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Communications Decency Act's Safe Harbor Broad But Bounded

by Joe Laferrera
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Ten years have passed since the Supreme Court struck down a portion of a then-new federal statute aimed at keeping the Internet clean. The Communications Decency Act (CDA), enacted in 1996 as the Internet was beginning to heat up commercially, was intended largely to protect children from the scourge of pornography and indecency. The Court decided that it painted with too broad (and vague) a brush, however, and invalidated the aspects of the law focused on policing content.

Part of the CDA was untouched by the Court's ruling, however, and survives today. Section 230 of the CDA states 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." It is intended to give Internet service providers ("ISPs") and other suppliers of online services a measure of protection against libel suits and similar actions arising from statements made by people who use their services. For example, an ISP would look to Section 230 to shield it from legal action in the event an individual published defamatory material on a website hosted by the ISP.

"If [a party] is responsible, in whole or in part, for creating or developing information, it becomes a content provider and is not entitled to CDA immunity."

In traditional defamation jurisprudence, courts draw a distinction between "publishers" of information and "distributors." The former is liable for defamatory content it publishes, but the latter is generally liable only if it is on notice of the defamatory nature of the material.

Section 230 of the CDA has been largely seen as a way of categorizing online service providers as "distributors," as opposed to "publishers," in the online world.

Last month, however, California's Supreme Court declined to take that approach. In *Barrett v. Rosenthal*, plaintiff Stephen Barrett sued defendant Ilena Rosenthal, contending that Rosenthal posted defamatory statements about Barrett on Internet news groups. Rosenthal was not the original author of the statements, but Barrett argued that she was liable as a distributor because she posted them after he had put her on notice regarding their allegedly defamatory nature.

(CDA, continued from p. 1)

The Appeals Court agreed with Barrett, but the state Supreme Court overturned it, finding that the CDA language simply did not support this result. It pointed to precedent indicating that "the publisher/distributor distinction makes no difference for purposes of section 230 immunity." Under this reading of the law, online service providers are free to publish defamatory statements, even once they have been informed that the statements are libelous.

Put another way, Section 230 of the CDA introduces a situation where only the author is ultimately responsible for defamatory statements. In this era, where anonymous communication on the Internet is commonplace, it may be difficult or impossible to identify the author. Absent additional legislative action, the *Barrett* decision thus introduces the possibility of a defamed plaintiff without a remedy to address libelous statements he may find on the Internet.

But although Section 230 of the CDA provides broad immunity for online service providers, that does not mean that there are no legal risks inherent in the business of providing online services on the web.

In May, the Ninth Circuit Court of Appeals concluded in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, that the website Roommates.com did not qualify for immunity under Section 230 for violation of the Fair Housing Act. The web site was sued by fair housing councils in California for aiding landlords in discriminating against certain classes of potential tenants. Roommates.com acts as a clearinghouse of sorts to match roommates, and also, to match landlords and tenants. Individuals wishing to use the site to locate an apartment were asked a number of questions about themselves, including their gender, sexual orientation and number of children. The plaintiffs claimed that, by doing so, it was assisting participating landlords in illegally discriminating against certain classes of potential tenants in violation of the Fair Housing Act.

Roommates.com responded by seeking protection from Section 230. The Appeal sCourt, however, had little sympathy. Far from being just a passive conduit for information, Roommates.com was actively involved in the content collected, since it required individuals to answer the questions at issue before proceeding to use the service. Addressing the scope of Section 230, the Court stated, "[I]f it is responsible, in whole or in part, for creating or developing information, it becomes a content provider and is not entitled to CDA immunity."

It is of note, however, that the Court did extend Section 230 immunity to Roommates.com in connection with free-form responses it solicited from potential tenants. For example, some users of the service made requests clearly at odds with the Fair Housing Act (seeking, for example, roommates of a particular race or ethnic background). But since Roommates.com did not have a hand in those responses, the Court found that it had not crossed the line between being a service provider and content provider.

The CDA has an important role in providing a reasonable safety net for the entities that provide the services that power the Internet and the World Wide Web. Along with its cousin, the Digital Millennium Copyright Act, which provides legal protection for service providers who host content that infringes an owner's copyright, there is a robust legal framework in place. But, as these cases show, the protections, though broad, are bounded. A service provider who is careful not to dip his toe into the waters of content creation has a strong claim of CDA immunity, but once that line is crossed, the waters quickly deepen. ♦

Supreme Court Changes Rules on Vertical Price Fixing

by Lee Gesmer (excerpted from his blog at MassLawBlog.Com)
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As recently as 1977 virtually all "vertical restraints" were *per se* illegal under the federal antitrust laws. This included "nonprice" restraints, which restrict the conditions under which firms may resell goods. An example might be a restriction on the locations from which a retailer may sell a manufacturer's product.

Supreme Court precedent also restricted both vertical "maximum" price restrictions (e.g., "you may not price this product higher than $12/unit") and vertical "minimum" price restraints (e.g., "you may not price this product at less than $10/unit").

However, over the last 30 years the Supreme Court has, in effect, withdrawn each of these antitrust prohibitions, holding that these restraints must be subject to the "rule of reason" (requiring an economic examination in every case to determine whether the harms outweigh the benefits), rather than the *per se* doctrine (that is, automatically illegal; no excuse will do).

In 1977 the Supreme Court dropped the *per se* rule on "nonprice" restraints in the case of *Continental T.V., Inc. v. GTE Sylvania, Inc.* Twenty years later, in *State Oil Co. v. Khan*, the second leg of this three-legged chair was removed when the Supreme Court held that maximum vertical price restraints should not be subject to the *per se* rule of illegality. In and of itself this was not terribly significant, since manufacturers rarely set maximum prices. The real battle, all antitrust lawyers knew, lay with the third, and most controversial, leg of the chair: minimum vertical price-fixing.

Since the 1997 *Khan* ruling left the *per se* rule against minimum price restraints intact, for the last ten years it has remained *per se* illegal for a manufacturer to dictate the minimum price at which a product may be sold. Hence, the phrase "manufacturer's suggested retail price" or "MSRP."

On June 28, however, the Supreme Court overruled the *per se* rule on vertical minimum price fixing. In *Leegin v. PSKS, Inc.*, the Court swept away the almost 96-year-old rule against vertical minimum price fixing, holding that henceforth this practice, too, will be judged under the "rule of reason."

The rationale behind this ruling? In a nutshell, the Court was convinced that "interbrand" (as opposed to "intrabrand") competition is sufficient to protect consumers. This leaves the risk, therefore, that a monopolist, or a manufacturer with overwhelming market power, will still be prevented from vertical minimum price fixing. However, because the practice no longer is *per se* illegal, proving the harmful impact on competition in any given case will be far more costly, difficult and unpredictable, for either a private plaintiff or the government. As a result, these cases will be rare.

Will this make business happy? Almost certainly it will, particularly since sellers can advertise price cuts so easily on the Web. Why should a retailer maintain a storefront and experienced on-site sales staff when it can be undercut so easily by an online vendor?

Will this change in the law be good for consumers in the long run, as the Supreme Court majority believes? Measuring the benefits and detriments of a rule such as this in an economy as complex as ours is well near impossible. The Supreme Court's decision was based more on economic theory than any empirical economic evidence, and therefore the answer to that question may never be known. What is clear, however, is that a generation of antitrust lawyers will have to learn to change their tune when a client asks: "Can I tell all my distributors (or retailers) that they cannot sell below a specific price?" ♦

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Gesmer Updegrove partner **Sam Kim** was recently honored on the front cover of this year's *Massachusetts Super Lawyers - Rising Star Edition*. An article highlights how Sam's immigrant experience and religious convictions drive him to serve his profession, his clients and his community as an attorney, a leader of various non-profit and networking organizations, and volunteer for community services and ministries.

Service and faith are key elements to Sam's growing success and recognition in the legal profession.

In the article, Sam discusses his approach to serving his clients: "I market myself as another business partner who backgrounds himself on all aspects of the business and is a general-practice outside counsel. The big picture is more important than legal jargon. It's as rewarding to do a few-hundred-thousand-dollar deal for a two-person company as a multimillion-dollar deal for a large company. I love finding out what's important for my clients and helping them get there." ♦

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