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Ninth Circuit Determines it Lacks Jurisdiction to Review § 230 Immunity Issue in Virtual-Yearbook Controversy

August 11, 2023

On August 3, 2023, the Ninth Circuit held that it lacked jurisdiction to review the U.S. District Court for the Western District of Washington's denial of immunity under §230 of the Communications Decency Act ("CDA § 230")[i] in *John Boshears v. PeopleConnect, Inc.*[ii]

Plaintiff-Appellee John Boshears sued Defendant-Appellant PeopleConnect, Inc., alleging that the Washington-based corporation violated his right of publicity[iii] by using his photo on Classmates.com, a social media networking website where members can plan in-person or virtual reunion events and view virtual yearbooks from high schools, junior high schools, and elementary schools.[iv] Mr. Boshears is a citizen of Indiana, where he resides and attended high school from 1995-1998.[v] Mr. Boshears learned that Classmates.com used photos of him from his high school yearbook to advertise subscription services and reprints of yearbooks.[vi] Mr. Boshears never used Classmates.com, nor consented to use of his persona.[vii] PeopleConnect argued, amongst other defenses, that it is immune from suit under CDA § 230, and therefore, Mr. Boshears' complaint should be dismissed under Fed. R. Civ. P. 12(b)(6).[viii] PeopleConnect also sought to compel Mr. Boshears to arbitrate his claims under §4 of the Federal Arbitration Act.[ix] The District Court rejected PeopleConnect's request to compel arbitration and denied immunity under CDA § 230.[x]

CDA § 230(c)(1) states, "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."[xi] To be entitled to immunity under § 230 CDA, PeopleConnect was required to show that it is an "interactive computer service"[xii] that merely publishes content provided by a third party "information content provider," defined in the statute as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[xiii] The statute defines a "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[xiv]

The District Court held that PeopleConnect was not entitled to protection under CDA § 230 because PeopleConnect decided "to create advertisements using Boshears' persona to sell subscription services."[xv] The District Court reasoned that, in this circumstance, PeopleConnect is a "content creator" because the

advertisement was "not merely a passive display of content created by another entity."[xvi]

In its interlocutory appeal, PeopleConnect argued that because the District Court denied its motion to compel arbitration in the same order in which it denied its motion to dismiss based on CDA § 230, the whole "order" was reviewable under §16(a) of the Federal Arbitration Act.[xvii] The Ninth Circuit ultimately determined that §16(a) of the Federal Arbitration Act only allowed it to review the District Court's order denying the motion to compel arbitration; therefore, it lacked jurisdiction to review the denial of CDA § 230 immunity.[xviii]

The District Court ruling that CDA § 230 broadly immunizes an interactive computer service provider that passively displays content created or provided entirely by third parties, but not an interactive computer service provider that acts as an information content provider by creating or developing the content at issue, is consistent with rulings in the Ninth Circuit and other Circuits.[xix] Institutions should be mindful of the differences between passively "displaying content" and active "content creation" to avoid liability.

Cullen and Dykman's Intellectual Property team continues to monitor important developments in trademark and copyright law. Should you have any questions about this legal alert, please feel free to contact Karen Levin (klevin@cullenllp.com) at (516) 296-9110 or Ariel Ronneburger (aronneburger@cullenllp.com) at (516) 296-9182.

This advisory provides a brief overview of the most significant changes in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnotes

[i] 47 U.S.C.A. § 230.

[ii] *Boshears v. PeopleConnect, Inc.,* No. 22-35262, 2023 WL 4946630 (9th Cir. Aug. 3, 2023).

[iii] See Ind. Code Ann. § 32-36-1-8 (West) and Ind. Code Ann. § 32-36-1-1 (West).

[iv] *Boshears v. PeopleConnect, Inc.,* No. C21-1222 MJP, 2022 WL 888300 (W.D. Wash. Mar. 25, 2022), *vacated in part, appeal dismissed in part,* No. 22-35262, 2023 WL 4940430 (9th Cir. Aug. 3, 2023), and *vacated in part, appeal dismissed in part*, No. 22-35262, 2023 WL 4946630 (9th Cir. Aug. 3, 2023).

[v] *Id.*

[vi] *Id.*

[vii] *Id.*

[viii] *Id.* at 2.

[ix] *Id.*

[x] *Id.* at 13.

[xi] 47 U.S.C.A. § 230(c)(1).

[xii] 47 U.S.C.A. § 230(f)(2).

[xiii] 47 U.S.C.A. § 230(f)(3).

[xiv] 47 U.S.C.A. § 230(f)(2).

[xv] *Boshears v. PeopleConnect, Inc.,* No. C21-1222 MJP, 2022 WL 888300, at *12 (W.D. Wash. Mar. 25, 2022), *vacated in part, appeal dismissed in part,* No. 22-35262, 2023 WL 4940430 (9th Cir. Aug. 3, 2023), and *vacated in part, appeal dismissed in part*, No. 22-35262, 2023 WL 4946630 (9th Cir. Aug. 3, 2023).

[xvi] *Id.*

[xvii] *Boshears v. PeopleConnect, Inc*., No. 22-35262, 2023 WL 4940430, at *2 (9th Cir. Aug. 3, 2023).

[xviii] *Id.* at 3.

[xix] See generally, *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *Ratermann v. Pierre Fabre USA, Inc.,* No. 22-CV-325 (JMF), 2023 WL 199533 (S.D.N.Y. Jan. 17, 2023); *Universal Commc'n Sys., Inc. v. Lycos, Inc.,* 478 F.3d 413, 417 (1st Cir. 2007).

Practices

- Intellectual Property

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