

## **Six Decisions, with Intellectual Property and Internet Communications Regarding Terrorist Activity at the Forefront – SCOTUS Today**

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The Supreme Court issued no fewer than six opinions on Thursday, May 18, addressing questions including whether an internet platform might be held liable as an aider and abettor of terrorist activity, and whether Andy Warhol's famous alterations of photos of the artist known as Prince violated the copyright of an almost-as-famous photographer.

So, let's start with the case of *Warhol v. Goldsmith*, which originated when the Andy Warhol Foundation for the Visual Arts (AWF) licensed to the publisher Condé Nast a silkscreen portrait of the musician Prince that was one of 16 works that were derived from a copyrighted photograph of Prince taken by Lynn Goldsmith, a prominent photographer of pop icons. This was years after the original photograph, commissioned by *Newsweek*, was published in that magazine. Goldsmith granted a limited license to *Vanity Fair* for the one-time use of the Prince photo as an "artist reference for an illustration." *Vanity Fair* hired Warhol in 1984 to produce the illustration, which he did by creating a purple silkscreen portrait of Prince. Goldsmith was credited and paid \$400 for the use of the source photograph. After Prince's death in 2016, *Vanity Fair*'s parent, Condé Nast, considered licensing the purple Prince portrait from AWF, but when it learned that the silkscreen was one of a series, it obtained a license from AWF to publish an orange version of the work. When Goldsmith learned of the Prince Series and saw *Orange Prince* on the cover of a magazine, she informed AWF of her position that the publisher had infringed her copyright. Condé Nast then sought a declaratory judgment of non-infringement or, alternatively, fair use. Goldsmith countersued, alternatively claiming infringement. In a lively, pop-reference-filled opinion, containing various reproductions of Warhol's Prince silkscreens in full color, Justice Sotomayor, writing for herself and six colleagues (Gorsuch and Jackson, JJ, a novel combo, concurring), holds that the "purpose and character" of AWF's use of Goldsmith's photograph in commercially licensing *Orange Prince* to Condé Nast does not favor AWF's fair use defense to copyright infringement.

AWF contended that the Prince Series works are "transformative" because the colorful silkscreens convey a different meaning or message from the photograph. However, the first factor (and the only one before the Court) employed in determining fair use focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference has to be weighed against other considerations, in this case, commercialism. Thus, as the Court held here, if an original work and its secondary use share the same or highly similar purposes,

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and the secondary use is commercial, the first fair use factor is likely to weigh against fair use, absent some other justification for copying.

The Court found that both the original purpose of the photo and AWF's copying it essentially shared the same—commercial—purpose. The majority opinion noted that while the Copyright Act, 17 U. S. C. §106, is designed to encourage creativity by granting the creator of an original work the right to reproduce it and to prepare derivative works, it balances the benefits of incentives to create against the costs of restrictions on copying. This balancing act is reflected in the common-law doctrine of fair use, codified in §107 of the Act, which provides that “the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright.” In confining its analysis exclusively to the “first factor,” the Sotomayor opinion thoroughly subordinated AWF's argument that its use was protected because it was transformative, that is, that the derivative work conveyed a substantially different artistic message from that of the original. Instead, stating that Goldsmith's original photograph and AWF's copying had the same commercial purpose, the Court affirmed the Second Circuit and its judgment in Goldsmith's favor.

In an even more lively dissent, Justice Kagan, joined by the Chief Justice, provides a tour de force of academic art criticism, dissecting Warhol's work to illustrate (what I'll confess is persuasive to me) how it transforms its original source. All three of the opinions in the case are worth reading, if for no other reason than to savor a lively dispute over an interesting legal and cultural subject.

A different, and perhaps more timely, sort of intellectual property dispute was presented in *Amgen Inc. v. Sanofi*. Both of these pharmaceutical giants had obtained patents covering engineered antibodies that help reduce levels of low-density lipoprotein (LDL), or “bad,” cholesterol, that can lead to heart attacks and strokes.

After Amgen got several patents in 2014, it sued Sanofi for infringement. Sanofi defended, claiming that Amgen's relevant claims were invalid under the Patent Act's “enablement” requirement. That provision requires a patent applicant to describe the invention “in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the [invention].” 35 U. S. C. §112(a). Sanofi characterized Amgen's method for generating additional antibodies as essentially a trial-and-error process of discovery, and accordingly that Amgen's patents failed to meet the enablement requirement because Amgen was seeking exclusive use of what could be millions more antibodies than it had taught persons skilled in the art to make.

Sanofi prevailed in both the district court and the Federal Circuit, and in a unanimous opinion written by Justice Gorsuch, the Supreme Court affirmed, holding that Amgen's claim was fatally overbroad and hence that it failed “to enable any person skilled in the art . . . to make and use the [invention]” as defined by the relevant claims.

Looking both to precedent and to the Patent Act's specific language, the Court reiterates that in exchange for the protection to be granted, the so-called patent “bargain” requires an inventor to deposit a “specification . . . so particular . . . as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman or other person skilled in the art or manufacture . . . to make, construct, or use the same.” 1 Stat. 110.

This is hardly a groundbreaking decision. However, it is a useful guide as to how the Court as a whole is approaching intellectual property protection in an especially dynamic time for invention, not just in pharmaceuticals, but in technology as well.

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Switching topics to the internet and terrorism, we turn to another unanimous opinion of the Court, this one written by Justice Thomas, in *Twitter v. Taamneh*.

Here, rather than suing ISIS, the terrorist organization that carried out an attack on an Istanbul nightclub, the family of an individual murdered in the attack sued Twitter, as well as Facebook and Google (the owner of YouTube), pursuant to 18 U. S. C. §2333(a), an Antiterrorism Act (ATA) provision that permits U. S. nationals who have been “injured . . . by reason of an act of international terrorism” to file a civil suit against certain entities for damages based on their aiding and abetting the terrorist actor.

The plaintiffs alleged that the social media companies knowingly allowed ISIS and its supporters to use their platforms and “recommendation” algorithms as tools for recruiting, fundraising, and spreading propaganda and that the companies also profited from advertisements placed on ISIS’s tweets, posts, and videos.

Reversing the Ninth Circuit, the Court held that the plaintiffs had failed to state a viable claim. The Court took up the questions of what it means to “aid and abet” and what precisely it is that a defendant has aided and abetted.

Going back to the oral argument of the case, it was clear that the Justices had a great deal of difficulty defining a limiting principle that would define impermissible speech on the internet. As Justice Thomas wrote: “it might be that bad actors like ISIS are able to use platforms like defendants’ for illegal – and sometimes terrible – ends . . . [b]ut the same thing could be said of cell phones, email, or the internet generally.” What is particularly interesting, and surprising to many, especially given previous statements made by Justice Thomas, is that the opinion does confront the controversial Section 230 ([47 U.S.C. § 230](#)), which is part of the amended Telecommunications Act and deals with blocking and screening of offensive material.

Instead, the Court simply adverted to prior appellate precedent defining liability for aiding and abetting, particularly the DC Circuit case of *Halberstam v. Welch*, 705 F. 2d 472 (1983), which sets forth a multifactor test for determining if there is a defendant’s conscious, voluntary, and culpable participation in another’s wrongdoing. Applying that understanding of aiding and abetting, the Court finds no duty that would require communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends. And, even if there were such a duty, it would not transform defendants’ distant inaction into knowing and substantial assistance that could establish aiding and abetting of a terrorist act. The Court resists a holding that would render all sorts of communications providers liable for wrongdoing merely for knowing that wrongdoers were using their services and failing to stop them.

The supporters of limiting Section 230 will be equally disappointed in the Court’s *per curiam* opinion in *Reynaldo Gonzalez v. Google*. This is a companion case to *Twitter v. Taamneh*, and it involved another ISIS terrorist attack, this one in Paris.

Here, the Court had granted certiorari to review the Ninth Circuit’s application of Section 230. Except it didn’t. Instead, in light of certain unchallenged holdings and the congruity of the *Twitter* holding, the Court held that the plaintiffs’ complaint—*independent of §230*—was of questionable viability, and so remanded the case for evaluation in light of the more detailed *Twitter* opinion.

In sum, despite considerable public attention to Section 230 and predictions that the Court would rule against the technology company defendants, the Court recognized the difficulties inherent in

moderating or blocking content on public platforms and instead has applied common law principles to determine whether a transmitter of noxious information can be found to be an aider and abettor of a criminal act.

*Ohio Adjutant General's Department v. Federal Labor Relations Authority* holds that the Federal Labor Relations Authority (FLRA) properly exercised jurisdiction over an unfair labor practices dispute in which an AFL-CIO union affiliate represented federal employees known as dual-status technicians who work for the National Guard in both civilian and military roles. Under the Federal Service Labor-Management Relations Statute, the FLRA only has jurisdiction over labor organizations and federal "agencies." 5 U. S. C. §7101 *et seq.*

Rejecting the petitioners' claim that they are neither, Justice Thomas, writing for himself and the jurisprudentially-diverse cadre of the Chief Justice and Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson—with Justices Alito and Gorsuch dissenting—holds that Ohio National Guard and Adjutant General's Department act as a federal "agency" when they hire and supervise dual-status technicians serving in their civilian role. They act pursuant to delegated federal authority and therefore are subject to federal civil-service requirements. While the dissenters disagree, the substantial majority holds that its conclusion is supported by the language of the statute, longstanding prior practice, and previous decisional law.

Finally, at least for Thursday's session, the Chief Justice writes for a unanimous Court in *Poliselli v. Internal Revenue Service*, holding that the petitioner, a taxpayer under investigation for failing to pay federal taxes, was not entitled to notice when the service issued summonses to third parties in its collection efforts. In short, the IRS may request the production of "books, papers, records, or other data" from "any person" who possesses information concerning a delinquent taxpayer. 26 U.S.C. §7602(a)(2).

Thus, the IRS may issue summonses both to determine whether a taxpayer owes money and to collect any outstanding liability. When the IRS conducts an investigation for the purpose of "determining the liability" of a taxpayer, it must provide notice, §7609(a)(1). However, when the IRS is engaged in "collecting any such liability," notice may not be required, §7609(c)(2)(D). In that it was not argued or decided below, the Court refrained from attempting to describe the metes and bounds of the phrase "in aid of the collection." Whatever those might be, the activities at issue fall within the statutory grasp.

Another active day at the Court with perhaps surprising decisions in several publicly controversial areas, but with little controversy on the Court.

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National Law Review, Volumess XIII, Number 145

Source URL:<https://natlawreview.com/article/six-decisions-intellectual-property-and-internet-communications-regarding-terrorist>