Enjoining Nonparties

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Abstract

In this Article, Professor Richard Bales and Ryan Allison use a series of hypothetical examples in order to flesh out the procedures and limitations of enjoining nonparties. The Article discusses the underlying policy conflicts that arise upon attempting to bind nonparties by an injunction decree.

In a picturesque little rural community in Anyburg, America during the nineteenth century, Farmer Fred liked to look out his window each morning and admire his luscious orchard of orange trees. The orchard extended for many acres to a nearby highway where a high fence separated the trees from the rest of the world. A quaint little brook flowed through his lands and kept his trees well watered. His oranges were the best in the state and he frequently sold them to high-priced bidders. Often, Farmer Fred liked to eat a few himself. The orchard was his most prized possession.

One day, Farmer Fred discovered that his neighbor, Evil Ed, liked to cross the highway and climb the fence to take as many oranges as he could carry. Evil Ed liked to eat and sell the oranges. Farmer Fred immediately obtained an injunction against Evil Ed which stated that "Evil Ed is not permitted to enter Farmer Fred's orchard to take oranges, and if he does, he will be fined $500 for every orange he takes."

The law in the nineteenth century stated that only those named to an injunction would be bound by the decree. So Evil Ed had Igor, his gardener, run over to Farmer Fred's orchard and take a few buckets of the fruit. Farmer Fred saw this and declared that Evil Ed would be in trouble with the courts.

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Evil Ed said, "No, no, my dear farmer. Your injunction says that only I *cannot take your precious oranges." He patted Igor on the head, then added, "It says nothing about my dear Igor."*

Evil Ed smiled and turned and walked back into his house to enjoy his oranges.

I. Introduction

Throughout the past three centuries, courts inconsistently have answered the question of who may be bound by an injunction decree. In the eighteenth and nineteenth centuries, courts held that only parties to the injunction suit could be bound. Over time, courts held that this rule was too narrow in its application. Litigants seeking injunctions were not afforded sufficient protection because defendants could disobey the court simply by acting through nonparties.

Eventually, many courts began to hold that the traditional scope of who could be bound by an injunction was too narrow. Courts established six categories of nonparties that could be held in contempt for the violation of an injunction decree: (1) agents of the enjoined party, (2) aiders and abettors of the enjoined party, (3) persons cognizant of the decree, (4) successors in interest of the enjoined party, (5) those coming into contact with a particular res, and (6) members of the same class in a class action suit.[1]

Each of these categories reflects a common underlying policy conflict. On the one hand is the principle, rooted in due process,[2] that a person should not be bound by an injunction decree unless she has had her day in court.[3] On the other hand, strict application of this principle facilitates the circumvention of injunction decrees by permitting unscrupulous parties to act through non-parties, such as agents or successors, who are not named in the injunction.

This Article examines how courts have grappled with this underlying policy conflict in cases arising under each of the six categories. Each succeeding part of this Article discusses one of the six categories of nonparties and provides possible solutions for the problems facing

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[1] Note, *Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719, 720 (1965).

[2] *See id.*

[3] *See id.* at 719.

modern courts. Part II of this Article discusses the agents of enjoined parties. Part III discusses aiders and abettors. Part IV discusses those persons cognizant of an injunction decree. Part V discusses the modern problem that successors in interest of the enjoined party face. Part VI discusses those coming into contact with a particular res. Part VI discusses members of the same class in a class action suit, and Part VII concludes.

II. Agents

Assume that Farmer Fred's orchard of orange trees are flourishing in the twentieth century. One afternoon around lunchtime, Farmer Fred looks out his window and sees Igor plucking an orange off an orchard tree. Farmer Fred knows that Igor works for Evil Ed (and is probably getting oranges for his master), so the good farmer notifies the proper authorities. Igor is later served with a summons to appear in court for violating the injunction. Igor claims that he cannot be held in contempt because the injunction named Evil Ed and not his gardener. In court, Igor protests as the judge declares that Igor has to pay $500 to Farmer Fred for the orange he took.

"But why?" asks Igor. "Because, good sir," answers the judge, "you are an agent of Evil Ed."

A. Background of Agents

Agents of a person can be bound to injunction decrees whether or not those individuals were parties to the original suit.[4] Courts have consistently relied on traditional agency principles to determine whether a person can be considered an "agent" of a party-defendant.[5] Agents have included employees,[6] partners,[7] and attorneys.[8]

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[4] *Id.* at 721.

[5] *Id.*

[6] Note, *supra* note 1, at 720 (citing Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 132 F. 978, 978 (E.D. Pa. 1904)).

[7] *Id.* (citing State *ex rel.* Kruckman v. Rogers, 124 Or. 656, 659, 265 P. 784, 785 (1928)).

[8] *Id.* (citing *In re* Rice, 181 F. 217, 220 (M.D. Ala. 1910)).

In *Wellesley v. Mornington*,[9] an English court introduced the concept that a person may be held liable when he acts as an agent for a party already bound to an injunction.[10] Lord Wellesley received an injunction against the Earl of Mornington prohibiting the Earl from cutting and taking timber from Lord Wellesley's estate.[11] The courts served the Earl with notice of the injunction and served all of his servants so that they would be made aware of its existence.[12] A servant of the Earl violated the injunction and continued to collect timber for the Earl.[13] Lord Wellesley took legal action against the servant but eventually decided not to seek a punishment.[14] In dicta, the court stated that the agent would have been held to have violated the injunction because "in the position that he was, and knowing" that the Earl was prohibited from taking the timber, the agent should "have taken care not to do any acts in violation of the order of the Court."[15]

In *Alemite Manufacturing Corp. v. Staff*, the plaintiff sued Joseph Staff and Louis John for patent infringement.[16] At the time of the suit, Staff was a salesman for John's business. The court issued a decree enjoining John and "his agents, employees, associates and confederates" from infringing or "aiding or abetting or in any way contributing to the infringement" of Alemite's patent.[17]

After the injunction was issued, Staff left John's employ and set up a business for himself.[18] Staff then infringed on Alemite's patent. Alemite responded by asking the judge in the original suit to punish Staff for contempt. Staff argued that, because he was no longer employed by John, he was no longer covered by the express terms of the original

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[9] 11 Beavan 181, 50 Eng. Rep. 786 (Ch. 1848).

[10] Note, *supra* note 1, at 720.

[11] *Wellesley*, 50 Eng. Rep. at 787.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] 42 F.2d 832 (2d Cir, 1930).

[17] *Alemite*, 42 F.2d at 832.

[18] *Id.*

injunction and therefore could not be held in contempt.[19] The district court disagreed and held Staff in contempt. Staff appealed.

Judge Learned Hand, writing for the Second Circuit Court of Appeals, held that because Staff was no longer employed by John, he was not bound by the injunction.[20] Hand wrote, in language that is oft-quoted, that "no court can make a decree which will bind any one but a party . . . it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so . . . the persons enjoined are free to ignore it."[21]

Hand's opinion further defined the classification of agent, when the opinion stated that

> [t]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.[22]

The court concluded that the district court "had no more power in the case at bar to punish [Staff] than a third party who had never heard of the suit."[23] Thus, there must be some relationship between the nonparty and the named party before that nonparty can be held to the injunction.

B. Modern Problem of Agents

Since Judge Hand's decision in 1930, courts have not established a concrete way of identifying those to be considered agents to a party-defendant of an injunction.[24] The modern problem that courts face is that a court's insufficient attention to the detail of an injunction may permit a party-defendant to circumvent the decree by acting through another

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[19] *Id.*

[20] *Id.* at 833.

[21] *Id.* at 832.

[22] *Alemite*, 42 F.2d at 833.

[23] *Id.*

[24] Note, *supra* note 1, at 721-22.

person.[25] This third person can become a straw man for the party-defendant so that the injunction may be violated without blame being given to those it intends to control. Yet, too much attention to enforcing the injunctions could lead the courts to be too strict and may lead to a third person being bound to the decree when she has had no day in court to defend her interest.[26]

1. Ambiguities in the Wording of Injunctions

A possible answer as to why courts have remained so indecisive towards agents lies in the vocabulary of injunctions themselves. Modern courts constantly face injunctions that are burdened with an inadequate vocabulary.[27] The word "agent" signifies several classifications such as "servants, associates, conspirators, confederates, successors in interest, or simply successors, assigns, and nominees."[28] Other terms such as "legally identified" (used by Learned Hand) also take the form of "represented by" or even the more ambiguous "privity."[29] Courts often use legal catch-phrases instead of carefully delineating the person bound by the injunction.[30] With a large number of available terms, courts have trouble deciding which words constitute the correct terms and who really falls into these categories. These ambiguities cause problems later when the injunction has to be interpreted and enforced.[31]

2. Agents Who Act Independently

Farmer Fred sees Igor taking an orange. Farmer Fred tells Igor that he will have to pay Farmer Fred the required $500. Igor declines and

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[25] *Id.*

[26] Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 877 (1975).

[27] *See generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U.L. REV. 193 (1992).

[28] Rendleman, *supra* note 26, at 877-78.

[29] *Id.* at 878.

[30] *Id.* at 876.

[31] *Id.* at 880.

they go to court. In court, Igor testifies that he was on his lunch break and forgot to bring his lunch pail to work. He thought it would be acceptable to go take an orange from Farmer Fred's orchard. There were a lot of oranges and one orange wouldn't hurt. Also, Igor didn't know anything about an injunction that said that Evil Ed was prohibited from taking Farmer Fred's oranges. Igor was thus acting independently. The judge agreed and let him go without having to pay Farmer Fred a dime.

An agent is to be given a day in court when he has an interest that differs from that of his superior.[32] Judge Learned Hand stated that an agent who severs his interest with his employer and acts for his own benefit, or otherwise acts outside the agency of his authority, is acting independently and is thus outside the realm of the injunction.[33] The modern problem courts have is determining when an agent is acting in an independent manner and to what extent the agent was previously represented by her superior at the initial injunction proceedings.[34] If courts err, then usually the mistake occurs because the drafters of an injunction infer that an agent has an identical interest that is adequately represented by her superior.[35] To infer such an interest contravenes the reasoning behind establishing the category of the agent. Such an inference may violate the agent's due process where her interest has not received its proper day in court.[36]

C. Possible Solution for Agents

A possible solution that would provide independent agents with better protection from injunction decrees would be for the courts to be linguistically more precise in constructing the injunctions. By enjoining specific people instead of ambiguous classifications such as positions of office or unnamed members of a group, the courts could reduce ambiguities that concern the modern agents.

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[32] Note, *supra* note 1, at 721-22.

[33] *Alemite*, 42 F.2d at 832.

[34] Rendleman, *supra* note 26, at 880.

[35] *Id.*

[36] *Id.*

The injunction should bind all persons or actions that are reasonably connected with the complaint.[37] If an injunction seeks to prevent a person from doing a certain thing, the person should be named, as should any specific agents and their duties to the party-defendant. But if an order seeks to prevent a specific action from occurring, the drafters can name the action and navigate around the issue of agents. The injunction no longer looks to who violated the injunction and whether the breaching party is an agent, but instead holds the party in contempt for simply violating the injunction.

This occurred in *Microsystems Software, Inc. v. Scandinavia Online AB*.[38] In this case, the plaintiff, Microsystems Software, Inc., developed and distributed "Cyber Patrol"–a blocking software used by parents to prevent their children from roaming into "salacious Internet venues."[39] The program prevented users from accessing a secret list of sites deemed objectionable.[40] Shortly after Microsystems introduced Cyber Patrol, Eddy Jansson and Matthew Skala, the original defendants, reverse-engineered the program and wrote a bypass code that enabled users not only to thwart the program but also to gain access to the list of blocked sites.[41] They then posted the code on their own web sites and gave permission for others to copy it.[42] The appellants were individuals who downloaded this software and began using it and distributing it from their own website.[43]

Microsystems sued and received an injunction against the defendants and "those persons in active concert or participation with them."[44] Microsystems complained that it was suffering irreparable injury because multiple individuals throughout the United States and the world had downloaded, copied, and created "mirror" web sites revealing the bypass

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[37] Thaxon v. Vaughn, 321 F.2d 474, 478 (4th Cir. 1963).

[38] 226 F.3d 35, 42 (1st Cir. 2000).

[39] *Microsystems Software*, 226 F.3d at 38.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Microsystems Software*, 226 F.3d at 38.

code.[45] The injunction provided that all persons distributing the bypass code could be held in contempt even though they were not individually named.[46] The injunction sought to hold *any* party in contempt that violated the decree.[47] In drafting the injunction, the court chose not to word the injunction to specifically name possible violators of the injunction.[48] Instead, the injunction applied to anyone who committed the act itself.[49]

The existence of such a linkage makes it fair to bind the nonparty, even if she has not had a separate opportunity to contest the original injunction. The interest here is proven not to be independent because the close alliance with the enjoined defendant adequately assures that the nonparty's interests were sufficiently represented. In *Microsystems Software*, for example, the interest of persons who had distributed the bypass code were closely aligned and adequately represented by the defendants.[50] It therefore was proper to bind them to the injunction even though they had not participated in the suit as parties.[51]

III. Aiders and Abettors

Evil Ed stands at the side of the highway staring at the orange trees and wonders how he might get a taste. As he stands there, a car drives by and stops to drop off Hitchhiker. Hitchhiker is standing by the orchard and notices the oranges. Evil Ed yells across the highway.

"Hey, you there! Why don't you go get us some oranges? There's an injunction that says that I am not allowed."

Hitchhiker nods and climbs the fence and retrieves some oranges for himself and Evil Ed. Farmer Fred hops out from behind a tree with his lawyer. Evil Ed runs off. Farmer Fred demands that Hitchhiker pay the

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[45] *Id.*

[46] *Id.* at 39.

[47] *Id.* at 40.

[48] *Id.* at 41.

[49] *Microsystems Software*, 226 F.3d at 38.

[50] *Id.* at 43.

[51] *Id.*

farmer $1000 for the two oranges he took for himself and Evil Ed. Hitchhiker refuses and says that just because he helped Evil Ed does not mean that he is in trouble. The lawyer steps in and tells Hitchhiker that he was aiding and abetting a named party, and thus is bound by the injunction.

A. Background of Aiders and Abettors

The second category of nonparties that courts hold to injunctions is the nonparties that assist the enjoined defendant in violating a decree.[52] These aiders and abettors are held in contempt in the same manner as agents. In the landmark English case of *Seaward v. Patterson*,[53] an injunction ordered Patterson to cease conducting boxing matches. Patterson was later accused of violating the injunction when the matches continued to occur.[54] He claimed that it was not he but Murry, a nonparty, that was running the boxing exhibitions.[55] Patterson argued that he could not be held in contempt since Murray was committing most of the acts.[56] Murray argued that he could not be held in contempt because the court did not have the proper jurisdiction to convict a nonparty that violated an injunction.[57] The court held that Murray could be held in contempt because he was a central character in continuing acts of the boxing matches and he was "aiding and abetting" the proscribed activity.[58]

The court conceded that there were previous cases that had acquitted nonparties, but those cases did not involve parties who "assisted" in the acts.[59] The court announced two kinds of contempt: one where a party is held in contempt for the benefit of the injunction plaintiff, and the second type of contempt for "obstruct[ing] the course of justice."[60] The

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[52] Note, *supra* note 1, at 723.

[53] 1 Ch. 545, 546 (C.A.) 1897.

[54] *Seaward*, 1 Ch. at 546-47.

[55] *Id.* at 547.

[56] *Id.* at 549-50.

[57] *Id.* at 547.

[58] *Id.* at 554.

[59] *Seaward*, 1 Ch. at 552, 555.

[60] *Id.* at 555-56.

difference is important as it caused the aider or abettor to be liable for criminal contempt for disobeying the court, but not for breaching the injunction.[61]

B. Modern Problem of Aiders and Abettors

The problem that courts face today is driven by the fact that they still have not distinguished between the two types of contempt.[62] The courts are faced with deciding between whether an aider or abettor has breached the injunction or gone as far as obstructing justice.[63] In the next category of nonparties, a solution is suggested that would help courts better construct injunctions dealing with aiders and abettors.

IV. Persons Cognizant of Injunction Decrees

Hitchhiker was dropped off beside Farmer Fred's orchard and Evil Ed was nowhere around. Hitchhiker was standing around waiting for his next ride and decided that he was hungry and would grab an orange or two. He remembered hearing the news of Farmer Fred's injunction. He was reminded of it again when he saw a sign on the fence that said orange-snatching was prohibited. Hitchhiker had heard of Igor the agent's plight, but Hitchhiker himself did not work for Evil Ed, nor was he helping anyone but himself to an orange. He therefore believed that he was outside the scope of those prohibited from taking oranges. He climbed the fence and took a bite out of an orange. Farmer Fred's tenacious lawyer jumped out from behind a tree and declared that Hitchhiker had violated the injunction and would suffer the consequences.

A. Background of Persons Cognizant

Modern law has extended to bind persons who have knowledge of an injunction.[64] An individual will be held bound if the individual has

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[61] Note, *supra* note 1, at 723.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 733-35.

knowledge of the injunction and is aware of the proscribed acts, even if the individual is not related to and has not assisted any enjoined party.[65] In the 1901 case of *In re Reese*, the plaintiffs obtained an injunction to enjoin the defendants from using threats of intimidation to prevent miners from continuing to work for the plaintiffs' Kansas coal company.[66] The injunction also forbade the defendants from influencing those already employed by the coal company to quit.[67] The injunction enjoined forty-six people by name, all of whom were citizens and residents of the state of Kansas.[68] The injunction named all mine workers who worked for the mine division and all other persons operating with the mine division who were citizens of Kansas.[69] John Reese was from Iowa and was not included on the list of defendants, nor was he involved with any of the specified mine divisions.[70] Reese was aware of the injunction but violated it by attempting to influence those employed by the coal company to quit.[71] Reese was charged with contempt as a party to the suit.[72]

The Eighth Circuit Court found that Reese acted independently without connection to the defendants.[73] The plaintiff argued that Reese should be held in contempt for violating the injunction because he was aware of its existence.[74] The court dismissed the complaints against Reese because he was not a party to the cause.[75] The court stated in dicta that Reese *would* have been convicted of contempt for obstructing the course of justice *if* such a claim had been alleged.[76] This stands for the proposi-

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[65] *Id* at 735.

[66] 107 F. 942, 942 (8th Cir. 1901).

[67] *Reese*, 107 F. at 945.

[68] *Id.* at 942.

[69] *Id.*

[70] *Id.* at 944.

[71] *Id.*

[72] *Reese*, 107 F. at 945.

[73] *Id.*

[74] *Id.* at 946.

[75] *Id.* at 948.

[76] *Id.* at 945-48.

tion that one need not be named to an injunction if he or she is cognizant of the decree.[77]

In *Ex parte Lennon*, James Lennon was employed by a railroad that was bound to an injunction that forced the company to accept transport railroad cars from the plaintiff company.[78] Lennon refused to accept one of the railroad cars and was held in contempt.[79] Lennon used the defense that he was a nonparty and was not subject to the injunction.[80] The Supreme Court stated: "To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."[81] Thus, as in *Reese*, here the Supreme Court held that one who is not named can still be found liable for breaching the injunction or obstructing justice.[82]

B. Modern Problem of Persons Cognizant

The *Lennon* Court failed to distinguish between a person who breaches an injunction and a person who obstructs justice. Many courts have tried to define who can be found to have breached or obstructed justice.[83] Judge Learned Hand wrote in *Alemite Manufacturing Corp. v. Staff* that "the respondent must either abet the defendant, or it must be legally identified with him."[84] Although *Alemite* is an often cited case for authority on binding nonparties, that case also failed to mention a distinction between breaching an injunction and obstructing justice.

In 1895, the Supreme Court in *In Re Debs* held that the language of an injunction that prohibited "all other persons" from violating an

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[77] *Reese*, 107 F. at 949.

[78] 166 U.S. 548, 17 S. Ct. 658, 41 L. Ed. 1110 (1897).

[79] *Lennon*, U.S. at 552.

[80] *Id.*

[81] *Id.* at 554 (citing Wellesley v. Mornington, 11 Beavan 181, 50 Eng. Rep. 786 (Ch. 1848)).

[82] *Id.* at 557.

[83] Rendleman, *supra* note 26, at 884-88.

[84] 42 F.2d 832, 833 (2d Cir. 1930).

injunction was too broad in its application.[85] The Court later accepted the wording of "all other person whomsoever" that soon became commonplace.[86] In the 1934 case of *Chase National Bank v. City of Norwalk*,[87] the Supreme Court held that an injunction obligating "all persons to whom notice of the order of injunction should come" was "clearly erroneous" because it "assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law."[88] Thus a problem exists where courts cannot distinguish who among aiders and abettors should be considered "notified" of an injunction and who can be held in contempt.

C. Possible Solution for Persons Cognizant

One possible solution is an alternative to the two options set forth in *Seaward v. Patterson*.[89] If non-defendants frustrate relief, then the courts could seek a second injunction naming the new "troublemakers" as defendants.[90] Using a second injunction would be an effective way of dealing with those who violate injunctions. There are two reasons why this second injunction would be useful to the courts. First, while the actor was not a party to the original injunction, a second injunction would allow the courts to name the violator as a bound entity in the future. Second, while the violator's original acts may have been independent from those of the named parties, the violator's interest is no longer independent because of the second injunction.[91] The downside to a second injunction is that the violator gets "one free bite" at the proverbial apple since she cannot be found in contempt of an injunction until she disobeys the injunction that names her.[92] This suggestion does not fully satisfy the

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[85] 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895).

[86] Rendleman, *supra* note 26, at 907.

[87] 291 U.S. 431, 54 S. Ct. 475, 78 L. Ed. 894 (1934).

[88] *City of Norwalk*, 291 U.S. at 436-37.

[89] 1 Ch. 545 (C.A.) 1897.

[90] Rendleman, *supra* note 26, at 909.

[91] *Id.* at 910.

[92] *Id.* at 909.

aims of the plaintiff, but it does "protect the interests of the defendant and society."[93]

One modern case where this solution could have been applied is *Paramount Pictures Corporations v. Carol Publishing Group, Inc.*[94] Samuel Ramer authored a book entitled *The Joy of Trek: How to Enhance Your Relationship with a Star Trek Fan.*[95] In 1997, Carol published the book, and approximately 6000 copies were distributed nationally to bookstores.[96] Ramer never received permission from Paramount to write the book, and Paramount believed that there was too much copyrighted material used, including portions of some 300 scripts.[97] Paramount brought a copyright infringement action against Carol and Ramer, their "agents, servants, employees, attorneys, and assigns, and all persons acting in concert with them" from printing or offering for sale *Joy of Trek.*[98] An injunction was issued that halted the distribution of the book.[99] Though the book was no longer being sent out by Carol, the book was still being sold in stores.[100] On appeal, Paramount then requested a supplemental order to clarify whether the injunction included non-party distributors and retailers currently selling *Joy of Trek.*[101] Paramount also asserted that Carol Publishing was obligated to notify those retailers that were acting in concert by distributing and selling the book.[102] Carol responded by arguing that it was in full compliance with the literal language of the injunction.[103] Carol argued that because the transactions between the publishing company and the retailers were complete before the injunction was issued, Carol could not be "acting in concert" with the

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[93] *Id.* at 911.

[94] 25 F. Supp. 2d 372 (S.D.N.Y. 1998).

[95] Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329, 332 (S.D.N.Y. 1998).

[96] *Carol Publ'g*, 25 F. Supp. 2d at 374.

[97] *See id.*

[98] *Id.* at 373.

[99] *Id.*

[100] *Id.* at 375.

[101] *Carol Publ'g*, 25 F. Supp. 2d at 374.

[102] *Id.* at 373.

[103] *Id.* at 376.

retailers as prohibited by the injunction.[104] Paramount rejoined that "by selling the book, these retailers and distributors may well be found directly liable for copyright infringement."[105]

The Federal District Court for the Southern District of New York held that, although the retailer and distributors may be independently liable for copyright infringement, this was not "a basis for expanding the injunction against Carol Publishing."[106] The court held Paramount had shown no evidence that Carol and the distributors were acting in concert with each other or to rebut Carol's evidence that Carol and the distributor had completed any and all transactions dealing with the book.[107] Although the court indicated that Paramount could pursue a second copyright infringement action against the retailers, the Court denied Paramount's request to extend the existing injunction to the retailers and distributors.[108]

Paramount could have avoided this situation by simply requesting a second injunction against the retailers and distributors instead of trying to expand the existing injunction. It was possible that the distributors and retail bookstores were not cognizant of the injunction against Carol Publishing. Even if the nonparties had been aware of the injunction, they could have successfully argued that all dealings with Carol had been completed. Paramount should have requested a second injunction directed specifically at the distributors and retailers. By seeking to expand the original injunction instead of seeking a second, more specific, injunction, Paramount wasted valuable time, giving the retailers and distributors more bites of the apple.

V. Successors in Interest of the Enjoined Party

Evil Ed passes away. In his will he leaves all of his property and interests to his son Evil Eddie. Evil Eddie remembers hearing his father

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[104] *Id.* at 375.

[105] *Id.*

[106] *Carol Publ'g*, 25 F. Supp. 2d at 376.

[107] *Id.*

[108] *Id.*

complain about the injunction and how he wished he could get an orange without paying for it. So in his father's memory, Evil Eddie decides to go over and take an orange. Evil Eddie was never formally aware of the injunction because, during his father's litigation, Evil Eddie was away at the Evil University studying to take over his father's estate. The new master of the Evil estate crosses the highway, scales the fence, and encounters the lawyer who tells Evil Eddie to leave. Evil Eddie is told of the injunction against his father, but Evil Eddie defends by saying the he cannot be held to the decree because only his father was named. Evil Eddie is wrong.

A. Background of Successors in Interest

When a party seeks to enjoin a nonparty, and that nonparty is a successor in interest to the property subject to litigation, the nonparty can be found to have violated an injunction.[109] Successors in interest encompass many types of people including heirs, purchasers, transferees, and successors to a specified position or office.[110]

Courts determine if an individual is subject to an injunction as a successor in interest by assessing the relationship and not simply by construing the terms of the injunction.[111] Up through the middle of the twentieth century, many courts did not recognize that injunctions affect the nonparties that may have an interest in a future situation.[112]

The landmark case that dealt with successors or assigns was *Regal Knitwear v. National Labor Relations Board.*[113] In this case, the National Labor Relations Board issued a cease and desist order against the party-defendant including "its officers, agents, successors and assigns."[114] The

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[109] Walling v. Reuter, 321 U.S. 671, 674, 64 S. Ct. 826, 828, 88 L. Ed. 2d 1001, 1004-05 (1994); Golden State Bottling Co., Inc. v. N.L.R.B., 414 U.S. 168, 178, 94 S. Ct. 414, 422, 38 L. Ed. 2d 388, 395 (1973); Computer Searching Corp. v. Ryan, 439 F.2d 6, 9 (2d Cir. 1971).

[110] Note, *supra* note 1, at 727-28.

[111] *Id.* at 727.

[112] *Id.*

[113] 324 U.S. 9, 65 S. Ct. 478, 89 L. Ed. 661 (1945).

[114] *Regal Knitwear*, 324 U.S. at 10.

question before the court was whether enforcement would be granted if the term "successors and assigns" was present in the injunction.[115] Up to that point, there were conflicting holdings among the Circuits as to whether the term could be enforced.[116] The *Regal Knitwear* Court noted that the Seventh Circuit had consistently invalidated the term "successors and assigns" in injunctions.[117] The Seventh Circuit nonetheless had implied that, in some situations, those same successors and assigns were bound to the injunction even though the injunction did not name them.[118] The *Regal Knitwear* Court addressed this issue:

> When one court of appeals strikes out the provision but says its absence may in some circumstances have the same effect as if it were there, and another court of appeals approves the provision but says its presence may have no more effect than if it were out, there is more than a faint suggestion that the conflict is over semantics rather than over practical realities.[119]

Thus, the Court recognized the necessity of clarifying the meaning of "successors and assigns" in the injunction.[120]

The Court declared that injunctions may not be granted where they are so broad as to punish the conduct of persons who are acting independently and who have not had their day in court.[121] The Court emphasized that while the term "successors and assigns" could be a term that violates the rights of nonparties, it also could be a tool used by party-defendants to sidestep injunction decrees.[122] If a party-defendant could evade an

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[115] *Id.*

[116] *Id.* at 11 (citing NLRB v. Brezner Tanning Co., 141 F.2d 62, 65 (1st Cir. 1944) (holding that successor or assign will not be held in contempt of an injunction if it disobeys the court's order even after the notice but without participating with the party-defendant)).

[117] *Id.*

[118] *Id.*; *see also Ex parte* Lennon, 166 U.S. 548, 553, 17 S. Ct. 658, 659, 41 L. Ed. 1110, 1112 (1897); NLRB v. Cleveland-Cliffs Iron Co., 133 F.2d 295, 302 (1st Cir. 1943); Int'l Bhd. of Teamsters v. Keystone Freight Lines, 123 F.2d 326, 329 (10th Cir. 1941).

[119] *Regal Knitwear*, 324 U.S. at 11.

[120] *Id.*

[121] *Id.* at 13.

[122] *Id.* at 14.

injunction in this manner, the Court stated, then those successors or assigns are within the scope of the law.[123] The Court therefore held that the term "successors or assigns" was a permissible and enforceable provision in injunction decrees.[124]

B. Modern Problem of Successors in Interest

Evil Ed wills his entire estate not to Evil Eddie, but to his nephew, Pete. Pete took over his uncle's estate and decided that he would run things differently. One day while out picking flowers, he noticed Farmer Fred's orchard and decided to go over to get an orange. Igor was watching from the garden and slapped himself on the forehead for not mentioning the injunction earlier to his new master. Pete knew nothing of the injunction. He only wanted to go over to his neighbor's orchard and try one out. Little did he know that the guard-dog lawyer was in the bushes, waiting to jump out.

The modern problem with successors and assigns is identical to the problem identified in *Regal Knitwear*.[125] The difficulty is determining when a successor or assign has an interest that is independent from its predecessor. *Regal Knitwear* stated that the proper way to determine an interest is by appraising the relations and behaviors of the successor, not by blindly construing the terms of an order.[126] As with the other classifications of nonparties, any inference that a successor has an identical interest as the one who preceded him may be inaccurate.[127] However, there may be situations where transfers, purchases, or inheritances are bona-fide, and where the successor has received no notice of the injunction. Under these circumstances, the successor may have an interest that is independent of the predecessor, and may be entitled to a day in court should the question of violating the decree arise.[128]

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[123] *Id.*

[124] *Regal Knitwear*, 324 U.S. at 16.

[125] *Id.*

[126] *Id.* at 15.

[127] Note, *supra* note 1, at 727-28.

[128] *Id.* at 728.

C. Possible Solution for Successors in Interest

A possible solution to protecting successors in interest from unfair allegations of contempt is found once again in the wording of an injunction. Through the use of correct words, an injunction can prevent cases of evasion where the original party-defendant continues to operate as before through a straw man. Injunctions should name more than just the person bound by specifically listing or detailing those who may be able to indirectly assist the party-defendant.

VI. *In Rem* Injunctions

Instead of wording the injunction to name only Evil Ed and his agents and heirs and assigns, Farmer Fred decided that others should be held accountable too. So he had the injunction say that "Any person of Anyburg who comes onto Farmer Fred's orchard and takes oranges will be fined $500 per orange taken."

A. Background of *In Rem* Injunctions

Injunctions that run with a thing, or a "res," are placed on particular objects to affect those persons who come into contact with it.[129] An *in rem* injunction is granted to prohibit a use of a res by those who have a current interest and even to those who may attain a future interest in the res.[130] The parties most obviously bound to an injunction are those who have current interests at the time the decree is issued.[131] There is typically no dispute as to due process of these parties since the parties had their day in court.

A problem arises, however, with nonparties who may acquire future interests but who have not yet had an opportunity to plead their case. At the time the original injunction was issued, persons with future interests had no right to participate in the suit. Courts seeking to bind these future-

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[129] *Id.* at 729-31.

[130] *Id.* at 730.

[131] *Id.*

interest nonparties through the use of a *in rem* injunction might also assume that future-interest nonparties were adequately represented in the original suit by present-interest parties.[132] Often, however, the interests of future-interest nonparties will be divergent from the interests of present-interest parties. If under these circumstances the future-interest nonparty is held bound by the original injunction, the result may be a violation of due process.

B. Modern Problem of *In Rem* Injunctions

In *Regal Knitwear*, the Supreme Court stated that successors to an interest cannot be bound solely because of being a descendant to one with an interest.[133] But the modern problem arises where the property itself is the recipient of the *in rem* injunction. While plaintiffs are able to attain injunctions that run with a position of office, courts often are hesitant to issue injunctions that run with a piece of property.[134] Such injunctions may deprive future-interest nonparties of their due process in many situations.[135] When a *residence* is bound by a decree, all subsequent owners will thus fall within the scope of the order.[136] This, however, is arguably inconsistent with Rule 65(d) of the Federal Rules of Civil Procedure, which provides that there must be actual notice and "active concert or participation" before an individual can be held in contempt.[137]

In *United States v. Hall*, Judge Wisdom, for the Fifth Circuit, wrote that *in rem* injunctions are binding on all persons regardless of whether those persons received notice.[138] There, the defendant was charged with violating an order that stated "no person shall enter any building of the Ribault Senior High School or go upon the school's grounds."[139] Hall,

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[132] Note, *supra* note 1, at 727-28.

[133] *Regal Knitwear*, 324 U.S. at 9.

[134] Note, *supra* note 1, at 728-31.

[135] *Id.*

[136] State *ex rel.* Everette v. Petteway, 179 So. 666 (Fla. 1938); *see also In re* Snow, 201 B.R. 968, 29 Bankr. Ct. Dec. 1174 (Bankr. C.D. Cal. 1996).

[137] FED. R. CIV. P. 65(d).

[138] 472 F.2d 261, 265-66 (5th Cir. 1972).

[139] *Hall*, 472 F.2d at 263.

though he was not a party to the underlying suit, received notice of the injunction. He purposefully entered the building to test the court's power and was sentenced to sixty days in jail.[140] Enforcing the injunction, Judge Wisdom wrote:

> School orders are, like in rem orders, particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties. [Therefore] broad applications of the power to punish may be necessary . . . if courts are to protect their ability to design appropriate remedies and make their remedial orders effective.[141]

This case is an example of how courts can infer that individuals have an interest in the decree but have in fact been denied an opportunity to defend their interest in court. Courts are faced with the task of determining who can be held in contempt for violating an *in rem* injunction and often assume that the individual's interest is an identical present interest.

C. Possible Solution for *In Rem* Injunctions

One case that illustrates a possible solution is *People ex rel. Gwinn v. Kothari*.[142] The City of San Diego brought a "public nuisance abatement action" against motel owners.[143] The city sought "injunctive relief to stop prostitution, drug sales, and unfair and unlawful business activities on the premises."[144] A temporary injunction forced the owners of the motels to go through detailed processes in renting rooms to patrons including such strict rules as requiring patrons to have photo identification, performing constant surveillance of tenants, and reporting any illegal activity to the police.[145] Presumably, with these strict requirements, selling the property to future owners would be difficult.[146] The owners

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[140] *Id.* at 264.

[141] *Id.* at 266.

[142] 83 Cal. App. 4th 759, 100 Cal. Rptr. 2d 29 (Ct. App. 2000).

[143] *Kothari*, 83 Cal. App. 4th at 762.

[144] *Id.*

[145] *Id.* at 763 n.1.

[146] *See id.* at 762-63.

and the city could not agree on whether future owners were bound by the injunction.[147] The owners appealed the injunction.

The Court of Appeals of California stated that injunctions may work to deprive the enjoined parties of rights others enjoy precisely because the enjoined parties have abused those rights in the past, but the injunction could not be binding on future owners with independent interests.[148] The court determined that the injunction would violate rights of future owners and thus struck down that part of the injunction.[149]

These steps taken by the California Court of Appeals are an example a possible solution that could protect independent nonparties from *in rem* injunctions. Courts contemplating an *in rem* injunction first should investigate the interest that the nonparty received or will receive in the future. The court then should make a determination of whether the transfer is for the purpose of sidestepping an injunction to frustrate relief for the plaintiff, or whether the transfer is bona-fide and independent.

The obstacle that this proposal presents is that courts could be overburdened with the task of making this determination. Some cases could require vast amounts of research and investigation. Determining the relationships between predecessor and successor could be an exacting demand. Through this measure, though, the interests of the nonparty will be protected, and the nonparty's due process is less likely to be violated.

VII. Members of the Same Class

In his elder years, Farmer Fred was becoming paranoid that every citizen of Anyburg was stealing his oranges. So Farmer Fred and all the other orange orchard owners got together and brought a class action lawsuit against the citizens of Anyburg, claiming that they had been stealing oranges for years. Out of the action, the court granted Farmer Fred and his legion of orange tree owners an injunction which stated that no citizen of Anyburg could enter into any orange orchard and take an orange.

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[147] *Id.* at 762.

[148] *Kothari*, 83 Cal. App. 4th at 766.

[149] *Id.*

A. Background of Class Actions

The interests of a large number of individual members of a party are best represented in a class action. One of the earliest class actions occurred in *Smith v. Swormstedt*, where a party that represented 1500 claimants filed suit against a party representing 3000.[150] The presence of all the class members would have been impracticable and, as the court noted, could even have been unjust to those members.[151] Thus, the named parties were permitted to represent the entire class. Any decision would bind all members to the decision.[152]

B. Modern Problem of Class Actions

Nephew Pete and Igor, who still lived on Evil Ed's estate, were upset that they could not go over to the orange orchard since they were citizens of Anyburg. By chance, Pete had a foreign exchange student from Italy living with him named Marco. Marco was out walking one day when he decided to go over and try out an American orange. As he walked in the orchard, Farmer Fred and his lawyer confronted the boy and told him about the injunction.

"No citizens of Anyburg are allowed to eat my oranges!" growled old Farmer Fred. "But I am from Italy!" countered Marco. "I am exchange student!"

The three individuals stood in the orange grove, scratching their heads trying to figure out just what exactly would be done. . . .

The modern problem that nonparties face from injunctive class actions is the determination of what constitutes a legitimate class.[153] As with the other classifications of nonparties, courts generally infer that the nonparties' interest has been previously represented. Under Rule 23 of the Federal Rules of Civil Procedure, a minimum requirement to create a class is that there be a common interest among class members.[154] Courts

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[150] 57 U.S. 288, 14 L. Ed. 942 (1850).

[151] *Smith*, 57 U.S. at 300.

[152] *Id.* at 303.

[153] Note, *supra* note 1, 732.

[154] FED. R. CIV. P. 23.

can hold these nonparties to an injunction along with the other class members because of this common interest. Although the commonality is central to the class action, it is not the only requirement. This requirement by itself would permit a court to broaden the range of a decree to include any nonparty who has a similar interest and thus defy the essential purpose of the class action.[155] This would injure both sides to the litigation. All nonparties could be bound to an injunction without a day in court. Conversely, a party found civilly liable to a class would then be liable to every nonparty with that commonality.

C. Possible Solution for Class Actions

Just as an agent to an injunction must have a specified relation to her superior, and a successor or assign must likewise possess an identical interest, so must the class representative and the nonparty be aligned with the same dependant interest.[156] A solution to prevent nonparties from being denied their day in court to protect their interest is the existence of a "ready-made bond of association between the representatives and the other members."[157] This ready-made bond would entail that the independent nonparty is outside the realm of the class action and is not bound by any decrees whether they be beneficial or detrimental.

One modern example in which a court has effectively identified common interests among class members is *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*.[158] The Margaret Sanger Clinic had offered abortion services for over fifteen years in Cincinnati, Ohio prior to this suit.[159] Various groups had consistently picketed and protested the clinic, and in 1986, it had to relocate because protestors destroyed its facilities with a firebomb.[160] Responsibility for the bombing was never

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[155] Note, *supra* note 1, at 732-33.

[156] *Id.*

[157] *Id.* at 733 (citing *Letter from George Wharton Pepper to Professor Arthur John Keeffe*, Mar. 24, 1948 appended to Arthur T. Keeffe et al., *Lee defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948)).

[158] 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990).

[159] *Project Jericho*, 556 N.E.2d at 160.

[160] *Id.*

established, but the clinic saw the picketers as an increasing threat as the intensity of their protests escalated.[161] The picketers began blocking roads, causing traffic hazards, and affecting neighboring apartments.[162] The clinic filed for and received an injunction against Project Jericho, several other anti-abortion groups, five named individuals, and a class of all other persons picketing in the area.[163] The injunction prohibited protestors from being so loud as to be heard within the clinic and from blocking the entrance to its facilities.[164] Tenants of local apartments filed a motion to intervene as plaintiffs.[165]

The trial court found that a large number of individuals, both named and unnamed, had violated the injunctions.[166] Seventeen of the defendants appealed, arguing that the injunction was too broad because it was "against all persons picketing."[167] The defendants argued that the scope of the injunction was overbroad because parties and nonparties could be held in contempt together even if they had no relation to one another.[168] The protestors claimed independent interests, but the Supreme Court of Ohio disagreed, stating that "[Rule of Civil Procedure] 23 does not require a class certification to identify the specific individuals who are members so long as the certification provides a means to identify such persons."[169] The court reasoned that, though the intentions of the individual protestors may have varied, the class was sufficiently specific because it defined the meaning of picketing and applied to persons picketing within a discrete geographical area.[170]

Furthermore, the Ohio Supreme Court agreed with the clinic that separate actions against the individual picketers could result in varying

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Project Jericho*, 556 N.E.2d at 160.

[165] *Id.*

[166] *Id.* at 161.

[167] *Id.* at 162.

[168] *Id.*

[169] *Project Jericho*, 556 N.E.2d at 165.

[170] *Id.*

verdicts.[171] The clinic could be placed in a situation where it could pursue action against some picketers but be unable to proceed against another engaging in similar conduct.[172] The court stated that "one purpose of a class action is to avoid such situations."[173]

Thus, the court here effectively identified the common interests of the defendants.[174] Although the protestors argued that they had separate independent interests, the court countered by ruling that the common interest was not just any common stance or belief but instead the act itself: being there in the specified location doing the specified acts.[175] By following such logic, courts can more effectively identify the interests of both parties and nonparties when they are charged with contempt of an injunction.

VIII. Conclusion

Farmer Fred will ultimately be able to protect his oranges from others, but the court will have to be careful in how it decides to word the injunction. The interest of a nonparty is the element that determines whether the accused should be held in contempt because of a violation of an injunction decree. Still, courts continue to make improper inferences and assume that an independent nonparty already has been given the opportunity to defend its interest through prior representation. These inferences sometimes result from ambiguities in the language of an injunction where terminology overlaps or is inconsistent with the demands of the injunction. To avoid these assumptions, courts must employ stricter discretion in determining the interest of the nonparty by requiring the injunction be unambiguous in its use of words and directly point out what it is that the plaintiff wishes to accomplish. By taking

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[171] *Id.* at 167.

[172] *Id.*

[173] *Id.* at 168.

[174] *See Project Jericho*, 556 N.E.2d at 165 (noting that the defendants wanted to "stamp out" the operation of the abortion clinic).

[175] *Id.*

these extra precautions, the plaintiff's interests will be better protected, while independent nonparties will not fear frivolous contempt proceedings.