31.

the primary goal of the enhanced Tribal subsidy.[33] Second, the court found that the FCC "failed to justify its fundamental policy reversal on forbearing the 'own facilities' requirement" despite the FCC's findings that non-facilities-based providers play an important role in promoting affordable telecommunications service.[34] The FCC reversed "its policy of forbearance . . . without conducting a new forbearance analysis or providing any reasoned explanation for its reversal."[35] Third, the court found that the FCC "failed to consider . . . important aspect[s] of the problem in adopting the Tribal Facilities Requirement."[36]

The court listed four important aspects of the problem in adopting the Tribal Facilities Requirement that the FCC failed to consider: (1) The FCC's decision did not explicitly consider the fact that facilities-based providers are unwilling to offer Tribal Lifeline services and the impact of this unwillingness;[37] (2) The FCC's decision did not explicitly consider "the effect of eliminating the enhanced subsidy for non-facilities-based providers," despite the FCC's knowledge that "two thirds of enhanced Tribal support goes to non-facilities-based providers[;]"[38] (3) The FCC failed to provide evidence "that directing the enhanced Tribal subsidy solely to facilities-based providers would incentivize them to deploy additional facilities and networks, reduce prices, or offer new service plans for low-income consumers[;]"[39] and (4) the FCC "ignored serious reliance interests" that gave rise to its forbearance policy because the FCC did not consider the business models of non-facilities-based providers that have been designed to target low-income consumers.[40]

B.

The court held that the Tribal Rural Limitation was also arbitrary and capricious for two reasons. First, the court found that the FCC failed to provide any evidence to support their claim that "telecommunications services are more available or more affordable for low-income consumers on urban Tribal land than on rural Tribal lands, such that the enhanced subsidy would be less necessary in urban areas."[41] Second, the court found that the FCC's "conclusion that limiting the enhanced Tribal subsidy to rural lands will incentivize deployment is . . . speculative" because the FCC provided no evidence for this conclusion.[42]

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33. *Id.* at 28.
34. *Id.* at 29.
35. *Id.*
36. *Id.* (quoting *State Farm*, 463 U.S. at 43).
37. *Id.* at 29-30.
38. *Id.* at 30.
39. *Id.*
40. *Id.* at 31.
41. *Id.* at 32.
42. *Id.*

C.

The court ruled that the *2017 Lifeline Order* failed on procedural grounds as well. Agencies are required to provide a period of notice-and-comment.[43] "When substantial rule changes are proposed[,]" an agency must provide: (1) at least, a 30-day comment period;[44] (2) factual detail and rationale, so that interested parties may leave targeted comment;[45] and (3) a final rule that is "a logical outgrowth" of the proposed rule.[46]

Here, the FCC's final decision was not a "logical outgrowth" because the final decision did not include several elements that garnered comment in the initial notice.[47] Additionally, in the notice, the FCC failed to include maps that showed which areas would be affected by the proposed rule,[48] which limited meaningful comment.[49] The FCC also failed to provide the proper notice-and-comment rulemaking proceeding that it had promised and the proper 30-day comment period.[50]

IV. CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit vacated the *2017 Lifeline Order* and remanded the matter to the FCC for a new notice-and-comment-rulemaking proceeding because the FCC's adoption of the Tribal Facilities Requirement and Tribal Rural Limitation was arbitrary and capricious.[51]

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43. *Id.*
44. *Id.* at 34.
45. *Id.* at 32.
46. *Id.* at 32.
47. *Id.* at 33.
48. *Id.*
49. *See id*.
50. *Id.* at 34-35.
51. *Id.* at 35.

Stolz v. FCC

Kyle Gutierrez

822 F.3D 234 (D.C. CIR. 2018)

In *Stolz v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit dismissed as moot in part and denied in part an appeal of the FCC's decision to deny the assignment of a radio broadcast license,[2] a decision that the court hoped would bring a "long-running dispute . . . closer to [its] conclusion . . . ."[3]

I. BACKGROUND

The transfer of ownership of a broadcast TV or radio station depends upon the FCC's approval of the assignment of that station's broadcast license to the station's new owner.[4] Approval requires that the FCC find that the assignment will serve "the public interest, convenience, and necessity[,]"[5] which includes promoting program and viewpoint diversity and "preventing undue concentration of economic power."[6] As such, FCC regulations provide that one entity may own no more than eight commercial stations in a market with 45 or more stations, with no more than five commercial stations operating in the same AM or FM service, or seven commercial stations in markets with 30-44 stations, with no more than four commercial stations operating in the same AM or FM service.[7]

In 2002, the FCC, while retaining its prior numerical limits on station ownership, updated its rules for defining the applicable ownership limits for a single entity in a given market.[8] This change also applied to broadcast license transfers.[9] While the *2002 Order* did not require existing licensees to divest any of their current station ownership interests, it provided that any assignment applications the FCC had not acted on before the *2002 Order's* adoption date would be subject to the new market definitions.[10]

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1. 882 F.3d 234 (D.C. Cir. 2018).
2. *See id.* at 238.
3. *Id.* at 236.
4. *Id.* (quoting 47 U.S.C. § 310(d)).
5. *Id.* (quoting 47 U.S.C. § 310(d)).
6. *Id.* (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978)).
7. *Id.* (citing 47 C.F.R. § 73.3555(a)).
8. *Id.* (citing 2002 Biennial Regulatory Review, *Report and Order*, 18 FCC Rcd 13620 (2003) (*2002 Order*)).
9. *Id.*
10. *Id.* at 236-37.

Edward R. Stolz, II, owner of the Royce International Broadcasting Company, held the broadcast license for a radio station in Sacramento, California.[11] In 1996, Stolz signed a letter of intent to sell the station and transfer its license to Entercom.[12] However, relations between the parties fell apart, and the sale and transfer were never completed.[13] After Entercom successfully sought specific performance of the sale in California state court, Stolz was ordered to sign the license transfer application that Entercom would submit to the FCC in November 2002.[14] However, Stolz refused to sign, and instead petitioned the FCC to deny the application.[15] Stolz contended that the FCC's measurement of the Sacramento market was the result of a flawed methodology and that, had an accurate standard been applied, ownership concentration rules would prevent Entercom from acquiring his station.[16]

The FCC's Media Bureau granted Entercom's application in May 2003.[17] However, less than a month later, the FCC adopted the *2002 Order*, which redefined the Sacramento market along the lines that Stolz had previously argued.[18] At the time of the application, Entercom already held the maximum number of broadcast licenses allowed in Sacramento.[19] Thus, had the *2002 Order* been applied, the transfer of Stolz's station's license to Entercom would have been denied.[20]

After being denied reconsideration by the Media Bureau, Stolz sought review from the full FCC which, ten years later, affirmed the Media Bureau's original decision.[21] Although Stolz attempted to argue that the Entercom transfer was unlawful under the District of Columbia Circuit's intervening decision in *Kidd Communications v. FCC* (*Kidd*), the full FCC denied Stolz's petition for reconsideration, concluding that Stolz should have sought to reopen briefing on his original petition in order to bring this argument sooner.[22]

II. ANALYSIS

Stolz's primary argument before the court was that, because Entercom's license transfer application was hovering in administrative limbo within the FCC when the *2002 Order* went into effect, it should have been assessed under the *2002 Order's* new local-market definition.[23] Had this been the case, the application would have been denied for pushing Entercom over

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11. *Id.* at 237.
12. *Id.*
13. *Id*.
14. *Id*.
15. *Id.*
16. *Id*.
17. *Id.*
18. *Id.*
19. *See id.*
20. *Id.*
21. *See id.* at 237-38.
22. *See id.*
23. *See id*. at 238.

the station ownership limit for the Sacramento market.[24] Conversely, the pre-2002 regulatory scheme would have allowed Entercom to obtain Stolz's station without violating the local-market ownership rule.[25] However, the court concluded that it did not need to determine whether Entercom's license was, in fact, pending, because Entercom terminated operation of one of its preexisting Sacramento FM stations and returned the station's license to the FCC while the present case was unfolding.[26] With only four FM stations and one AM station in the Sacramento market, Entercom was eligible to acquire Stolz's station even under the *2002 Order's* standard.[27] As such, the court dismissed this portion of Stolz's appeal as moot.[28]

Stolz further argued that the D.C. Circuit's decision in *Kidd* rendered the FCC's approval of Entercom's license transfer invalid.[29] In response, the FCC asserted that, because he elected to bring his *Kidd* argument in a petition for reconsideration, instead of through a supplemental filing before the FCC had rendered its decision, Stolz had forfeited his ability to rely on this intervening precedent.[30] However, the court rejected the FCC's argument, concluding that it knew of no FCC rules that permit supplemental filings after the pleading cycle has closed, and that the FCC's procedural regulations failed to provide fair notice to claimants that failure to make such a supplemental filing will forfeit that claim.[31] The court went on to point out that FCC regulations actually make it clear that claimants should use a petition for reconsideration to raise "events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commissioner."[32]

Although the FCC was able to identify some prior decisions indicating that it has, at times, accepted supplemental filings, the true issue before the court was whether Stolz had been given "fair notice that he had to plead for an exercise of discretion under an *unwritten* rule on pain of forfeiting a claim that the *written* rules expressly say could be presented later in a petition for reconsideration."[33] In order for an agency to have a claim-foreclosing procedural requirement like this, "it needs to be explicit about the rule and upfront about consequences of noncompliance."[34] The court further noted that the only reason that Stolz waited ten years to raise his *Kidd* argument in the first place was that the FCC took ten years to decide on Stolz's initial appeal.[35]

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24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.* at 239.
31. *See id.*
32. *See id*. (quoting 47 C.F.R. § 1.106(b)(2)).
33. *Id*. (emphasis in original).
34. *Id.*
35. *See id.*

However, despite this procedural victory, the court proceeded to reject Stolz's interpretation of and reliance on *Kidd*.[36] While both *Kidd* and the present case stemmed from a state court order to file a broadcast license assignment application,[37] the D.C. Circuit in *Kidd* found the FCC's decision to approve the application unlawful because the FCC "woodenly granted the assignment application" by virtue of the application being the result of a state court's decision—without ensuring that it furthered the public interest and "notwithstanding that the transfer would enforce the very type of reversionary interest that FCC regulations expressly prohibit."[38] However, the transfer of Stolz's station would not have enforced any sort of prohibited reversionary interest.[39] Similarly, the California state court did not order the FCC to grant the application, but rather ordered Stolz to sign the application in order to comply with his original agreement with Entercom.[40] Thus, unlike *Kidd*, the FCC based its decision to grant Entercom's application entirely on federal law and established FCC policy.[41]

III. CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit dismissed Stolz's appeal in part and denied it in part because his challenge to the FCC's decision to apply its pre-2002 local-market definition to Entercom's broadcast license assignment application was moot, and because his remaining challenge to the FCC's decision under *Kidd* lacked merit.[42]

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36. *See id.*
37. *See id.* (citing *Kidd Communications v. FCC*, 427 F.3d 1, 3 (D.C. Cir. 2005)).
38. *Id.* at 239-40.
39. *See id.* at 240.
40. *See id.*
41. *See id.*
42. *See id.*

United States v. AT&T, Inc.

Tawanna Lee

916 F.3D 1029 (D.C. CIR. 2019)

I. INTRODUCTION

In *United States v. AT&T, Inc.*,[1] the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's denial of a permanent injunction of the vertical merger between AT&T and Time Warner under Section 7 of the Clayton Act, 15 U.S.C. § 18.[2] The D.C. Circuit applied the "clearly erroneous" standard of review.[3] The court held that the government failed to meet its burden to establish that the proposed merger would likely substantially lessen competition within the multichannel video distribution market.[4]

II. BACKGROUND

On October 22, 2016, AT&T Inc. announced its plan to acquire Time Warner Inc. as part of a $108 billion vertical merger transaction.[5] AT&T Inc. is a distribution company with two traditional Multichannel Video Programming Distributor ("MVPD") products, whereas Time Warner is a content creator and programmer.[6] The merged firm would operate in each segment of the industry's "three-stage chain of production:" content creation; packaging content into networks to be licensed to third-party MVPDs for distribution; and providing on-demand content, directly to subscribers or through licenses with third-party distributors.[7] The government brought suit under Section 7 of the Clayton Act alleging that "the newly combined firm likely would . . . use its control of Time Warner's popular programming as a weapon to harm competition."[8]

Section 7 of the Clayton Act prohibits mergers where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. . . ."[9] The district court applied the *Baker Hughes* burden-shifting framework to

1. United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).
2. *Id.* at 1031.
3. *Id.* at 1029.
4. *Id.* at 1046.
5. *Id.* at 1035.
6. *Id*.
7. *Id.* at 1033.
8. *Id.* at 1035.
9. *Id.*at 1032 (citing 15 U.S.C. § 18 (2018)).

consider the effect of the proposed merger on competition.[10] Under this approach, the government bears the burden of demonstrating that the merger is likely to substantially lessen competition in the relevant market.[11] Because vertical mergers do not produce immediate change in the relevant market share, the government may not rely on statistics about changes in market concentration to support a presumption of anticompetitive effect.[12] Alternatively, the government must "make a fact-specific showing that the proposed merger is "likely to be anticompetitive."[13] The burden then shifts to the defendant to present evidence that the government's prima facie case "inaccurately predicts the relevant transaction's probable effect" or to "sufficiently discredit" the basis of the underlying government claims, after which the burden of production shifts to the government to present additional evidence.[14] The ultimate burden of persuasion remains with the government.[15] The government must demonstrate more than a mere probability of decreased competition. Rather, the government must show there is a reasonable probability that the proposed merger is likely to substantially lessen competition to successfully bring a Section 7 claim.[16] The district court held that the government "failed to clear the first hurdle in meeting its burden of showing that the proposed merger was likely to increase Turner Broadcasting's bargaining leverage."[17]

At issue on appeal was the district court's factual findings "on its increased leverage theory whereby costs for Turner Broadcasting System's content would increase after the merger, principally through threats of long-term 'blackouts' during affiliate negotiations."[18]

III. ANALYSIS

The court analyzed the evidence in the record to evaluate the government's assertions that the district court erred in finding that the government failed to meet its burden of proof on two grounds: "the district court discarded the economics of bargaining, and the district court failed to apply the foundational principle of corporate-wide profit maximization."[19] The government also argued that the district court "used internally inconsistent logic when evaluating industry evidence and clearly erred in rejecting its expert's quantitative model of harm."[20]

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1038.
18. *Id.* at 1031.
19. *Id.* at 1033.
20. *Id.*

A. *Increased Leverage Theory of Harm*

The court found unpersuasive the government's argument that the district court discarded the economics of bargaining or failed to apply the principle of corporate-wide profit maximization.[21] At trial, the government advanced an increased leverage theory of harm in asserting its claim that the effect of the acquisition would substantially lessen competition. The theory is that "by combining Time Warner's programming and DirecTV's distribution, the merger would give Time Warner increased bargaining leverage in negotiations with rival distributors, leading to higher, supracompetitive prices for millions of consumers."[22] The government presented expert opinion forecasting the likely anticompetitive effects of the proposed merger based on a quantitative model, taking into account the Nash economic bargaining theory.[23] The Nash theory stands for the proposition that "the relative loss for each party affects bargaining leverage and when a party has more bargaining leverage, that party is more likely to achieve a favorable price in the negotiation."[24] The resulting model predicted cost savings realized from the elimination of double marginalization, or the elimination of profit margins at two different levels in a vertical supply chain and the extraction of increased fees for its content.[25]

The defendant, AT&T, rejoined with expert analysis of "real-world data" from previous instances of vertical integration within the market demonstrating "no statistically significant effect on content prices."[26] Significantly, the district court gave force to evidence presented by AT&T that revealed that the government's predictive modeling did not take into consideration Turner Broadcasting System's existing irrevocable offers of no-blackout arbitration agreements, which a government expert conceded would necessitate a new model.[27] The government did not present any comparable analysis of "real-world" data for previous vertical mergers in the industry.[28] As a result, the court found that the district court had not misunderstood or misapplied the economic theory, but rather, concluded that the "theory inaccurately predicted the post-merger increases in content costs."[29] Significantly, the court dismissed the government's challenges to the district court's treatment of its economic theories as "largely irrelevant, during the seven- year period" in which the irrevocable offers would be in force.[30]

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21. *Id.* at 1040.
22. *Id.* at 1035.
23. *Id.* at 1036.
24. *Id.* at 1039.
25. *Id.* at 1036.
26. *Id.* at 1031.
27. *Id.* at 1031.
28. *Id.* at 1031.
29. *Id.* at 1040.
30. *Id.* at 1041.

B. *Dynamic Video Programming and Distribution Market*

The court also found that the government's argument that the district court's reasoning in evaluating trial testimony was internally inconsistent was unpersuasive.[31] The court reviewed the evolving nature of the video programming and distribution industry.[32] Traditionally, the market operates in a "three-stage chain of production"[33] with 1) studios or networks creating content, 2) programmers packaging content into networks to be licensed for distribution, and 3) distributors selling bundled networks to subscribers.[34] The licensing of content is facilitated by affiliate agreements whereby distributors pay "affiliate fees" to programmers, negotiated through "lengthy and complicated" "affiliate negotiations."[35] Failure to reach an agreement results in the distributor losing rights to display the programmer's content, resulting in a "blackout" for customers.[36] Because of the economic loss borne by both parties in the event of a blackout—as programmers lose affiliate fee revenues and distributors risk losing subscribers—blackouts are rare.[37] Nonetheless, record evidence suggested that negotiating parties employ threats of blackouts as a negotiating tactic.[38]

At trial, the government presented the defendant's own statements and those of other industry leaders submitted seven years earlier in an administrative proceeding about the anticompetitive effects of a proposed vertical merger on the video programming and distribution industry.[39] Additionally, the government presented testimony from third-party distributors about their concerns and reasons to believe that a merger would increase Turner Broadcasting's bargaining leverage.[40] In response, AT&T presented testimony from executives involved in previous vertical mergers, rebutting the government's theory that the integrated company's increased bargaining leverage would allow AT&T to extract higher costs for its content during affiliate negotiations.[41] The district court found that the third-party testimony "fail[ed] to provide meaningful, reliable support for the [g]overnment's increased leverage theory, while the executives' testimony undermine[d] the persuasiveness of the [g]overnment's proof."[42] As a result, the court found that the record evidence did not demonstrate that the district court clearly erred in discounting the government's testimony because it was "speculative, based on unproven assumptions, or unsupported."[43] The court

31. *Id.* at 1044.
32. *Id.* at 1046.
33. *Id.* at 1033.
34. *Id.* at 1033-34.
35. *Id.* at 1034.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 1031.
40. *Id.* at 1045.
41. *Id.* at 1036.
42. *Id.* at 1045 (internal quotations omitted).
43. *Id.* at 1038 (internal quotations omitted).

also credited the record evidence that indicated that the video programming and distribution industry had been experiencing "ever-increasing competitiveness"[44] with the emergence of "virtual" multichannel video programming distributors, such as DirecTV Now and YouTube TV, and subscription on-demand content distribution platforms.[45] Due to the dynamism of the market, taken in consideration with the evidence on record, the court found that the government's contention that the district court clearly erred failed.[46]

C. *Legal Standard for Evaluating Vertical Mergers*

Because Section 7 does not require evidence of certain harm, the district court recognized "the uncertainty regarding the measure of proof for the government's burden."[47] This court, while noting the government's latest guidance on non-horizontal mergers was issued in 1984,[48] was unpersuaded to weigh in, as neither party challenged the standard.[49] Both parties used varying language to articulate the government's burden, including that it must show an "appreciable danger" of competitive harm or that it must show that harm is "likely" or "reasonably probable."[50] The district court concluded that, even if the varying formulations governed, it was nonetheless unnecessary to articulate distinctions.[51] The district court's conclusion that the government had failed to satisfy its burden "would remain unchanged."[52]

IV. CONCLUSION

The court held that the district court did not abuse its discretion in denying a permanent injunction of the vertical merger under Section 7 of the Clayton Act, 15 U.S.C. § 18, because the district court did not err in finding that the government failed to satisfy its burden to establish that the proposed merger was likely to increase Turner Broadcasting System's bargaining leverage to increase the costs of its content.[53] Accordingly, the court affirmed the lower court's decision.[54]

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44. *Id.* at 1046 (quoting *United States v. AT&T Inc.*, 310 F.Supp.3d 161, 241 (D.D.C. 2018)).
45. *Id.* at 1034.
46. *Id.* at 1032.
47. *Id.* at 1037.
48. *Id.* at 1036-37.
49. *Id.* at 1037.
50. *Id.*
51. *Id.*
52. *Id.* at 1037 (citations and internal quotations omitted).
53. *Id.* at 1046.
54. *Id.* at 1046.

Worldcall Interconnect, Inc. v. FCC

Amy Lattari

907 F.3D 810 (5TH CIR. 2018)

I. INTRODUCTION

In *Worldcall Interconnect, Inc. v FCC*, the United States Court of Appeals for the Fifth Circuit denied Worldcall Interconnect, Inc.'s (WCX) petition for review of an FCC Order.[1] The court held that (1) even if the FCC erred when deciding that the automatic roaming rule didn't apply, that error was harmless and, therefore, 47 C.F.R. § 20.12(e) should be applied;[2] (2) "[t]he FCC's interpretation of 47 C.F.R. § 20.12, that it was the service being supplied by the host carrier, rather than the home carrier, that determined whether the automatic roaming rule applied"[3] was permissible; and (3) because a competitor has no obligation to tie their roaming rates to that of an inferior, the commercial reasonableness decision is affirmed.[4]

II. BACKGROUND

A. Roaming

Roaming services are regulated by the FCC.[5] These transactions concern three different entities: the cellphone user, the home service provider, and the host service provider.[6] The cell phone user pays for cell service through a home provider.[7] If said cellphone user leaves the home provider's territory, they are connected with a host provider's service.[8] In order for this to work, the "home provider and host provider must enter into an agreement granting the home provider's subscribers use of the host provider's network."[9]

One of the major FCC orders affecting regulation of roaming transactions is the Automatic Roaming Order, in which automatic roaming was defined as "[a service with which] a roaming subscriber is able to originate or terminate a call in the host carrier's service area without taking any special actions."[10] In contrast, manual roaming requires the user to take a

1. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810 (5th Cir. 2018).
2. *Id*. at 819.
3. *Id*. at 821.
4. *Id*. at 825.
5. *Id*. at 814.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (citing Reexamination of Roaming Obligations of Commerical Mobile Radio Serv. Providers, 22 FCC Rcd. 15817, 15818 (2007)).

specific action—usually manually turning over a credit card number to the host provider.[11] This new Order required automatic roaming from carriers "upon reasonable request" and "on reasonable and nondiscriminatory terms and conditions."[12] These specifications are narrowed though to (1) "commercial mobile radio service [or CMRS] carriers" who "offer real-time, two-way switched voice or data service that is interconnected with the public switched network" and (2) "the provision of push-to-talk and text-messaging service by CMRS carriers."[13] CMRS is defined as "a mobile service that is: (a)(1) Provided for profit, i.e. with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) the functional equivalent of a mobile service."[14]

The Automatic Roaming Order did not extend to data roaming services.[15] Instead, these services are covered under the 2011 Data Roaming Order.[16] This is applied to "all facilities-based providers of commercial data services [CMDS]," which is defined as "any mobile data service that is not interconnected with the public switched network and is: (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public."[17] This Order requires CMDS providers to "offer roaming arrangements to other such providers on commercially reasonable terms and conditions . . . ."[18] Importantly, under these rules "providers may negotiate the terms of their roaming arrangements on an individualized basis."[19] The FCC looks at cases involving these types of provisions on a "case-by-case" basis, considering the totality of the circumstances.[20]

The major difference between the Automatic Roaming Rule and Data Roaming Rule is the ability for CMDS providers to individually negotiate under the latter rule.[21] The Automatic Roaming Rule makes discriminatory terms impermissible, whereas the Data Roaming Rule does not.[22]

B. *Procedural History*

Worldcall Interconnect is a cell phone service provider that operates in a relatively rural area in Texas.[23] They sought out AT&T in an attempt to enter

11. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 814 (5th Cir. 2018).
12. *Id.* (quoting Reexamination of Roaming Obligations of Commerical Mobile Radio Serv. Providers, 22 FCC Rcd. 15817, 15818 (2007)).
13. *Id.* (quoting Reexamination of Roaming Obligations of Commerical Mobile Radio Serv. Providers, 22 FCC Rcd. 15817, 15818 (2007)).
14. *Id.* at 814-15 (5th Cir. 2018) (citing to 47 C.F.R. § 20.3).
15. *Id.* at 815.
16. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 815 (5th Cir. 2018).
17. *Id.* (citing 26 FCC Rcd. 5411, 5416 (2011).
18. *Id.* (citing 26 FCC Rcd. 5411, 5416 (2011).
19. *Id.* (citing 26 FCC Rcd. 5411, 5416 (2011).
20. *Id.* at 815.
21. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 815 (5th Cir. 2018).
22. *Id.*
23. *Id.* at 816.

into a data roaming agreement in 2011.[24] The parties could not reach a mutual agreement after multiple unsuccessful negotiations and subsequently went to the FCC for assistance.[25] A few years later, the parties again attempted negotiations, but to no avail.[26] After this failure, WCX filed a complaint with the FCC.[27] Amongst many allegations in the complaint, WCX claimed AT&T's rates were discriminatory and commercially unreasonable, and sought application of the Automatic Roaming Rule.[28] The Enforcement Bureau issued an interim order denying the complaint, and WCX entered into an agreement with AT&T shortly thereafter that "resolve[d] the remaining issues consistent with the Interim Order[,]"[29] with the understanding they would challenge the denial.[30] WCX then sought and was denied review by the FCC, because the FCC agreed with the Bureau that 47 C.F.R. § 20.12(d), the Automatic Roaming Rule, does not apply to the dispute, but instead 47 C.F.R. § 20.12(e), the Data Roaming Rule, does.[31]

III. Analysis

A. *Standard of Review*

Agency actions are reviewed under an arbitrary and capricious standard, which asks "whether [the] agency articulated a rational connection between the facts found and the decision made."[32] This involves "more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[33] When deciding questions of law, the court gave deference to an agency's own interpretation of their regulation, striking only interpretations that are "plainly erroneous or inconsistent with the regulation[,]"[34] and this deference is "even greater" than what is required under *Chevron*.[35]

The court must take "due account . . . of the rule of prejudicial error"[36] when deciding cases under arbitrary and capricious review standards (also known as harmless error).[37] This allows the reviewing court to refuse to reverse an action, even if there was a clear mistake made, as long as that mistake "clearly had no bearing on the procedure used or the substance of

24. *Id.*
25. *Id.*
26. *Id.* at 817.
27. *Id.*
28. *Id.* at 817.
29. *Id.* at 817.
30. *Id.*
31. *Id.*
32. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 817 (5th Cir. 2018) (citing *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, 867 F.3d 564, 571 (5th Cir. 2017)).
33. *Id.* at 818 (citing *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 495 (5th Cir. 2013)).
34. *Id.* at 821 (citing *Auer*).
35. *Id.* at 818 (citing *Elgin Nursing*, 718 F.3d at 493).
36. Administrative Procedure Act, 5 U.S.C. § 706 (2018).
37. *Id.*

decision reached."[38] Although there are several factors that contribute to the harmless error analysis, the only relevant issue here is "an estimation of the likelihood that the result would have been different."[39]

B. *WCX Contends Order Should be Vacated Under Harmless Error Standard*

To make the argument that the Automatic Roaming Rule (47 C.F.R. § 20.12(d)) should apply, WCX contended that the FCC erred when deciding that WCX requested "Mobile Broadband Internet Access Service" (MBIAS) instead of a roaming agreement.[40] In response, AT&T argued that, in their complaint, WCX alleged a violation of 47 C.F.R. § 20.12(e), conceding that it was indeed a MBIAS request because the rule applies to those transactions.[41]

WCX did not point to any facts sufficient to prove its request of a "roaming agreement"—no terms of an agreement with AT&T or any negotiation offers from either party.[42] On the other side, the FCC failed to show any representations besides WCX's own contentions to substantiate their finding that "WCX requests only a mobile broadband internet access service from AT&T."[43] While the FCC's contention that WCX alleged a violation of Section 20.12(e) in their complaint is true, WCX also alleged a violation of Section 20.12(d), stating they sought both services.[44] The court stated that the facts are insufficient to support WCX's claims. [45]

WCX alleged that the FCC's factual findings, including WCX's MBIAS request, "was the foundation for [its] legal conclusion that only Rule 20.12(e) applies[,]" stating that the FCC referenced this specific fact "four times" in their decision.[46] The court found that the FCC applied 20.12(e), instead of 20.12(d), because the FCC interpreted 20.12(d) to only apply to CMRS.[47] The FCC stated that "[t]hese, and these alone . . . are the services covered by Section 20.12(d)[,]" and that "WCX requests only mobile broadband Internet access service from AT&T."[48] Therefore, it makes no difference if WCX had requested MBIAS or solely a roaming agreement, because these are both non-interconnected services.[49] As long as AT&T

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38. *Id.* (citing *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001).
39. *Id.* at 819 (quoting *Shinseki*, 556 U.S. at 411).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* (quoting WCX's reply brief).
44. *Id.*
45. *Id.*
46. *Id.* at 819 (quoting WCX's reply brief).
47. *Id.*
48. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 819 (5th Cir. 2018) (quoting FCC decision) (internal citation omitted).
49. *Id.*

interconnected service was not involved, 47 C.F.R. § 20.12(d) did not apply.[50] The court found that Section 20.12(e) does apply because WCX is requesting a data service of some kind, and all non-interconnected services are covered under this rule.[51] Under the harmless error argument, the court held any error that may have been made by the FCC was harmless and therefore does not warrant vacatur, stating that WCX requested MBIAS instead of a roaming agreement.

C. *WCX's Proposed Interpretation of Section 20.12*

WCX contended that 47 C.F.R. § 20.12(d), the Automatic Roaming Rule, should apply to this transaction.[52] To make this argument, WCX used what is known as a "who-what" interpretation.[53] 47 C.F.R. § 20.12(a)(2)-(3) supplies the "who" that the regulation should apply to in terms of the automatic and data roaming obligations, and 47 C.F.R. § 20.12(d)-(e) addresses the "what" – which are the requirements by which these parties must abide.[54] Under this reading, AT&T is 47 C.F.R. § 20.12(a)(2)'s "who" because they are a company that supplies interconnected services to customers, which makes them liable to 47 C.F.R. § 20.12(d)'s "what."[55] This means they must provide automatic roaming upon reasonable request.[56]

In response, the FCC first argued that the "who-what" interpretation of 47 C.F.R. § 20.12 was not properly preserved and raised for the first time on appeal.[57]

The Communications Act states that a party seeking reconsideration can only "[rely] on questions of fact or law upon which the [FCC] . . . has been afforded no opportunity to pass."[58] However, the Act does not "require an argument to be brought up with specificity but only reasonably 'flagged' for the agency's consideration."[59] Therefore, the issue under this argument was "whether a reasonable [FCC] necessarily would have seen the question raised before us as part of the case presented to it."[60]

When WCX was originally in front of the FCC, they argued that, because their customers use their interconnected network while roaming on AT&T's network, 47 C.F.R. § 20.12(d) is applicable.[61] On appeal, WCX argued that it is not their customer's roaming on AT&T's network that allows this case to fall under 47 C.F.R. § 20.12(d). Rather it is what AT&T offers, specifically interconnected services, that allows Section 20.12(d) to apply.[62]

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 820.
54. *Id.*
55. *Id.* at 820.
56. *Id.*
57. *Id.*
58. *Id.* at 820 (citing 407 U.S.C. § 405(a)).
59. *Id.* (citing *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016)).
60. *Id.* (citing *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016)).
61. *Id.*
62. *Id.*

The court found that although WCX did not specifically raise the "who-what" interpretation originally, the proposed interpretation of 47 C.F.R. § 20.12 is "adequately preserved . . . ."[63] WCX stated in their original brief "AT&T offers interconnected voice and data service to its own customers, so it is subject to 47 C.F.R. § 20.12(d)."[64] Although it was not raised directly, this implication is enough to "tee up" this argument before the FCC, so they should have been aware that the interpretation of 47 C.F.R. § 20.12 was at issue in this dispute.[65] Therefore, the FCC had the opportunity to confront this question about the interpretation of 47 C.F.R. § 20.12 originally and again on appeal.[66] The court held that WCX's arguments involving the proper interpretation of 47 C.F.R. § 20.12 have not been waived.[67]

Because this issue was not waived, the court then looked to the merits of the 47 C.F.R. § 20.12 argument.[68] WCX argued that 47 C.F.R. § 20.12 is "clear and unambiguous and cannot yield to the [FCC's] reading[,]" meaning that the court, under their standard of review, can strike.[69]

The court found that 47 C.F.R. § 20.12 is ambiguous on its face.[70] Subsection (a)(2) states "automatic roaming obligations apply to CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hands-off subscriber calls" and "the provision of push-to-talk and text-messaging service by CMRS carriers."[71] Assuming this provides the "who" and 47 C.F.R. § 20.12(d) provides the "what," there is still no other information given regarding when these obligations take place.[72] This is important because of the word "offer" used in subsection (a)(2).[73] Do the obligations of the Automatic Roaming Rule begin when the provider "offers" services to its own customers, or only when it "offers" services to roaming customers?[74] Because the regulation does not adequately answer this question, the court found it is not "clear and unambiguous," and therefore heavy deference to the agency's interpretation of the regulation applies.[75]

Keeping in mind that the FCC's interpretation was not "plainly erroneous or inconsistent with" 47 C.F.R. § 20.12, the court held that the FCC's interpretation—that the service provided by the host carrier, not by the home carrier, is what determines whether the Automatic Roaming Rule applies—is permissible.[76] Importantly, this distinction is also supported by

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See id*.
69. *Id.*
70. *Id.*
71. *Id.* (citing 47 C.F.R. §20.12(a)(2)).
72. *Id.*
73. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 821 (5th Cir. 2018).
74. *Id.*
75. *Id.*
76. *Id.* (citing *Auer v Robinson*, 519 U.S. 452, 461 (1997)).

the Automatic Roaming Rule itself: "[l]ike any other common carrier service offering, if a CMRS provider offers automatic roaming, it triggers its common carrier obligations with respect to the provisioning of that service."[77] The court held this is how 47 C.F.R. § 20.12 should be interpreted.[78]

Lastly, under this interpretation, the court considered whether AT&T is providing CMDS in this transaction.[79] The court mainly looked at the timing of the agreement to decide this.[80] In front of the Enforcement Bureau, the parties acknowledged that WCX sought a "data roaming agreement . . . shortly after the Data Roaming Order was released."[81] This made it clear that WCX requested CMDS services and AT&T provided them.[82] This finding showed that the FCC did not act arbitrarily in concluding that the Data Roaming Rule should be applied.[83]

77. *See id.* at 821 (quoting Automated Roaming Rule, 22 FCC Rcd. At 15827-28 (emphasis added)).
78. Worldcall Interconnect, Inc. v. FCC, 907 F.3d 810, 822 (5th Cir. 2018).
79. *Id.* at 822.
80. *Id.* at 822.
81. *Id.* (citing joint statement of the parties before the Bureau).
82. *Id.* at 822.
83. *Id.* at 822.