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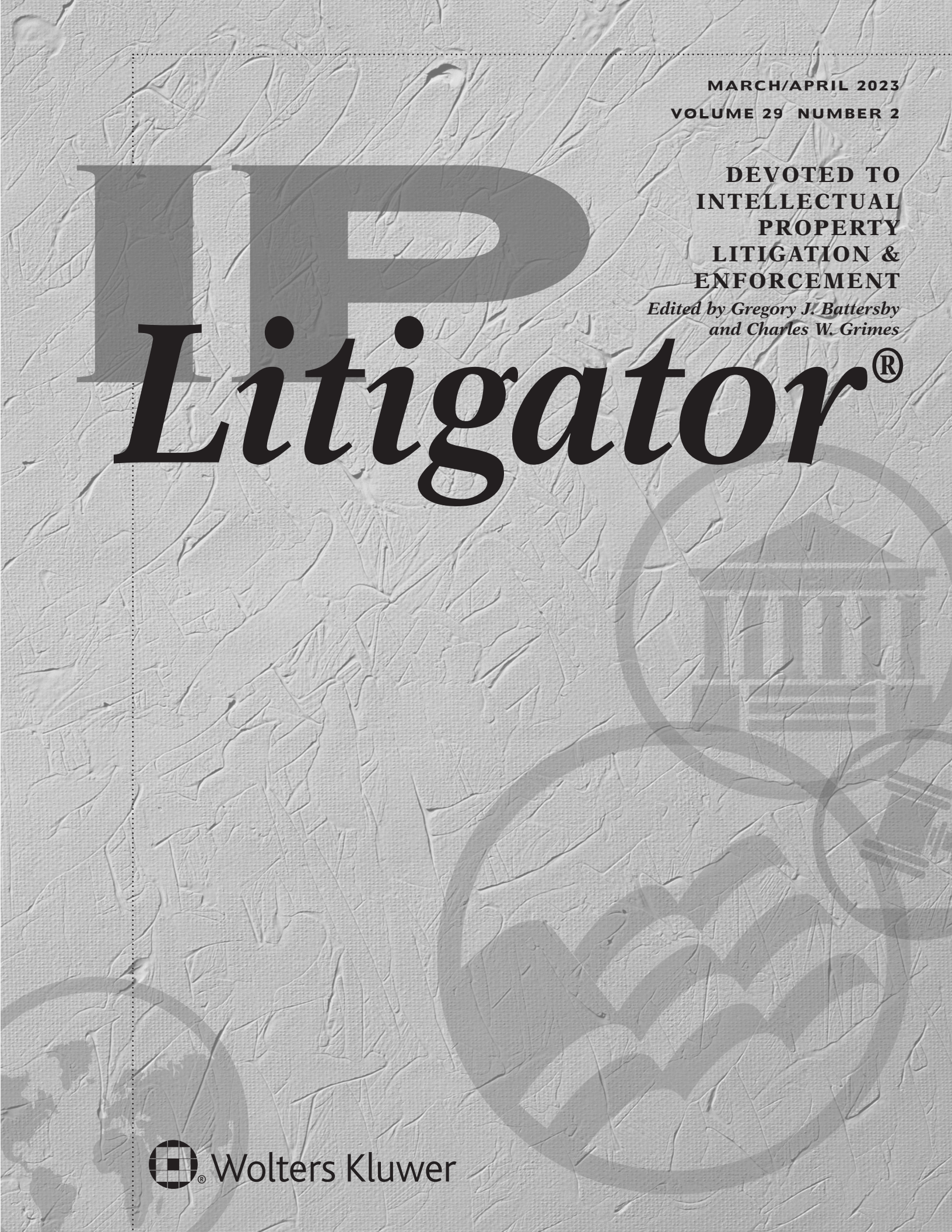

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Technology Litigation

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The CDA and DMCA—Recent Developments and How they Work Together to Regulate Online Services

Section 230 of the Communications Decency Act (CDA, codified at 47 U.S.C. § 230) and Section 512 of the Digital Millennium Copyright Act (DMCA, codified at 17 U.S.C. § 512) are separate legal structures that work together to uphold certain protections for online service providers against claims arising out user-generated content.

Enacted into law in 1996, Section 230 serves as a foundation of internet law, allowing major social media networks, blogs, digital marketplaces, and other websites to flourish. Section 230 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." 47 U.S.C. § 230(c)(1). The law was written at a time when the internet was still in its infancy, and allowed the internet to grow, as one commentator has stated, from "baby to … behemoth." See "Inside the 'Battleground for the Internet's Soul: Section 230," Curley, Mike, Law360 *https://www.crowell.com/files/20210830-Inside-The-Battleground-For-The-Internets-Soul-Section-230.pdf*

In 2011, Section 512 was adopted to provide an affirmative defense to copyright infringement claims arising out of certain content displayed online at the direction of a user. Section 512 only applies if the conditions for safe harbor have been met. Specifically, Section 512 explains that "[a] service provider shall not be liable for monetary relief, […] injunctive or other equitable relief, for infringement of copyright […] if the service provider […] upon notification of claimed infringement, […] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity." 127 U.S.C. § 512(c). While the DMCA focuses on copyright infringements, its safe harbor provision mirrors protections offered by Section 230.

These are important statutes impacting companies and users of online services right now. In the context of copyright law and the DMCA, a jury in the Eastern District of Virginia found that an internet service provider did not sufficiently implement DMCA requirements and awarded Plaintiffs a $1 billion verdict, which may encourage Plaintiffs to make such arguments with more frequency. *See Sony Music Entm't v. Cox Comm's, Inc.*, No. 1:18-cv-00950 (E.D. Va. Jan. 12, 2021). In addition, on December 30, 2022, BackGrid USA filed a copyright complaint against Twitter in U.S. District Court for the Central District of California. BackGrid USA identifies itself as a "premier celebrity-related photograph agency," which "provides highly sought-after images of celebrities around the world to top news and lifestyle outlets." Complaint at 6, *BackGrid v. Twitter*, No. 2:22-cv-09462-KS (C.D. Cal. Dec. 30, 2022).

In its complaint, BackGrid USA makes two copyright claims:

1. Twitter Does Not Terminate Repeat Infringers as Required for Safe Harbor Protection Under 17 U.S.C. § 512(i); and
2. Twitter Does Not Expeditiously Remove Infringements as Required for Safe Harbor Protection Under 17 U.S.C. § 512(b)-(d).

According to BackGrid USA, "[d]espite sending more than 6,700 DMCA takedown notices [to Twitter], not a single work was taken down and not a single repeat infringer was suspended." BackGrid USA's claims that Twitter's inability to "expeditiously … remove, or disable access to, the material that is claimed to be infringing or to be the subject of the infringing activity" means they can no longer rely on Section 512 safe harbors. *See* 17 U.S.C. § 512(e).

What Litigators Need to Know

As technology practitioners that take on cases where Section 230 and the DMCA are at issue, there are two notable takeaways related to these statutes:

1. While the CDA and DMCA are separate statutes, they work together to regulate online services.

The exemption in 47 U.S.C. § 230(e)(2) explicitly states that

Section 230 has "no effect on intellectual property law." According to the statute, "nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."

This has been affirmed across the United States. Federal appellate courts recognize that "federal district courts have held that § 230(e)(2) unambiguously precludes applying the CDA to immunize interactive service providers from trademark claims." *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006). And in *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit explained that "the immunity created by § 230(c)(1) is limited by § 230(e)(2), which requires the court to 'construe Section 230(c)(1) in a manner that would neither 'limit or expand any law pertaining to intellectual property.'" *Gucci Am., Inc. v. Hall & Assocs.,* 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (quoting § 230(e)(2)). As a result, the CDA does not clothe service providers in immunity from 'law[s] pertaining to intellectual property.' *See Almeida,* 456 F.3d at 1322." 488 F. 3d 1102, 1118 (9th Cir. 2007).

In the *Gucci* case, the U.S. District Court explained that "Section 230 does not automatically immunize [Internet service providers (ISPs)] from all intellectual property infringement claims. To find otherwise would render the immunities created by the DMCA from copyright infringement actions superfluous." 135 F. Supp. 2d at 417. The Court explained that, "[s]imilarly, in *UMG Recordings, Inc. v. Escape Media Group Inc.*, the New York Supreme Court denied Defendant's argument that 'plaintiff's claims are barred by the "safe harbor" provision set forth in Section 512 of the [DMCA] … and that plaintiff's claims are preempted by Section 230 of the [CDA]…'" 948 N.Y.S.2d 881, 884 (2012).

2. Section 230 reform efforts could impact how Courts and commentators treat the DMCA.

The last few years have ushered in efforts to amend Section 230. For example, Senator Mark Warner (D-VA) introduced S. 299, the SAFE TECH Act, which "limits federal liability protection that applies to a user or provider of an interactive computer service (*e.g.*, a social media company) for claims related to content provided by third parties." Representative Paul Gosar (R-AZ) introduced H.R. 7808, the Stop the Censorship Act, which "eliminates immunity for restricting content that is otherwise objectionable and applies such immunity when a company restricts content that is unlawful or that promotes violence or terrorism" and confers immunity to "actions taken that provide users with the option to restrict access to any material, regardless of whether such material is constitutionally protected." Most recently, Senator Lindsey Graham (R-SC) introduced S. 2972, a Bill to Repeal Section 230, which would eliminate Section 230 in its entirety.

In addition, President Biden announced core principles for Enhancing Competition and Tech Platform Accountability, which included removing "special legal protections for large tech platforms" and called for "fundamental reforms to Section 230." See "Readout of White House Listening Session on Tech Platform Accountability," *https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/08/readout-of-white-house-listening-session-on-tech-platform-accountability/.*

Reducing Protection for ISPs Raises Questions About Potential Effects of Using DMCA to Advocate for Users and Websites

Could reforms to Section 230 change the way courts and practitioners use the DMCA or put Section 512's safe harbor protections at risk? Repealing Section 230 would mean that online service providers—such as social media companies, search engines, review boards, blogs, and other sites that share user-generated content—could more readily be held liable for the content they host. In turn, the scope of liability could force them to consider limiting or excluding certain material that may be construed as illegal. While the DMCA provides a "safe harbor" to providers who remove content after being notified that it may infringe on federal copyright law, it also provides a process for users to challenge the notice and allows the web platform to restore the content.

Would repealing Section 230 increase the reliance on copyright claims and potentially overwhelm courts with a flood of litigation on challenged content? The DMCA's protections would only insulate ISPs from liability if they met the notice and takedown provisions of the Act and impact another's copyrights. A repeal of Section 230 or a substantial carve-out would reduce in whole or in part one of the twin protections currently provided to online service providers. Without Section 230, many internet services used by billions on a daily basis may become more costly. It would increase liability exposure, which would in turn

lead to rising provider costs. It has been argued by Section 230 proponents that the loss of the protections could lead to a reduction in the current ability for users to post comments, engage with social media, or rate products found online. Some services may opt to shut down.

The CDA and DMCA have been critical to the internet's expansion to date. How Courts construe and legislators act with respect to these laws could have lasting impacts on how the internet develops over the next decade.

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