

# Dan Farr Prods. v. U.S. Dist. Court, 874 F.3d 590 (9th Cir. 2017)

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## BACKGROUND

Appellee-plaintiffs are San Diego Comic Convention (“SDCC”), a not-for-profit corporation, with the purpose of appreciating comics and other popular arts through various events, such as its “Comic-Con convention” in San Diego. Petitioner-defendants are Dan Farr Productions, Daniel Farr, and Bryan Brandenburg (“Petitioners”), and who also produce a convention for comics and the popular arts in Salt Lake City, Utah, entitled “Salt Lake Comic Con.”

The SDCC was created in 1970 by “a group of comics, movie, and science fiction fans” determined to host southern California’s first comic book convention. Although the SDCC has changed its name a couple of times, it has always kept the “Comic Convention” portion of its name. The SDCC schedules an extensive list of events that range from exhibits, workshops, and educational and academic events to portfolio reviews that bring together aspiring artists and major companies.

The Salt Lake Comic Con was created in 2013 by Dan Farr Productions, which focuses on “organizing events, launching and acquiring new shows, and partnering with premium celebrities and brands in the pop culture arena.” The Convention offers its consumers events such as photo ops, panel discussions with celebrities, costume competitions, and film festivals.

SDCC’s complaint alleged that the Petitioners’ use of the term “Comic Con” infringed on its family of service marks. In response, the Petitioners claimed that SDCC had abandoned its trademarks and that they were generic and descriptive. Throughout the litigation, the Petitioners extensively posted various news reports, documents, and their opinions relating to the case on their social media outlets. Subsequently, SDCC moved for a protective order to prevent the Petitioners from further discussing the case on their social media outlets on the basis that the Petitioners’ conduct threatened SDCC’s constitutional right to a fair trial by tainting the jury pool.

## PROCEDURAL HISTORY

The district court partially granted SDCC’s motion for a protective order, concluding that Petitioners’ behavior of making public statements about the trial, both before and during, on Petitioners’ social media outlets endangered SDCC’s constitutional right to a fair trial. The district court’s

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protective order required Petitioners to refrain from opining about matters related to the substantive parts of SDCC's claim. Furthermore, if Petitioners chose to publish, post, or share public documents that were associated with the current case, they were ordered to share the entire document as well as to withhold any statements regarding the suppressed matters. Petitioners appealed and sought writ of mandamus, which was granted.

#### ISSUE

The issue was whether the district court violated Petitioners' First Amendment rights when it prohibited them from discussing the litigation on their social media outlets and required them to post a disclaimer announcing the court's prohibition.

#### DECISION

The Ninth Circuit Court of Appeals granted Petitioners' writ of mandamus and ordered the district court to vacate its order as an unconstitutional prior restraint on speech.

#### REASONING

In determining whether to grant Petitioners' the writ of mandamus, the court looked at whether Petitioners' conduct posed a serious and imminent threat to SDCC's constitutional right to a fair trial, and whether prior restraint was the least restrictive means available.

First, the court reasoned that because prior restraint on speech is "the most serious and least tolerable infringement on First Amendment rights,"<sup>1</sup> it would be permissible only if without the prior restraint securing twelve jurors who would render a verdict based solely on the admitted evidence was impossible. The court stated that SDCC failed to present evidence that illustrated how Petitioners' conduct precluded securing an impartial jury: it failed to show how many of Petitioners' 35,200 Twitter followers were registered voters in San Diego and Imperial Counties, and how many of the 120,000 2014 Salt Lake Comic Con attendees would be included in the San Diego jury pool.

Additionally, the court stated that the 200,000 articles the district court focused on was in fact a single 2014 Associated Press article. The court stressed that only 160,000 printed copies of the article were distributed worldwide and that even the district court judge himself was not aware of it. The court also found the number of people who showed Petitioners' support on Facebook insignificant, and it noted that SDCC also failed to show if any of these supporters were part of the San Diego jury pool.

Furthermore, the court reasoned that because this civil trademark infringement case was not as inflammatory as a criminal trial, any pretrial

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1. *Dan Farr Prods. v. U.S. Dist. Court*, 874 F.3d 590, 596 (9th Cir. 2017).

publicity would be less likely to present egregious constitutional problems. The court also highlighted that pretrial publicity does not threaten the fairness of a trial in large metropolitan areas.

Secondly, the court held the protective order was not the least restrictive means available, and the district court failed to follow binding precedent that listed voir dire, sequestration, and jury instruction as alternatives to prior restraint. The court noted that the district court erroneously defined the voir dire process when it stated that all citizens who have heard or read about the case would be screened out by the process. The court stated that voir dire excludes people who have fixed their minds about guilt or innocence about a case or party.

Furthermore, the court found fault in the district court's reasoning that sequestration would impose unnecessary inconvenience on the jury: the court stated that the jury's inconvenience alone should not outweigh Petitioners' First Amendment rights.

Finally, the court also found the district court's reasoning as to why jury instructions were inappropriate for the case unsound. The district court stated that jury instructions were inadequate because the court could not expect the jury to actually follow its instructions. The court stated that there was a rebuttable presumption that the jury would follow the court's instruction, and that the district court failed to overcome that presumption.