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INTELLECTUAL PROPERTY & TECHNOLOGY ALERT

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New York District Court Rules That State Common Law Copyright Claims Are Not Barred by the Communications Decency Act

By Emily Evitt

On March 25, 2009, the Southern District of New York issued a ruling in *Atlantic Recording Corp. v. Project Playlist,* No. 1:08-cv-03922-DC, denying Defendant Playlist's motion to dismiss Plaintiffs' state law copyright infringement and unfair competition claims. In its ruling, the Court found that the Communications Decency Act ("CDA") does not apply to state or common law copyright claims (such as those that protect sound recordings fixed prior to 1972). The recent decision diverges from the Ninth Circuit's 2007 ruling in *Perfect 10, Inc. v. CCBill, LLC.*, 488 F.3d 1102 (9th Cir. 2007), which suggested that the exception to the statutory immunities of the Communications Decency Act for claims "pertaining to intellectual property" might not reach (and thus the CDA would bar) state or common law claims that involve or relate to intellectual property or related rights.

Project Playlist involved claims brought by six record labels (affiliated with the Warner Music Group and the Universal Music Group), against the owner and operator of a website that enables and allows users to search, play, share, and download music available on the Internet. In addition to claims for direct and secondary liability under federal copyright law, Plaintiffs asserted claims for common law copyright infringement and unfair competition under New York state law with respect to Defendant's infringement of Plaintiffs' pre-1972 sound recordings. (There is no federal copyright protection for sound recordings produced before February 15, 1972. 17 U.S. C. 301(c).) In response to the Complaint, Defendant moved to transfer venue to the Northern District of California. In the alternative, Defendant moved to dismiss Plaintiffs' state law claims for common law copyright infringement and unfair competition as barred by the CDA, 47 U.S.C. § 230.

Congress passed the CDA in 1996 with the goal of protecting minors from obscene online content. In order to avoid stunting the Internet's growth, the Court also immunized Internet service providers from liability based on certain communications by users of the services. That immunity was codified in Section 230(c)(1), which provides that "[n]o 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." The CDA defines "information content providers" as companies that play a role in the creation or development of content. In other words, persons or entities that create or develop content to be disseminated on the Internet may be subject to liability for that content, while those who merely transmit or publish that content ("interactive computer services") cannot be held liable.

The relationship between the immunities of the CDA and claims for infringement or violation of state or common law intellectual property rights has been a matter of some controversy. Under Section 230(e)(2), the CDA shall have "[n]o effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." In *CCBill*, the Ninth Circuit held that the Section 230(e)(2) carve-out was limited to ***federal*** intellectual property law, and thus would not apply to state law right of publicity claims, even though such claims arguably involved "intellectual property" rights. By contrast, in *Universal Communication Systems, Inc. v. Lycos, Inc.*, the First Circuit, considering a state law trademark dilution claim, reasoned that "[c]laims based on intellectual property laws are not subject to Section 230 immunity." 478 F.3d 413 (1st Cir. 2007).

In an effort to avoid liability for its role in copying and disseminating pre-1972 sound recordings,

Project Playlist argued that it was an "interactive computer service" and thus immune from liability under the CDA. Noting that this was an issue of first impression in the Second Circuit, the Court relied on First and Third Circuit precedent to find that "an interactive computer service is not liable where it posts or links to a third-party's content." The Court concluded that Playlist is an "interactive computer service" and thus (as a threshold matter) fell within the broad scope of the CDA because it "merely creates an interface for users of Playlist's Website to listen to third-party content, and also provides links to download third-party content."

The Court then turned to the second issue: Whether the CDA's exception or carve-out for "any law pertaining to intellectual property" would apply to state law or common law copyright claims. Citing *CCBill*, Playlist argued that the carve-out only applies to federal intellectual property law, and thus the CDA necessarily would bar the Plaintiffs' state law claims for the pre-1972 sound recordings. The Court disagreed, finding that to limit the Section 230(e)(2) carve-out solely to federal claims was contrary to the plain language of the statute, as well as the intent of Congress:

> The problem with Playlist's argument is that it lacks any support in the plain language of the CDA. In four different points in Section 230(e), Congress specified whether it intended a subsection to apply to local, state, and federal law.... It is therefore clear from the statute 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.

As a result, the Court concluded, unambiguously, that "as a matter of law... Section 230(c)(1) [of the CDA] does not provide immunity for ***either federal or state*** intellectual property claims." This conclusion, if adopted by other courts, could give a boost to the viability of a range of state law claims related to intellectual property - such as common law misappropriation, right of publicity, and state or common-law trademark law claims - brought against the operators of various online services.

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