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SPEAKERS

Dan Knepper, Anthony Sanders, Dan Nelson

00:00

A Anthony Sanders 00:16

There is a storm on the horizon- a time of hardship and pain. The battle has been won, but the war against the machines rages on. This is John Connor. “There is no fate but what we make.” That was not from a recent ruling by the D.C. Circuit, but its spirit- from *Terminator Salvation- *may have inspired it. The court ruled that an AI program cannot be an author under copyright laws. Is this a victory for humanity in our ongoing war against the machines, or just a simple application of longstanding precedent? We'll discuss that, plus crisscrossing the American West from the Tenth Circuit, this week on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, March 26, 2025, and we have a tale of two Dans today: Dan Knepper, General Counsel at the Institute for Justice and a regular guest here on Short Circuit, and also first-timer Dan Nelson, who's been at IJ for a little while but is making his first appearance on the show. We'll get to Dan Knepper in a bit, including more about the war against the machines. Last time Dan was on the show, he wore a beautiful Christmas sweater with a dinosaur on it. This week, his fashion choice may be less important for the show, but I will say he has a visual, and I think Dan Nelson will as well, for both of their cases. So, if you're an audio listener to Short Circuit, which is great, this episode has a YouTube version, and it might be one you check out later to see the visuals. And if you're already on YouTube- hello! As I said, we'll get to Dan Knepper in a moment, but first, Dan Nelson. Among other things he does at IJ, he recently co-authored an article set to be published in the coming months about the history of Section 1983- that is, the Civil Rights Act of 1871, a law we've discussed many times on the show and one that we at IJ depend on for much of our civil rights work. Dan has discovered some history that hasn’t really been discussed in this way before, which may shed new light on ongoing scholarship about the law’s origins, deep in the midst of Reconstruction. So Dan, give us a little teaser about that.

D Dan Nelson 03:15

Yeah, so thanks so much. I co-authored a paper with our colleague Patrick Jaicomo, who's a senior attorney here at IJ and litigates a lot of Section 1983 cases. As many of you probably know, Section 1983 is a civil rights statute that allows you to sue state officials who violate your constitutional rights. There's a doctrine the Supreme Court created called qualified immunity, which often shields state officers even if they violate your rights. Patrick and I unearthed an original clause in the 1871 version of the statute that discounts, displaces, and completely rejects qualified immunity. The statute back then said that "every person shall be liable, notwithstanding any contrary state law." This "notwithstanding" clause matters because, according to the Supreme Court, qualified immunity is a doctrine rooted in state common law- so this clause rejects that foundation. Now, there has been recent scholarship noting the existence of this clause. What our article focuses on is its omission- this clause was, for previously unknown reasons, dropped from Section 1983 just three years after it was enacted. The current consensus is that this omission appears to walk back Section 1983's original rejection of qualified immunity. But we detail the history of the clause and explain that everyone back then understood that removing these ubiquitous "notwithstanding" clauses- common in older statutes- didn't change the substance of the law. So, today, Section 1983 still displaces qualified immunity. This paper will be forthcoming in the Harvard Journal of Law and Public Policy, so we're really excited about it.

A Anthony Sanders 05:01

Yeah, and if viewers and listeners are interested, we'll include a link to that draft in the show notes. When I read it, I learned all kinds of things I had no idea about- like how "notwithstanding" clauses used to be used and how statutes were drafted in the 18th and 19th centuries. It's really fascinating stuff, and actually quite relevant to current litigation. So we'll look forward to discussing it more in the future on Short Circuit. But now, we're going to turn to Dan Knepper. Dan, I may have made the situation sound pretty bleak- suggesting that humanity is under siege and that the D.C. Circuit has fended off another push from artificial intelligence. But I believe you might have a more optimistic take on things, maybe a story that's a bit less Terminator and a bit more Star Trek- less about doom and more about growing pains and coexistence.

D Dan Knepper 06:14

Indeed. Thanks, Anthony. I'll be looking at Thaler v. Perlmutter, a D.C. Circuit Court of Appeals case from last week. It was decided by a three-judge panel, with Judge Millett writing the opinion and Judges Millett, Wilkins, and Senior Judge Rogers joining. You're right- the most enjoyable part of the opinion comes later, when the court starts discussing policy and whether machines can respond to incentives. They compare the AI in this case to Data from Star Trek, noting that while Data might be capable of many things, he's not capable of producing good poetry. The opinion even quotes a poem attributed to Data: "Felis catus is your taxonomic nomenclature, an endothermic quadruped, carnivorous by nature," and remarks that it's "truly terrible, Data, truly terrible."

A Anthony Sanders 07:06

Chat GPT can get some good poetry, I'll say.

D Dan Knepper 07:11

I believe you. I was excited that this decision came down this way. I emailed Anthony, almost right away. We've got a court of appeals case on artificial intelligence. Finally, we're gonna get some clarity on this topic that we're all all really excited about. And we don't get a whole lot. That's the long and short of it.

A Anthony Sanders 07:39

But it's really interesting. The guy who brought this case, the actual human, he has a plan that seems pretty interesting.

D Dan Knepper 07:46

Yeah, so in reading about it, I wondered the same thing- was this a test case? What was he really trying to accomplish? The background is that Dr. Stephen Thaler, a computer scientist, created an AI program called the Creativity Machine. He set the Creativity Machine to “art,” and- believe it or not- that’s the technical term he used. The AI then produced an image titled A Recent Entrance to Paradise. For our radio listeners, the artwork depicts a set of rather old-looking train tracks heading into what appears to be a bridge or tunnel. You can see light at the far end, with sunlight bathing the landscape beyond. There's a lush abundance of foliage- lots of green, and also quite a bit of purple. This, apparently, is the art in question. I actually tried to find an art critic willing to weigh in on the aesthetic merit of the piece, and so far have come up short. For whatever reason, no one seems eager to opine on whether the Creativity Machine is producing “good” art.

A Anthony Sanders 08:59

Well what is your view? I mean, it kind of reminded me of some of that sports art you get in bars. I wasn't super impressed by it, but it's not terrible.

D Dan Knepper 09:09

I was going more with if you’re out there and you’ve seen folks doing spray can art- you know, wolves howling at the moon, that kind of stuff- that’s the vibe this piece gives off. Maybe it’s not for me, but you might like it. So, Dr. Thaler, having created- or rather, having had the Creativity Machine create- this “masterpiece,” submitted a copyright registration application to the U.S. Copyright Office. Critically, he listed the Creativity Machine as the sole author of the work and listed himself as the copyright owner. The Copyright Office denied the application, citing its long-standing requirement that works must be authored, in the first instance, by a human being. Dr. Thaler challenged the denial through the administrative process and eventually took the case to the district court, which upheld the Copyright Office’s decision. That brings us to the D.C. Circuit Court of Appeals. And with that backdrop, we finally get a legal

ruling on something involving generative AI. What we learned? Not a whole lot- but something. The D.C. Circuit issued a relatively straightforward, undramatic statutory interpretation: under current law, no copyright is available for a work that was entirely created by AI. They left open the possibility that a different outcome might result if a work is only partially AI-generated and involves meaningful human input. But that's not the case here, so they declined to rule on that broader question- for now.

A Anthony Sanders 10:57

But also, there's this twist along the way. So he applies for the copyright- again, I don't know all the steps in the process, but it's an administrative thing- and in his application, he says that the only author, which is different than owner as you said, is the Creativity Machine. And so the Copyright Office denies it, and basically says, "Are you really saying the machine is the author?" And he says, "Yes, not me, just the Creativity Machine." And so it moves forward through the administrative process with that understanding. But then when it gets to the District Court, he kind of starts hedging a little bit. He says, "Well, I could be considered the author if it's, you know, that I used the Creativity Machine as a tool." But at that point, the court says, "Well, you waived that argument." Because throughout the entire earlier process, he was super clear that he was not the author, and that it was solely the machine. So the court says, "well you waived that buddy."

D Dan Knepper 11:46

Yeah, it's too late. So we can talk about it now. The legal answer is that you are right, it was waived. Then the court of appeals and district court spent very little time on it because it was brought up too late. The Copyright Office has provided some guidance on how it evaluates submissions for works that are, to some extent, created by artificial intelligence. They've said that you have to look at the fundamental nature of the work. For example, if it's a song, it's got to be the music; if it's poetry, it's got to be the words. These must be created by a human. The Copyright Office has also stated that simply providing prompts to AI probably won't be enough to claim authorship. They've denied some applications where there was a combination of human input and AI-generated content. One example they gave involved an artist who used AI to generate images, then arranged and enhanced them in Photoshop. The Copyright Office said that the person could get a copyright for their work in Photoshop, but not for the AI-generated parts. So the Copyright Office is grappling with some difficult questions about how much of an AI-supplemented work should receive copyright protection and under what circumstances. I think what the court will say here is that not only is that question not before them, but it's a question for Congress. And in this case, I think that's the right answer. These are really complicated issues, with lots of different factors, and it's hard to imagine the right set of facts and circumstances coming before the courts to allow them to make a rule. These are big policy decisions, and the Constitution gives Congress the authority to make rules related to copyright and patents, so I think this is where the issue should be straightened out.

A Anthony Sanders 11:55

So you mentioned the Constitution. One other wrinkle that's going on the background is the copyright office argued that the statute doesn't allow for a computer program to be an author. But then they had a backup argument that the court didn't get to; that constitutionally, it has to

be a human who is an author, based on the clause in Article One, Section Eight, about Congress's power to give a copyright. Do you see that playing a role in the in the future, or is that kind of a side note, because everyone understands that we're not going to start giving copyrights to computer programs. Or are we?

D Dan Knepper 15:08

Haha, I think it is more of a side note. You know, there was a case not that long ago that has a great nickname called the monkey selfie case.

A Anthony Sanders 15:22

We talked about that case before.

D Dan Knepper 15:24

It is a copyright case that, I don't know if you could guess, involves a monkey taking a selfie, right? And that case was at the Ninth Circuit, and the Ninth Circuit dispatched it on standing grounds, but standing grounds within the Copyright Act. Because there's just so much good statutory language and the way that it's put together to really have a basis for a copyright under the Copyright Act, this is another component: the author has to be a human. And so, maybe, maybe there are avenues around that, but that is, that's been the framework for animals so far, and now for robot overlords.

A Anthony Sanders 16:12

I love how the court went through all the reasons it has to be a human. And at one point it says that they refer to a widow or widower first for how your copyright would pass to someone else. And they say machines aren't widows or widowers or have children.

D Dan Knepper 16:40

It's just so, there are the Copyright Act gives certain rights to the owners, and all of those rights can only be exercised, so says the court, as you gave an example, all those rights can really only be exercised by humans. But then in the very next paragraph, Anthony, it says, "Oh, and by the way, the copyright also says machines aren't authors," and it says parts of machines are computer programs—you kind of could have just started right there, right?

A Anthony Sanders 17:02

It seemed a little like beating a dead horse, I gotta say. They were trying to cut off every avenue in case, maybe the same plaintiff, or maybe someone else came back and try this again.

D Dan Knepper 17:15

One of the things that did strike me is the analysis, notwithstanding the little bit of the policy towards this question for Congress and so on. But the analysis on this was brief. Like, they say, you know, Dr. Thaler's opposing arguments fail, period. It was just kind of to the core. They were not going to mess around with this. They weren't going to open up alternative ways for this to get interpreted. They took it straight down the statute, got rid of it, because the tough cases are coming. I kind of got the sense that this panel was delighted to not have those tough cases yet. Like, they had a very clean way to read this, consistent with precedent and consistent with the statute, and they put it aside and said, we'll deal with those times when there are humans involved later.

A Anthony Sanders 18:10

Yeah. Dan Nelson, do you see this as not a tough case as well?

D Dan Nelson 18:15

I think this is a pretty easy case. And I think that the second we all started using ChatGPT, you knew this case was coming. I mean, I'm with you guys, but a little surprised that this guy didn't try to make the argument that he ultimately waived, which was that he himself was the author. I don't know if that was intentional, like if he really wanted to try to pioneer this case where AI can itself copyright things, but I thought that was really interesting. And we'll see where Congress grows from here. But I agree with Dan. I mean, this is really one of those instances where the court's just like, look, the copyright says what it says. And we're in a new era in a lot of ways, but let's just let Congress take care of it from here.

A Anthony Sanders 19:00

As far as his motivation, or maybe other computer scientists' motivations, it seems like the actual try here was narrow and targeted- let's see if it works. Obviously, it was a test case, and it didn't work this time. But there are two bigger questions. One is the one you were just talking about, Dan Knepper, which is: what if you use AI to create things, and what if you're the creator of the AI? Is that different from creating the AI, and then another user goes and uses it? In the former case, I could see a good argument for you being the author or the owner of that work. But the bigger question, which maybe this computer scientist is into, or maybe not, but I'm sure there are others out there, is whether artificial intelligence programs themselves could have rights. This is the data question, the Star Trek question, and one way you could have rights is through copyright. Another way, as you just mentioned, is standing- if you get into court. People are still split on whether machines will pass the Turing test, or if they've already passed it. But if we do start having something that we could plausibly say is like a person, this artificial intelligence, will it be able to do things the creativity machine couldn't do here? That's really a question, and I'm sure these three judges were very happy they didn't have to address it.

D Dan Knepper 20:49

Dan Knepper 20:49

I thought one of the things the court did, setting a foundation and reminding you what this is all about, is that copyright isn't for the author. We have copyright to grant a short-term monopoly because someone who works hard to create something shouldn't have it stolen from them cheaply or copied cheaply on the second go-around. The incentive is for others to create something uniquely valuable on their own. That's why the Copyright Act works, and the economics of it. AI machines don't work like that- they don't respond to those incentives, at least not yet. So, this doctor argued that if AI can't get a copyright, people who do AI will lack the incentive to create new things. But the court said, no, humans are still motivated. We'll see how that plays out, but Congress has time to figure this out. These questions are big and beyond what we have to deal with today, so we'll let them handle it. In your first example, Anthony, I had to imagine it slightly differently: let's say I create an AI machine and train it solely on my own stuff. So, I have an AI machine that will only produce things based on my work, and I have all the rights to.

A Anthony Sanders 22:36

Your own personal watercolor.

D Dan Knepper 22:39

Yes. And would the output of that AI have to be mine, with the copyrights? Could that be? Because I created the machine and everything the machine does it based off what I learned. I think there's a good argument for it, but the way the Copyright Office is looking at it right now, they're focused on who's putting the words on paper- where does that come from? If it's not coming from a human, it doesn't count. So, I think all of these examples are ways you'll see these debates played out over time.

A Anthony Sanders 23:21

Yeah, because of course, no feasible AI program is going to be, as you just said, instead it's going to have everything on the internet, right? Which, of course, one person hasn't authored. Yeah, well we'll follow this. I'm sure this isn't the first of these types of cases we'll discuss. So, now we're going to move out West. Now, I've always- I worked and lived in the Mountain West for a short time. Grew up way out west on the West Coast, so I've always been a little confused about this checkerboard pattern of ownership. You get out there, and I remember learning about it a little bit in social studies, with the railroads giving land to some people, but not others. But I never really understood it much until I read this very interesting case that Dan Nelson is going to tell us about.

D Dan Nelson 24:21

Yeah, this case is wild. I mean, when I first looked at it, it seemed like just a wild west trespass case. But the checkerboard really makes things interesting. And you know, this checkerboard you're talking about covers millions of acres in the West, so this had pretty big implications. But really, this trespass dispute got pretty nasty. It was between a rancher and some hunters. And

it's not like the hunters were on his private property, like shooting his cattle or something. They weren’t even walking or hunting on his private grounds. What they were doing was, while walking to hunt on public grounds, they were doing what's called corner crossing. It’s this weird way of getting to public lands to hunt that really only exists in the West. So, imagine a checkerboard where you’ve got red and black squares. Every other square is red, every other square is black. The government owns all the red squares, and a private party, in this case, the rancher, owns all the black squares. The government squares are hunting grounds for hunters, but the problem is, it’s hard to get to these squares because you’ve got all the black, private squares in the way. So, what hunters do is go to the very corner of a public square, where the two public squares are connected diagonally, and they walk across to continue hunting. Now, this poses a problem, because while you’re not actually walking on any private property, you are invading the private airspace of the black squares.

A Anthony Sanders 26:15

Right, because, by definition, if you go back to high school geometry, there is utility in point, and your body is not that thin, so you're going to have to go over private land to get to this public square.

D Dan Nelson 26:31

Yeah, and I actually thought about this for maybe a little more than a second, which is a little embarrassing. I’m like, okay, if I take a checker on a checkerboard, move diagonally, like, it’s going over onto these black squares. And, I mean, I’d contend I’m not as round as a checker, but even if I’m walking diagonally, I’m still crossing over their land- my shoulders, my pack, whatever else. And so this is where the dispute really gets going. When this rancher finds out these hunters are doing this, it starts off with the rancher sending his employees to tell these hunters, “Hey, stop. You can’t do this,” and yelling at them. That doesn’t really work, so what does the rancher do next? He puts No Trespassing signs around this tiny marker that denotes exactly where the corridor is. This tells the hunters where to step over without stepping on private grounds. By doing that, the hunters can’t crawl under or go around these signs and chains the rancher put up. So what do they do? They have to hold on to the signs and swivel them around their legs so they’re still not touching private property, but they are touching the signs. The rancher points this out, and the next time they go hunting, they get an A-frame ladder. I’m not kidding. They get an A-frame metal ladder. And this is out in the middle of nowhere, so I don’t know how far they had to carry this thing, but they get a ladder to climb over the No Trespassing signs and then walk back down so that they never walk on private property.

A Anthony Sanders 28:11

At least here, they haven't put fences up or anything

D Dan Nelson 28:15

No.

A Anthony Sanders 28:15

It really is just a state, kind of in the middle of nowhere, and they had GPS devices, to know exactly what was public and private.

D Dan Nelson 28:26

I think it's called Onyx Hunt or something like that. I've actually used the app before for one of our IJ cases. It's super accurate- GPS coordinates. So these hunters have it down probably to the centimeter. And the facts in the record are that, at least, they weren't stepping on private land at all. The most they were doing at one point was touching those trespassing signs to swivel from one public square to another public square. So anyway, this whole thing gets drawn out. The rancher ends up convincing the local prosecutor to charge them with criminal trespass. This actually goes to a jury trial, and they're acquitted. Then later, he says, "Look, I'm going to sue you for civil trespass and seek $9 million." We could talk more about where that number came from, because they weren't doing any damage to the property. So it's interesting that it's $9 million. He says, "It doesn't matter if you're not touching my land. You're still violating my private airspace. That's trespass under Wyoming state law, plain and simple." Despite that, the lower court rules for the hunters, and this goes up to the 10th Circuit. There are really two issues: one, is this a civil trespass? The 10th Circuit actually says, "Yes, under Wyoming state law, this is civil trespass." You don't just own the land; you own what's under the ground and above the ground.

A Anthony Sanders 29:56

Yeah, there's all this talk about the how the Romans said you own everything to the sky, and how things were before airplanes.

D Dan Nelson 30:04

Oh, yeah. This goes back centuries. And even today, like, airplanes can fly over you, but you own the low-level airspace. By the way, this makes total sense because people could put up bridges over your property

A Anthony Sanders 30:19

Or drones

D Dan Nelson 30:22

Yes. So this is a legitimate thing. The 10th Circuit says, "Yes, this is a civil trespass." But then there's issue two: even if it's a civil trespass, does federal law preempt liability for civil trespass for these hunters? The 10th Circuit says yes, citing an old 1885 statute Congress enacted due

to the confusion and issues with all these different squares and...

A Anthony Sanders 30:57

It was basically unlawful enclosures act.

D Dan Nelson 31:01

-which those chains definitely seem like they're doing Yes, the UIA and it's probably best to just quote it here. But the UIA declares "all enclosures of any public lands to be unlawful. And then to that end, it says no person, by force, threats, intimidation, or by any fencing or enclosing or any other unlawful means shall prevent or obstruct free passage or transit over or through the public lands." And so the hunters are saying, "Look, by you not letting us do this coroner crossing, you are violating this act, which says you can't obstruct free passage." Yeah, and the court's like, "Look, it says enclosures or fencing," so it doesn't have to be a literal fence- if you're yelling at people or trying to stop them from accessing public land, that can still violate the statute. The purpose of the 1885 law was to deal with exactly this problem: back then, cattle barons were fencing off or blocking access to public land next to their private property, creating major access issues. Congress passed the Unlawful Enclosures Act to guarantee public access and prevent those kinds of obstructions. So what the 10th Circuit says here is that while yes, this technically counts as a civil trespass under Wyoming law- since you do own the airspace above your land- federal law preempts that. Enforcing that trespass is considered a nuisance under the federal statute, and under the UIA, the hunters are allowed to abate the nuisance. That doesn't mean they're granted an easement or can build a road, but it does mean they're allowed to cross at the corners to access public land. It's a very specific and narrow allowance, but a really important one for preserving public land access.

A Anthony Sanders 32:57

So I guess, thinking of that- if the rancher says, "Okay, well, I'm going to take away the stakes and the chain," then we go back to what we started with: you do the corner crossing, but you actually go over the airspace of a tiny bit of the corner. At that point, the rancher isn't creating a nuisance. So would they then have a trespass action? Because the court also says, as you just said, this is not creating an easement.

D Dan Nelson 33:27

Yeah. So the the court basically says, look, there's no necessity doctrine here, we're not providing an implied right.

A Anthony Sanders 33:39

Right, like someone who's land locked within someone else's land.

D Dan Nelson 33:42

Exactly that's not what the UIA is doing. It's just like, if you are not letting these hunters access these public lands, essentially, what you were saying is no one can access these public lands, except the rancher. Because he owns, the adjoining private lots, and so that is the nuisance that needs to be evaded. And it doesn't really matter if there's fencing or not. It's just the fact that you're trying to obstruct that you're trying to obstruct that free passage- that itself is the nuisance.

D Dan Knepper 34:12

Can I ask question?

D Dan Nelson 34:13

Yeah, go for it.

D Dan Knepper 34:14

How'd they get the elk out?

D Dan Nelson 34:16

I never thought about that. I don't know. I actually listened to the oral argument on this, and it's interesting because it's like, okay, you're not allowing an implied easement by necessity. The court's not saying there's a right of access, per se, but it's obviously offering more than just that little needle. But what if hunters want to take their vehicles, like their trucks- they don't want to do all this walking? Do you have to open the width for this corner crossing? One judge- I forgot who it was- said, what if you have disabled hunters in wheelchairs? Do you have to widen the corner crossing? I think this case poses some really difficult questions, on both ends, because either you're kind of allowing these hunters to access private land in ways where I don't really know where the line is, but then, on the other hand, if you're ruling for the rancher, you're basically just saying all these millions of acres of public land- these public squares that are completely landlocked- are arguably, given Congress's short-sightedness (and we can talk about that too), foreclosed now. It's really tricky, and it's just a jumbled mess of centuries of case law that the Tenth Circuit was trying to sift through and figure out to draw a rule.

A Anthony Sanders 35:50

I'm sure some of our viewers and listeners are wondering why the land is like this? Why would anyone set up this public and private checkerboard thing in the first place. Can you give a little of that history, because even reading the case, and knowing the history and knowing a little bit anyway, it still is kind of bizarre how Congress did that and then they just left it there.

D Dan Nelson 36:17

Yeah. I mean, so the short of it is, Congress was trying to incentivize westward expansion and development. They were very excited about this- if you look at the Congressional Record and such. Their thinking was: if we sell every other square to private entities, like railroads, they'll develop the land. And from that, we'll probably get access roads, other infrastructure, and economic activity. That, in turn, would drive up the value of the public squares that the government retained, and then we could sell those for a profit. But that never happened- because it turns out this is all just desert land.

A Anthony Sanders 36:57

But it happened elsewhere, right? Like, say, part parts of Montana, where there were cities built. But a lot of it, especially here in southern Wyoming, no one lives there.

D Dan Nelson 37:09

Yeah, exactly. And once you find the desert plots that have water and those that don't, it's like- all the private developers go to the ones with water and other resources, and then you leave the rest. No one wants the public ones. So eventually, when Congress realized, well, we can't sell them- they're not worth anything, we can't even sell them for pennies- they just said, "Well, we'll just keep them for hunting grounds." And that's what they're used for today.

A Anthony Sanders 37:32

And they hand out permits to hunt in them. I mean, theres no allegation the hunters did anything wrong, right?

D Dan Nelson 37:39

Right. Yeah, I do want to talk about the damages for a bit. I mean, when I saw $9 million, I was like, what in the world? Why $9 million? And of course, the hunters alleged in their briefing that the $9 million figure basically came from the rancher calculating the value of his land along with the value of the public land. The idea was that, because he was effectively the only one who could access those public squares, it elevated the value of his property by about 25 to 30%, according to one of his experts. So the hunters were essentially accusing the rancher of trying to monopolize or acquire de facto control over this public land for himself. And the rancher, in response, was saying, "No, you can't just trespass on my land. I don't care if you're stepping on it or not- I still have air rights." So there was this interesting back and forth, with both sides kind of trading barbs.

A Anthony Sanders 38:42

That seems to be more a question of actual ownership rights, right? So if nobody can access the land, then the value of my land goes up by X amount- or whatever it is, probably inflated anyway. But if people can access the land, then that added value disappears. But that's not

really about what these three guys actually did, because they didn't cause that shift- that's just a legal question. They were just trotting across this land. If the rancher won, he'd probably just get nominal damages I would think.

D **Dan Nelson** 39:19

Yeah, I think that's right.

A **Anthony Sanders** 39:23

Another question I have, how is this in federal court? Is it just diversity, because these hunters aren't from Wyoming or

D **Dan Nelson** 39:30

Yeah? I mean, there were some federal questions. I mean, obviously you had the UIA involved, and there was some taking litigation too,

A **Anthony Sanders** 39:36

But at bottom, it's just the state trespass, civil action, right?

D **Dan Nelson** 39:42

Yeah, I think there was diversity, because the hunters actually, now that you bring this up, they weren't from Wyoming, if I remember correctly. There were four hunters, I'm pretty sure of that. And actually, that makes me think of one other thing. When I was reading this, I was like, how is this not a takings? Can Congress just pass a statute and say, "Well, the public has access to your land now," and you don't get any compensation? And the court does wrestle with this. Ultimately, it concludes that even if this access could maybe constitute a taking, the right to corner cross preexisted the rancher's ownership of the land. So when he acquired the land, there was already this preexisting limitation in place. I thought that was really interesting- like, huh, does the rancher not inherit the full rights from the prior owner? I guess, according to the court, he doesn't. But it's notable that takings was implicated and the court had to engage with that argument.

A **Anthony Sanders** 40:51

That seems to me, in a way, like it's kind of bringing back the access-by-necessity point- even though the court elsewhere says this isn't about that. But it sort of has to be, right? Because if you divvy up land this way- back when it was originally sold- and the understanding is that the public can still access the public squares, then you have to assume the public is going to be

able to corner cross. So it is, in effect, an easement. Maybe we don't call it that, but it's there. And that's why the court's ruling isn't a taking- because you never had the right to prevent people from corner crossing in the first place.

D **Dan Nelson** 41:35

Right, right. Yeah. And I kept coming away thinking, this really just kind of feels like an easement. I understand it's not, and I think the court was really trying to emphasize, like, "Look, we're not saying you have a permanent right of access or that you could build a road." I think they were really trying to focus on this idea, probably to reconcile this mess of case law- a jumbled mess, according to the court. Not only that, but also to try to give a really narrow ruling, to say, "Look, we're just letting you guys abate a nuisance." I think this leaves some line-drawing questions down the road that the court was aware of, especially during oral argument, but I think they're saving that for another day.

A **Anthony Sanders** 42:18

Well, we'll save further exploration of corner crossing for another day, but I'd love to get back to it. It seems there are a few cases on it- there's another one from the Ninth Circuit that discusses it. Oh, and that reminds me- before we close, there's one point I wanted to address. So I hadn't seen this before, but the Tenth Circuit was, at one point, carved out of the Eighth Circuit, just like the Eleventh Circuit was carved out of the Fifth Circuit in 1981, right? So the Eleventh Circuit is the youngest geographical circuit. The old Fifth Circuit was huge, kind of like the Ninth Circuit today, and it basically covered all the South. Then they carved out the Eleventh Circuit. But then the Tenth Circuit cites this old Eighth Circuit case, which is geographically now where the Tenth Circuit is, but they say they're not bound by that case because their own precedent is they're not bound by these old Eighth Circuit cases. Meanwhile, the Eleventh Circuit has said exactly the opposite about old Fifth Circuit cases. I mean, each circuit can do its own thing for whatever reason, but it's kind of interesting that the Tenth Circuit doesn't feel they have to follow that precedent.

D **Dan Nelson** 43:45

I was puzzled as well. I'm like, these are the same states we're talking about, the same geographic area. I was very puzzled myself. And I feel like there's got to be some interesting history there. But the court- the Tenth Circuit- has long said that they're not bound by this old Eighth Circuit precedent. I just thought that was really interesting. I agree with you, yeah.

A **Anthony Sanders** 44:04

And by the way, it is a lot older. So I said 1981 for the Eleventh Circuit, but the Tenth Circuit was created in 1929.

D **Dan Nelson** 44:11

Oh, wow.

Oh, wow.

A Anthony Sanders 44:12

So, yeah, we're talking about some really old cases here. But when we're talking about Western property rights, there are definitely some old cases out there. Yes. Well, thank you, Dan, that was fascinating. And Dan Knepper, yours was fascinating as well. We'll get back to both of these issues, as I was saying, in the future. But for now, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.