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Court Rejects Section 230 Immunity from State Intellectual Property Law Claims

by

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In 2021, the debate over the scope of legal immunity for Big Tech social media sites under Section 230 of the Communications Decency Act remains as lively as ever. Against the backdrop of lower courts' expansive conferral of Section 230 immunity for Big Tech social media websites, a September 23 decision by the U.S. Court of Appeals for the Third Circuit tacked in a different direction. In Hepp v. Facebook, the Third Circuit recognized an exception to Section 230 immunity for claims pertaining to state intellectual property (IP) law.

Hepp v. Facebook is notable for recognizing that the natural reading of Section 230's text is determinative of the scope of legal immunity conferred by the statute rather than non-textual policy considerations. The court's decision rightly credited the importance of property rights—including IP rights—in a free online marketplace. And it has produced an unmistakable circuit split that could pave the way for the U.S. Supreme Court to interpret

Section 230 and narrow the immunity afforded to internet giants like Facebook, Google, Microsoft, and Twitter.

Section 230(c)(1) of the Communications Decency Act of 1996 confers immunity on "interactive computer services" by prohibiting them from being treated as the publisher or speaker of information provided by another content provider. And Section 230(c)(2) immunizes "interactive computer services" from liability for "good faith" actions to restrict availability of objectionable material. But Section 230(e) contains carve-outs for five categories of law. The carve-out at issue in Hepp v. Facebook is Section 230(e)(2), titled "No Effect on Intellectual Property Law," which states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."

Plaintiff Karen Hepp is a TV newscaster whose livelihood depends on her reputation and control of the use of her likeness. A photo was taken of her without her knowledge or consent and posted on Facebook as an ad for a dating app. Posts of the photo also appeared on the websites Reddit and Imgur. She sued Facebook, Reddit, and Imgur, raising claims under Pennsylvania's "right of publicity" statute and its common law.

A federal district court dismissed the case, holding that the Defendant companies were entitled to Section 230 immunity. The court adopted the Ninth Circuit's approach in the 2007 case of Perfect 10, Inc. v. CCBill LLC, where it held that Section 230(e)(2) applies only to federal intellectual property. By a 2-1 vote, the Third Circuit reversed the District Court and remanded the case. Judge Thomas Hardiman wrote the opinion for the majority.

The Third Circuit determined that the most natural reading of Section 230(e)(2)'s text indicates that a state law can be a "law pertaining to intellectual property" and that Section 230(e)'s structure does not change the text's natural meaning. It rejected the view that the text and structure of Section 230(e) indicate that it includes state laws only where they are co-extensive with federal laws. Facebook argued that state law "rights of publicity" have no federal analog and are therefore not encompassed by Section 230(e)(2)'s carve-out for laws pertaining to intellectual property. But according to the court, references to state law in Section 230(e) indicate that "when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly." The Third Circuit favorably quoted the U.S. District Court for the Southern District of New York's observation in its 2009 Atlantic Recording Corp. v. Project Playlist, Inc. decision that "if Congress wanted the phrase 'any law pertaining to intellectual property' to actually mean 'any federal law pertaining to intellectual property,' it knew how to make that clear, but chose not to."

Additionally, the Third Circuit concluded that the natural reading of Section 230(e)(2) is not trumped by policy considerations about free markets or legal certainty that Facebook cited as supporting immunity from state IP laws. The court acknowledged that Congress enacted a pro-free market policy in Section 230. But it emphasized the centrality of IP rights in a free market:

> Section 230's policy goals do not erase state intellectual property rights as against internet service providers. Facebook errs by downplaying the role of property in markets. After all, state property laws—along with contract laws—enable "the resulting formation of effective markets." . . . Because state property rights can facilitate market exchange, interpreting the § 230(e)(2) limitation to include state intellectual property laws tracks Congress's pro-free-market goal. So the enacted policies do not require an alternate reading.

Moreover, the Third Circuit observed that policy interests also cut in favor of IP rights. It wrote that "if likeness interests are disregarded on the internet, the incentives to build an excellent commercial reputation for endorsements may diminish," and "[t]hat would cut against the statute's explicit policy objectives because information provided by promotional advertisements can enhance market efficiency and vibrancy." Indeed, the court remarked that right of publicity claims bear close resemblance to trademark infringement claims insofar as they both involve the misappropriation of the value of one's image and the creation of consumer confusion. The court added that "trademark claims typically avoid violating free speech by addressing misleading commercial speech."

Based on a survey of legal dictionaries, the Third Circuit determined that "'intellectual property' has a recognized meaning which includes the right of publicity." And on that basis, the court upheld Hepp's right to bring a state statutory right of publicity claim that is available to persons whose valuable interests in their likeness "is developed through the investment of time, effort, and money."

Senior Judge Robert Cowen dissented from the majority's holding, agreeing instead with the Ninth Circuit's decision in Perfect 10, Inc. v. CCBill LLC that the exception includes only federal IP law. A circuit split between the Third Circuit and Ninth Circuit now clearly exists on the scope of Section 230(e)(2). The implications of such a split could prove highly significant because an appeal of the case to Supreme Court would furnish the high court's very first occasion to interpret Section 230.

In his October 2020 statement respecting the court's denial of certiorari in Malwarebytes, Inc. v. Enigma Software Group USA, LLC, Justice Clarence Thomas took aim at lower courts that have "long emphasized nontextual arguments when interpreting §230, leaving questionable precedent in their wake." According to Justice Thomas, courts have long adopted "the too-common practice of reading extra immunity into statutes where it does not belong" by having "relied on policy and purpose arguments to grant sweeping protection to Internet platforms." Although the decision in Hepp did not cite Justice Thomas's statement in Malwarebytes, the Third Circuit's prioritization of Section 230's text over non-textual policy concerns accords with his views.

There is some reason to think a prospective Supreme Court ruling on Section 230(e)(2)'s IP carve-out could lead to other changes in Section 230 jurisprudence. A decision by the high court in Hepp wouldn't touch on specific interpretive issues regarding immunity under other Section 230 provisions that have generated the most controversy—like the "good faith"

requirement for interactive computer services that restrict access to user content or what constitutes "otherwise objectionable" online material. But a Supreme Court pronouncement that Section 230's text takes primacy over policy in determining the scope of immunity—like in Hepp and in Justice Thomas's statement in Malwarebytes—could lead courts in future cases to narrow the immunity afforded to social media leviathans like Facebook.

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