haynesboone

August 18, 2020

Trends in ISP and Platform Liability: CDA Section 230 and DMCA Safe Harbors

By: Wesley D. Lewis

The internet as we know it today was made possible, in part, through the creation of a legal framework that permits platforms and internet service providers (ISPs) to host user-generated content without substantial risk of liability. Two significant statutes are collectively responsible for establishing this framework: The Communications Decency Act of 1996 (CDA) and The Digital Millennium Copyright Act (DMCA), enacted in 1998.

Without these two pieces of legislation, the internet would be a vastly different place than it is today. The CDA and DMCA both allow ISPs, social media platforms, and other online service providers (collectively referred to in this article as "service providers") to act as conduits and repositories for user-generated content without liability for such content. This statutory civil immunity allows service providers to take a hands-off approach to user-generated content, obviating the need to conduct pre-publication moderation or review of content made available on or through their services. Without this protection, service providers would be less likely to host the third-party content we have come to expect on the internet—such as reader commentary on news sites, YouTube videos, and Instagram posts—lest they be exposed to liability for defamation, copyright infringement, or other causes of action arising from the user-generated content they host. Considering, for example, that an estimated 500 hours of video are uploaded to YouTube *per minute*,[1] service providers simply could not exist in their current form without Section 230 of the CDA and Section 512 of the DMCA to protect them from liability arising from such content.[2]

Yet, despite their importance to the modern internet, Section 230 and the DMCA's safe-harbor provisions have been subject to increasing scrutiny and criticism from a variety of sources—particularly over the past year. Litigants, lawmakers, and even President Trump have all sought to limit or overcome the protections of Section 230 and the DMCA in an effort to hold service providers more accountable for user-generated content they host. Service providers should be cognizant of these developments and understand that Section 230 immunity and the safe harbor protections Section 512 of the DMCA are neither absolute nor indestructible in this rapidly changing legal landscape.

Section 230: Caught Between a Rock and a Hard Place

Section 230 of the Communications Decency Act provides that "[n]o 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."[3] This provision has been called the "twenty-six words that created the Internet,"[4] because it allows service providers to host user-generated content without being treated as the publisher or speaker of such

[1] *See Hours of video uploaded to YouTube every minute as of May 2019*, STATISTA (Aug. 9, 2019).
[2] Of course, neither Section 230 nor the DMCA impact users' liability for the content they post on the internet, nor does the CDA or DMCA shield service providers from liability for they content they create.
[3] 47 U.S.C. § 230.
[4] *See* Jeff Kosseff, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

content. Importantly, the CDA also allows online service providers to moderate objectionable content voluntarily, if done in "good faith."[5]

Section 230 has been the subject of mounting public scrutiny, particularly over the last year. Earlier this year, the Trump Administration and some Republican members of Congress challenged Section 230 in response to a growing perception of anti-conservative bias on mainstream social media. In an apparent response to Twitter's decision to append fact-check warnings to several of his tweets, President Trump issued an executive order attacking the protection afforded by Section 230, suggesting that platforms that remove objectionable content in a biased manner should lose their Section 230 protections.[6] Similarly, in response to allegations that social media websites are guilty of stifling conservative speech, Senator Josh Hawley (R-Missouri) introduced a bill that would require social media platforms to enforce their rules equally as a condition to receiving Section 230 immunity.[7] Senator Hawley's proposed legislation, entitled the *Ending Support for Internet Censorship Act*, would strip platforms of Section 230 immunity unless they submit to an external audit that establishes that their algorithms and content-removal practices are politically neutral.[8] Finally, the Department of Justice released a report of proposed reforms to "realign the scope of Section 230 with the realities of the modern internet."[9] These proposals focus on limiting Section 230 immunity to place greater responsibility on online platforms to moderate their content and create specific "bad Samaritan" carve-outs for Section 230 immunity for providers that facilitate illicit content online and limit providers' ability to remove "objectionable" content.[10]

But criticism of Section 230 does not emanate exclusively from Republicans; notable Democrats have also called for either significant reform or wholesale repeal of the statute. Earlier this year, Democratic presidential candidate Joe Biden called for the repeal of Section 230, arguing that it allows social media networks to skirt their responsibility to combat the proliferation of fake or misleading news.[11] Similarly, House Speaker Nancy Pelosi recently reiterated long-standing criticisms of Section 230, arguing that the law has allowed for the rampant spread of misinformation, online harassment and trolling.[12]

Thus, while their reasons may differ, politicians and government officials across the political spectrum have voiced concerns over Section 230's impact on the internet and society. And while President Trump's executive order and the Department of Justice's report on Section 230 are recommendations for future legislation and do not carry the force of law, Section 230 appears to be in a particularly precarious situation in light of the increasingly critical attention it is receiving. Internet service providers should monitor these developments and remain prepared to take appropriate actions to preserve immunity under the current statutory scheme.

---

[5] 47 U.S.C. § 230(c)(2)(A).
[6] *See Executive Order on Preventing Online Censorship*, WHITEHOUSE.GOV (May 28, 2020), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.
[7] *See Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, (June 19, 2019), *available at* https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.
[8] *Id.*
[9] U.S. Dep't of Justice, *Section 230—Nurturing Innovation or Fostering Unaccountability?* (June 2020), *available at* https://www.justice.gov/file/1286331/download.
[10] *Id.*
[11] *See Interview: Joe Biden*, The NEW YORK TIMES (Jan. 17, 2020) ("Section 230 should be revoked, immediately should be revoked, number one. For [Mark] Zuckerberg and other platforms.").
[12] Taylor Hatmaker, *Nancy Pelosi warns tech companies that Section 230 is 'in jeopardy'*, TECHCRUNCH (Apr. 12, 2019), *available at* https://techcrunch.com/2019/04/12/nancy-pelosi-section-230/.

DMCA Safe-Harbor Protections: *Cox* and Related Litigation

Like Section 230, the Section 512 of the DMCA permits service providers to take a hands-off approach to third-party content, allowing ISPs and platforms to host and provide transmission channels for such content without fear of liability for copyright infringement. Specifically, Section 512 of the DMCA permits service providers who meet certain requirements to claim "safe harbor" immunity from civil liability for secondary or vicarious liability arising from the alleged copyright infringement of their users.[13]

Typically, ISPs avoid liability for the infringing conduct of their users by adhering to the statutory requirements of the "safe harbor" provisions of the DMCA. These requirements shield ISPs from liability if they are: (1) unaware of, or had no reason to suspect, specific acts of infringement; (2) receive and process takedown requests for allegedly infringing works; and (3) reasonably implement policies designed to terminate repeat infringers.[14] ISPs failing to meet these requirements are at risk of failing to qualify for safe-harbor protection under the DMCA.

Cox Communications, the third-largest Internet and cable television provider in the United States, recently learned that lesson the hard way. In December 2019, a jury found Cox liable for $1 billion in damages in a copyright infringement lawsuit brought by Sony Music, Universal Music Group, Warner Music Group and EMI.[15] In a previous proceeding, the same court determined that Cox had failed to reasonably implement a repeat-infringer policy and was therefore ineligible to claim safe harbor protection under the DMCA, a ruling the Fourth Circuit affirmed.[16] As a result, Cox was exposed to extensive liability for secondary copyright infringement based on the alleged infringement of its users, with the massive verdict resulting from the jury's finding that Cox acted willfully and was subject to statutory damages of approximately $100,000 for each of approximately 10,000 works.[17]

While *Cox*'s eye-popping billion-dollar verdict grabbed the lion's share of the headlines, that lawsuit is just one of several brought against ISPs claiming secondary and vicarious liability for their users' copyright infringements.[18] In recent years, copyright owners (in particular, record labels) have repeatedly sought to overcome DMCA safe-harbor protections for ISPs, claiming that the ISPs have not adequately established or implemented policies for terminating repeat infringers. These lawsuits are part of a larger trend of copyright owners attempting to hold ISPs accountable for the alleged infringement of their users. And, given the success of the *Cox* plaintiffs, the trend is likely to continue.

---

[13] 17 U.S.C. § 512.
[14] *See id.*
[15] *Sony Music Entm't, et al. v. Cox Commc'ns, et al.*, No. 1:18-cv-00950 (E.D. Va.).
[16] *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293 (4th Cir. 2018). As of the date of this writing, a final judgment has not yet been entered in the case.
[17] In post-verdict motion practice, the district court recently upheld the jury's statutory damage award on a per-work basis, but the parties are continuing to submit briefing regarding the total number of allegedly infringed works at issue in the lawsuit. Order, *Sony Music Entm't, et al. v. Cox Commc'ns, Inc.*, Case No. 1:18-cv-00950 (E.D. Va. June 2, 2020), ECF No. 707.
[18] *See, e.g.*, *UMG Recordings, Inc. v. Grande Commc'ns Network, LLC*, No. 1:17-cv-00365-DAE (W.D. Tex. Apr. 21, 2017); *Warner Bros. Records Inc. v. Charter Commc'ns, Inc.*, Case No. 1:19-cv-00874-RBJ-MEH (D. Colo. Mar. 22, 2019); *UMG Recordings, Inc. v. Bright House Networks, LLC*, Case No. 8:19-cv-710-MSS-TGW (M.D. Fla. Mar. 22, 2019); *UMG Recordings, Inc. v. RCN Telecom Svcs., LLC*, Case No. 19-cv-17272 (D.N.J. Aug. 27, 2019).

Cox and related litigation demonstrate that ISPs' safe-harbor protections are far from absolute, and a failure to comply with the DMCA's requirements can result in massive liability for secondary and vicarious copyright infringement. In this respect, service providers must be aware of the limitations of DMCA safe-harbor protections and how to maximize those protections, particularly considering recent successful efforts to overcome the DMCA's statutory safe-harbor protections against ISPs.

DMCA Section 512 under Fire from the Copyright Office

The DMCA's safe-harbor provisions also face mounting criticism from the United States Copyright Office itself. In May 2020, the Copyright Office published a long-anticipated report on Section 512 of the DMCA, concluding that the safe-harbor protections afforded to ISPs have become "imbalanced."[19] In light of this perceived imbalance, the Copyright Office made several suggestions to adjust or clarify Section 512, specifically identifying areas "where current implementation of Section 512 is out of sync with Congress' original intent, including: eligibility qualifications for the service provider safe harbors, repeat infringer policies, knowledge requirement standards, specificity within takedown notices, non-standard notice requirements, subpoenas, and injunctions."[20]

While the Copyright Office stopped short of recommending repeal or wholesale revision of the statute, it identified several areas of concern or "imbalance." First, the Copyright Office recommended clarifying the eligibility requirements for entities entitled to claim safe-harbor protection under the DMCA. While Congress intended Section 512 to be construed broadly to account for technological advancement, the report cautions that courts may have taken an overly expansive view of the types of entities entitled to safe-harbor protection. Second, the report also suggests that recent judicial decisions have "set too high a bar" for the level of knowledge of infringing activity that an ISP must have to waive safe harbor protection; accordingly, the Copyright Office suggested lowering the amount of "red flag knowledge" of infringing activity that would result in a waiver of safe-harbor protections. Finally, the Copyright Office argued that the DMCA's requirement that ISPs establish and reasonably implement a repeat infringer policy is unclear and suggested that Congress should better define "repeat infringer" and establish "minimum requirements" for a DMCA-compliant repeat-infringer policy.

Conclusion

Section 230 of the Communications Decency Act and the safe-harbor provisions of the DMCA remain important pieces of legislation. However, with rapid technological and societal change, these provisions are under increasing scrutiny and criticism. Stakeholders, litigants, and government officials from a variety of backgrounds are challenging previously held attitudes regarding the extent to which service providers should be responsible for the user-generated content they host. Platforms and ISPs, while still entitled to Section 230 immunity and safe-harbor protection under the DMCA, must be cognizant that these protections are not absolute, and they certainly are not guaranteed.

---

[19] *Section 512 of Title 17: A Report of the Register of Copyrights*, UNITED STATES COPYRIGHT OFFICE (May 2020), *available at* https://www.copyright.gov/policy/section512/section-512-full-report.pdf.
[20] *Section 512 Study* COPYRIGHT.GOV (May 21, 2020), https://www.copyright.gov/policy/section512/.