

Three Hurdles to Website Owner Liability

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Federal law provides that 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(c)(1), and that no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section, §230(e)(3). Note, the statute contains important exceptions. See, e.g., 47 U.S.C. § 230(e)(1) (excepting federal criminal liability); and § 230(e)(2) (scope of intellectual property laws remain unchanged).

Courts across the country have uniformly interpreted 47 USC 230 expansively and have held that “suggesting,” “encouraging,” or otherwise “soliciting” content does not render service providers ineligible for statutory immunity. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (dating site with pre-prepared responses not an information content provider as “the selection of the content was left exclusively to the user”).

Section 230 immunity is applicable even in light of facilitation of access to or customization of online information created by third parties.

See *Batzel v. Smith*, 333 F.3d 1118, 1032 (9th Cir. 2003) (rejecting liability based on the service’s conscious selection of third-party content); *Universal Communication Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (rejecting liability based on the theory that the service induced unlawful postings); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. Jan. 31, 2005) (rejecting liability where message board provider encouraged users to submit complaints about public officials); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (CDA 230 bars claims stemming from the “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone, or alter content — are barred.”); *Batzel*, 333 F.3d at 1021 (operator of listserv “exercises some editorial discretion in choosing which of the e-mails he receives are included in the listserv mailing, omitting e-mails unrelated to stolen art and eliminating other material that he decides does not merit distribution to his subscribers”).

In addition to the first hurdle to website owner liability, to-wit, 1) 47 USC 230, two others are:

2) A potential affirmative defense to a claim of direct copyright infringement is fair use (e.g., a noncommercial educational use involving a teacher making a single copy of a poem from a large collection for critique in class). Pursuant to 17 U.S.C. §107 et seq., the relevant factors to be considered are: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

3) Another potential affirmative defense to a claim of direct copyright infringement is the safe harbor provided by the Digital Millennium Copyright Act (DMCA). In 1998, responding in part to the concerns of online service providers (OSPs) regarding their potential liability for the copyright infringement of their

users, Congress enacted a number of narrow “safe harbors” for copyright liability. These safe harbors apply only to OSPs and only to the extent that the infringement involves four functions: transitory network transmissions, caching, storage of materials on behalf of users (e.g., web hosting, remote file storage), and the provision of information location tools (e.g., providing links, directories, search engines). Each of these functions, however, is narrowly defined by the statute. In addition to being limited to certain narrowly circumscribed functions, the safe harbors are only available to entities that comply with a number of complex, interlocking statutory requirements including:

- The OSP must 1) adopt, reasonably implement, and notify its users of a policy of terminating the accounts of subscribers who are repeat infringers; and 2) accommodate and not interfere with “standard technical measures” that have been widely adopted on the basis of industry-wide consensus.
- The OSP must designate a “copyright agent” to receive notices of alleged copyright infringement, register the agent with the Copyright Office, and place relevant contact information for the agent on its Web site.
- The OSP must, upon receiving a notification of infringement from a copyright owner, expeditiously remove or disable access to the infringing material (“notice and takedown”).
- The OSP must not have known about the infringement, or been aware of facts from which such activity was apparent (i.e., a “blind eye” approach misses the safe harbor).
- The OSP must not receive a direct financial benefit from infringing activity, in a situation where the OSP controls such activity.