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Third Circuit Takes an Anti-Platform View in Interpreting the Communications Decency Act, Creating a Circuit Split., The National Law Review, October 29, 2021

Since the emergence of the internet nearly four decades ego, the United States has sought to promote the freedom of the internet domestically and abroad. In the early 1990s, Congress enacted laws that aimed to promote the internet and foster the still largely unregulated free market online while at the same time placing restrictions on some objectionable conduct.

The 1996 Communications Decency Act (CDA) is one such law. Recognizing the need for rapid and free communications, the CDA bars attempts to treat website platforms as publishers or speakers of the content spoken by others and allow platforms to make their own moderation decisions. Section 230(c) of the CDA creates a statutory immunity for platforms with respect to lawsuits arising out of the information posted by another content provider. This immunity is not unlimited, however. Subsection 230(e) carves out five limitations, including that "nothing in [section 230] shall be construed to limit or expand any law pertaining to intellectual property."

Another law enacted to promote freedom on the internet is the Digital Millennium Copyright Act of 1998 (DMCA), which sought to balance the interests of website platform owners who host content posted by their users against the interests of copyright holders, giving the former immunity to claims of copyright infringement so long as the website promptly removes infringing materials after a copyright holder gives the required notice, and the website operator meets other statutorily defined requirements. As these laws are now being interpreted by the courts (at least in the Third Circuit), some of the freedoms that platforms have come to expect may be at risk.

Recent Expansion of "Any Law Pertaining to Intellectual Property"

The recent decision of the United States Court of Appeals for the Third Circuit in ***Hepp v. Facebook, et al.***, No. 20–2725 (3d Cir. 2021), examined the scope of the "any law pertaining to intellectual property" carveout, ultimately choosing to significantly expand it to include not only state intellectual property laws but also the "nontraditional" intellectual property laws (as distinguished from the traditional IP laws: patent, copyright and trademark), including the right of publicity. Faced with the arguments that it is acting to defeat the purpose of the CDA by promoting the internet "unfettered" by changing any unpredictable laws of the 50 states, the Third Circuit took pains to note that its decision is limited to holding that the right of publicity law in Pennsylvania met the definition of "any law pertaining to intellectual property" and making no such pronouncements with respect to the laws of any other states.

Background and Issues

Karen Hepp is a professional newscaster and host of FOX 29's *Good Day Philadelphia*. She brought a lawsuit against Facebook (among other defendants*), alleging that a photograph of her at a convenience store – taken without her knowledge and consent – appeared on Facebook as part of an advertisement for a dating app, *FirstMet*. Hepp alleged that the post violated her right of publicity under Pennsylvania's right of publicity statute, 42 Pa. Const. Stat. §8316, and under common law. To support her claim, Hepp argued that she invested time, energy and resources in building her reputation and her social media following, such that her endorsement is valuable. She claimed that she never authorized the image in question to be used in online advertisements of dating sites.

Facebook moved to dismiss Hepp's claims under section 230 of the CDA, which states that "[no] provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 U.S.C. § 230). In other words, Facebook argued that as an online intermediary that merely hosts or republishes the speech of others, it is immune–protected against suits that might otherwise hold it legally responsible for what others say and do. Hepp argued that her suit should proceed in light of the "any law pertaining to intellectual property" limitation to the immunity provision of section 230.

In examining the scope of the immunity carveout, the Third Circuit reviewed other federal court decisions across the nation that touched upon section 230 immunity. The seminal decision on the issue is *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), which held that the CDA's provision "any law pertaining to intellectual property" referred only to federal intellectual property laws. The court in *Perfect 10* noted that the CDA's policy goal was to insulate the internet from regulation and that this purpose will be hindered if federal immunity created by section 230 varied dependent on the laws of each state. "Because material on a website may be viewed across the internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the internet from the various state-law regimes." *Perfect 10*, at 1118–19.

While the *Perfect 10* decision was the only circuit court decision clearly on point, the Third Circuit also considered two prior decisions – *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st. Cir 2007) and *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F.Supp.2d 690 (S.D.N.Y. 2009) – which only briefly discussed the intellectual property (IP) law's immunity carveout but did not spend any time questioning whether state laws should be included, let alone the nontraditional IP laws.

Third Circuit's Opinion and Dissent

Having examined these three decisions, the Third Circuit opined that the "test and structure" of the CDA, as well as definitions contained in various legal dictionaries, lead to the conclusion that the section 230(e) carveout can apply to federal and state laws that pertain to intellectual property.

Citing the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the court observed that the right of publicity is an individual property right closely analogous to patent and copyright because it focuses on the right of the individual to reap the reward of their endeavors. A divided Third Circuit concluded, therefore, that Pennsylvania's right of publicity statute, which only provides a cause of action to those whose valuable interest in their likeness "is developed through investment of time, effort and money," was an intellectual property right that

defeated Facebook's immunity under the CDA.

The Third Circuit also swept aside Facebook's policy arguments that the inclusion of state laws in the immunity carveout will increase uncertainty about the precise contours of the immunity in cases involving state IP laws. In so holding, the court stated that (1) policy considerations cannot displace the text and (2) there was no evidence that the *Lycos* and *Project Playlist* decisions created any disarray that Facebook predicted.

Circuit Judge Robert Cowen dissented in part from the majority's decision, predicting that *Hepp* gutted the CDA's immunity system and opened the proverbial floodgates to a "potential influx of disparate and downright confusing state law "intellectual property" claims that would be contrary to Congress's express goals in enacting section 230.

Judge Cowen noted that there is no existing circuit split between the First and Ninth circuits' interpretation regarding the scope of section 230(e)(2). Instead, Judge Cowen argues that the inconsistency of interpreting state right of publicity and intellectual property laws lies within the majority decision. Judge Cowen argues that internet service providers now face the prospect that troubled the Ninth Circuit – "[because] such laws vary widely from state to state, no litigant will know if he is entitled to immunity for a state claim until a court decides the legal issue." *Perfect 10*, 488 F.3d at 1119 n.5. Thus, Judge Cowen concluded that he would have affirmed the district court's dismissal of Hepp's claims against Facebook, which found that Pennsylvania's right of publicity law clearly is not coextensive with federal intellectual property law.

The majority's opinion in *Hepp* thus marks a clear split with the Ninth Circuit's decision in *Perfect 10*, and it remains to be seen whether the U.S. Supreme Court will take up this issue to resolve the newly created circuit split. We note that on October 21, 2021, Facebook requested that the Third Circuit re-hear the appeal *en banc*, arguing that the "majority's decision misreads the intellectual property exception to the immunity established by section 230 of the Communications Decency Act (CDA) creating a conflict with" the Ninth Circuit, and "ignores a key textual feature and downplays the contextual and structural features of the statute."

Notes

*Hepp named Reddit, Inc. and Imgur, Inc. as defendants, but the district court granted the defendants' motion to dismiss because it lacked personal jurisdiction over the other parties. The Third Circuit affirmed the dismissal. Hepp also named a Czech company, WGCZ, in connection with a website that hosted her image after a user posted it on an illicit gallery; however, the district court granted WGCZ's motion to dismiss because it did not operate the website during the relevant time period.