

Mixed signals on the free flow of information online — one step forward, two steps back

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APRIL 21, 2026

March 2026 saw three important court decisions that may affect the internet as we know it today. A Supreme Court decision took a step forward for a free and robust internet that encourages the free flow of information, while two state court decisions each took steps back from this same free flow of information over the internet.

In the Supreme Court case, the Court held that an internet service provider was not liable for copyright-infringing content that was transmitted over the internet via the provider's instrumentalities. In the state court decisions, one from California and one from New Mexico, juries held that large social media platforms can be held liable for harm caused by addiction to social media. All cases carefully drew lines between content online and large companies' products and services that aid in the posting and dissemination of that content.

Together, these three decisions highlight the tension between First Amendment speech rights, statutory safe harbors, public safety online, and recourse for harms, such as mental health deterioration and copyright infringement. The cases also demonstrate that the traditional statutory safe harbors for internet actors may be circumvented by creative pleading and litigation tactics, leading to questions about their continued relevance.

Defendants asserted safe harbor defenses, but courts did not rely on them

All three decisions involved defenses of "safe harbors" for various parties under two laws passed by Congress in the late 1990s. The first was in 1996 when Congress passed the Communications Decency Act ("CDA"), of which "Section 230" provides a safe harbor for platforms and internet service providers that store and transmit others' content that cause non-intellectual property harm, such as defamation and invasion of privacy, to third parties.

The second was in 1998 when Congress enacted the Digital Millennium Copyright Act ("DMCA") which provided, *inter alia*, a defense for parties that either store content posted by others on their platforms or transmit that content via their

instrumentalities when that content infringes on a third party's copyrights. Storage of information is generally associated with internet websites that host and display content posted by third parties, such as social media sites and product review sites. Transmission of information is generally associated with internet service providers ("ISP") that provide the connections needed to access the internet.

These laws were intended to aid the growth of the then nascent internet and were largely successful, as demonstrated by the behemoth that the internet has become. Many cases since these laws were passed (likely, hundreds) resulted in internet platforms and service providers finding shelter in the safe harbors, avoiding liability for content posted by parties other than those who store and/or transmit the content. Now, however, the trend may be shifting away from these safe harbors as demonstrated by all three cases.

Courts decided all three cases on grounds outside safe harbor protections

In the Supreme Court case, the defendant was an internet service provider accused of secondary copyright infringement based on content posted online by others that allegedly infringed on the plaintiff's copyrights. The defendant asserted the safe harbor defense of the DMCA. The Court, however, did not rely on the DMCA to find that the ISP was not liable for any secondary infringement. Instead, the Court found that the ISP's conduct did not comprise secondary contributory copyright infringement at all.

The Supreme Court's decision held that secondary infringement cannot be proven when the alleged secondary infringer did not direct and/or advertise its instrumentalities for infringing purposes. Instead, in the case at issue, the instrumentalities were directed to personal use of the internet.

For this holding, the Court invoked the 1984 landmark case of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), in which the Sony's Betamax product (essentially a video cassette recorder) was found not to be directed and designed especially for infringing use but rather was designed for "personal use."¹ The Court contrasted this case with another

landmark case, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). In *Grokster*, the product at issue was a peer-to-peer music sharing network that was designed especially for copyright infringement via sharing music with strangers all over the internet. The product here was more akin to *Sony* than to *Grokster*.

In the state law cases, the defendants were large social media platforms that host content posted by others. The claims were that the defendants' algorithms, which display a continuous stream of content to users based on content that those users had previously seen and for which the users had shown a preference, caused harmful "social media addiction" in its users. Social media addiction allegedly caused harm, such as body shaming and other issues that are somewhat common in children and teenagers.

Plaintiffs in the state cases, anticipating that the defendants were likely to invoke the safe harbor defense of Section 230, successfully avoided that defense by fashioning their claims on state law theories including failure to warn, negligence, and concealment of information. The juries found in favor of the plaintiffs despite the defendants' dependence on the Section 230 safe harbor.

In all three cases, the decisions were based on features of the defendants' platforms and instrumentalities, not on the content posted with the aid of the platforms and instrumentalities. This distinction between content and platforms helped the courts avoid the defenses of statutory safe harbor.

These decisions may signal a shift in how courts approach internet liability

In all three cases, the decisions carefully distinguished between the content that may be harmful or infringing, and the

algorithms and services provided. The content itself was not ultimately important in any of the cases, and all were decided based on how the platform or service provider provided their services. Future cases may be more careful in drawing the same line between platform and service providers' products and the content posted by third parties so as to avoid the safe harbor defenses.

The Supreme Court case provides internet companies with a newly-stated defense against secondary copyright liability for content posted by its users. This would encourage the free flow of information online. The state cases go the opposite way, however, finding that the traditional statutory defenses of the safe harbor do not always protect internet companies.

Those decisions may tend to make internet companies more wary of permitting free-flowing information on their platforms. Of course, the Supreme Court case supporting more free-flowing information should hold the most sway here, but courts and litigants may continue to find ways to categorize cases as directed to services and not to content, thereby circumventing the statutory safe harbors to elevate concerns such as public safety over free speech concerns.

For now, there appears to be a movement toward public protection and interest in preventing some content from free dissemination online, despite the Supreme Court's latest relevant decision. Time will tell if this trend continues.

Notes:

¹ The Court's recent decision appears to solidify the rule that copyright infringement cannot be found when the accused use is a "personal use." In the *Betamax* case, the Court's majority opinion hinted that personal use cannot comprise copyright infringement, and the dissent interpreted the majority's holding to be an affirmative and clear decision that personal use cannot form the basis for copyright infringement.

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This article was first published on Westlaw Today on April 21, 2026.