

## INTERNET & THE LAW

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### The Cycles of Applying the Law **Online**

*If there was a leniency, it may be disappearing.*

**BY LANCE KOONCE**

*'The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations.... [I]ts vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online business an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.'*

**S**O SAYETH the Ninth Circuit in the recent *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* ruling, 521 F.3d 1157 (9th Cir. 2008). It is an interesting quote, even if dicta. Is the court really suggesting that back in the good old days (i.e., a few years ago), when the Internet presumably was still a fragile new means of communication, courts were entitled to interpret congressional mandates with less precision or vigor, so as to give online businesses an inequitable leg up over their brick-and-mortar competitors? And that courts

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now should recognize that times have changed, and interpret the same statutes extant "back then" in a different manner?

More importantly, is the Ninth Circuit right? Some 15 years into the Internet revolution, has the technological tide shifted in such a fundamental way that the laws that govern conduct online must also change?

There is modest evidence to suggest that the court is correct, although some of that evidence has been generated by the Ninth Circuit itself. A review of several areas of law particularly intertwined with Internet service providers (ISPs) seems to indicate an identifiable ebb and flow of regulation and judicial interpretation that cuts across substantive issues and legal regimes, and that may be entering a phase of contraction at present.

This pattern, which likely holds true for many types of technological introductions, might be described as having four stages:

- (a) the introduction of technology and attempts to apply existing laws;
- (b) legislation addressing areas with imperfect fit;
- (c) aggressive enforcement of new legislation; and
- (d) moderation of enforcement, and judicial retrenchment.

Before turning to specific areas where this pattern might be seen, a word about the types

of legislation peculiar to the Internet era.

To state the obvious, the Internet touches on wide swathes of our lives, and thus to talk about "Internet laws" is perhaps meaningless. However, because the Internet is primarily a communications and content delivery technology, among the legal regimes most significantly affected by the medium are the intellectual property laws, along with the law of defamation. The Internet is also a facilitator of commerce, and thus issues such as application of the tax laws and contract law also arise with some frequency.

After several years of fitful application of existing laws to issues arising in the new online reality, it became clear that there were areas where laws needed to be rewritten or even created from whole cloth to address trouble spots. Domain names, a unique aspect of the medium, are an example of the type of open issue that needed to be addressed by brand new laws. In the United States, the Anticybersquatting Consumer Protection Act was created to address perceived gaps in the Lanham Act as applied to domain names, while internationally the Uniform Domain-Name Dispute-Resolution Policy arbitration regime was created to facilitate prompt resolution of disputes.

Section 230 of the Communications



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Decency Act (Section 230), enacted in 1996, creates an immunity for providers of interactive computer services against liability that might arise from content created by third parties, as follows: “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 1998 Congress acted to address copyright issues unique to the Internet area, enacting the Digital Millennium Copyright Act (DMCA). Significantly, the Act provides a “safe harbor” from copyright infringement liability for an ISP for infringing material made available through the ISP, as long as the ISP does not have actual or constructive knowledge<sup>1</sup> of the infringing material, or—if it gains such knowledge—acts quickly to remove the infringing material. 17 U.S.C. §512(c). To qualify for the safe harbor, the ISP also must not “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” Id.

### Section 230

The *Roommates.com* case involved application of the Section 230 service provider immunity discussed above to an Internet business that matches prospective roommates with others renting rooms, much like an online dating service. However, in the case of the *Roommates.com* service, users were directed through a series of online forms that the plaintiff housing councils argued were based on discriminatory criteria.

Prior decisions interpreting Section 230 immunity have almost uniformly upheld immunity, and expanded the reach of the statute beyond the strict confines of the language of the statute. The cases expanding Section 230 have held that it immunizes service providers not just from defamation claims, but also from a wide variety of other torts.<sup>2</sup> See, e.g., *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (distribution of obscene material); *Doe v. MySpace*, 474 F.Supp.2d 843 (W.D. Tex. Feb. 13, 2007) (negligence).

The outward creep of the Section 230 decisional law has engendered some debate among legal observers. Yet as explained by the Fourth Circuit in one of the earliest cases interpreting the section, an expansive reading of it has been deemed consistent with

Congressional intent because “lawsuits seeking to hold a service liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium...” *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

But the “new and burgeoning Internet” has apparently given way to a more mature medium that ought to take more responsibility for its actions. In the *Roommates.com* case, the

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Ninth Circuit denied Section 230 immunity to the Web site provider, noting that the statute itself limits the immunity where the service provider is also the creator or developer of the offending content.

The court held that the creation of online questionnaire forms with drop-down lists that only offered a limited subset of choices (according to the court, non-neutral choices) constituted sufficient involvement in the development of the potentially discriminatory conduct that the service provider fell outside the statutory language.

To reach its desired result, the Ninth Circuit majority was forced to retreat from the language of its own prior decision in *Carafano v. Metroplash.com Inc.*, 339 F.3d 1119 (9th Cir. 2003), in which it had stated in connection with an online dating service called Matchmaker:

The fact that some of the content was formulated in response to Matchmaker’s questionnaire does not alter this conclusion. Doubtless, the questionnaire facilitated the expression of information

by individual users. However, the selection of the content was left exclusively to the user. The actual profile “information” consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an “information content provider” under the statute because no profile has any content until a user actively creates it. Id. at 1124.

The court acknowledged the apparent conflict between the broad immunity provided in the *Carafano* case and its more limited ruling in *Roommates.com*, but opined that the result in *Carafano* was correct because the Matchmaker Web site only offered “neutral” tools, whereas the *Roommates.com* Web site’s drop-down menus elicited discriminatory content. Yet it appears clear that the Ninth Circuit could have easily found that the service provider was entitled to immunity on the same basis as in *Carafano*, and that it went out of its way to create a new standard that requires much higher scrutiny of Web site design before a service provider will be entitled to immunity.

The *Roommates.com* dissent claimed that the decision represents an “unprecedented expansion of liability for Internet service providers [that] threatens to chill the robust development of the Internet that Congress envisioned.” The dissent went on to state:

By exposing every interactive service provider to liability for sorting, searching, and utilizing the all too familiar drop-down menus, the majority has dramatically altered the landscape of Internet liability. Instead of the “robust” immunity envisioned by Congress, interactive service providers are left scratching their heads and wondering where immunity ends and liability begins.

### Copyright—Secondary Liability

The widespread sigh of relief heard from ISPs in May 2007 when the Ninth Circuit issued its opinion in *Perfect 10 v. Amazon Inc.*, 487 F.3d 701 (9th Cir. 2008), amended, 508 F.3d 1146 (2008),<sup>3</sup> was the result of the appellate court’s reversal of

the Central District of California's ruling on copyright fair use in that case. That exuberant response may have been too hasty.

The case involved claims by the provider of adult images that Google's image search function infringed the provider's copyright interests, by displaying thumbnail versions of the images as part of the search results, and by linking to full-sized images on third-party servers. On summary judgment, the district court held that Google's provision of the thumbnails was not a fair use under the Copyright Act, and that Google could not be held secondarily liable under theories of contributory or vicarious liability.

The district court's ruling on fair use might have significantly curtailed the ability of search engines to provide relevant graphic material in order to represent search results. Although clearly damaging to companies such as Google, Amazon and Yahoo!, it was not clear that the decision would have had a broader chilling effect on all ISPs, or all Internet users.

Regardless, the Ninth Circuit reversed, finding that the display of reduced-size images in a search result was very "transformative" and provided a significant public benefit, and thus was a fair use. Yet the court also reversed on contributory liability, building on the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (secondary liability for "intentionally inducing or encouraging direct infringement"). The Ninth Circuit remanded for a determination of whether Google could be found secondarily liable on the basis of a new test: whether Google "had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps."

The circuit's reversal on contributory liability has the potential for a more widespread impact on ISPs. It requires those that have knowledge of infringing material and who can remedy the problem with "simple" measures to do so. Presumably receiving notice of allegedly infringing material in the form of a demand letter would be sufficient to create knowledge.

But what constitutes "simple" measures to address the infringing material? The decision would seem to create a new requirement for taking affirmative steps upon notice of

infringing material appearing in search results that would impose a substantial new burden on search engines, although perhaps the full impact will not be known until the district court addresses the issue on remand.

More importantly, the decision on contributory infringement seems to anticipate several pending lawsuits addressing a similar issue in a slightly different context: ISP liability for infringing material posted by third parties, where the ISP has generalized knowledge of the infringing material, but where there is a legislative carve-out shielding ISPs from liability.

### Copyright—DMCA

Google, through its subsidiary YouTube, is at the center of another lawsuit, *Viacom Int'l Inc. v. YouTube Inc. et al.*, (S.D.N.Y. Docket No. 07 civ. 2103), aimed at clarifying and thereby limiting protections for ISPs, in this case §512 of the Digital Millennium Copyright Act. A second major lawsuit on point, this one a class action, is also pending in the Southern District of New York: *The Football Association Premier Ltd. et al. v. YouTube Inc. et al.*, (Docket No. 07 civ. 3582).

Although the claims vary somewhat in these cases, the underlying premise is the same: While the DMCA creates a safe harbor for ISPs with respect to infringing content posted by others, there must be limits to that safe harbor, especially where the ISP is on notice of specific works, or types of works, that are repeatedly posted without authorization from the owner of the works.

Although the defendants acknowledge that the DMCA creates an exclusion from the safe harbor for ISPs who do not address infringing conduct from repeat offenders, they argue that it does not create any exception for infringing content (even massive amounts of such content) owned by the same party that is repeatedly posted by different users.

Content providers argue that it is a virtual impossibility for them to constantly monitor the millions of videos posted daily on YouTube to identify their content, and that the burden is so heavily weighted against them that ISPs—which earn revenue, usually in the form of advertising, from infringing content and non-infringing content alike—should be forced, at the very least, to adopt all available technological measures to identify and remove content. In essence, the plaintiffs argue that

YouTube exploits the DMCA safe harbor in order to build a profitable business based on copyright infringement.

Although pending lawsuits obviously shed little light on the direction courts may take, they do indicate that forces are being marshaled in opposition to the broad interpretations of the DMCA safe harbor that have prevailed thus far. Whether these result in court decisions that align with the Ninth Circuit's apparent bias towards curtailing the most protective aspects of current laws governing online behavior, or in a more coordinated effort to push for legislative reform, remains to be seen.

### Conclusion

In most complex systems, there is an ebb and flow to innovation and subsequent assimilation of change into the system.

For every new and purportedly revolutionary concept or product, there is a period of consideration and analysis (and often suspicion), which then leads to rejection or acceptance. If the new idea finds favor in the marketplace, there often is over-exuberant adoption, followed inevitably by contraction and tighter scrutiny.

So too in law, when new technologies are introduced. While the limited examples discussed above cannot yet be deemed a trend, it is an appropriate moment in time to ask whether a period of contraction has begun. We should look for evidence in other areas, such as Internet taxation (currently shielded in large part by the Internet Tax Freedom Act) and the push for "net neutrality." Perhaps more importantly, we should ask what will be at the other end of this phase: a period of relative calm, or another cycle of expansion and contraction?

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1. The Act states that an ISP may qualify for the safe harbor where it, "in the absence of...actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent..." 17 U.S.C. §512(c)(1)(A)(2).

2. Indeed, the only areas seemingly beyond the reach of §230 have been federal intellectual property claims and criminal claims, expressly exempted by Congress. 47 U.S.C. §§230(e)(1) (criminal) and (e)(2).

3. Six months later, the Ninth Circuit amended its decision to reflect that the burden on a summary judgment motion with respect to the fair use defense is on the defendant, not the plaintiff, as it originally suggested.

### **About Davis Wright Tremaine**

Davis Wright Tremaine LLP is a national business and litigation law firm with more than 480 attorneys in nine offices: Seattle and Bellevue (Wash.), Portland (Ore.), Anchorage (Alaska), Los Angeles, San Francisco, New York, Washington, D.C. and Shanghai, China. For more information, visit [www.dwt.com](http://www.dwt.com).

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