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SPEAKERS

Anthony Sanders, Paul Avelar, Patrick Jaicomo, Ken White

A **Anthony Sanders** 00:25

Hello and welcome to Short. Yes, we are doing a live recording today in front of an audience at IJ's Partner's Retreat in sunny Southern California. This is a very special episode that I've been very excited about. We have a couple of familiar voices that you listeners are about to hear who have been on Short Circuit before, and then we have a first timer. So joining me are Paul Avelar, who is the Managing Attorney of our Arizona office. And Patrick Jaicomo, who is one of the leaders of our Project on Immunity and Accountability. Welcome, gentlemen.

P **Patrick Jaicomo** 01:07

Hey, everybody.

P **Paul Avelar** 01:08

Hello, everyone. Thanks for having us back.

A **Anthony Sanders** 01:10

And also, we have a special guest, who is a bit of an inspiration for how we run the podcast here as a matter of fact, so we used to, in the old days have the podcast run by John Ross, who now runs our Bound by Oath podcast and he did a wonderful job for many years. During the pandemic, we kind of switch things around, and we were all stuck at home. And it was hard to get good advice. And suddenly I was running a podcast hosting a show. I had never hosted a show before I had never really hosted much of anything before, not even a party. And so I thought well, how do you how do you do this thing? Now, of course, my colleagues gave me some some great advice. But I had been listening to podcasts for a little while. And one of those podcasts was this, this great show, where they talked about all this crazy stuff that happened to do with the President of the United States, called All the Presidents' Lawyers. And so from some of the cadence they had transitions between Josh Barro and his wing man, I got a little bit

of tips that I don't think ever translate into how I do the show. I don't think I was good enough for that. But it was a good inspiration for me. And so I'm very happy to have Josh's wing man here today, Ken White. Uh, Ken is a longtime criminal defense attorney and First Amendment lawyer here in Southern California. He's at the firm of Brown, White and Osborn. Most listeners, however, will know him by the moniker Popehat. And you can catch him these days on Josh and his new show, Serious Trouble. So Ken, welcome to Short Circuit.

K Ken White 02:53

Well, thank you. I do want to say for the record, I think Josh is my wing man. But you know, I guess that's a matter of the dispute.

A Anthony Sanders 03:01

Yes. Well, I guess whether or not you prefer the person giving the straight news and asking for what's going on, or whether you like the lawyer who ruins everyone's hopes and dreams with the cold reality of the law, you know, it's going to going to depend on on your point of view,

K Ken White 03:18

Okay, that part I'll own up to.

A Anthony Sanders 03:20

So before we get started, there was one question I wanted to ask that I'm sure a lot of people would like to know. And that is, how the heck did you get the nickname Popehat?

K Ken White 03:30

Well that's about 20 years old. And when I started writing about legal issues, mostly criminal justice and the First Amendment on the internet, and started a blog with friends, I picked that name as a reference to a friend who was a origami expert. And he loved to make things with origami, including little origami mitres, pope hats. And it seemed when he was wearing an origami mitre he was infallible undefeatable at poker. And so it was a reference to that, and to the idea that people who are on the radio or right online tend to think that they are infallible. So it seems only appropriate.

A Anthony Sanders 04:09

So we're going to be infallible about our opinions today on the Fifth, Sixth and DC circuits. And we're gonna start with one of our favorite subjects, always what the heck's going on in the Fifth Circuit? And that is a case Ken is going to do Missouri v. Biden.

K Ken White 04:26

Absolutely. Recently, in the Fifth Circuit, informally known to some of us as the "Oh my god, I can't believe he wrote that" circuit has just reviewed and significantly changed a lower court decision on a very controversial issue. And that was a lawsuit by the states of Missouri and Louisiana, and a handful of Internet users against Joe Biden, the Department of Health and Human Services and a variety of government actors. And this was over the issue of whether or not The government was violating people's First Amendment rights by influencing social media platforms to moderate them or ban them or deplatform them, particularly during COVID. And these plaintiffs claimed that the White House that the Surgeon General that a bunch of other government agencies got involved in going to Facebook and Twitter and twisting their arms to get rid of people for saying things like, you know, the lockdowns are bad or that, you know, Bill Gates is putting microchips in us through vaccines or whatever a wide range of things from maybe just a little bit outside the mainstream to really crazy stuff. Much earlier in the year there was a very lengthy, very vivid opinion from a trial court judge finding that yes, absolutely. The government's done all this completely unacceptable, arm twisting, and it crossed the line into a First Amendment violation. Because of course, normally, when Twitter and Facebook and these companies ban us for things that, you know, we meant in the best way, that's not a First Amendment violation, because they're private actors. But there is this doctrine that says at some point, when the government gets involved with encouraging a private party, to get involved with your rights, that can be state action, that can be a violation of your First Amendment rights. The trial court decision was pretty controversial, possibly because it was written, as is kind of the fashion now a lot of the time, in a very overtly political, kind of some would say, screed type of fashion.

A Anthony Sanders 06:45

Judges being political?

K Ken White 06:47

Yeah, I know it's hard to believe. So, you know, it landed in a way that I think was very partisan with people either saying, "Oh, absolutely, that's right. That's what this administration is like they're all evil" or saying, "Clearly, this is a Russian/Anti-Vax plot and, you know, it's all nonsense". So what I like about this decision on September 8 from the Fifth Circuit is it's a really thorough professional evaluation of what the actual laws and the evidence is. And I think it really cleaned up the lower court decision to a place where people are going to be a lot more willing to actually examine the First Amendment issues. So what they did was they went to the evidence and put it because they were being a little less screed-y in a significantly more convincing way. That yes, there actually was a substantial amount of actual arm twisting and veiled and not veiled threats from government actors, to social media platforms that cause them to moderate things that they were not otherwise moderating, during COVID, relating to election disinformation that the government believed originated with the Russians and so forth. And then the Circuit did a quite good, quite clear job, in this lengthy opinion, of explaining where that line is, because it's not an easy line, you know, between the government's right to jawbone, as the term is to advocate for things to encourage the private sector, versus going into a realm where they actually coerce. So it talks about these two ways the government can go too far. One is substantial encouragement, which means a lot more than it sounds, it really

means being so involved that they're making the decision, or coercion. And of course, because it's a circuit, and multifactorial tests are circuit judge's crack, they gave us a nice, clear four factor test. It's kind of a really a tribute to Anthony Kennedy, in a way so that we could all in the future have a better way of telling what's acceptable government involvement and what isn't. So, the Circuit opinion actually turned me around a little bit. I was, I was skeptical of the trial court opinion, because it was so overtly screed-y. I found this much more convincing, I'm fairly convinced that you made a good case of actual interference by the government not withstanding, and I'm probably more sympathetic to the government's viewpoints on these things, and the things that we're trying to get moderated. I think one thing this opinion doesn't talk a lot about is transparency, and that one of the main reasons this comes off as so offensive and so scary is it's going on behind the scenes. And so that kind of plays into a lot of current movements towards maybe social media companies and other companies, when they're being contacted by the government should keep some sort of log, a public log, of "the government came to us about this" and that that would be a good thing. The other note about this case, of course, is that you came to me and prepped for this. We had some excitement this week, or what passes for excitement for people who closely follow circuit court decisions, where the circuit first granted rehearing which would mean the opinion would be wiped out, and then reversed that and said, "No, we don't. Strike that. File a brief about rehearing". And it came out in the paper that a clerk actually said, "Sorry, that was our mistake". There was a certain amount of speculation and conspiracy theory about what was actually going on, but it was purely a clerk making a mistake. And as we all know, when a clerk makes a mistake, at least, those of us who are married know, the thing that you do is you apologize to the clerk for your role in bringing about the mistake. So now I suspect it won't get reheard. I'm not sure it's right for Supreme Court review, simply because it's very fact dependent in this case. And I don't think this yet diverts from other circuit views on where the line is.

A Anthony Sanders 10:56

Yeah, even though it does go the other way from some of those other recent cases on whether there was coercion or not. But you think it's just different facts. And so it lands on the other side of the same standard?

K Ken White 11:08

Yeah, because I think they adopt standards that have been used in the Second Circuit, and Ninth Circuit, you know, widely seen among themselves as being the most important circuits. And so it doesn't really go out in a new way on new law. I don't think the Supreme Court right now is so much taking on cases where they're just having a different factual interpretation of historic events.

P Paul Avelar 11:34

Well, I sort of ask a meta question here, and I don't mean that in the punny way. The Supreme Court has taken a couple of cases last term, and this term dealing with free speech and social media last year with the Google and Twitter cases about Section 230, that they kind of wound up ducking. And then this term, they've taken two cases involving politicians or lawmakers who blocked people from commenting on their Facebook pages. And remarkably, neither one of

these politicians was named Trump. So we've got another two of these cases that are out there. They do seem to finally be taking an interest in free speech and social media. Do you think they're going to stay out of this one simply because facts matter? And this is a very fact-y kind of case?

K Ken White 12:18

Well I would be surprised simply because this comes out as a decision that's very pro free speech. The one thing that Circuit Court did that was important is it cleaned up the extent of the injunction, which is often a Supreme Court bugaboo. You know, the judge had basically enjoined every government official in the entire country from saying anything to social media anywhere, and the circuit came back, "No, no, no, no, we're gonna narrow that down to no coercion", you know, because that's what's actually what's against the constitution. So we don't have that factor. And actually, the plaintiffs themselves like the result. They don't seem to, they only want it tweaked just a little bit in their petition for rehearing. So I don't think there's going to be the big impetus to like, solve a circuit split or correct something that's seen as a First Amendment injustice.

P Patrick Jaicomo 13:11

Yeah. My initial reaction was first, wow, this is a 74 page per curiam opinion. And I wonder, I wonder if that is a record. And just for the listeners who don't know per curiam opinions tend to be very short. In fact, the case that IJ just got certiorari on, Devillier v. Texas, is another Fifth Circuit per curiam opinion, that's literally a single paragraph long. So we see going from one paragraph to 74 pages, this is an interesting use of the per curiam. But I think the most important thing, and this goes to Ken's point about the cleaning up of the district court opinion, kind of probably shifting the way a lot of people feel about the ultimate result of this lawsuit at this stage, is that as the Fifth Circuit is going along in this decision, it repeatedly emphasizes: if Twitter or Facebook or other social media, which are private companies, want to censor people however they choose, they can do that. But that's not what the point is arguing here. And so the crucial fact in this case that everyone always needs to keep in mind when we're talking about social media and censorship is that the legal problem here is that the government was at least allegedly twisting the arms of these companies or strongly encouraging them to act essentially, as a cutout, for the government to silence critics.

A Anthony Sanders 14:25

The interesting thing I saw was the play between this and the Elizabeth Warren case from the Ninth Circuit that we actually talked about on Short Circuit a few months ago where she was basically mad at Amazon, and so was given she's just, you know, one out of 100 senators who doesn't have executive authority to prosecute under the antitrust laws, but she was sending these messages that were allegedly construed to be blocking some publishers on Amazon and the Ninth Circuit ruled that that was not coercive. And but here, it seems that I think this is definitely more on the coercion side of the line, but if you put those two together, I think those will be some guideposts going forward. And so if this doesn't go to the court, which I agree, I think unlikely, these these are maybe the two cases to keep an eye on in coming years when seems like this issue is perhaps going to keep coming up?

K Ken White 15:25

Well, here I mean, the Fifth Circuit basically adopted the Ninth Circuit standard there, their multifactor test. And I think it was legitimate take that the coercion here was more substantial than Warren's coercion. It is interesting that how, right now the script flips for so many people, depending on who or what is being coerced, you know. So the same set of people might have radically different reactions to say what Governor DeSantis is doing to Disney versus what the Biden White House is doing to Twitter, depending on their own political predilections about coercion.

P Paul Avelar 16:04

You mean, it's not just judges that are political?

K Ken White 16:07

That's what I've heard.

A Anthony Sanders 16:10

One other point on this, this clerk, I get, I believe, the Fifth Circuit that the clerk made a mistake, but it's not like, you know, they put a not in the order instead of a did. They, it was pretty detailed about remanding and granting, and that might have been a funny game of telephone within the office, but I wonder if there's something else going on there?

K Ken White 16:34

Well, you know, a lot of this stuff I understand is kind of done with automated systems and drop down menus and stuff like that, and they can be complicated. Let's just say I tried to e-file something in a Federal Circuit once and it did not go well.

A Anthony Sanders 16:48

God bless our paralegals.

K Ken White 16:49

Exactly.

A Anthony Sanders 16:51

Well, elsewhere in the country, in the Sixth Circuit, we have some other abuse of discretion, but

Well, elsewhere in the country, in the Sixth Circuit, we have some other abuse of discretion, but in a little different format. And we're going to be getting into here something we talk about a lot on the show, which is government immunity. But a twist here is instead of qualified immunity, usually involving the police or other government workers, we have judicial immunity, maybe the most powerful immunity of them all. So Patrick, tell us the story of this judge's courtroom.

P Patrick Jaicomo 17:23

Yes, so this is a case from the Sixth Circuit called Orta v. Repp and Repp is the name of the judge from rural Ohio, Mark Repp, who seemed to be running his court like his own little fiefdom. And what happened in this case was a woman was coming to court to watch a criminal proceeding for the father of her two children. She was sitting quietly in the back waiting as the first case was being heard on a completely unrelated matter. And in very bizarre fashion, this judge begins heckling her, and suggesting that she's under the influence of drugs. Now, what's clear after the fact is that he had no evidence for this whatsoever. She'd been sitting quietly, she was exhibiting no outward signs of having any sort of drug problem. This was just some weird issue that he was latched on to and we'll get into in just a second, perhaps why he was doing this. But as the morning progresses, he keeps making comments about her being on drugs, it's very strange. He ultimately, in the first case, orders the criminal defendant to be drug tested, and he says something along the lines of "I think we're going to have a few drug tests today. What do you think, Miss Orta?". Before her boyfriend's case is called, he then instructs the bailiff to take her and have her drug tested. Now she's just someone who's in a public hearing. She's not before the court. She has no criminal history related to the court. She has no, you know, drug history that the court is aware of. He's simply just saying "You're in my courtroom. I'm going to make this bailiff take you and drug test you." So he takes her the bailiff takes her out of the room. They go back, she refuses to take a drug test because why should she? They make her wait and wait and wait. Meanwhile, her boyfriend's case is called and the judge continues in a very unprofessional demeanor. He's casually swearing on the record. He ultimately says to this man, "Well, your girlfriend might be going to jail too today, so I hope someone's watching the kids." After lunch, this woman is brought back into this courtroom and the bailiff tells the judge that she has refused to take the drug test. And so what he does is he holds her in contempt of court and sentences her to 10 days in jail because she wouldn't take a drug test. So she's carted off to jail, at which point she starts to panic and thinks like "Who IS going to take care of my children? Okay, I'll take the drug test." She tells an officer at the jail, he says it's too late. So she ends up stuck in jail overnight. Before the next day, and this is a really remarkable fact, the local prosecutor goes into the judge's chambers and basically says "You can't do this. You need to drop these charges." And this actually isn't in the Sixth Circuit opinion. It's in some of the other ancillary documents from the related cases. But the judge ultimately does agree to drop the charges, BUT he says she has to get into some drug diversion program. That's ultimately thrown out. The charges against her are thrown out by the Ohio Court of Appeals, and here's the good news of the story is, ultimately this goes up to the Ohio Supreme Court, which suspends this judge, not only from his judgeship, removing him from office, but also suspends him from the practice of law as an attorney for a year. So there is something good that came out of it.

20:31

Consequences?

Patrick Jaicomo 20:32

Yes, well, don't worry, we're gonna tamp those down. So this woman sues this judge and says, "You violated my constitutional rights" for obvious reasons. And the judge, of course, claims judicial immunity. And as many of us have heard about qualified immunity, which is created by judges, you might not be surprised to learn that judges have created their own judicial immunity as well, which is much stronger. And this immunity covers judges absolutely for everything they do in a judicial capacity as long as there is some potential claim for jurisdiction. And so what the Sixth Circuit actually says in this case is, "What he did was terrible. Sure, sure, sure. But he had the power under Ohio law to hold people in contempt. That's subject matter jurisdiction, and obviously, he was a judge on the bench when he did this, so he was acting in a judicial capacity. So that's just too bad case is dismissed. But of course, we're going to do a little bit of throat clearing and say, one, it's not so bad, because this judge faced some consequences. And two, of course, as you always do, when you're sanctioning something terrible, you say at the end of your opinion, what happened here is terrible, we absolutely do not condone it", which every time I see that I have to Google the definition of condone again. To permit. I was like, yes, that is, in fact, what you are doing by allowing this to happen. And the thing that's very interesting here is that the history of judicial immunity is that the Supreme Court created it, and they said, "We have to do this for the good of the people. It's not to protect the judges, it's to protect the integrity of the system." And there is something to the fact that you don't want every person who loses a lawsuit to be able to turn around and sue the judge. But the problem is that what the court predicated all this on was it didn't want judges to have to be concerned about personal consequences for things they were doing so that they would be fearless in making their decisions. And so when you have a situation like this, or courts have said, "Sure, you can't sue a judge for money if they do things like this, but they could be prosecuted for their actions as a judge. They could have consequences at the State Bar", as was the case here. There are places where consequences are allowed. And so it doesn't make sense, to me at least, why judicial immunity should apply in a situation where a judge does face consequences. And here, did in fact, have consequences. Because in situations as egregious as that, we do want them to pause before they do these things. And the real problem with this application of immunity especially through the contempt power, which often looks a lot more like prosecutorial action than judicial action, is there really is no good limiting principle. So of course, there could be a judge who does something like this, but you could also have a judge say, "Hey, sir, in the back, Kramer! You know, you're very annoying, and I'm gonna hold you in contempt and sentence you to death, which I will now carry out in the courtroom." And presumably, the judge will face some consequences for that, but they won't be in a civil rights lawsuit because they'll have judicial immunity, at least if you actually apply the standards as they've been written.

Paul Avelar 23:25

Well, the carrying out would be executive. That's it.

Patrick Jaicomo 23:27

So you'd have to have the bailiff do it. That's right. Yeah.

A Anthony Sanders 23:30

Yeah, that's an interesting question. So was the bailiff sued?

P Patrick Jaicomo 23:34

The bailiff was sued. I actually don't know what happened. So this is a case where they had the rule 54B separation. So they got to appeal the judicial immunity separately. So I'm not sure what's going on with the other claims.

A Anthony Sanders 23:45

Yeah, it does seem so that this line that this can be under the judicial immunity umbrella seems fantastical. But that this seems to be a trend. Maybe it's just because I've been reading too many of these opinions lately, of courts saying, "Oh, this is this is really bad. What happened? We do not condone it, test test test. But in this one case, we don't think we can we can give a compensation to the victim."

P Patrick Jaicomo 24:14

Yeah, and obviously we see this happen all the time in our immunity cases. We have a case in the Eighth Circuit called Pollreis where this happened where a police officer held two, you know, underage boys at gunpoint because he was looking for adult suspects. And the circuit ultimately granted qualified immunity and then had like a paragraph at the end that said, you know, "We really feel for these boys, what happened to them was terrible, and they comported themselves with, you know, dignity and respect. Nevertheless, immunity is granted."

A Anthony Sanders 24:41

We talked about a judicial immunity case on the show a few months ago, and it was kind of a split decision where the judge was putting these children in jail, basically, and because he literally was not wearing the robe, and was outside of the court room, that the case could go forward. But a different claim where he did other reprehensible things, but it was, you know, he was sitting on the bench with a robe seemed to be the difference, even though there wasn't really much of a line other than that.

P Patrick Jaicomo 25:14

Yeah, so that case was called Rockett v. Eighmy, and we actually did an amicus in that case, and IJer Tori Clark argued as amicus before the court in that case. And yeah, so there, you had a judge who physically escorted some kids to jail and put them in jail because they didn't like his decision that they had to live with their mom. And then separately from that, he issued a completely illegal order that caused them to be arrested in another state. And so the distinction that the court made there was, well, the robe piece of it was just kind of color. What they were saying was, "In taking them physically, as the judge, and walking them and placing them in a

jail cell. That's an executive function, and so it wasn't judicial. That's being a police officer." But if you wildly misinterpret the statutes and illegally caused them to be arrested in another state, well, you know, judges are able to issue orders for pickups and bench warrants and things. And so that's fine.

K Ken White 26:06

So is there another line we could have? I mean, do you have an idea for something different we could do here?

P Patrick Jaicomo 26:10

Yeah. So I think, I certainly think there should at least be an exception for situations where there are otherwise consequences for the judges, because at that point, the justification for the immunity has already evaporated. And we want judges to be concerned that if they do certain things that they might be criminally liable for or be disbarred for, that they could also be liable in damages. And the reason that's important is because that's the only thing that gives Alexzandria Orta a remedy for the violation of her rights. And so here, it's kind of cold comfort, because you have two sides of every coin. Sure, the judge has been held accountable, in some sense, because he's faced consequences. But Alexzandria Orta's rights have been violated and she's never been made whole for what happened.

K Ken White 26:52

You wonder if you can come up with some sort of standard where the judge had no plausible or colorable claim of law to do what they did?

P Patrick Jaicomo 27:01

Yeah. And so one of the two standards for how you get around this immunity is, if someone's not acting in the judicial capacity, that's one thing or if they act in the complete absence of jurisdiction. And what the court has taken that to mean isn't that you acted without jurisdiction at all, it really has to be bad. And so it's really never been clear. And in fact, in this decision, and in a lot of others, they always cite back to the single example from a case from 1871, where the Court said, "That would be like if a probate judge sentenced someone beyond a criminal maximum", and we say, "Well, probate judge has no jurisdiction over criminal matters." There's like, sure, that's great. That should not get immunity. But there has to be something less egregious than that, where you say, "Oh." And this might be just as simple as in, like in the qualified immunity context and obviousness exception, where there have to be cases where, you know, every reasonable person would say, "No, of course, you couldn't do that. Of course, you couldn't just say like, you know, 'Hey, the Sixth Circuit's coming to hear cases in Cincinnati. I'm an Ohio court judge, this opinion offended me. So I'm going to issue a bench warrant for Judge Sutton and have him arrested.'" Nobody would think like, "Oh, well, yeah, that was a judicial act."

A Anthony Sanders 28:12

Don't be giving listeners any ideas here. So moving to a different subject now. We have an intellectual property case, which we don't get to all that often on Short Circuit. We had an ERISA case a few weeks ago that I got a little flack about to tell you the truth. I thought it was interesting. But now we're going to turn to a property case, an intellectual property case, but it has all kinds of intersection with due process and how the law even just gets made. So Paul is going to talk about this American Society for Testing & Materials v. Public.Resource.Org from the DC Circuit.

P Paul Avelar 28:53

Right. So you promised infallibility earlier, and I will confess, I know absolutely nothing about copyright law. And so I was planning on cruising right past this one while I was reading for cases for this. And then I noticed that there was a whole long list of amicus parties in this case, and I thought, "That's usually a pretty good sign that something weird is happening and weird is fun." So the plaintiffs are private organizations who develop suggested technical standards in their fields for industries or products. Actually, Patrick has run into these guys before in his capacity as a private attorney. So who is ASTM?

P Patrick Jaicomo 29:36

Yeah, so in my previous life as a civil attorney, I discovered in a case involving whiteboards that ASTM is this organization that sets all sorts of industrial standards for everything you imagine. And you can see it now you'll have this experience now where you start noticing it all the time. If you have a dry erase marker, for instance, in really tiny letters, it'll say ASTM, and then some numbers. And if you Google this, you'll eventually get back to one of these standards that this case is about, and it'll say, you know, "The standard for dry erase markers is that they have to be completely erased through seven wipes at a average pressure of 14 pounds." And so like the reason that these things exist is that a lot of industrial contracting is based on these as sort of accepted standards. And so, you know, if I'm going to order a bunch of dry erase markers from a producer, the contract will say they need to meet the ASTM standards, because that's just the industry agreement.

P Paul Avelar 30:29

Well, that's not all they're used for, as it turns out. Many of these organizations promulgate these codes, and then I'm sure not coincidentally at all, the government then adopts the codes as governing law. If you've ever seen, say, the International Building Code, that is a code that is written by a private organization that is then basically adopted by almost every municipality and government entity, local entity in the country. And that sets the standards for how homes or buildings or bridges or whatever gets built. And so say not hypothetically, you are suing the state of California over the way it regulates site plans, and you want to find out what does the California Building Code say about site plans? You go and you find out that, in fact, the law is copyrighted. It's actually held in copyright by the private organization. They are, after all, the ones who wrote it. And so you go to the state of California and you say, "Can I get a copy?" and they say, "No." Well, that's a real problem. Enter Public.Resource.Org, which is a group that comes in and collects all of these materials, and then publishes them on the Internet for free

for anyone to, to see. And so all of these private organizations sue Public.Resource.Org for copyright violations. You have our copyrighted work, and you're putting them up on the internet for anyone to see, without regard to our copyright. And so that's what this case is about. And so here, what the DC Circuit says is, in this case, it's sort of bounced around a little bit. In this very interesting, if you're into copyright law, multifactorial inquiry, what we find is that Public.Resource.Org is actually engaged in fair use because they are, yes, they're using, publishing, taking copyrighted materials, but they're putting them on the Internet for free for educational purposes. And, you know, that's fair use. They're not doing it commercially. They're not charging people for access to this. And clearly, this is an educational purpose about something really important, i.e. the law. You know, if there's this presumption that we all know the law, and that's the reason why we have to follow it. Well, what happens if the law is subject to copyright? If I want to know if what my house that I want to build is within compliance, I have to go buy a private code from someone and pay like $300 for it? That doesn't make a lot of sense. And really, and this is, so that's the case, fair use? Great, you can go find that stuff now. To me, the more interesting is sort of the background here. And there's this idea in the law, called the government edicts doctrine, that no one can own the law. That, you know, say in one of these cases, the judge heard that we were discussing it, and they're like, "Hey, wait a minute. I wrote that opinion. I have copyright on that. How dare you talk about my case, and cite it in your briefs and such without paying me my royalty for my copyright." You just can't, you can't do that. Government officials, when they're working in their official capacity and they publish something, that's government edicts. And so, the weird question in these cases are like, what's the effect of that doctrine with copyright for these private organizations? And Public.Resource.Org has actually sort of been doing this for a little while. They were at the US Supreme Court a couple of terms ago fighting with Georgia over the copyrighted parts of its state code, which didn't make any sense to me, because Georgia thought it can copyright parts of its state code. You can't do that, by the way, nine nothing. So. But this is becoming I think, more and more of an issue because again, lots of these, these standards are are everywhere. There's lots of organizations that promulgate these standards. And they're adopted across a wide variety of fields. Everything from as I said before building codes to what are the standards for car seats? Like if you want to know what car seats to buy, which ones meet the standards and which ones don't? And those are adopted by I think CPSC. You have to go pay for a copy of the code to go find out what it is, and so, you know, who controls stuff that becomes law? And there's lots of other potential ramifications here for property. After all, copyright really is property. How are we going to protect that, but also allow people to get access to it? But anyway, a fun copyright case, if there's such a thing as a fun copyright case. Sort of pointing to this larger, and I like it because you know, to a hammer, every problem looks like a nail. To a constitutional lawyer, every problem looks like due process, and this looks like a due process thing to me.

A Anthony Sanders 35:27

I can hear all the IP lawyers who listen to the show who I do know that there are some screaming while driving to work this morning about how of course their field of law is very interesting. And Paul, you just don't appreciate us enough, which might be true. But I see this, I mean, along the same lines. But I think one thing that people involved in the nitty gritty of these codes, and then who are maybe the city attorney who puts it, suggests that we then incorporate in the ordinance and how all that business gets made is they assume that the only people who really will care about what these codes say, are like, you know, people at engineering firms who already have a copy on the shelf, and would have it anyway. And so yeah, you just go refer to your own private library, if you want to know the law. Well, I've been

in some property rights cases at IJ, and I was looking at the ordinance of the city we were suing and it says, "Well, this is the code," and I was like, "Oh, what's that? How do I go find that? Oh, it's $299. I could order that today, or I could go to this obscure library and try to find one." And it actually does have a practical issue to property owners or small time lawyers or what have you.

K Ken White 36:47

I can't imagine that these companies make their money by the numbers of copies of these model things that they sell, do they? Because I mean, maybe a good government way to do it is have the government say, "We won't consider your model standards unless you agree to make them available on the Internet for free if we adopt them."

P Paul Avelar 36:47

I don't know what their business model is. Another option here is yes, you have a copyright in the thing that you created, and we're going to enact it. We're going to adopt it into law that must make it publicly available. Well, that sounds like possibly a taking of intellectual property. It's before a public use, so the public can know what the law is, crazy idea. That's taking; the government would have to pay for that sort of thing. Maybe if the government had to pay for the laws it enacted we'd have fewer of them, I don't know.

A Anthony Sanders 37:40

It seems to me there's something here too, about the fact that these standards organizations, I'm sure are happy that their standards are put into law for all kinds of reasons. But if you I mean, if you had some standard like this a group of people put together and what they make gets put into law, and then that makes it fair use, and they didn't want that? There could be something else there. And it seems like the standard maybe is flexible enough that you know that that wouldn't be, but that is very much not the case with I think all of these standards organizations.

P Patrick Jaicomo 38:17

Yeah, I was actually wondering and talking to Paul briefly before we started. You know, what if you had some malicious legislator who had a bone to pick with JK Rowling, and they said, we're now enacting all the Harry Potter books into the California statutes. And I really don't know what that looks like.

A Anthony Sanders 38:26

We're putting them in the Federal Reporter.

P Paul Avelar 38:36

Paul Avelar 38:30

Or lawyers. I mean, you're supposed to pay us to get access to the law. What are the other people or this is the unauthorized practice of law, these industry groups writing codes. Heresy.

P Patrick Jaicomo 38:36

Yeah, exactly. Just attach them to your court decision. I mean, the other thing that comes to mind when we're talking about this is, you know, you shouldn't have to pay to get the law, and I'm thinking like, "Man, I've paid a lot in PACER fees over the years as articulated by the federal court."

K Ken White 39:01

Well of course, having just sat through a bunch of Institute for Justice seminars, I'm suspicious that this is actually a cartel of industry groups, passing in offering codes that will help fight off competition.

P Paul Avelar 39:14

Oh, you're so cynical.

A Anthony Sanders 39:15

Well, we're gonna have to hold the rest of our cynicism for the next episode. But for today, I'd like to thank my three guests for coming on Short Circuit. Very much appreciated each of them, especially our friend here, Ken White. I'd like to thank the audience who was here, live with us today, and all our listeners. But in the meantime, I hope that all of you, get engaged.