Swings of the Legal Pendulum

Media liability specialist **PATRICIA KOCSONDY** *lays out three key decisions challenging freedom of expression and intellectual property rights.*

Dear Expert,
It seems like legal and regulatory decisions always follow new digital developments. Are there any new ones that I need to stay on top of?
Worried in Worcester

Dear Worcester,
There are three recent legal/regulatory decisions that warrant significant attention. Each creates challenges for "technotainment" – the intersection between technology and media/entertainment – in terms of balancing the freedom to innovate with the freedom of expression. Here goes:

RECORDING ROYALTIES

Federal laws govern all copyrighted sound recordings made after Feb. 15, 1972. While Congress gave traditional radio stations a right to perform sound recordings without paying an additional royalty, and later created a licensing system for digital broadcast radio, there are no federal rules for recordings created prior to 1972.

Pre-1972, only state law applies and any issue regarding copyrighted recordings is decided on a state-by-state basis.

The Turtles, the 1960s-era band best remembered for the upbeat song "Happy Together," argues that it retained royalty rights on a state law basis for their pre-1972 songs. The band's founders, Flo and Eddie (real names: Mark Volman and Howard Kaylen), have filed class action lawsuits against SiriusXM in several states, alleging the digital broadcaster owes them millions of dollars under state copyright laws, even though such laws predate the development of digital radio.

Hundreds of millions of dollars may be at stake, given that SiriusXM is just one of a dozen digital broadcasters, and this may impact traditional radio, too. The case has gone through several state appeals courts and may end up at the U.S. Supreme Court. Congress also is seeking to harmonize sound recording copyright laws on a state and federal basis. Stay tuned, no pun intended.

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CHANGES TO THE CDA

The complete immunity provided by Section 230 of the Communications Decency Act (CDA) protecting companies like Backpage.com that were obvious outlets for sex trafficking was so unsettling to Congress that both sides of the aisle agreed to amend the law.

In April 2018, President Trump signed an amendment (H.R. 1865) to the CDA limiting the immunity provided under Section 230 for online services that knowingly host third-party content that promotes or facilitates prostitution.

The new law has sharp teeth and applies retroactive liability. This suggests a new potential exposure for any company that previously provided an online listing service, or allowed social media exchanges between users (think: sexting) that may have culminated in physical meetings gone wrong. Online dating services could be similarly susceptible.

This is all open to interpretation, as the amendment is just a few months old and is being challenged. But the airtight CDA has sprung a hole. A single watershed case and the pendulum could swing sharply in the other direction.

THE SERVER TEST

The standard copyright rule of thumb for online publishing is called the "server test." Basically, as long as an online content provider does not host unlicensed copyrighted content on its server, it does not infringe upon the owner's copyright.

This rule, in place since a 2007 court ruling (Perfect 10 v. Amazon), is a foundational pillar of Internet content sharing. Recently, a court ruling (Goldman v. Breitbart News) has upended the status quo.

Here's the backdrop: photographer Justin Goldman snapped a picture of New England Patriots' quarterback Tom Brady and posted it on Snapchat. Others reposted the photo on Twitter with commentary. Breitbart News then embedded these tweets with the photo on its site. Goldman sued Breitbart, alleging copyright infringement.

The question before the judge was whether or not the image on Breitbart violated copyright laws. Breitbart used inline linking (the display of an image appearing on another site) to post the photo. The website visitor does not see the hyperlink. Rather, the image automatically appears as if the site – in this case Breitbart – is actually "hosting" the photo.

The judge denied a request to throw out the suit, and the request for an immediate appeal of that ruling was denied, so the case will now continue. The upshot is the server test has lost some foundational footing – at least for the time being.

These three examples underscore the rapidity with which new laws and regulations surface to dramatically alter the liability of media companies. Staying on top of these shifting risks is a full-time responsibility.

It is always best to remain proactive and conservative when managing risks, while also using insurance and other risk transfer mechanisms to minimize the impact to the bottom line.

Patricia Kocsondy is senior vice president and the media professional liability product manager for Chubb. She can be reached at Patricia.Kocsondy@Chubb.com.