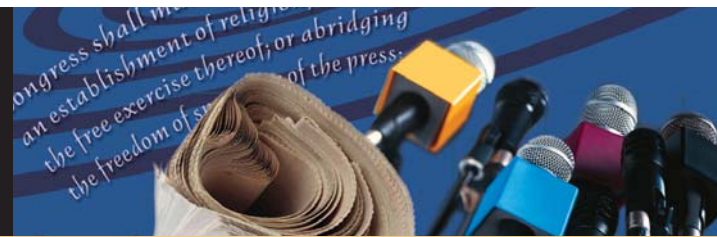


FIRST AMENDMENT
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FCC INDECENCY SAGA
CONTINUES: COURTS
AND CONGRESS TAKE UP
WHERE FCC LEFT OFF**By Robert Corn-Revere and Ronald London**

On June 4, 2007, the U.S. Court of Appeals for the Second Circuit issued its decision in *Fox Television Stations, Inc. v. FCC*, vacating and remanding the Federal Communications Commission's recently articulated policy of enforcing its broadcast indecency policy strictly against fleeting, isolated and unintended expletives. The case involved Federal Communications Commission enforcement actions taken against two broadcasts of the Billboard Music Awards that aired on the Fox television network in 2002 and 2003.¹ The court held that "the FCC's new policy regarding 'fleeting expletives' represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry" and that the Commission "failed to articulate a reasoned basis for this change in policy."²

The Second Circuit decision coincided with congressional action that revised the FCC's broadcast indecency enforcement authority. In 2006, Congress adopted the Broadcast Decency Enforcement Act, multiplying the potential fine for an "indecent" or "profane" transmission ten-fold to \$325,000 per utterance, and the FCC coincidentally issued rules implementing the change just before the court decision was announced.³ Additionally, after the *Fox Television Stations* decision was issued, the Senate Commerce Committee approved a bill sponsored by Senator John D. Rockefeller that would require the FCC to "maintain a policy that indecent or profane material may

[\(CONTINUED ON NEXT PAGE\)](#)THE UNCERTAIN FUTURE OF
SECTION 230 AND LIABILITY
FOR MIXED-CONTENT WEBSITES**By Thomas R. Burke and Ambika K. Doran**

More than a decade ago, Congress enacted Section 230 of the Communications Decency Act, a sweeping statute that immunizes the Internet publication of third-party content from defamation and other tort claims. Courts interpreting Section 230 have almost uniformly found that the statute protects Internet content providers from tort liability based on content created by third parties. However, in the past decade, few Section 230 decisions have meaningfully analyzed whether federal immunity is available where Internet content providers—such as websites—edit, prepare content for users to select, or combine original content with third-party content, now commonplace features. These providers may be vulnerable to liability, particularly in light of a recent ruling in the Ninth Circuit Court of Appeals finding no immunity for a mixed-content website. Whether the court hears this decision *en banc*, the scope of Section 230's immunity will shape the future of Internet content.

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THE FCC INDECENCY SAGA

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include a single word or image."⁴ The evident purpose of the Rockefeller bill is to overturn the court's decision in *Fox Television Stations*.

These actions are the culmination of thirty-two years of legal development since the FCC first articulated a standard for broadcast indecency in 1975.⁵ The Second Circuit ruling in *Fox Television Stations* also is the first court decision to invalidate an FCC enforcement action on indecent broadcasts since the 1977 D.C. Circuit decision in *Pacifica Foundation v. FCC*. That case involved the FCC's 1975 ruling imposing sanctions on George Carlin's "filthy words" monologue, and it led to the 5-4 Supreme Court decision in *FCC v. Pacifica* reversing the D.C. Circuit and narrowly upholding the FCC's constitutional authority to regulate indecent broadcasts.⁶

The Second Circuit decision and potential congressional response make clear that these actions are far from the end of the story. The Commission has yet to issue final decisions in a number of significant cases in which Notices of Apparent Liability were released during the past three years, the outcome of which may turn on pending judicial actions. Additionally, the FCC's decision to fine CBS Broadcasting \$550,000 for its transmission of the 2004 Super Bowl halftime show is currently on appeal to the United States Court of Appeals for the Third Circuit.⁷ In short, there may be significant developments in this area of law in the relatively near term.

Second Circuit ruling

The Second Circuit opinion in *Fox Television Stations, Inc. v. FCC* was written by Judge Rosemary Pooler and joined by Judge Peter Hall. Judge Pierre Leval dissented. The majority opinion rested on the narrow ground that the decision violated the Administrative Procedure Act because the Commission had failed to explain its change in policy. However, the holding was applied more broadly to encompass the FCC's general policy of enforcing the law against "fleeting expletives," and was not limited to the two broadcasts at issue.⁸ The opinion also included an extended discussion, in dictum, of the First Amendment problems raised by the FCC's approach to enforcement. It remanded the matter to the FCC, but added "we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can

adequately respond to the constitutional and statutory challenges raised by the Networks."⁹

As the court explained, the decision in *Fox Television Stations* arose from an effort begun by the FCC in 2004 to strengthen enforcement of 18 U.S.C. § 1464, which prohibits the broadcast of "obscene, indecent or profane language."¹⁰ In 2003, the FCC's Enforcement Bureau had dismissed an indecency complaint filed against the *Golden Globe Awards* show, after U2's lead singer Bono unguardedly exclaimed it was "fucking brilliant" his band won an award.¹¹ In March 2004, the Commission reversed the Bureau's decision to dismiss the *Golden Globe Awards* complaint. In doing so, it reversed a long line of FCC precedent that had held that "fleeting" or "isolated" expletives were not actionable, particularly when uttered in live settings.¹² A broad coalition of broadcasters and other entities filed petitions for reconsideration of the *Golden Globe Awards* decision in April 2004, but the FCC never acted on them.

In the meantime, the FCC issued an "omnibus" indecency order in February 2006 that addressed several dozen shows against which indecency complaints had been filed over a three-year period.¹³ The Commission intended the *Omnibus Order* to "provide substantial guidance ... about the types of programming that are impermissible under [the] indecency" rule. It expanded on and explained the change in policy in *Golden Globe Awards*, proposing fines against six programs on various networks, finding a few dozen more not indecent, and finding four other shows indecent and profane but not subject to fine because they aired before the 2004 *Golden Globe Awards* decision. The four programs in this category included the 2002 and 2003 *Billboard Awards* on Fox (on which, respectively, Cher and Nicole Richie uttered unscripted expletives), episodes of *NYPD Blue* on ABC (that included various iterations of "bullshit"), and a December 2004 *Early Show* on CBS (in which the interviewee in a news segment used the term "bullshitter").

The programs in this final category led to the petitions for review in *Fox Television Stations, Inc. v. FCC*. The major broadcast networks and their affiliates filed petitions that were consolidated in the Second Circuit. After a brief mid-appeal remand in which the FCC reversed its decisions regarding the *Early Show* and *NYPD Blue*, the appellate proceeding continued with the Commission's decisions regarding the *Billboard Music Awards* still at issue.¹⁴ Following the remand, the Court imposed an expedited

briefing schedule and heard oral argument in late December last year.

The Second Circuit did not limit its review to the *Billboard Award* holdings, but rather invalidated the FCC's creation of the new "fleeting expletives" policy. The court rejected "the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts of the *Billboard Music Awards* were indecent and/or profane. The Remand Order applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against Fox."¹⁵

The majority opinion found the policy arbitrary and capricious because it represented a significant break with positions the FCC had previously taken, and it failed to adequately explain the radical departure from the previously restrained interpretation of the indecency rule. The court observed that "[f]or decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent," and held the FCC must provide a reasoned basis for any change in policy.¹⁶ It suggested the FCC must show that indecent speech is harmful in some way, noting the FCC's order was "devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent [broadcast] speech."¹⁷

The court rejected several bases on which the FCC defended its change in policy. First, to the extent the FCC had argued the change was necessary to protect children from suffering the "first blow" of hearing even a single expletive (the "first blow" language comes from the Supreme Court's 1978 *Pacific* decision), the court held the FCC provided no reasonable explanation for changing its position that fleeting expletives were not harmful "first blows" for nearly 30 years between *Pacific* and *Golden Globe Awards*. It also faulted the extent to which the current rule gives the FCC *carte blanche* to excuse "first blows" in, for example, newscasts, or in movies the FCC finds artistically worthy, like *Saving Private Ryan*.¹⁸

Because the majority decided that the FCC's decision was arbitrary and capricious, it held it

was unnecessary to reach the constitutional issues raised by the networks. However, the court issued nearly nine pages of dicta expressing "skepticism" about whether "the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster."¹⁹ The court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny."²⁰ Expressing sympathy with "the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," the majority added: "We can understand why the Networks argue the FCC's 'patently offensive as measured by contemporary community standards' indecency test coupled with its 'artistic necessity' exception fails to provide the clarity required by the Constitution [and] creates an undue chilling effect on free speech."²¹

Citing the Supreme Court decision in *Reno v. ACLU*, 521 U.S. 844 (1997), which invalidated as unconstitutionally vague a test for indecency nearly identical to the FCC's rule for broadcasting, the court stated: "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency."²² The majority opinion also stated the FCC's test raises "the separate constitutional question of whether it permits the FCC to sanction speech based on [the agency's] subjective view of the merit of that speech." It added, "the FCC's current indecency regime" of requiring that "broadcaster[s] ... demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were 'integral' to the work ... gives too much discretion to government officials" under the First Amendment.²³

Additionally, after noting that "all speech covered by the FCC's indecency policy is fully protected by the First Amendment," the court stopped short of saying broadcasting should be subject to the same strict First Amendment scrutiny that applies to all other mass media. At the same time, the court observed that it is getting extremely difficult to describe broadcasting as "uniquely pervasive" as a justification for subjecting broadcasters to less First Amendment protection than other media.²⁴ The Second Circuit cited the Supreme Court's decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), to suggest strict scrutiny may soon apply to broadcasting, and noted the availability of less restrictive means of avoiding the perceived harm of indecency, e.g., the V-chip. The court

concluded that "the FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's robust oversight."²⁵

The court also briefly discussed the FCC's reinvigoration of Section 1464's profanity prong as banning "personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive ... as to amount to a nuisance."²⁶ After noting the wealth of precedent holding that "profanity" involves blasphemy or sacrilege "and nothing more," the court observed "the FCC's definition of 'profane' ... would substantially overlap with the statutory term 'indecent'" in a manner "so extensive as to render the [latter] term ... superfluous."²⁷ Consequently, to the extent that "on remand, the FCC may desire to explain its gloss on the definition of 'profane,'" the Court held that whatever deference is owed agency construction of such terms, "the FCC must still demonstrate that its construction is reasonable, particularly in light of Congressional intent, the canons of statutory construction, and the historical view of the plain meaning of this term."²⁸

Judge Leval issued a dissenting opinion on the grounds that he felt the FCC adequately explained its policy change, and the majority simply had a "difference of opinion" on the FCC's direction in altering course. He characterized the reversal on "fleeting expletives" as a "small change ... by the FCC in its [indecency] standards" that merely "diminished the significance of the fact that the ... expletive was not repeated."²⁹ The dissent found the change in position justified by the FCC's "sensible, although not necessarily compelling" explanation that "the 'F-Word' ... inherently has a sexual connotation" and "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."³⁰ This was sufficient, the dissent argued, under the deferential standard of review afforded agencies and their right to effectuate changes in policy. The dissent declined to address the constitutional implications of the FCC's new policy.

Where we go from here

The ultimate impact of the decision in *Fox Television Stations* is not yet clear. The court remanded the case to the Commission for another opportunity to explain the change in its "fleeting expletives" policy for broadcast

indecency. If the FCC can provide an adequate explanation, or if Congress ratifies the change through legislation, it is possible that the government's more aggressive approach to indecency enforcement would be restored. In this regard, the "Protecting Children from Indecent Programming Act," introduced by Senator Rockefeller on July 12 and passed by a voice vote of the Commerce Committee on July 19, provides that the FCC "shall maintain a policy that a single word or image may constitute indecent programming."³¹ The bill has gained a number of influential co-sponsors since its introduction, although it is not certain that the legislation ultimately will be approved by Congress.³² But if S. 1780 becomes law, the FCC would have congressional approval for the policy it articulated and applied since *Golden Globe Awards*.

However, any such action by the FCC or Congress would be vulnerable to a constitutional challenge. Although the Supreme Court upheld against statutory and constitutional challenge the Commission's indecency definition in *FCC v. Pacifica Foundation*, the Court emphasized that its holding was limited to the "verbal shock treatment" of the George Carlin monologue in which multiple expletives were deliberately and repeatedly broadcast during a 12-minute segment.³³ Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica's* slim majority, noted "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." They stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes."³⁴ To underscore the FCC's limited authority in this area, the Court took note of the Commission's statement that it would be inequitable to hold a licensee responsible for indecent language when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing."³⁵ In short, if Congress were to authorize the FCC to enforce the indecency rules to penalize the fleeting or inadvertent broadcast of "a single word or image," it would contradict the limited scope of *Pacifica* and would put to the test the Second Circuit's First Amendment dictum in *Fox Television Stations*.

Alternatively, if neither Congress nor the FCC acts to restore the "fleeting expletives" policy announced in *Golden Globe Awards*, the Commission will be required to follow key aspects of its more cautious approach to

indecent enforcement first articulated in *Pacifica* and its progeny. However, other actions related to the indecency rules may have an important impact on the scope of the FCC's ability to regulate broadcast content. For example, pointing to its indecency rules as a template, the FCC has concluded that content controls could be expanded to include depictions of violence.³⁶ Specifically, the Commission found that, as with indecent broadcasts, Congress could restrict "excessively violent" programming during times of the day when children are likely to be in the television audience.³⁷

If Congress were to authorize the FCC to adopt such rules, such action would raise not just the First Amendment problems explored in *Fox Television Stations*, but also the many complicated constitutional issues associated with any attempt to either define or restrict depictions of violence. To date, no court has found a satisfactory answer to such questions.³⁸ Quite to the contrary, the United States Court of Appeals for the Seventh Circuit has observed that "violence on television ... is protected speech" and that "[a]ny other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."³⁹ In striking down restrictions on renting to minors videotapes that depict violence, the Eighth Circuit confirmed that violent video programming is entitled to "the highest degree of First Amendment protection."⁴⁰ Given this legal backdrop, courts may be asked to further limit the Commission's authority to regulate broadcast programming if Congress follows the FCC's recommendation to extend the indecency rules to restrict depictions of violence.

NOTES

1. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). This was the first court decision issued in response to the controversy created by the FCC's attempt to substantially tighten its broadcast indecency enforcement regime as described in our 2004 FIRST AMENDMENT LAW LETTER article, *Indecent Proposals: Why the Most Recent FCC Indecency Crackdown Risks Crossing the Center Line into an Oncoming First Amendment Showdown*.

2. *Fox Television Stations*, 489 F.3d at 446-447.

3. Pub. L. No. 109-235, 120 Stat. 491 (2006). See *Amendment of Section 1.80(b)(1) of the Commission's Rules*, FCC 07-94 (released June 1, 2007).

4. S. 1780, Protecting Children From Indecent Programming Act, 110 Cong., 1st Sess. (July 19, 2007). See 110 CONG. REC. (Daily Digest) p. D1010-11 (July 19, 2007).

5. *A Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, New York, N.Y., 56 F.C.C.2d 94, 99 (1975) ("FCC Pacifica Order").

6. *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978).

7. *CBS Corp. v. FCC*, No. 06-3575 (3d Cir.).

8. *Fox Television Stations*, 489 F.3d at 454.

9. *Id.* at 467.

10. *Id.* at 451-452.

11. *Complaints About Various Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 18 FCC Rcd. 19859 (Enf. Bur. 2003) ("Golden Globes Bureau Decision").

12. *Complaints About Various Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 FCC Rcd. 4975, 4980 (2004) ("Golden Globes Order") (overruling portions of prior holdings that "isolated use of expletives is not indecent").

13. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 (2006) ("Omnibus Order").

14. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13,299 (2006) ("Omnibus Remand Order").

15. *Fox Television Stations*, 489 F.3d at 454.

16. *Id.* at 461.

17. *Id.*

18. *Id.* at 458-459.

19. *Id.* at 462.

20. *Id.* at 463.

21. *Id.* at 463.

22. *Id.* at 463-464.

23. *Id.* at 464.

24. *Id.* at 464-465.

25. *Id.* at 466.

26. *Id.* at 466-467.

27. *Id.* at 467.

28. *Id.*

29. *Id.* at 473-474 (Leval, J., dissenting).

30. *Id.* at 469.

31. S. 1780, *supra* note 4.

32. Originally sponsored by Senators Rockefeller, Pryor and Inouye, S. 1780 has gained Senators McCain, Brownback, and Byrd as co-sponsors.

33. *Pacifica*, 438 U.S. at 742 ("our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast" in a "specific factual context"); see also *id.* at 750 ("[i]t is appropriate... to emphasize the narrowness of our holding"). As Justice Powell explained in his concurring opinion, the Court approved "only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion." *Id.* at 755-56 (Powell, J., concurring).

34. *Id.* at 760-761 (Powell, J., joined by Blackmun, J., concurring).

35. *Id.* at 733 n.7 (quoting *Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, New York, N.Y., 59 F.C.C.2d 892, 893 n.1 (1976)).

36. *Violent Television Programming and Its Impact on Children*, 22 FCC Rcd. 7929 (2007).

37. *Id.* at 7949.

38. This point has been emphasized repeatedly in numerous recent cases in which state and local governments attempted unsuccessfully to regulate violent video games. See, e.g., *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealer's Ass'n v. Schwarzenegger*, 2007 WL 2261546 (N.D. Cal. 2007); *Entertainment Merchant's Ass'n v. Henry*, 2006 WL 2927884 (W.D. Okla. 2006); *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

39. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

40. *Video Software Dealer's Ass'n v. Webster*, 968 F.2d 684, 689 (1992).

UNCERTAIN FUTURE OF SECTION 230

(CONTINUED FROM PAGE ONE)

I. The History of Section 230

A. Section 230's roots

In 1995, a New York trial court controversially found that an Internet service provider could be held liable for the content of its subscribers' posts, as the publisher of the content.¹ The court relied heavily on the provider's exercise of editorial control over the content of messages posted on its bulletin boards, and use of a software program to screen all postings.² Had courts followed the decision, website owners would have been left with a thorny choice: Halt any attempts to edit objectionable material, or edit material heavily, knowing it would be subject to the same liabilities as traditional print publications. Overruling this decision, Congress passed Section 230 in 1996.³ In doing so, it sought to promote Internet development free from government intrusion.⁴

Section 230 states, "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."⁵ The statute prohibits the imposition of liability by any state or local law "inconsistent with this section."⁶ It defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."⁷

Section 230 broadly defines "Internet content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."⁸ Section 230 immunizes these entities when they "in good faith ... restrict access to or availability of material" they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."⁹

B. The vast majority of courts broadly uphold Section 230's immunity

Nearly all courts faced with the mere reposting of third-party content—including five federal appellate courts and two state high courts—have interpreted Section 230 to immunize

Internet service providers and websites for content authored by third parties.¹⁰ In the first such case, the Fourth Circuit Court of Appeals set the tone, affirming dismissal of a lawsuit brought against America Online, after an AOL subscriber posted a malicious hoax on an AOL bulletin board. America Online did not take the defamatory material down after notification, allowed subsequent similar postings, and refused to post a retraction.¹¹ The court noted, in oft-quoted language: "Congress made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."¹² Given "the amount of information communicated via interactive computer services ... [i]t would be impossible for service providers to screen each of their millions of postings for possible problems."¹³

California appeared headed in the opposite direction a few years back when an appellate court in San Francisco decided that Section 230 did not immunize defendants who had reason to believe the material they posted was defamatory, making them, according to the court, "distributors," rather than "publishers."¹⁴ The state supreme court recently reversed the decision, confirming that it, like *Zeran* and other courts, would reject notice-based liability under Section 230. In its decision, the court also questioned whether Section 230 immunity depends on how aggressively a website procures and publishes challenged third-party content.

Despite finding that individual users are more likely to be able to screen the content and to participate in the posting of offensive material, the court found that "there is no basis for deriving ... any operative distinction between 'active' and 'passive' Internet use. By declaring that no 'user' may be treated as a 'publisher' of third party content, Congress has comprehensively immunized republication by individual Internet users."¹⁵ This principle is in tension with *Batzel v. Smith*, where the Ninth Circuit ruled that such a user must reasonably believe the third-party author intended his material for publication.¹⁶ As such, it remains fertile ground for analysis in future cases.

Practically speaking, in the decade since Section 230 was enacted, courts have made at least three things clear. *First*, Section 230

applies broadly not only to Internet service providers like America Online, but to all online services to which users can post content, ranging from ordinary interactive websites¹⁷ to e-mail listservs.¹⁸ **Second**, although Section 230 immunizes such websites from the posting of third-party content, it does not immunize the content provider him- or herself; thus, in a recent spate of cases, plaintiffs have tried to force Internet providers to disclose the identity of various bloggers, who posted allegedly defamatory content.¹⁹ **Third**, by its language, Section 230 does not affect enforcement of federal criminal law, federal intellectual property law, otherwise consistent state law, or communications privacy law.²⁰ Section 230 bars all tort claims, even when based on an allegation of negligence in enabling the poster to violate criminal statutes.²¹ The applicability of Section 230 beyond these general rules is murkier.

II. Recent Section 230 Decisions

Recent cases illustrate that there is substantial ambiguity as to the legal outcome where a plaintiff sues a website owner over data that the owner either collects and redistributes in a particular form or combines with third-party content. Despite the 10-year existence of Section 230, however, few appellate courts have considered these increasingly common situations. Collectively, these decisions turn on a court's interpretation of what constitutes an "information content provider," as defined by Section 230. Of those courts that have analyzed these mixed-content situations, most, mainly trial courts, have construed Section 230 broadly. Notably, the Ninth Circuit found immunity for an Internet dating service where a third party created a false profile of an actress based on a questionnaire the service provided to any user seeking to post a profile.²²

In another case, a federal district court, reasoning that Section 230 allows the screening of "objectionable" content, found immunity for Google after it refused to run advertisements on the plaintiff's website.²³ Another federal district court found immune an online directory service even though it facilitated the creation of entries through a form and prompts.²⁴ In another case, a federal district court found Amazon.com immune for publication of images by third parties even though it had encouraged the third parties to

publish the images.²⁵ Finally, a New Jersey court found that even though a website operator helped "shape" the content of third party postings, selectively edited the postings, and banned users deemed disruptive, Section 230 still provided immunity.²⁶ Nevertheless, some courts have gone the opposite direction, rejecting Section 230's immunity in mixed-content cases.²⁷

Decisions from the Ninth Circuit are currently at center stage in the debate about the scope of Section 230 immunity. The court recently decided not to grant immunity to a mixed-content website, despite two earlier decisions to the contrary. These earlier cases properly recognized that Congress intended defendants to exercise editorial control over the website content, and that such control does not convert them into "content providers."

A. *Batzel and Carafano*

The Ninth Circuit decided two cases in 2003, finding immunity even in unusual circumstances. In *Batzel v. Smith*, the court found immunity for the director of Amsterdam's famed Rijksmuseum, who posted to a listserv an e-mail he received in his capacity as its moderator, so long as the district court determined on remand that the sender intended his e-mail for publication.²⁸ The director, in posting the messages, engaged in a traditional editorial process: He selected which emails merited publication to the relevant audience, and made minor alterations to them, including the one at issue.²⁹

The *Batzel* opinion is notable not only for its holding—that the Ninth Circuit would, like most courts, interpret Section 230 broadly—but more importantly for its expansive reasoning. The court examined the foundation of Section 230, finding that Congress primarily intended to encourage interactive service providers and users to "self-police the Internet for obscenity and other offensive material."³⁰ Further, as the court noted: "If efforts to review and omit third-party defamatory, obscene or inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers are likely to abandon efforts to eliminate material from their site."³¹ Applying these principles, the court found that the director's alterations to the e-mail and choice to publish it did not "rise to the level of 'development.'"³² Rather, "the central purpose of the Act was to protect from

liability service providers and users who take some affirmative steps to edit the material posted. ... The 'development of information' ... means something more substantial than merely editing portions of an e-mail and selecting material for publication."³³

Earlier that year, the court had made a similar ruling, this time where the website operator arguably contributed more content to the postings than in *Batzel*. In *Carafano v. Metrosplash.com*, the court found immune an online matchmaking service that had allowed someone to post a false profile of actress Christianne Carafano.³⁴ The same individual also posted a fake e-mail address that, when contacted, provided Carafano's home address and phone number.³⁵ As a result, numerous individuals harassed Carafano, prompting her lawsuit.

The court, faced for the first time with a website that facilitated the creation of content, found nonetheless that the service, Matchmaker, was not an "information content provider" under Section 230.³⁶ Matchmaker required participating individuals to complete a detailed questionnaire with pre-prepared multiple choice and free response essay questions.³⁷ Citing the "robust" protection Section 230 had afforded other defendants and the "restrictive definition of 'information content provider,'" the court found the existence of the questionnaire irrelevant, because "selection of the content was left exclusively to the user."³⁸ Even the site's classification of user characteristics into categories did not "transform Matchmaker into a 'developer' of 'underlying misinformation.'"³⁹ Moreover, Matchmaker's facilitation of highly structured searches based on questionnaire responses advanced the Congressional policy "to promote the continued development of the Internet and other interactive computer services."⁴⁰

B. About face: Roommate.com

Despite the *Batzel* and *Carafano* decisions, as well as similar precedent in other jurisdictions,⁴¹ the Ninth Circuit issued a surprising opinion in *Fair Housing Council of San Fernando Valley v. Roommate.com*, finding that Section 230 does not immunize a roommate finding service from claims under the Fair Housing Act.⁴² In this closely watched case, Roommate.com has petitioned for *en banc* review.

Roommate.com is very fact-specific. The website required users to respond to a series of online questionnaires by choosing from answers in drop-down and select-a-box menus.⁴³ It also included a space for users to post essays.⁴⁴ Some questions allowed users to express preferences about potential roommates based on gender, sexual orientation, and children.⁴⁵ The service allowed users to create personal profiles showing this information and search lists of compatible roommates, and it sent newsletters to members seeking housing, listing compatible members.⁴⁶

Judge Alex Kozinski, writing for the majority, addressed three sets of information separately. First, citing the Section 230 provision that any person "responsible, in whole or in part, for the creation or development of information" is an Internet content provider, the court found that Roommate.com was "responsible" for the questionnaires because it created the forms and answer choices.⁴⁷ Second, the court found publication and distribution of profiles also made Roommate.com a content provider, because it facilitated the channeling of discriminatory housing preferences.⁴⁸ Finally, the court found Roommate.com was immune from challenges to information in the essay section of user profiles.⁴⁹

The court's fractured opinion—in which the three-judge panel produced three separate opinions—is ill-reasoned, on several grounds. First, the decision appears very result-driven. The decision evidences the court's sincere concern with allowing Internet technology to undermine federal fair housing law, yet the court scarcely considered whether the information Roommate.com "contributed" could violate the Fair Housing Act, citing briefly to the plaintiff's theory that it could and noting it need not decide the issue then.⁵⁰ Moreover, courts may unfortunately apply the decision's sweeping dicta to the detriment of the vast majority of websites who are dependent on content provided by third parties and whose day-to-day content does not implicate federal housing laws or comparable statutes.

This is particularly evident from a hypothetical the majority opinion poses—whether the owners of a website "harassthem.com" would be liable for the posting of names, addresses, social security numbers, and the like.⁵¹ But

Section 230 hardly sanctions such conduct, and indeed does not provide immunity for the posters themselves; in the situation posed, the content provider would undoubtedly be liable for the information. In addition, rather than analyze who authored the challenged content—the proper focus under Section 230—by offering this hypothetical, the court mistakenly shifted the attention to the content of the challenged speech.

Second, unlike in *Carafano* and *Batzel*, the court appeared to ignore the policy reasons behind Section 230: Congress sought to immunize the editing of online content provided by third parties.⁵² It also ignored the express Congressional intent to overrule a case with essentially the same holding—that publishers of Internet content are liable to the same degree as print publications for content.⁵³ Moreover, it overlooked portions of the statute itself, which expressly immunize content providers who "in good faith ... restrict access to or availability of material" they consider "objectionable."⁵⁴ As the court in *Batzel* explained, interpreting Section 230 to allow only the removal of information from the Internet—rather than the screening of content—"cannot fly There is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity."⁵⁵ This analysis, ignored by the court in *Roommate.com*, is invaluable to understanding the broad immunity Congress intended when it enacted Section 230.

Finally, the court's attempt to distinguish the case from *Carafano* evidences a technical approach to Section 230 that cannot withstand scrutiny, and is likely to leave website operators in considerable confusion over their use of questionnaires and posting of user profiles.⁵⁶ The court noted that *Carafano* differs in "at least one significant aspect," in that Matchmaker did not solicit the content provider to post information about Carafano.⁵⁷ Yet this distinction implies that Matchmaker could be liable for any defamatory content it "solicited" merely by posting a questionnaire—a holding that would be wholly inconsistent with *Carafano*. In addition, the court noted, *Roommate.com* "channels the information based on members' answers to various questions."⁵⁸ But in *Carafano*, too, users could conduct searches based on answers provided in response to Matchmaker's

questions, and such "interactivity" is precisely what Congress sought to encourage and protect when it enacted Section 230.⁶⁰

III. Practical Implications of Recent Decisions

The decision in *Roommate.com* has created confusion in the Section 230 world, which beforehand remained relatively stable. Nonetheless, courts have yet to fully explore the scope of Section 230 as applied to mixed content. Internet service providers and website owners should consider the following practical points.

First, *Roommate.com*, even if affirmed, does not alter the basic principle that sites can use third-party content without fear of tort liability. This holds true so long as the site does not solicit content in the very fact-specific ways of the defendants in *Carafano* and *Roommate.com*. For example, *Roommate.com* does not mean that a site exposes itself to liability merely by asking its audience for feedback on a particular story, or by allowing users to post anonymously to bulletin boards. In addition, although Section 230 should protect the ability of a party to select and publish offensive material, future decisions may explore whether someone who actively pursues and posts offensive third-party content may escape liability. For now, the posting of third-party content remains well-protected under cases like *Zeran* and *Barrett*. Indeed, even the divided *Roommate.com* court agreed on this point.⁶¹

Second, in light of *Roommate.com*, websites that feature content or pre-prepared questionnaire "answers" that visitors can select should ensure this content does not independently violate federal or state laws. This concern is unlikely to apply to most sites. Nor is it clear whether, in the future, the Ninth Circuit will find any site that merely solicits third-party content with specific questions to be the "provider" of that content. Nevertheless, website operators should remain cautious about allowing users to post their own comments if the space provided for doing so overtly urges readers to post information that a court might deem illegal.

Third, websites may remove portions of offensive or libelous third-party content and retain immunity under Section 230. Indeed, this was the express Congressional intent behind

Section 230, which immunizes entities when they "in good faith ... restrict access or availability of material" they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."⁶² Even the dissent in *Batzel*, in proposing a workable test for immunity in the mixed-content context, acknowledged as much, finding that "[a]n important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. Preserving CDA immunity, even when a service user or provider retains the power to delete offensive communications, ensures that such entities are not punished for regulating themselves."⁶³

Fourth, the marketing and promotion of third-party content should not jeopardize Section 230 immunity. For example, in *Blumenthal v. Drudge*, a federal district court found that America Online, which hosted the now infamous political blog *Drudge Report*, was immune from liability for the blog's content.⁶⁴ The court found this to be the case even though AOL paid Drudge for his content, reserved the right to remove content or request changes, and advertised Drudge's "[m]averick gossip."⁶⁵ Thus, websites may promote the activities of its bloggers, and even their ability to edit the content, knowing that Section 230 immunizes their conduct.

The current debate in the Ninth Circuit regarding the scope of Section 230's immunity is a microcosm of cases to be considered by courts nationwide, as user-generated and mixed content continue to flourish. Understanding the current state of the law and watching future decisions will be critical to making decisions about what content a website operator can post without fear of liability.

NOTES

¹ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *6 (N.Y. Sup. May 24, 1995).

² *Id.* at *4.

³ See S. Conf. Rep. No. 104-230 (1996). In contrast, in the United Kingdom, generally, once the owner of a website receives notice of defamatory content, he or she may be sued as the publisher of the statement. See *Godfrey v. Demon Internet Ltd.*, 3 W.L.R. 1020 (Q.B. 1999).

⁴ 47 U.S.C. § 230(b)(1)(2).

⁵ *Id.* § 230(c)(1).

⁶ *Id.* § 230 (e)(3).

⁷ *Id.* § 230(f)(2).

⁸ *Id.* § 230(f)(3).

⁹ *Id.* § 230(c)(2)(A).

¹⁰ *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal.4th 33 (Cal. 2006); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); see also *Barrett v. Fonorow*, 799 N.E.2d 916 (Ill. App. 2003); *Gentry v. eBay Inc.*, 99 Cal. App. 4th 816 (Cal. App. 2002); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. App. 2001); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (Cal. App. 2001); *Jane Doe One v. Oliver*, 755 A.2d 1000 (Conn. Super. 2000), *aff'd*, A.C. 21269 (Conn. App. 2002) (*per curiam*). But see *Doe v. GTE Corp.* 347 F.3d 655, 660-61 (7th Cir. 2003) (stating in *dicta* that Section 230(c)(2), a means of defining (c)(1), may not provide any immunity at all, and that Section 230 may permit the states to regulate Internet service providers in their capacity as intermediaries).

¹¹ *Zeran*, 129 F.3d at 328-330.

¹² *Id.* at 331.

¹³ *Id.* at 333.

¹⁴ *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379 (Cal. App. 2004), *rev'd*, 40 Cal. 4th 33 (Cal. 2006).

¹⁵ *Id.* at 62. See also *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others").

¹⁶ 333 F.3d at 1035.

¹⁷ See, e.g., *Donato v. Moldow*, 865 A.2d 711 (N.J. App. 2005) (finding Section 230 applies to a website operator who posted information, conducted polls, and allowed users to post comments).

¹⁸ See generally *Barrett*, 40 Cal. 4th 33. Likewise, in *Batzel*, the Ninth Circuit applied Section 230 to the poster of an e-mail on a listserv, so long as the poster reasonably believed the author had intended the e-mail for publication. 333 F.3d at 1035. A few courts have held otherwise. See, e.g., *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273 (D.N.J. 2006) (declining to apply Section 230 to a search engine).

¹⁹ See, e.g., *Doe v. Cahill*, 884 A.2d 451 (Conn. 2005).

²⁰ 47 U.S.C. § 230(e).

²¹ For example, the Florida Supreme Court found that Section 230 immunizes an interactive service even where the plaintiff alleges negligence, in furtherance of criminal statutes, such as child pornography laws. See generally *Doe v. America Online*, 783 So.2d 1010 (2001).

²² *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003).

²³ *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

²⁴ *Prickett v. InfoUSA, Inc.*, 2006 WL 887431, at *5 (E.D. Tex. Mar. 30, 2006).

²⁵ *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).

²⁶ *Donato v. Moldow*, 865 A.2d at 719-20.

²⁷ A few courts, seemingly result-oriented, have found Section 230 immunity may be unavailable. *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 199 Fed.Appx. 738, 744 (11th Cir. Aug. 1, 2006) (where a website operator submitted affidavits that it generally did not alter or post consumer complaints on its website, affidavits were insufficient to demonstrate the operator was not a content provider under Section 230); *Doctor's Assocs., Inc. v. QIP Holders, LLC*, 2007 WL 1186026, at *2 n.3 (D. Conn. Apr. 19, 2007) (finding that defendant Quizno's might be content provider under Section 230 if it helped authors of commercials use plaintiff Subway's mark); *Anthony v. Yahoo!*, 521 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006) (court refused to dismiss case on Section 230 basis where plaintiff alleged defendant had presented outdated profiles to its online dating service and created some of the content at issue); *Teva Pharm. USA Inc. v. Stop Huntingdon Animal Cruelty USA*, 2005 WL 1010454, at *11 (N.J. Super. Ct. Ch. Div. Apr. 1, 2005) (website that posted achievements of animal rights activists was not immune under Section 230 because it selected and revised postings and endorsed radical activities); *Hy Cite Corp. v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142, 1151 (D. Ariz. 2005) (where defendant operated website allowing consumers to post complaints about companies, and forced companies to pay money to remove posts, fact that some content originated with website operator and that website operator solicited reports with promise that individuals might be compensated suggested defendants were "responsible ... for the creation or development of information" submitted by third parties); *Loan Ctr. of California v. Krowne, No. FCS029554* (Solano County Court July 27, 2007) (tentative ruling) (finding Section 230 may not immunize a website's characterization of a mortgage lender as "gone" in the title of a third-party post).

²⁸ *Batzel*, 333 F.3d at 1035.

²⁹ *Id.* at 1021.

³⁰ *Id.* at 1028.

³¹ *Id.*

³² *Id.* at 1031.

³³ *Id.*

³⁴ *Carafano*, 339 F.3d 1119.

³⁵ *Id.*

³⁶ *Id.* at 1125.

³⁷ *Id.* at 1121.

³⁸ *Id.* at 1123-24.

³⁹ *Id.* at 1124.

⁴⁰ *Id.* at 1125.

⁴¹ *E.g., Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006).

⁴² --- F.3d ---, 2007 WL 1412650 (9th Cir. 2007).

⁴³ *Id.* at *1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *2-*3 (citation omitted).

⁴⁸ *Id.* at *4-*5.

⁴⁹ *Id.* at *6.

⁵⁰ *Id.* at *3.

⁵¹ *Id.* at *4.

⁵² *Id.* at *2.

⁵³ See note 3 and accompanying text.

⁵⁴ 47 U.S.C. § 230(c)(2)(A).

⁵⁵ *Batzel*, 333 F.3d at 1032.

⁵⁶ It also casts doubt on the decision in *Craigslist, Inc.*, 461 F. Supp. 2d 681, where the court found Section 230 immunizes Craigslist from third-party postings violative of the Fair Housing Act.

⁵⁷ *Roommate.com*, 2007 WL 1412650, at *4.

⁵⁸ *Id.* at *5.

⁵⁹ *Carafano*, 339 F.3d at 1024-25.

⁶⁰ See note 3 and accompanying text.

⁶¹ 2007 WL 1412650, at *5-*6.

⁶² 47 U.S.C. § 230(c)(2)(A) (emphasis added).

⁶³ *Batzel*, 333 F.3d at 1040 n.16 (citation omitted) (Gould, J., concurring in part, dissenting in part).

⁶⁴ 992 F.Supp. 44.

STAYING ANCHORED TO DMCA SAFE HARBORS IN TURBULENT TIMES

By Jennifer Small

Section 512 of the Digital Millennium Copyright Act represents an important compromise between copyright holders and service providers. Pursuant to the safe harbors of Section 512, a service provider will not be liable for certain kinds of infringement committed by its users if the service provider complies with requirements enacted to ensure the service provider's reasonable cooperation with the copyright holder in the event of a dispute.

In order to uphold its end of the bargain, a service provider must, among other things:

- designate a single person to receive notices of infringement and keep such contact information updated;
- adopt, reasonably implement, and inform subscribers and account holders of a policy for terminating repeat infringers;
- accommodate and not interfere with standard technical measures used by copyright holders to identify or protect copyrighted works, such as employing encryption technology that makes it impossible for a copyright owner to ascertain which users are transferring which files;
- have no actual knowledge of infringement and be aware of no facts or circumstances from which infringing activity is apparent; and
- act expeditiously to remove the allegedly infringing material upon receiving notice of a claimed infringement.

For its part, a copyright holder must, among other things, send proper take-down notices which make clear the allegations at issue. Specifically, copyright notices must:

- identify the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notice, a representative list of such works at that site;
- identify the material that is claimed to be infringing and provide information reasonably sufficient to permit the service provider to locate the material;

- provide the complainant's contact information;
- declare under penalty of perjury that the complainant has a good-faith belief that the use of the copyrighted material is not authorized by the copyright owner, its agent, or the law;
- declare under penalty of perjury that the information in the notice is accurate and that the complainant is the copyright owner or authorized to act on behalf of the copyright owner; and
- provide the complainant's physical or electronic signature.

Compliance with the above requirements is not just a matter of "best practices." Rather, such details are the key to gaining or piercing the immunity offered by the DMCA's safe harbors, and determining whether a company is liable in a high-stakes lawsuit. For example, in a recent multi-million dollar copyright suit against a popular user-generated-content website, the court explained, "[the defendant's] ultimate eligibility for 'safeharbor' protection depends on whether [the defendant] can prove that it satisfies elements common to all the safe harbor provisions...". *Tur v. YouTube Inc.*, 2007 U.S. Dist. Lexis 50254, at *7 (C.D. Cal. June 20, 2007).

Ninth Circuit explains safe harbor requirements in *Perfect 10, Inc. v. CCBill LLC*

Earlier this year, the Ninth Circuit published a noteworthy decision clarifying the internal procedures an online or Internet service provider must implement to avail itself of the DMCA safe harbors. *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751 (9th Cir. 2007). The decision addressed a copyright dispute brought by Perfect 10, a publisher of adult photographs, against CCBill, a payment-processing service, and CaveCreek Wholesale Internet Exchange, a website-hosting service. Perfect 10 alleged that webmasters using the defendants' services had posted unauthorized Perfect 10 content on their websites. On a motion for summary judgment, the district court held that the defendants qualified for certain safe harbors under the DMCA. *Perfect 10, Inc. v. CCBill LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004). Both parties appealed. The Ninth Circuit affirmed in part and reversed in part, remanding some issues for further consideration.

The Ninth's Circuit decision in *CCBill*, discussed in more detail below, offers important lessons: (1) it provides further information about the requirements for duly implementing a repeat-infringer policy; (2) it holds that DMCA take-down notices must *individually* comply with the statute's notice requirements and that a service provider's receipt of a non-compliant notice does not trigger any take-down response; and (3) it offers further insight into what might constitute interference with "standard technical measures."

Repeat-infringer policies

To gain protection under the DMCA safe harbors, service providers must develop an internal policy to terminate accounts of users who have repeatedly infringed. Determining what is required under this provision has been the subject of some debate. The statute does not specify, for example, whether "repeat infringement" means repeat *alleged* infringement or repeat *adjudicated* infringement. It also does not specify whether repeat infringers can ever be rehabilitated such that they can once again join the ranks of subscribers and account holders. While these questions remain, *CCBill* offers some solace to would-be defendants by ruling that a repeat-infringer policy need not be perfectly implemented as long as the implementation is reasonable.

In *CCBill*, the defendants tracked alleged infringers by keeping a written log of such incidents. Perfect 10 asserted that the defendants' repeat infringer policies were not reasonably implemented because, in some cases, the defendants had neglected to record the name of the infringing webmaster in the corresponding column of the log. The Ninth Circuit, however, disagreed with Perfect 10's assertion, noting that the limited instances of not filling in all portions of the log did not indicate the service providers' policies were unreasonably implemented, where the blank information was limited to a single page and where discovery otherwise showed that the defendants properly tracked alleged infringers. The court thus held that the few blank fields in the logs did not present a triable issue of fact as to whether the defendants failed to implement their policies.

Proper infringement notices

The DMCA requires service providers to respond expeditiously to proper notices of infringement from copyright holders. It also requires the service provider to expeditiously remove content where the service provider has actual or constructive knowledge that the content is infringing. The relationship between these standards raised the question of whether an incomplete notice might ever constitute actual or constructive knowledge on the part of the service provider, requiring take down of the at-issue content, notwithstanding the fact that the notice was non-compliant. *CC Bill* answers this question in the negative.

In *CC Bill*, Perfect 10 asserted that the defendants failed to respond to alleged infringements after being placed on notice by Perfect 10. The court disagreed with this challenge, holding, as did the trial court, that Perfect 10's notices failed to substantially comply with the DMCA's notification requirements and thus raised no genuine issue of material fact as to whether the defendants reasonably responded to them or otherwise reasonably implemented a repeat-infringer policy based on such notices.

Perfect 10 purported to meet the notice requirements through a combination of three documents: (1) a 22,185 page document including pictures with URLs of Perfect 10 images that were allegedly posted on websites made available via the defendants' services; (2) a spreadsheet identifying the Perfect 10 models in the prior notice; and (3) interrogatory responses, signed under penalty of perjury, which incorporated by reference the aforementioned spreadsheet. Neither the first nor the second documents contained a statement under penalty of perjury. The court, therefore, held that Perfect 10's DMCA notices were deficient, reasoning:

The DMCA requires a complainant to declare, under penalty of perjury, that he is authorized to represent the copyright holder and that he has a good-faith belief that the use is infringing. This requirement is not superfluous. Accusations of alleged infringement have drastic consequences. An accuser could have content removed entirely. If the content infringes, justice has been done. But if it does not, speech

protected under the First Amendment could be removed. We, therefore, do not require a service provider to start potentially invasive proceedings if the complainant is unwilling to state under penalty of perjury that he is an authorized representative of the copyright owner and that he has a good-faith belief that the material is unlicensed.

Id. at 761. Thus, because Perfect 10's notices of infringement lacked the requisite declarations under penalty of perjury, it could not use such notices to create an inference that the defendants failed to reasonably implement their repeat-infringer policies.

A service provider will fall outside the DMCA safe harbors if it has constructive or actual notice but fails to take action against infringing activity. The Ninth Circuit held, however, that such red-flag notice excludes instances where domain names or other information associated with a website create merely a vague indication of illegal activity, where such domain names could be the result of marketing hype rather than actual infringement. Thus, the fact that the defendants in *CCBill* provided services to websites with URLs such as "illegal.net" and "stolencelebritypics.com" failed to create a red flag to which the service providers were obligated to respond.

Interference with "standard technical measures"

The *CCBill* court also addressed, for the first time, whether blocking access to websites constitutes interference with "standard technical measures" in violation of section 512(i)(1)(B), which prohibits a service provider that interferes with "standard technical measures" from benefitting from the safe harbors. Perfect10 argued that *CCBill* did not qualify for any safe harbor because it interfered with "standard technical measures" by blocking Perfect10's access to its affiliated websites. The defendants asserted that accessing websites was not a standard technical measure under section 512(i)(1)(B) because it was not "developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." *Id.* at 764 (citing § 512(i)(2)(A)). They also asserted that, because Perfect 10 had previously reversed charges for subscriptions, such measures unfairly imposed

a substantial cost on the defendants. In light of the aforementioned disputed issues of fact, the court remanded the issue to the district court to determine whether the defendants' refusal to process Perfect 10's transactions constituted a "standard technical measure," thus removing defendants from eligibility for the DMCA safe harbors.

DMCA practice points

The following practice points can be extracted from the *CCBill* decision:

- DMCA compliance requires, among other things, that a service provider maintain appropriate internal procedures which document DMCA notices and other instances of infringement that may come to a service provider's attention. A service provider, however, has some latitude as to the kind of internal procedures that are implemented. It may be sufficient for a service provider to maintain copies of all DMCA take-down notices it has received, presuming, however, that the service provider is able to track instances where a subscriber or account holder has infringed repeatedly and otherwise properly implement a repeat-infringer policy.
- Entities enforcing copyrights under the DMCA should ensure that their take-down notices are DMCA-compliant and that the notices contain declarations under penalty of perjury that: (a) the entity has a good-faith belief that the material is being infringed; and (b) the information in the notice is accurate and the entity is either the copyright owner or authorized to act on behalf of the copyright owner.
- Entities enforcing copyrights under the DMCA should ensure that each individual notice complies with all of the DMCA's notice requirements. They should not assume that separate notices regarding the same alleged infringement can cumulatively meet the DMCA's notice requirements.
- Notwithstanding the fact that compliance with DMCA requirements need not be perfect, it still must be substantial. *CCBill* does not, for example, overturn *Ellison's* requirement that a service provider maintain updated contact information for receiving infringement notices. *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004). Thus, service

providers should continue to regularly evaluate and monitor their internal DMCA procedures to ensure that their procedures are in compliance with the DMCA.

- While *CCBill* held, on its facts, that suggestive URLs alone are not enough to create a red flag warranting expeditious action pursuant to a reasonably implemented repeat-infringer policy, this holding underscores the continuing tension between the DMCA safe harbors and the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005). *Grokster* created what many believe to be a new kind of secondary liability for online service providers by ruling that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 919. While suggestive URLs alone might not constitute sufficient notice to mandate action under a repeat-infringer policy, they could provide support that a service provider is distributing its service or corresponding software with the intent of promoting infringement.

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