



ninth circuit extends good samaritan immunity under the communications decency act

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On June 25, 2009, the Ninth Circuit affirmed the district court's grant of summary judgment for defendant in *Zango, Inc. v. Kaspersky Lab, Inc.*, No. 07-35800, holding that a provider of Internet filtering software is entitled to immunity under the Communications Decency Act (47 U.S.C. § 230). Consistent with the Ninth Circuit's broad interpretation of the Act's immunity provisions, the Court extended immunity from those who filter to those who provide filtering tools and clarified that immunity is not limited to Internet service providers.

The case was a showdown between two technology companies: Plaintiff Zango provides users with online games, movies, music, and videos, in exchange for users watching ads as they surf the Internet. Defendant Kaspersky offers filtering software that enables users to block malicious software called "malware," including the species of malware called "adware," i.e., pop-up ads. Kaspersky's filters characterized Zango's programs as adware and blocked them. Also, Zango alleged that users running Kaspersky's filtering program were barred from downloading Zango's software.

Zango filed suit in Washington state court for tortious interference with contractual rights, violation of the Washington Consumer Protection Act, trade libel, and unjust enrichment. Kaspersky removed to federal court. The district court granted summary judgment, holding Kaspersky was entitled to immunity under Communications Decency Act § 230(c)(2)(B), which provides immunity for "good Samaritan" blocking and screening of offensive material. Zango appealed, claiming this immunity is limited to Internet content providers and does not extend to purveyors of filtering software.

The Ninth Circuit acknowledged that the application of Section 230 immunity to purveyors of filtering software was an issue of first impression. In previous cases the court considered the boundaries of immunity of Internet content providers in the context of Internet billboards that removed users' postings. Thus, here the

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Court found that Section 230 immunity extended beyond those who remove content to those who provide others with the means of removing content.

The Communications Decency Act (CDA) was passed with the goal of protecting minors from online exposure to indecent material. To this end, Section 230(c)(2)(B) provides immunity for "interactive computer services" that "enable or make available to information content providers or others the technical means to restrict access to ... material that the provider or users considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." In addition to the plain language of the CDA, the Court found that Congressional policy goals, including removing disincentives for the development of software filters, supported the extension of immunity to purveyors of filtering software like Kaspersky.

The Ninth Circuit analyzed each statutory requirement in turn: First, the Ninth Circuit noted, under CDA § 230(f)(2), "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server..." Looking to the language of the statute, the Court reasoned that Kaspersky's software qualified as an "access software provider," which CDA § 230(f)(4) defines as "a provider of software ... or enabling tools that do any one or more of the following (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze or digest content."

Second, after determining that Kaspersky qualified as an "access software provider," the Court considered whether it met the definition of "interactive computer service." An interactive computer service "provides or enables computer access by multiple users to a computer service." The Ninth Circuit held that Kaspersky met this requirement because users updated its software online through communications with Kaspersky's servers, both automatically and manually. The Court reasoned that "interactive computer service" is not narrowly restricted to services that provide Internet access. In doing so, the Court rejected Zango's argument that the Court's broad definition of "interactive computer service" would provide immunity to all software providers who offer online updates. The Court reasoned that CDA good Samaritan immunity is limited to providers of filtering software.

Third, the Ninth Circuit held that Kaspersky qualified for immunity because Section 230 protects both those who enable and those who make available the technical means to restrict access to objectionable content. Thus, even accepting Zango's argument that it was Kaspersky, not its users, doing the filtering, the Court found that Kaspersky was making available the means to filter.

In addition, the Ninth Circuit also rejected Zango's argument that Section 230 immunity was not intended to apply to business torts. The Ninth Circuit cited its own decision in *Perfect 10 v. CCBill*, 488 F. 3d 1102 (9th Cir. 2007), as evidence to the contrary, which it characterized as the application of CDA immunity to unfair competition and false advertising claims. The Court reasoned that the market should guard against excesses of filtering software - if a consumer finds that the Kaspersky software is over-filtering (e.g., blocking programs such as Zango), the consumer can buy a different type of filtering software - and that it was the express policy of the CDA to foster a free market for online services.



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Writing in concurrence, Judge Fisher pointed out a possibly dangerous consequence of the Court's decision: immunity for companies using filtering software for anti-competitive purposes. Judge Fisher noted that the CDA immunizes providers of software that filters "otherwise objectionable" material. (Whether the material filtered was "otherwise objectionable" was not at issue in this case; Zango waived it.) Moreover, the CDA gives immunity to software that filters content the user or the provider classifies as objectionable. Therefore, Judge Fisher postulated that a filtering software provider could characterize its competitor's content under the broad heading of "otherwise objectionable" to block that content.

Thus, in this case of first impression, the Court extended immunity from those who filter to those who provide the means for others to filter and established that good Samaritan immunity is not limited to Internet service providers. The Court's ruling is consistent with the Ninth Circuit trend of expanding the scope of CDA immunity.