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Opinion No. 13-39

Constitutionality of Requirement to Produce Evidence in Animal Cruelty Case

QUESTIONS

1. Does House Bill 1191/Senate Bill 1248 of the 108th Tennessee General Assembly, 1st Session (2013) as amended, (hereinafter "HB1191") violate the United States Constitution?

2. Does HB1191 impair a protected property interest in media work product such as video or photographs taken as part of an undercover investigation?

OPINIONS

1. HB1191 is constitutionally suspect under the First Amendment on three grounds: 1) the scope of HB1191's requirements is underinclusive relative to the governmental interest in preventing cruelty to livestock; 2) HB1191's requirement to provide any recordings of livestock cruelty to law enforcement could be an impermissible prior restraint; and 3) HB1191's reporting requirement could be found to constitute an unconstitutional burden on news gathering. In addition, HB1191 could be held to violate a person's Fifth Amendment right against self-incrimination.[1]

2. The more persuasive position is that the circumscribed, non-commercial use of images depicting cruelty to livestock during the course of the law enforcement investigation of a crime amounts to fair use. Persons who may receive the images depicting cruelty to livestock through a public records request to the government would be subject to any applicable copyright restrictions regarding the display, reproduction, or distribution of those images.

[1] This Office cannot anticipate all possible factual situations in which HB1191 might be applied or "as applied" constitutional challenges that might develop therefrom. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges).

ANALYSIS

1. HB1191[2] amends Tenn. Code Ann. § 39-14-202, relating to cruelty to animals, by adding the following new subsection:

> (1) A person who intentionally records by photograph, digital image, video or similar medium for the purpose of documenting a violation of subsection (a) committed against livestock shall, within forty-eight (48) hours, or by the close of business the next business day, whichever is later:
>
> (A) Report such violation to a law enforcement agency with jurisdiction over the alleged offense; and
>
> (B) Submit any unedited photographs, digital images or video recordings to law enforcement authorities.
>
> (2) A violation of this subsection is a Class C misdemeanor punishable by fine only.

HB1191, 108th Tenn. Gen. Assem., 1st Sess. (2013). By its terms, HB1191 will take effect on July 1, 2013. *Id.* § 2.

HB1191, Section 1, applies only to animal cruelty committed against "livestock." "Livestock" is defined in Tenn. Code Ann. § 39-14-201(2) to mean "all equine as well as animals which are being raised primarily for use as food or fiber for human utilization or consumption including, but not limited to, cattle, sheep, swine, goats, and poultry." Cruelty to animals prohibited by Tenn. Code Ann. § 39-14-202 is a Class A misdemeanor, with second or subsequent convictions being a Class E felony. *Id.* § 39-14-202(g)(1) & (2).

The stated purpose of the bill according to its legislative history is to ensure the prompt reporting of animal cruelty committed against livestock and the submission of any unedited documentary evidence to a law enforcement agency so that the suspected animal cruelty may be expeditiously investigated and addressed by law enforcement. *See generally* House Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 17, 2013) (statements of Rep. Holt and other supporters) (available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1191). HB1191 does not require everyone with knowledge of animal cruelty committed against livestock to report the violation to a law enforcement agency with jurisdiction over the alleged offense; rather it requires only "a person who intentionally records by photograph, digital image, video, or similar medium for the purpose of documenting a violation" to report the violation. HB1191, § 1. The person intentionally recording this documentary evidence is required to make a determination whether the images recorded show a violation of the livestock

[2] Amendment 1 to HB1191 deleted the language of the bill as originally filed and substituted the language ultimately approved by the General Assembly. *See* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1191.

cruelty statute for the duty to report to apply. The duty to report requirement in HB1191 does not apply to a person who views, has knowledge of, or comes into possession of the recorded documentary evidence, but is not the person who recorded the documentary evidence. The duty to report requirement also does not apply to a person who did not "intentionally" record the evidence "for the purpose of documenting a violation"; for example, if a person inadvertently recorded an animal cruelty violation while taking photographs for other purposes, then the requirement would not apply.

Requiring the reporting of a criminal offense is not unprecedented in Tennessee law. For example, abuse, neglect, or exploitation of an adult, as well as child injury or abuse, must be reported. As to an adult, "[a]ny person . . . having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made . . . [and such] report shall be made immediately to the department [of human services] upon knowledge of the occurrence of the suspected abuse, neglect, or exploitation of an adult." Tenn. Code Ann. § 71-6-103(b)(1) & (c). A person who knowingly fails to report adult abuse, neglect, or exploitation commits a Class A misdemeanor. Tenn. Code Ann. § 71-6-110. The identity of a person who reports abuse, neglect, or exploitation of an adult is confidential and may not be revealed unless ordered for good cause by a court with jurisdiction; that person is also afforded immunity from civil and criminal liability. Tenn. Code Ann. §§ 71-6-105, -118. Similarly, as to a child, Tenn. Code Ann. § 37-1-403(a)(1) provides: "Any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately . . . ." The failure to report the child injury or abuse is a Class A misdemeanor. Tenn. Code Ann. § 37-1-412. Generally, the reports of harm and the identity of the reporter are confidential, and the reporter is provided with immunity from civil and criminal action. Tenn. Code Ann. §§ 37-1-409, -410.

HB1191 differs in several important respects from the mandatory child or adult abuse reports required by state law. First, HB1191 does not require the immediate report to law enforcement agencies by all persons with knowledge of livestock cruelty. It only requires the report of livestock cruelty when the person has intentionally recorded the acts of cruelty. If a person knows or has evidence of cruelty but has not recorded the acts of cruelty or has done so unintentionally, then the requirements of HB1191 do not apply. HB1191's reporting requirement does not apply to anyone who views or receives a copy of the recordings and who would then also have knowledge of the cruelty. Second, the child and adult abuse reporting statutes list with specificity the judicial, executive or law enforcement officials to whom the mandatory reports must be submitted. HB1191 states only that the report be made "to a law enforcement agency with jurisdiction over the alleged offense." There presumably are a significant number of federal, state, and local officials and entities who exercise some law enforcement jurisdiction over animal cruelty; it is unclear whether a report to any one of those entities would satisfy HB1191's requirements. In fact, the law enforcement agency to which recordings are to be submitted under HB1191 is not limited to "a law enforcement agency with jurisdiction" but rather is more generally described as "law enforcement authorities." Therefore, the recordings could arguably be given to any law enforcement authority, even if it had no jurisdiction over animal cruelty, although reading the statute *in pari materia* would suggest the contrary. Third, in contrast to the child and adult abuse reporting statutes, HB1191 provides neither confidentiality nor immunity to the person reporting livestock cruelty.

HB1191's requirements related to both the reports and the recordings impact speech rights protected by the First Amendment. In that regard, there are three potential objections on the validity of the restrictions and requirements contained in HB1191. First, the provisions in HB1191 are arguably underinclusive relative to the governmental interests that the bill seeks to protect. Second, the requirement to provide any recordings to law enforcement authorities could be construed by the courts as an unconstitutional prior restraint. Third, the reporting requirements could be found to constitute an unconstitutional burden on news gathering.[3] In addition, HB1191 raises Fifth Amendment concerns related to self-incrimination.

Underinclusiveness

In *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), the United States Supreme Court struck down a state regulation restricting access of minors to "violent video games" as being violative of the First Amendment. The Court found that California's law prohibiting the sale of violent video games to minors was a content-based restriction on speech subject to strict scrutiny review. The Court was not persuaded that the state's interest in protecting children from alleged damaging effects of exposure to violent images supported upholding the over- and underinclusive law, which focused solely on "violent video games." In so holding, the Court explained the issue of "underinclusiveness" as follows:

> The consequence is that [the state's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Here, [the state] has singled out the purveyors of video games for disfavored treatment—at least when compared to [others also exhibiting violent images]—and has given no persuasive reason why.

Brown, 131 S. Ct. at 2740.

As noted above, in contrast to the requirements that anyone with knowledge of suspected child or adult abuse must report such information, HB1191 imposes a reporting duty only on persons who are seeking to engage in speech by creating communicative recordings for the

[3] In some circumstances, the First Amendment also protects against compelled speech just as it protects the right to speak. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc*., 487 U.S. 781, 796-801 (1988) (finding the First Amendment interest in compelled speech and compelled silence is equivalent in the context of fully protected expression and striking down a compelled disclosure regarding a professional fundraiser's fees); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (invalidating a state statute that compelled a newspaper to print an editorial reply thereby exacting "a penalty on the basis of the content [the] newspaper"). "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. The right of freedom of thought protected by the First Amendment against state action "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

purpose of documenting animal cruelty committed against livestock.[4] The underinclusiveness of HB1191's reporting duty, which applies to recordings but not to other documentary or eyewitness evidence of abuse, creates an issue about whether the government is disfavoring particular persons who seek to communicate by creating recordings of livestock cruelty, rather than pursuing its stated interest in having immediate reporting of livestock cruelty in order to facilitate law enforcement investigations. If HB1191 were subject to strict scrutiny review as in *Brown*, then the legislation's sole focus on recordings of livestock cruelty would fail to satisfy the narrow tailoring requirement of the strict scrutiny test. But in contrast to *Brown*, HB1191 does not attempt to regulate commercial video game sales and rentals but rather purports to assist law enforcement with the investigation and prosecution of livestock cruelty. As a general rule, "the public has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (internal quotation marks omitted); *see Austin v. Memphis Publ'g Co.*, 655 S.W.2d 146, 150 (Tenn. 1983) (noting the "time-honored rule that the public has a right to every man's evidence"). Yet given HB1191's impact on First Amendment interests, courts would likely apply an enhanced level of scrutiny to the legislation such that its narrow scope would be constitutionally suspect.

Prior Restraint

The scope of subsection (1)(B) of HB1191 is unclear insofar as it requires the person recording an instance of livestock cruelty to "[s]ubmit *any* unedited photographs, digital images or video recordings to law enforcement authorities." HB1191, § 1(1)(B) (emphasis added). The word "any" has as one of its ordinary meanings "every" or "all." *See, e.g., Webster's New Collegiate Dictionary* 51 (1981). The Tennessee Supreme Court adopted this broad and

[4] Courts have recognized that photography intended to communicate a message to its audience, especially when it involves matters of public interest, is a form of expression, which is entitled to First Amendment protection just as the written or spoken word is protected. The First Amendment has been found to protect the filming of matters of public interest, such as government officials in public spaces whether by the press or by private individuals. *See, e.g., Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (finding that videotaping police in performance of duties may be a protected First Amendment activity); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (finding it "highly probable" that filming of a public official on street by contributors to public access cable show was protected by the First Amendment, and noting that, "[a]t base, plaintiffs had a constitutionally protected right to record matters of public interest"); *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) (holding that arrest of individual filming police activities from private property violated First Amendment); *Porat v. Lincoln Towers Cmty. Ass'n*, 2005 WL 646093, at *4 (S.D.N.Y. Mar. 21, 2005) (noting that photography for more than mere aesthetic or recreational purposes enjoys some First Amendment protection); *Cirelli v. Town of Johnston School District*, 897 F. Supp. 663 (D.R.I. 1995) (holding that teacher had a right under the First Amendment to videotape potentially hazardous working conditions at school, which were a matter of public concern); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding that police interference with television newsman's filming of crime scene and seizure of video camera constituted unlawful prior restraint under First Amendment); *cf. Connell v. Town of Hudson*, 733 F. Supp. 465, 471-72 (D.N.H. 1990) (denying qualified immunity from First Amendment claim to police chief who prevented freelance photographer from taking pictures of car accident).

inclusive definition of "any" in a related context construing Tennessee's Shield Law. *See Austin v. Memphis Publ'g Co.*, 655 S.W.2d at 149 (finding in a facial statutory construction context that "[t]he non-specific adjective 'any' means 'all.'"); *see also Roddy Mfg. Co. v. Olsen*, 661 S.W.2d 868, 871 (Tenn. 1983) (the word "any" in a statute is synonymous with the word "all"). Construed in this sense, HB1191's requirement to submit "any" unedited recordings would require the surrender of all images to law enforcement and would prohibit the person who made the recordings from retaining them in any form. This requirement would appear to prevent the person making the recording from publishing the images once they have been given to law enforcement authorities. Under many circumstances, forty-eight hours may not be sufficient time to prepare and publish recordings subject to HB1191. Accordingly, HB1191 could be held to be a presumptively unconstitutional prior restraint on expression. *See, e.g., CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (staying injunction of telecast of videotape asserted to have been obtained through "calculated misdeeds" of broadcaster); *see also United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010) (holding that depictions of animal cruelty are not categorically outside the protection of the First Amendment).

In order to avoid this constitutional infirmity, a court may adopt an alternative construction and interpret HB1191 as not requiring the submission of *all* existing copies. *See State v. Burkhart*, 58 S.W.3d 694, 697-98 (Tenn. 2001) (holding that courts have a duty to construe a statute to avoid constitutional conflict). While an alternative construction would run contrary to the state Supreme Court precedent described above, it could be argued that, since HB1191's stated purpose is to prevent ongoing livestock cruelty and to obtain convictions, construing it to require only the submission of copies to law enforcement is consistent with its general purpose. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) (holding that statutory language must be construed in light of the statute's general purpose). Furthermore, there are statements in the legislative history that are supportive of this construction. Senate Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 16, 2013) (statement of Sen. Gresham) (stating that HB1191 does not prohibit retention of copies by the recorder); House Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 17, 2013) (statement of Rep. Holt) ("There's nothing here that says . . . a third party cannot have a copy of this tape or recording, whatever it is") (both statements available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1191). Unless a court adopts the narrower construction of "any," HB1191 would likely be found unconstitutional on First Amendment grounds.[5]

[5] The ambiguity over whether HB1191 requires that "all" recordings be submitted to law enforcement authorities would also give rise to a challenge against the legislation under federal due process standards as being "void for vagueness," since HB1191 on its face fails to adequately define its prohibitions and what constitutes a violation. As the United States Supreme Court observed:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . First, . . . laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108-10 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

News Gathering Privilege

The Court in *Branzburg* recognized that news gathering qualifies for First Amendment protection, *see Branzburg*, 408 U.S. at 681, 707. While this principle has been recognized primarily in the context of the press, it has also been acknowledged that the concept of news gathering is very broad and can encompass a wide scope of activity outside what is recognized as the traditional press. *Id.* at 703 ("The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public.").

In *Branzburg*, the United States Supreme Court considered whether the First Amendment affords reporters a conditional privilege against responding to grand jury subpoenas and answering questions relevant to an investigation into the commission of a crime, including revealing confidential sources. *Branzburg*, 408 U.S. at 680, 682. The Court rejected the existence of a unique testimonial privilege for reporters before a grand jury:

> We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. . . . [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91 (footnote omitted). Notwithstanding this holding, a majority of federal courts of appeal appear to interpret *Branzburg* as establishing a qualified privilege of varying scope for journalists to resist compelled discovery. *See Keefe v. City of Minneapolis*, No. 09–2941 DSD/SER, 2012 WL 7766299, at *3 n.3 (D. Minn. May 25, 2012) (so stating, and collecting cases). The Sixth Circuit—in which Tennessee resides— is not part of this majority. *See Storer Communications, Inc. v. Giovan* (*In re Grand Jury Proceedings*), 810 F.2d 580, 583-84 (6th Cir. 1987) (concluding that acceptance of a reporter's First Amendment privilege would be tantamount to substituting the dissent for the majority opinion as the holding of *Branzburg*).[6]

[6] The Tennessee Supreme Court has not addressed the foregoing question, in all likelihood because the General Assembly enacted Tennessee's Shield Law, Tenn. Code Ann. § 24-1-208, nine months after the decision in *Branzburg*. *See Austin*, 655 S.W.2d at 149; Tenn. Code Ann. § 24-1-208(a). Tennessee's Shield Law, Tenn. Code Ann. § 24-1-208(a), expressly provides:

> (a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand

In light of the *Branzburg* decision, a statute that mandates reporting of incidents of animal cruelty and requires the submission of photographic evidence of the violations to law enforcement may be defensible against a First Amendment challenge based on the news gathering privilege. This Office notes, however, some significant qualifications to this observation.

The operation of HB1191 is distinguishable in several respects from that of the grand jury subpoenas at issue in *Branzburg*. *Branzburg* relied, in part, on "the ancient role of the grand jury" in Anglo-American jurisprudence. *See Branzburg*, 408 U.S. at 686-87. The procedures spelled out by HB1191 enjoy no such historical pedigree. In response to the concern that confidential sources would be deterred from furnishing publishable information, *Branzburg* pointed out that grand juries characteristically conduct secret proceedings. *See id.* at 695, 700. HB1191 contains no corresponding commitment to secrecy on the part of law enforcement authorities; in contrast to the statutory reporting requirements for child and adult abuse, HB1191 does not protect the confidentiality of the person making the report, nor does it expressly create an exception from the state public records law for the documentary material submitted to law enforcement. Finally, *Branzburg* observed that the fact that "[g]rand juries are subject to judicial control and subpoenas to motions to quash" helped safeguard First Amendment values inherent in news gathering. *See id.* at 707-08 (noting that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth," that "grand jury investigations if instituted or conducted other than in good faith" would pose First Amendment issues, and that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."). HB1191, by contrast, requires that recorders of livestock cruelty turn over their evidence without judicial intermediation, within a relatively short time frame (forty-eight hours or by the close of business the next business day, whichever is later), and to undefined "law enforcement authorities" (leaving the determination of the appropriate agency to the recorder of the information). *See* HB1191, § 1, (1). HB1191 also makes the failure to submit this documentation within the relatively short time frame a crime. One who wishes to raise and test First Amendment concerns relative to HB1191 must first subject himself or herself to criminal liability. *Id*. § 1, (2). All of these factors raise the concern expressed by the dissent in *Branzburg* that authorities not "annex" news gatherers as "an investigative arm of government." *See id.* at 725 (Stewart, J., dissenting). Thus, while the State has a significant interest in preventing cruelty to livestock, *Branzburg* leaves room for a challenge that the means chosen do not bear an appropriate relation to that goal.

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jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

It is not clear whether HB1191 conflicts with the Shield Law. According to the House sponsor of HB1191, the legislation is not intended to amend the Shield Law. House Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 17, 2013) (statement of Rep. Holt) (in response to inquiry from Rep. Lynn on how HB1191 relates to the Shield Law, responding that HB1191 is not intended to nullify the Shield Law, while indicating that he believes the Shield Law has already in many ways nullified itself due to the difficulty in defining its scope) (available at http://wapp.capitol.tn.gov/apps/BillInfo/ Default.aspx?BillNumber=HB1191). However, if HB1191 is not intended to encompass recordings of livestock cruelty that are generated in the process of "gathering information for publication or broadcast," then HB1191 would have little practical applicability. For purposes of this opinion it is assumed that HB1191 applies at least to some activities covered by the Shield Law.

Self-incrimination

Branzburg noted in the context of compelled speech related to criminal investigations that the courts will require grand juries to operate within the limits of the Fifth Amendment to the United States Constitution, which in pertinent part provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* at 708; *see Johnson v. United States*, 228 U.S. 457, 458 (1913) (noting that pursuant to the Fifth Amendment a party is personally privileged from producing evidence). Similarly, HB1191 cannot not be implemented to override the constitutional right against compelled self-incrimination that is guaranteed by the Fifth Amendment to the United States Constitution. In certain instances, unedited documentary evidence of suspected animal cruelty violation may also reveal a possible violation of the law by the person recording that cruelty, such as trespass. The Fifth Amendment right could be asserted to protect that person from being required by HB1191 to submit documentary evidence to law enforcement which may incriminate that person in a crime.

2. A recorder of livestock cruelty might have two property interests respecting the images taken: ownership of the physical medium in which the images are embodied and, provided that the pictures meet minimal standards of originality, a copyright interest in the images themselves. If the courts construe HB1191 as requiring only the submission of unedited copies to law enforcement, the law is not likely to significantly invade the former interest. The Copyright Act, 17 U.S.C. §§ 101 to 1332, grants to copyright holders the exclusive rights to, *inter alia*, display, reproduce, and distribute their works, 17 U.S.C. § 106, and creates a cause of action for infringements of those rights, 17 U.S.C. § 501. The fair use doctrine permits others to reproduce copyrighted works for approved purposes such as criticism, reporting, and education. *See* 17 U.S.C. § 107. A non-exhaustive four-factor test is employed to determine whether a use is a fair use in any given case: "[T]he factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.* "Using this analysis, courts have repeatedly held that the reproduction of copyrighted works as evidence in litigation is fair use." *Scott v. WorldStarHipHop, Inc.*, No. 10 Civ. 9538(PKC)(RLE), 2011 WL 5082410, at *7 (S.D.N.Y. Oct. 25, 2011) (citing, among other authorities, *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406–07 (9th Cir. 1982), and 4 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.05[D] (2011) (stating that "[I]t seems inconceivable that any court would hold such reproduction to constitute infringement either by the government or by the individual parties responsible for offering the work in evidence.")). Thus, while each case will turn on its own facts, law enforcement authorities are likely to be able to argue that a circumscribed, noncommercial use of images depicting cruelty to livestock in the course of an investigation of a crime amounts to a fair use.

HB1191 does not make the documentary evidence confidential nor does it create an exception to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-101 to -702, regarding whether a citizen may request the production the documentary evidence required to be submitted to law enforcement authorities. To the extent that this documentary evidence is subject to production under a public records request, the citizen receiving that documentary evidence

apparently would be bound by any applicable copyright laws regarding the display, reproduction, and distribution of that material.

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