KEKER VAN NEST & PETERS

TL;DR

Key Developments and Trends in Internet Law

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Presenters

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Agenda

Online Platforms

Copyright

Computer Fraud and Abuse Act

Online Contract Formation

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Origins of Section 230

- *Stratton Oakmont, Inc, v. Prodigy Servs. Co.* (New York 1995)
  - Prodigy hosted bulletin boards, including Money Talk
  - User of Money Talk accused investment firm Stratton Oakmont of fraud
  - Stratton Oakmont sued Prodigy for defamation
  - Court held Prodigy could be held liable because it exercised editorial discretion over messages on bulletin boards by enforcing content guidelines and screening posts for offensive language
  - Contradictory result to 1991 decision by federal court in *Cubby, Inc. v. CompuServe*

Origins of Section 230

– Reaction to *Stratton Oakmont, Inc.*

- Bulletin boards and internet platforms have no incentive to screen content for fear of incurring liability
- Internet platforms could not survive if they were liable for all of the content their users posted
- Representative Chris Cox and Senator Ron Wyden proposed an amendment to the Communications Decency Act

Section 230—Key Provisions

The Communications Decency Act, 47 U.S.C. § 230

(c)(1) Treatment of publisher or speaker

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.

(c)(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected

. . . .

Section 230—Key Provisions

Limitations (47 U.S.C. § 230(e))

No immunity for conduct that

- Violates Federal Criminal Law
- Violates Intellectual Property Rights
- Facilitating Sex Trafficking

Why did Section 230 become so important?

1. Courts adopted a broad reading of the statute

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. **Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.**

Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)

Why did Section 230 become so important?

2. Growing significance of online platforms

1998

2004

2011

2005

2018

2006

CDA: Under Attack from All Sides

Executive Order 13925, "Preventing Online Censorship" (May 28, 2020)

"Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms." (Pres. Biden Interview with New York Times on Jan 17, 2020)

Section 230 : Federal Legislation

- Over dozen Section 230 reform/repeal bills pending in Congress
  - Some would repeal Section 230 entirely
  - Others would repeal it for “personalized recommendations”

Section 230—Supreme Court

Gonzalez v. Google, Inc.

- **Underlying Facts**: American woman killed in a Paris in an ISIS attack in 2015. Her family sues Google under the Antiterrorism Act, arguing that Google aided ISIS's recruitment through YouTube videos – specifically, recommending ISIS videos to users through its algorithms.
- **Lower court ruling**: Divided panel ruled that Section 230 protects such recommendations, at least if Google's algorithm treated content on its website similarly. The majority acknowledged that Section 230 "shelters more activity than Congress envisioned it would." However, the majority concluded, Congress – rather than the courts – should clarify how broadly Section 230 applies.
- **Issue to be Decided**: Whether Section 230(c)(1) immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information.

Section 230 Reform

Scenario	Potential Change
Legislative Change	Change unlikely
Supreme Court	Viability of protection for platform recommendation features uncertain
Lower Courts	More willingness to adopt narrow readings of the statute in edge cases (e.g., online marketplace, product liability, misrepresentation claims)

Section 230 Reform

Scenario	Likelihood of Change
Failure to Remove Framework	Unlikely to Change
Removal Framework	Unlikely to Change
Recommendation Framework	Uncertain

First Amendment

Florida SB 7072 (May 2021)

- Publicize de-platforming standards and application guidelines
- Content moderation rules only promulgated every 30 days
- **Social media companies must apply "censorship, de-platforming, and shadow banning standards in a consistent manner"**
- **No censoring, de-platforming, or shadow banning of a journalistic enterprise based on content**
- **Registered political candidates cannot be de-platformed during their candidacy**
- Private right of action

- Florida law preliminarily enjoined (July 2021) for violating First Am. and Section 230(c)(1)
- Injunction largely upheld by 11th Cir. (May 2022)
- Cert petition pending before US Supreme Court

First Amendment

- Texas HB 20 (Sept. 2021)
  - Size thresholds: online platforms with more than 50 million monthly active users
  - Transparency
    - Mandates policies outlining what content is permitted, platforms' compliance policies, and instructions for reporting violating content
    - Biannual reporting requirements detailing enforcement actions
  - Content moderation
    - No censorship based on viewpoint
    - Exception for inciting criminal activity, threats of violence
  - Allows private and AG lawsuits

  - 5th Circuit (Sept. 2022) reversed lower court ruling enjoining the law
  - October 12: 5th Circuit granted unopposed request to stay the law's implementation pending cert petition before Supreme Court

First Amendment

- Circuit split between 11th and 5th Circuit
- U.S. Supreme Court will have to resolve the First Amendment Question

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Digital Millennium Copyright Act Safe Harbor

§ 512. Limitations on liability relating to material online

(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—

(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

. . .

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

BMG Rts. Mgmt. v. Joyy, (CD Cal. Dec. 5, 2022)

- Plaintiff music publisher sues defendant social media companies for copyright infringement
- Plaintiff did not issue any DMCA takedown notice for the accused works before suing
- Court dismisses the direct infringement claims based on lack of volitional conduct
- Court, acting sua sponte, takes Plaintiff to task for failing to avail itself of DMCA process and effectively imposes an exhaustion requirement for DMCA remedies

> *"[I]t appears that Plaintiff seeks to leverage discovery procedures and effectively spread the substantial investigative costs to Defendants through this litigation. In the interest of expedience and justice, the Court, on its own motion, stays this case until Plaintiff demonstrates that it has availed itself of DMCA remedies, including issuing takedown notices for specific instances of copyright infringement."*

Copyright Alternative in Small-Claims Enforcement Act

Key provisions

- Creates Copyright Claims Board to hear small copyright cases
- Limited to written discovery
- Remote hearings
- Limited appellate review
- ***Faster, cheaper, easier***

SEC. 212. COPYRIGHT SMALL CLAIMS.

(a) SHORT TITLE.—This section may be cited as the "Copyright Alternative in Small-Claims Enforcement Act of 2020" or the "CASE Act of 2020".

"§ 1502. Copyright Claims Board

"(a) IN GENERAL.—There is established in the Copyright Office the Copyright Claims Board, which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in this chapter.

Copyright Alternative in Small-Claims Enforcement Act

Key limitations

- Caps on damages
  - $30,000 limit per proceeding
  - $15,000 limit per work
- Annual limits to protect against abusive conduct
  - 30 suit cap/yr by any party
  - 40/80 suit cap by any attorney/firm
- **Notice and opt-out ability required**

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What do these people have in common?

Copyright of AI-generated works

Copyright of AI-generated works

“[C]opyright law only protects ‘the fruits of intellectual labor’ that ‘are founded in the creative powers of the [human] mind.’

. . .

the Office will not register works ‘produced by a machine or mere mechanical process’ that operates ‘without any creative input or intervention from a human author’ because, under the statute, ‘**a work must be created by a human being**’”

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CFAA

"Whoever intentionally accesses a computer ***without authorization*** or ***exceeds authorized access***, and thereby obtains information" from a "protected computer" violates the CFAA.

18 U.S.C. § 1030(a)(2)

CFAA: “Exceeds Authorized Access” Circuit Split

Broad Reading

- First, Fifth, Seventh, Eleventh Circuits

Narrow Reading

- Second, Fourth, Ninth Circuits

CFAA: “Exceeds Authorized Access” Van Buren v. US

No. 19-___

IN THE

Supreme Court of the United States

NATHAN VAN BUREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

CFAA: “Exceeds Authorized Access” Van Buren v. US

QUESTION PRESENTED

Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.

Van Buren v. United States (June 3, 2021)

Adopts the Narrow Reading

- An individual who has authorization to access a database but exceeds the scope of permissible access does not violate Section 1030(a)(2) of the CFAA

Van Buren v. United States (June 3, 2021)

"This provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them."

CFAA: “Without Authorization” LinkedIn v. HiQ

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HIQ LABS, INC., *Plaintiff-Appellee*, v. LINKEDIN CORPORATION, *Defendant-Appellant.*	No. 17-16783 D.C. No. 3:17-cv-03301-EMC OPINION

On Remand from the United States Supreme Court

Argued and Submitted October 18, 2021
San Francisco, California

Filed April 18, 2022

Before: J. Clifford Wallace and Marsha S. Berzon, Circuit Judges, and Terrence Berg,* District Judge.

Opinion by Judge Berzon

CFAA: “Without Authorization” LinkedIn v. HiQ

For all these reasons, it appears that the CFAA’s prohibition on accessing a computer “without authorization” is violated when a person circumvents a computer’s generally applicable rules regarding access permissions, such as username and password requirements, to gain access to a computer. It is likely that when a computer network generally permits public access to its data, a user’s accessing that publicly available data will not constitute access without authorization under the CFAA. The data hiQ seeks to access is not owned by LinkedIn and has not been demarcated by LinkedIn as private using such an authorization system. HiQ has therefore raised serious questions about whether LinkedIn may invoke the CFAA to preempt hiQ’s possibly meritorious tortious interference claim.[20]

Data Scraping—HiQ v. LinkedIn Conclusion

- November 2022 Summary Judgement Ruling
  - Court ruled that provisions of a website user agreement that prohibit data scraping and creation of fake profiles are enforceable under a breach of contract claim.

- December 2022
  - Plaintiff voluntarily dismisses the complaint pursuant to a settlement
  - The stipulation includes a $500,000 judgment entered against hiQ, establishment of hiQ's liability under California common law torts of trespass to chattels and misappropriation, and various forms of injunctive relief effectively prohibiting hiQ's future ability to data scrape LinkedIn.

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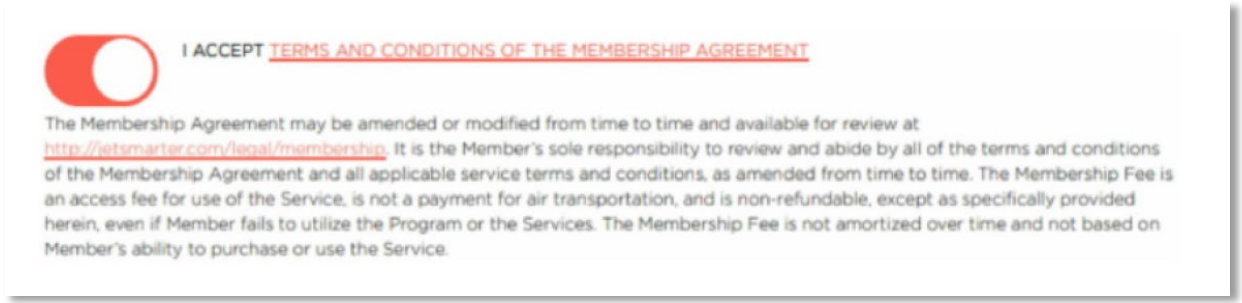
Formation

Guiding principles:

- Notice
  - Actual or Constructive
  - Conspicuous **notice** that user is entering into a contract
  - Conspicuous **notice** of the terms

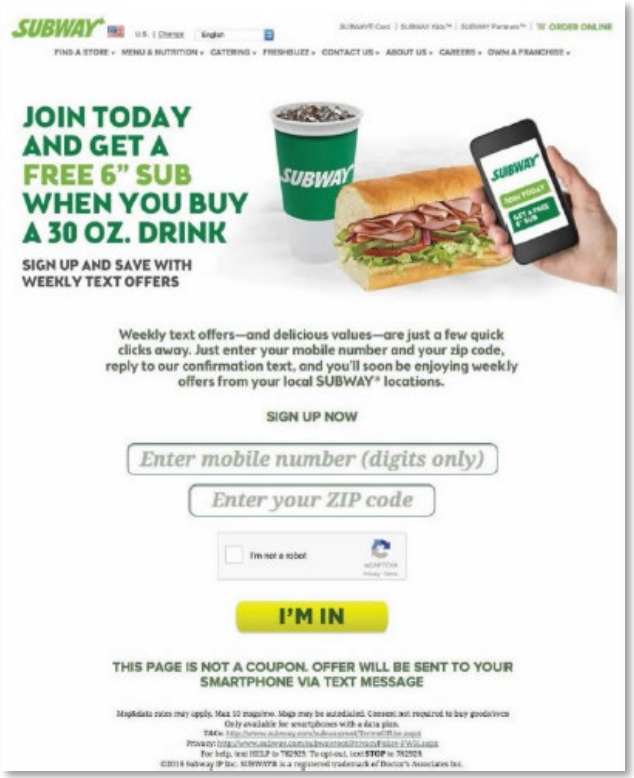
- Assent
  - Manifestation of **assent**

Clickwrap



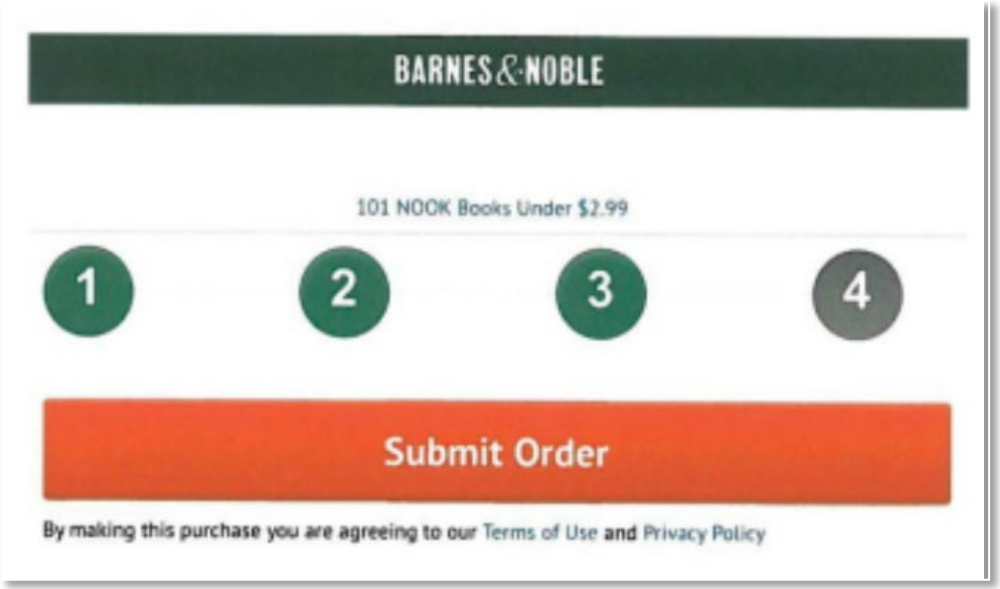
Abraham v. JetSmarter Inc., 2019 WL 1459056 (E.D. Wis. Apr. 2, 2019)

Browsewrap



Arnaud v. Doctor's Assocs. Inc., 2019 WL 4279268 (E.D.N.Y. Sept. 10, 2019)

Modified clickwrap

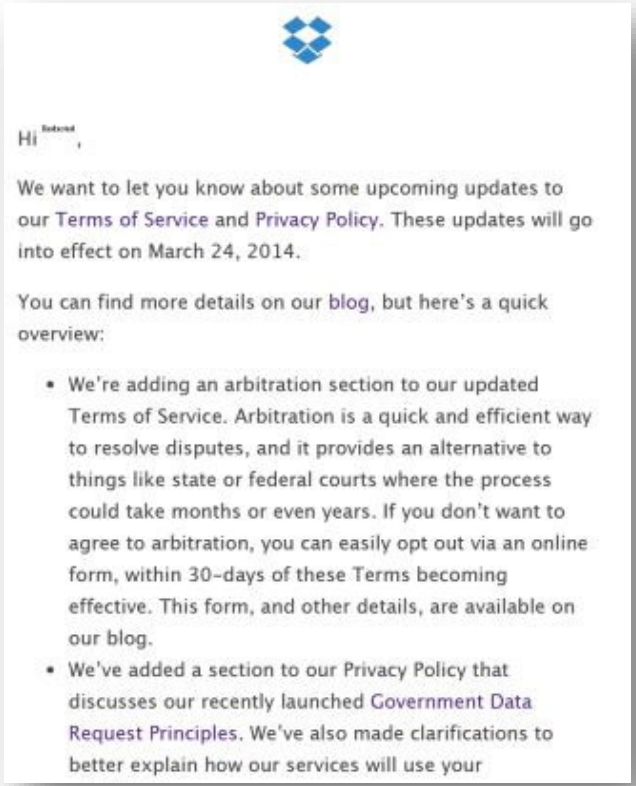


Bernardino v. Barnes & Noble Booksellers, Inc., 2018 WL 671258 (S.D.N.Y. Jan. 31, 2018)

Amending terms of service

Sifuentes v. Dropbox, Inc. (N.D. Cal. June 29, 2022)

- User signed up for Dropbox in 2012 and sued Dropbox in 2020 over data breach
- User assented to TOS, including a provision that Dropbox could change terms by notifying users via email
- Dropbox added an arbitration clause in 2014 and notified users via email
- Court holds “there is nothing in the record to suggest that Plaintiff saw or read the email, such as a read receipt reflecting that Plaintiff opened the email. The Court finds that Defendant has not shown by a preponderance of the evidence that Plaintiff had actual notice of the updated terms of Service.”



Hi [redacted],

We want to let you know about some upcoming updates to our Terms of Service and Privacy Policy. These updates will go into effect on March 24, 2014.

You can find more details on our blog, but here's a quick overview:

- We're adding an arbitration section to our updated Terms of Service. Arbitration is a quick and efficient way to resolve disputes, and it provides an alternative to things like state or federal courts where the process could take months or even years. If you don't want to agree to arbitration, you can easily opt out via an online form, within 30-days of these Terms becoming effective. This form, and other details, are available on our blog.
- We've added a section to our Privacy Policy that discusses our recently launched Government Data Request Principles. We've also made clarifications to better explain how our services will use your

Amending terms of service

Alkutkar v. Bumble (N.D. Cal. Sept. 8, 2022)

- Plaintiff joined Bumble in 2016, paid for a service to improve his visibility, and sued in 2021 based on poor results
- User agreed to terms
- Bumble added an arbitration clause in 2021 and notified users two ways:
  - Via email: Court says ineffective because no record of the people to whom the email was sent and no evidence email was opened
  - Via blocker: Court says this is effective because (1) users must click “I agree” before moving on, and (2) contained notice of the arbitration clause

Best practices

Clickthrough process is gold standard

- Notification of key changes helps, particularly arbitration clauses

All records are potential evidence in litigation.

- Back-end records showing who agreed, on what date
- Historical records of terms on any specific date
- Screenshots of in app pop ups showing clickthrough process required to agree to terms
- If using email, keep clear records of who received emails and read receipts

Thank you