

Breaking the Hold of Massive Internet Companies

Internet providers have protected themselves well with complex legislation, much to the detriment of the general public. A minor exception to that rule is found in *Hepp vs. Facebook*, 2021 U.S. App. LEXIS 28830 (3rd Cir. September 23, 2021) (Hardiman, C.J.). Section 230 of the Communications Decency Act of 1996 bars many claims against internet service providers. See 47 U.S.C. §230(c). But Section 230 does not bar intellectual property claims. According to §230(e)(2), intellectual property claims are not precluded.

Appellant Karen Hepp had worked in the news industry her entire adult life. She hosted FOX 29's *Good Day Philadelphia*. As is often the case for television personalities, Hepp's professional success as a newscaster depends in part on her reputation and social media following. She has built an "excellent reputation as a moral and upstanding community leader" and had amassed a sizeable social media following. Hepp's endorsement could be a valuable commodity. Naturally, that value depended on her ability to control the use of her likeness.

Hepp's photograph was circulated without her knowledge or consent. She did not know the store's location or how the image was posted online. She never authorized it. The first post was an advertisement to a dating app which appeared on Facebook. The advertisement used Hepp's image to promote its dating service. Reddit, another invasive species, linked the post to the photo as well. Hepp sued Facebook, Reddit and Imgur. The court threw the case out, holding that § 230(e)(2) was the basis. Hepp appealed, and Imgur and Reddit cross-filed. The alleged context did not relate to misappropriation and it was argued that the alleged misappropriation did not relate to any of the context. Because Hepp failed to establish the strong connection present in *Ford Motor vs. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021) the Court held that the district court lacked personal jurisdiction over Imgur and Reddit.

With Facebook, the issue was immunity under § 230. § 230(e)(2) limitation applies to state intellectual property law. There is a carveout exception where intellectual property law is involved. The Circuit held that Hepp's statutory claim against Facebook arises out of a law pertaining to intellectual property. For that reason, the § 230(e)(2) limit applied and Facebook was not immune under § 230(c). The appeals court reversed the district court order dismissing Hepp's amended complaint against Facebook with prejudice. This is a narrow holding. It does not threaten free speech. Plaintiff alleges her likeness was used to promote a dating service in ad. It was a misappropriation.

The take away is as follows:

- § 230 of the Communications Decency Act of 1996 bars claims against internet service providers.
- But § 230 does not bar intellectual property claims, § 230(e)(2).
- Here, claim by Hepp was that her photo was used without her permission or consent on a dating app.

- The Communications Decency Act of 1996 does not bar claims against providers like Facebook based upon intellectual property laws.
- One of the intellectual property laws applicable here is Pennsylvania state law concerning the use of someone's likeness, which is not permitted.
- § 230 does not preclude claims based on state intellectual property laws.
- Hepp's statutory claim against Facebook fits that bill.
- This does not open the floodgates.
- This case has nothing to do with free speech.
- Hepp alleges her likeness was used to promote a dating service without her permission, and that satisfies the exception within the protections that Facebook and other online services have.

The distinction between intellectual property claims and claims against the internet service providers is a thin reed to serve as a claim of victory. Nevertheless, it does show that the internet companies are not entirely protected.

Hopefully, we will see the anti-trust laws apply against Facebook and other giants who dominate social media and have developed significant control over the populous at large.

CAR/srb

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.