Third Circuit Holds Facebook Not Immune Under Section 230 of Communications Decency Act from State Law Claims Alleging Violation of Right of Publicity

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In a precedential opinion, *Hepp v. Facebook, et al.*, ____ F.4th _____, No. 20-2725 (3d Cir. Sept. 23, 2021) (publication pending), the Third Circuit became the first Circuit Court of Appeals to apply the intellectual property exception under Section 230 of the Communications Decency Act of 1996 ("CDA") to state law right of publicity claims. Although Section 230 of the CDA bars many claims against internet service providers ("ISPs"), it contains a carve-out for intellectual property claims. Specifically, Section 230(e)(2) provides, in part, that "[n]othing in [Section 230] shall be construed to limit or expand any law pertaining to intellectual property." The issue in *Hepp* was whether Section 230 barred a Philadelphia newscaster's state law claims for violating her right of publicity. The Third Circuit held that because those state law claims fall within the ambit of the intellectual property exception, they are not precluded. Slip op. at 4.

The case arose from the unauthorized posting of Philadelphia newscaster Karen Hepp's image online. Hepp alleged that two sets of posts using her photograph violated her right of publicity under Pennsylvania law. The first post was an advertisement to a dating app that appeared on Facebook. The second post involved a Reddit thread linked to an Imgur post of her photo. Hepp brought suit against Facebook, Reddit, and Imgur, alleging two state law claims: (1) violation under Pennsylvania's right of publicity statute; and (2) violation of Pennsylvania common law. *Id.* at 5-6. Reddit and Imgur challenged personal jurisdiction over them. The Third Circuit concluded that Reddit's and Imgur's alleged contacts with Pennsylvania do not relate to the litigation. *Id.* at 8. Accordingly, Reddit and Imgur were dismissed for lack of jurisdiction.

Next, the Third Circuit examined whether Facebook was immune under Section 230, or whether the intellectual property carve-out preserved Hepp's state law claims. The Court conducted its analysis in two steps: First, it evaluated whether the intellectual property exception can apply to state law claims. Second, it looked at whether the intellectual property exception applied to Hepp's statutory claim. *Id.* at 11.

With respect to the first step, the Court held that the intellectual property carve-out applies to state intellectual property law, and not just to federal laws. Acknowledging that there are "precious few cases interpreting Section 230's intellectual property provision," the Court examined two circuit court cases and one district court case. In *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007), the First Circuit held that a claim of trade name dilution under Florida law was properly dismissed "as a matter of [Florida] trademark law" "because of the serious First Amendment issues that would be raised by allowing

[Plaintiff's] claim," even though "Section 230 immunity does not apply." Slip op. at 12. The Third Circuit interpreted the First Circuit's decision as "necessary only because the court held § 230(e)(2) preserved the state law claim." *Id.*

The Ninth Circuit in *Perfect 10, Inc. v. CCBill LLC*, 448 F.3d 1102 (9th Cir. 2007) held to the contrary, finding that only federal intellectual property was encompassed within the intellectual property exception. The Ninth Circuit reasoned that the CDA's policy goal of insulating the internet from regulation would be impeded if federal immunity varied based on state laws.

Lastly, the Third Circuit discussed *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009), where the district court held that "if Congress wanted the phrase 'any law pertaining to intellectual property' to actually mean 'any *federal* law pertaining to intellectual property," it knew how to make that clear, but chose not to." Slip op. at 13.

After considering these precedents and Facebook's arguments, the Third Circuit reversed the district court's holding, which followed the Ninth Circuit's approach limiting the application of the intellectual property exception to federal intellectual property law. The Court reasoned that the text and structure of Section 230(e)(2) does not change its natural reading. Although the explicit references to state law in subsection (e) are coextensive with federal laws, "those references also suggest that when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly. . . . So, the text and structure tell us that § 230(e)(2) can apply to federal and state laws that pertain to intellectual property." *Id.* at 14.

The Third Circuit further found that the CDA's policy provision do not require an alternate reading. "Because state property rights can facilitate market exchange, interpreting the § 230(e)(2) limitation to include state intellectual property laws tracks Congress's pro-free market goal." *Id.* at 15. The Court also rejected Facebook's policy arguments because "policy considerations cannot displace the text." *Id.*

After deciding that the intellectual property exception applies to state intellectual property claims, the Court then turned to the second step of its analysis. That is, whether Hepp's statutory claim arose from a "law pertaining to intellectual property." *Id*. at 17. The Court surveyed dictionary definitions of "intellectual property" and concluded that the definitions provided explicit and implicit support that "intellectual property" includes Pennsylvania's statutory right of publicity. *Id.* at 17-19. Thus, the Court held that Hepp's statutory claim arose out of a law pertaining to intellectual property and as such, the intellectual property exception applied, and Facebook was not immune under the CDA.

In concluding its opinion, the Court emphasized the narrowness of its holding: (1) The holding does not threaten free speech because "Hepp's statutory claim against Facebook is about the commercial effect on her intellectual property, not about protected speech." *Id.* at 21. (2) The holding does not open the floodgates as Pennsylvania's statute is limited and the Court did not express an opinion as to whether other states' rights of publicity constitute "intellectual property." *Id.* at 22. (3) The Court did not opine on Hepp's Pennsylvania common law claim, but remanded the issue to the district court. *Id*.

Facebook has since filed a petition for rehearing *en banc*.

A full copy of the Third Circuit's September 23, 2021 opinion is attached.