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## IN *IMDb.com*, NINTH CIRCUIT REJECTS USING SPEECH REGULATION AS COMMERCIAL WEAPON

by Megan L. Brown and Ashlyn Roberts

In June, a three-judge panel of the Ninth Circuit unanimously held in *IMDb.com Inc. v. Becerra & Screen Actors Guild* that a California state law prohibiting IMDb from publishing an actor's age on its public website was an unconstitutional content-based restriction on speech. Speech by commercial actors has long been regulated to address the economic and policy goals of various constituencies. Such speech has been subjected to lesser protection by some courts, but its status under the First Amendment is in flux. The Supreme Court has been increasingly protective of free speech and has rejected content-based restrictions, but the IMDb decision shows that commercial speech regulations will continue to be pursued by governments until the Supreme Court clarifies the appropriate level of scrutiny for content-based restrictions on the speech of commercial actors.

The Internet Movie Database, or IMDb, is a free, publicly available website that provides information about cast and crew members of various movies, television shows, and video games. The database contains over 6 million entries, and the Ninth Circuit noted that it is the 54th most visited website in the world. Like Wikipedia, anyone can update the information on an actor's profile, and IMDb has a "Database Content Team" that monitors the site and reviews the entries for accuracy.

In addition to the public database, IMDb recently started offering a subscription-based service for industry professionals called IMDbPro, which the court described as "Hollywood's version of LinkedIn." Unfortunately, the state of California viewed this innovation as an opportunity for greater speech regulation.

At the behest of some in the entertainment industry and in the name of curbing age discrimination, the California state legislature passed [AB 1687](#). This law required any "commercial online entertainment employment service provider" that offers a paid subscription service to remove, upon the subscriber's request, any birthdate and age information of the subscriber from both the subscription website and *"on any companion internet Web sites under its control."* Not surprisingly, the Screen Actors Guild assisted the state in defending the speech restriction which benefitted its members.

Before the new law took effect, IMDb challenged the new law as an unconstitutional restriction on its speech. The Ninth Circuit concluded that, "[o]n its face, AB 1687 restricts speech because of its content." It rejected the State of California and the Screen Actors Guild's argument "that the statute merely regulates contractual obligations between IMDb and subscribers to IMDbPro."

The Ninth Circuit declined to categorize the speech as commercial speech, reasoning that "[t]he content is encyclopedic, not transactional." It also rejected arguments that the speech could be categorized as speech that facilitates illegal conduct or speech that implicates privacy concerns. "We set a high bar for cordoning off new types of speech for diminished protection," wrote the court.

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**Megan L. Brown** is a Partner with Wiley and **Ashlyn Roberts** was a summer associate with the firm and is currently a 3L at George Washington University Law School. Ms. Brown is the *WLF Legal Pulse's* Featured Expert Contributor, First Amendment.

In the end, the court applied strict scrutiny, a standard of review that traditionally requires a court to determine if (1) there is a compelling governmental interest supporting the restriction on speech, (2) the restriction is the least restrictive means of accomplishing that end, and (3) the restriction is narrowly tailored to target the governmental interest. If a law fails any of these prongs, the government has not met its burden to justify the regulation. Here, although the court noted that fighting age discrimination is a compelling governmental interest, the law failed both the least restrictive means and narrow tailoring prongs.

The State “fail[ed] to show that the law is the least restrictive means to protect its compelling interest” because other “speech-neutral remedies” existed. Additionally, the Court found that the law was underinclusive because it only protects subscribers to IMDbPro who request the removal of their age information, and not all actors who have their age information publicly revealed on the site.

In an *amicus brief*, the Electronic Frontier Foundation noted that “the denial of age information deemed contraband by the challenged statute hinders the public’s ability to engage in the very debate the statute aims to address regarding age discrimination in the movie industry.” An *amicus* brief written by First Amendment scholars and the Reporters Committee for Freedom of the Press echoed those sentiments: “The proper remedy is not to suppress speech, but rather to enforce laws against age discrimination.”

This case is part of an ongoing battle over what level of scrutiny courts should apply to restrictions on speech, particularly when the restrictions apply to commercial actors.

In 2015, the Supreme Court *held* that the First Amendment prohibits content-based restrictions on speech. Applying strict scrutiny, the Court struck down a Sign Code as unconstitutional because it allowed some billboards but prohibited others based on the content of the sign and with no compelling governmental interest. The Ninth Circuit relied on this opinion in evaluating the California law regarding publication of age information.

Although the application of strict scrutiny to content-based restrictions seems straightforward, discrepancies continue to arise when there is debate over whether something is “commercial speech.” For example, in 2015, the D.C. Circuit heard a *case* involving restrictions on the type of advertisements airlines could run regarding government taxes. The court upheld the restrictions, and the Supreme Court declined to hear any appeal.

In a closely watched *case* earlier this year, the Supreme Court rejected a statutory exception for government-backed debt collectors to a general ban on robocalls. Writing for a divided court, Justice Kavanaugh explained that distinguishing between different kinds of robocalls is the very definition of a content-based restriction. The full majority did not share his view that strict scrutiny should be applied to all content-based restrictions. Justice Sotomayor disagreed with the application of strict scrutiny to the exception but found that the content-based distinction in that case failed intermediate scrutiny anyway. In contrast, while supporting the overall robocall ban, Justice Breyer broadly advocated for the survival of the exception for government-backed debt collecting, contending that the exception was merely “ordinary commercial regulation” that was not entitled to strict scrutiny.

Here, the Ninth Circuit did not address or decide what level of scrutiny applies to commercial speech by declining to categorize California’s law as a regulation on commercial speech. But the lack of certainty on the proper level of scrutiny to apply to these types of speech regulations is problematic. This case provides yet another example of how the absence of clarity from the Supreme Court about the rights of speakers that have an economic motive encourages government actors to restrict speech to advance policy or economic agendas.

The clock is running for the State of California to seek certiorari in the Supreme Court. Parties have 90 days after the Circuit Court’s judgment to petition the Supreme Court for a writ of certiorari. Should the State choose to appeal this case, it may be time for the Supreme Court to address this unsettled part of First Amendment law.