

Did the Third Circuit Just Break the Internet?: Circuit Split Over Whether a News Anchor Can Sue Facebook for a Photo Shared Without Consent

Social media platforms such as Facebook enjoy protection from liability against many claims pursuant to Section 230 of the Communications Decency Act¹; however, a recent Third Circuit opinion in *Hepp v. Facebook, Inc.* potentially poses a large threat to this veil of protection.² On September 23rd, 2021, a divided Third Circuit ruled that plaintiff Karen Hepp, a Philadelphia news anchor, could pursue her Pennsylvania state law claim against Facebook for violation of her right to publicity.³ Ms. Hepp alleged that her photo was used in an advertisement for a dating app published on Facebook's platform without her consent, and the unauthorized use of this photo threatened her reputation as a popular news anchor.⁴ The district court dismissed Hepp's claim with prejudice and held that Facebook was entitled to immunity under Section 230 of the Communications Decency Act.⁵ Section 230(c) of the Communications Decency Act bars many claims against internet service providers,⁶ while Section 230(e) places limits on the types of claims from which internet service providers receive protection.⁷ Most germane to this discussion is Section 230(e)(2) which states "nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."⁸ The district court held that Section 230(e)(2) did not apply to violations of state intellectual property law, a conclusion which was used as support to dismiss Ms. Hepp's claim.⁹

The divided Third Circuit disagreed with the district court's interpretation of Section 230(e)(2) and held that Section 230(e)(2) applied to both state and federal intellectual property law claims.¹⁰ The Court went on to hold that intellectual property includes the right of publicity, therefore Ms. Hepp's state-law claims are not precluded under Section 230(c) as they are encompassed within the intellectual property carve-out contained in Section 230(e)(2).¹¹ This ruling marks a clear split with the Ninth Circuit's 2007 holding in *Perfect 10, Inc v. CCBill Inc.*¹² There, the Ninth Circuit held that Congress intended "intellectual property," as used in the statute, to mean "federal intellectual property."¹³ The Ninth Circuit was wary that the lack of uniformity in state-law intellectual property claims would pose an undue burden on internet platforms as they would be unsure of whether they were entitled to immunity from a state claim.¹⁴ The dissenting Judge in *Hepp v. Facebook, Inc.* shared this sentiment and reasoned that the decision will "open the floodgates" to a massive amount of litigation surrounding the issue of immunity.¹⁵

¹ 47 U.S.C. § 230

² <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

³ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

⁴ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

⁵ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

⁶ 47 U.S.C. § 230(c)

⁷ 47 U.S.C. § 230(e)

⁸ 47 U.S.C. § 230(e)(2)

⁹ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

¹⁰ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

¹¹ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

¹² <https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrjledwve/frankel-heppvfacebook--perfect10.pdf>

¹³ <https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrjledwve/frankel-heppvfacebook--perfect10.pdf>

¹⁴ <https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrjledwve/frankel-heppvfacebook--perfect10.pdf>

¹⁵ <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnvweybzrvw/frankel-heppvfacebook--3rdcircuitopinion.pdf>

Only time will tell on whether this decision will truly “open the floodgates” to litigation. One commentator notes that there is “little doubt” that Facebook will ask for an *en banc* review of the Third Circuit decision considering the colorful dissent and the majority’s split with the Ninth Circuit.¹⁶ Until then, we are left with the question of whether or not the Third Circuit truly just broke the Internet.

-- Kendall Kilberger

This article discusses the recent circuit split in which the Third Circuit, in direct contrast to the Ninth Circuit, held that Section 230(e)(2) of the Communications Decency Act applied to both state and federal intellectual property claims. The Court, therefore, ruled that Karen Hepp’s state-law violation of publicity claim against Facebook was not precluded under Section 230(c) of the Act as it was encompassed within the intellectual property carve-out.

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¹⁶ <https://www.reuters.com/legal/transactional/3rd-circuit-splits-with-9th-says-celeb-can-sue-facebook-unauthorized-photo-2021-09-23/>