

# When Shopping, Social Media Content, and AI Collide: Spotlight on eCommerce and Platform Litigation Trends

2024 ANA Masters of Advertising Law Conference

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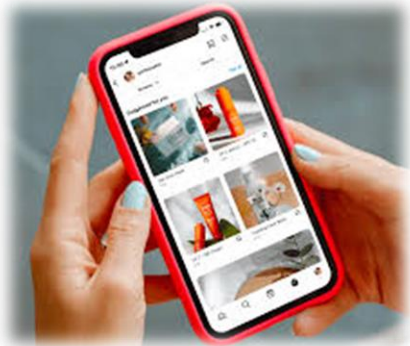
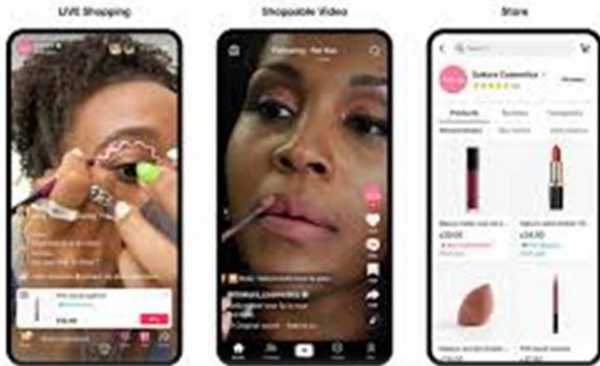


# Agenda

- 1 Trending Social Commerce
- 2 How Brands Are Using AI
- 3 AI Challenges on E-commerce and Social Media
- 4 Communication Decency Act Section 230
- 5 The DMCA Safe Harbor and Notice and Takedown System

# Trending Social Commerce

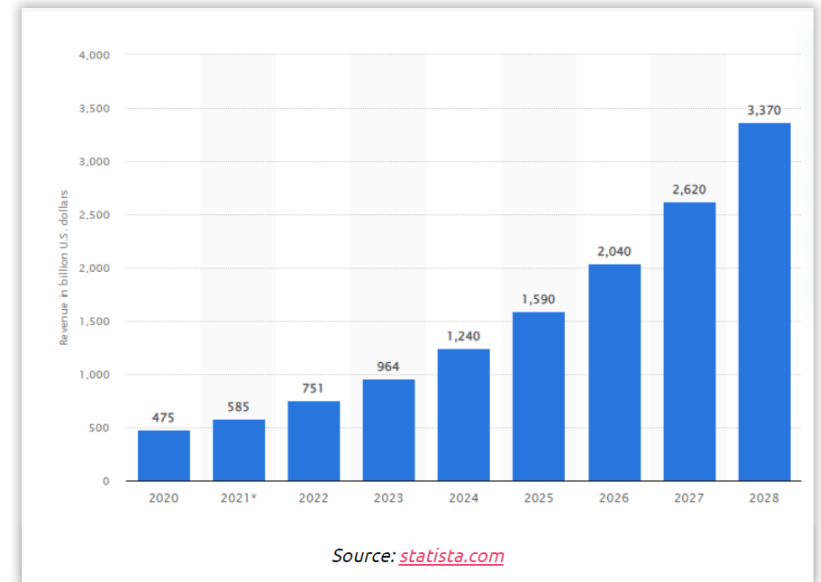
# Trending Social Commerce



- ❑ Customers today are shopping more and more on social media.
- ❑ “Social shopping” leverages content from social media platforms – Instagram, TikTok, Facebook – to influence buying decisions and streamline the shopping process.
- ❑ Brands are benefitting from combining e-commerce and social media, experiencing increased engagement and conversion.

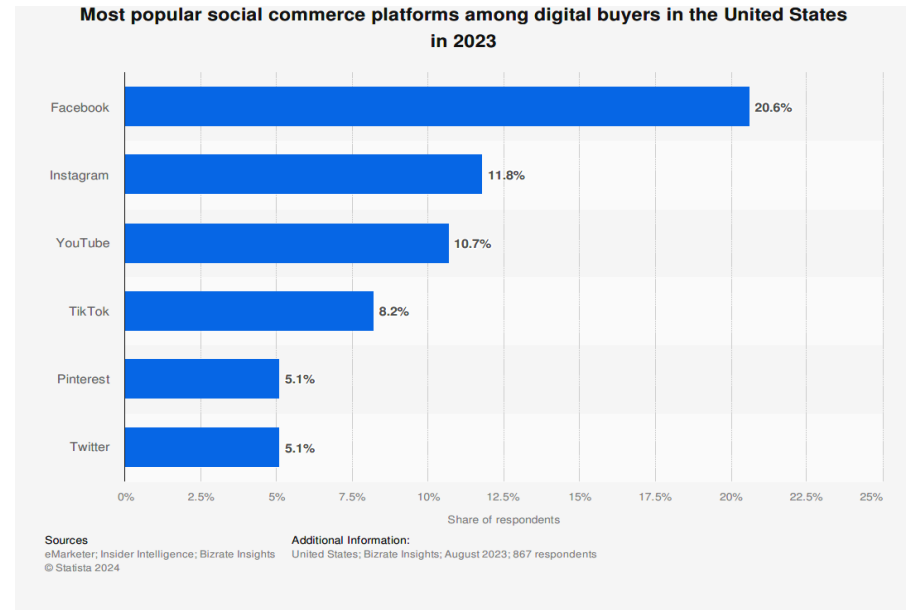
# Trending Social Commerce – *Customer use and sales*

- 98% of customers plan to utilize social purchasing to make at least one purchase this year; up from 68% last year.
- Social commerce generated \$475 billion in sales in 2020 and is expected to generate \$3.37 trillion by 2028.



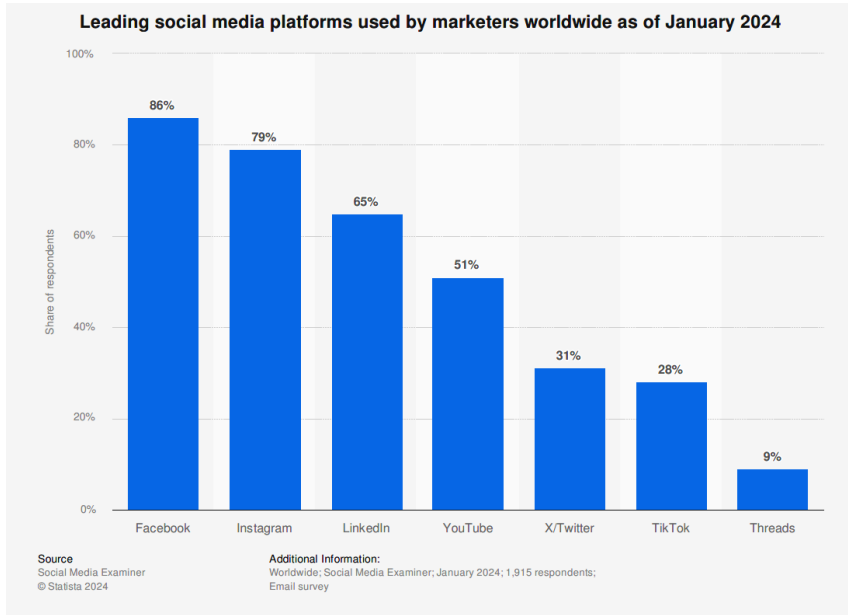
# Trending Social Commerce – *Customer use and sales*

- Among social media platforms, Facebook ranks top for shopping in the US (20.6% of digital buyers use it as a shopping destination).
- Instagram ranks second at 11.8%.





# Trending Social Commerce – *Marketer Use*



- Most marketers use Facebook to promote their products (86%)
- Instagram is a close second (79%)

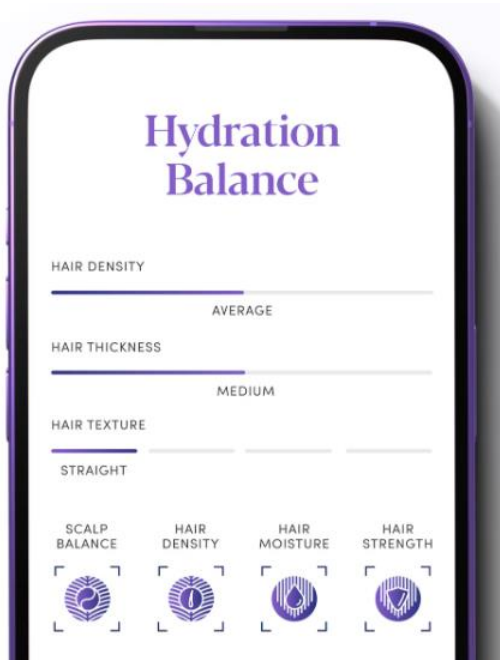
# How Brands Are Using AI



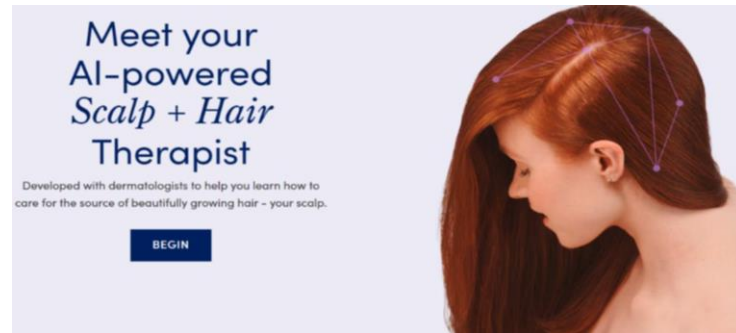
# ▶ How Brands Are Using AI

- **Data analytics** (with agency partners)
- **Visual assets** (digital renderings, backgrounds, etc.)
- **Other creative assets** (posts, voice overs, copy, etc.)
- **Customization** (creating a personalized experience for each consumer)

# How Brands Are Using AI – Examples (Dove)

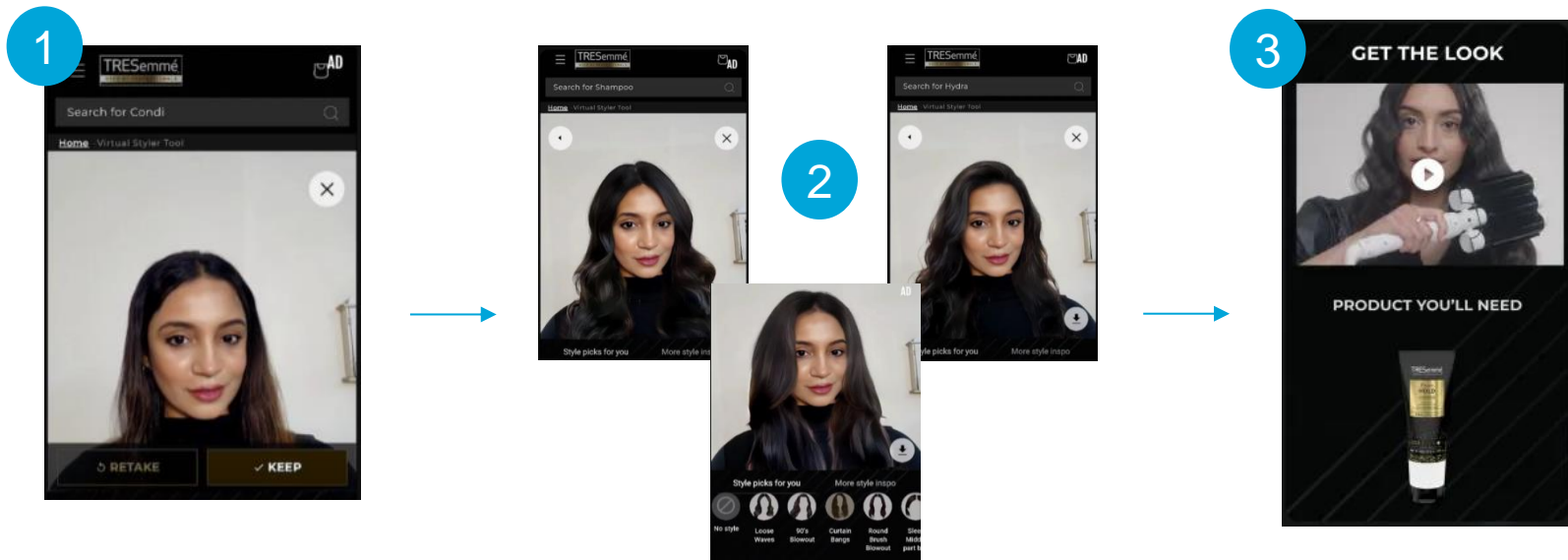


- Dove launched its AI-powered scalp+hair therapist developed with dermatologists to help users learn how to care for their scalp.
- Dove's AI therapist recommends the best Dove Scalp + Hair Therapy products for users after learning about your hair type and goals through an interactive, 12 question assessment.



# How Brands Are Using AI – Examples (TRESemmé)

- ❑ TRESemmé's AI virtual try-on tool uses AI to help you discover your hair needs and recommend the best products for a personalized routine.





# How Brands Are Using AI – Risks and Considerations

## □ **Intellectual Property**

- Third-party IP infringement;
- Loss of own IP rights

## □ **Confidentiality**

- Preventing disclosure to public or third parties

## □ **Data Privacy**

- Protecting personal data in AI models and prompts

## □ **Cyber Security**

- Tools / platforms
- Malicious use / fraud

## □ **Regulatory**

- EU AI Act and global laws

## □ **Ethics**

- Bias
- Misinformation
- Creators' rights

# AI Challenges – Issues and FTC Measures

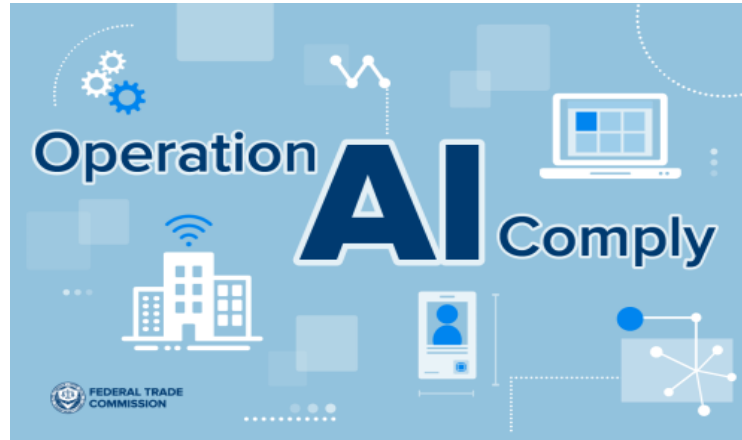


# AI Challenges – *FTC Measures*

- On August 14, 2024, the FTC announced a final rule prohibiting fake and AI-generated consumer reviews, consumer testimonials, and celebrity testimonials, along with other types of unfair or deceptive practices involving reviews and testimonials.
  - *“Fake reviews not only waste people’s time and money, but also pollute the marketplace and divert business away from honest competitors,”* said FTC Chair Lina M. Khan.
- The FTC began enforcing the new rule in October 2024.

# AI Challenges – *FTC Measures*

- FTC's **Operation AI Comply** is a means for action against companies that have relied on AI to engage in deceptive or unfair conduct.
- FTC announced five cases as part of Operation AI Comply: “The FTC’s enforcement actions make clear that there is no AI exemption from the laws on the books.”



# AI Challenges – FTC enforcement

*In re Rytr LLC*, FTC Matter No. 232-3052 (Sept. 25, 2024)

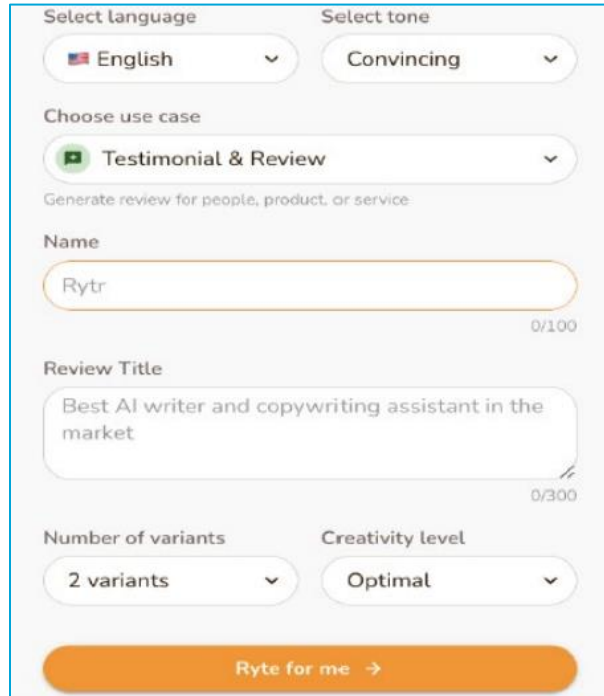
- ❑ The FTC alleged that Rytr, an Internet service that uses generative AI to produce unlimited written content for subscribers for over 43 “Use Cases,” one of which is for testimonials and reviews, enabled users to generate written content for reviews that could be manually copied and pasted by the user to post reviews online.
- ❑ Through minimal user input (tone, keywords, creativity level), Rytr’s service created genuine-sounding, detailed reviews that contain specific, often material details that have no relation to the user’s input.
- ❑ The FTC alleged that these reviews would “almost certainly be false” for users who copy-pasted the content online and would deceive potential customers.

The Rytr logo is displayed in white text on a solid red rectangular background.

✓ **Rytr's AI generates original and compelling content that sounds like you, not a robot.**

# AI Challenges – FTC enforcement

*In re Rytr LLC, FTC Matter No. 232-3052 (Sept. 25, 2024)*



The screenshot shows the Rytr AI interface for generating a review. It includes the following elements:

- Select language:** A dropdown menu set to "English".
- Select tone:** A dropdown menu set to "Convincing".
- Choose use case:** A dropdown menu set to "Testimonial & Review".
- Generate review for people, product, or service:** A sub-label for the use case.
- Name:** A text input field containing "Rytr" with a character count of 0/100.
- Review Title:** A text input field containing "Best AI writer and copywriting assistant in the market" with a character count of 0/300.
- Number of variants:** A dropdown menu set to "2 variants".
- Creativity level:** A dropdown menu set to "Optimal".
- Generate button:** An orange button labeled "Rytr for me →".

- ❑ Example reviews generated by Rytr:
  - ❑ **User input:** “this product” under the Name field, and “dog shampoo” under the Review Title field.
  - ❑ **Respondent’s service generated:** “As a dog owner, I am thrilled with this product. My pup has been smelling better than ever, the shedding has been reduced and his coat is shinier than ever. It’s also very easy to use and smells really nice. I recommend that everyone try this out!”
- ❑ As Rytr set no limit on the number of reviews a user with the unlimited output subscription could generate and copy, records revealed that some subscribers had produced thousands of reviews.

# AI Challenges – FTC enforcement

*In re Rytr LLC*, FTC Matter No. 232-3052 (Sept. 25, 2024)

- ❑ The FTC alleged that Rytr’s Testimonial & Review service causes or is likely to cause substantial harm to consumers and has no or *de minimis* reasonable, legitimate use.
  - ❑ “[I]ts likely only use is to facilitate subscribers posting fake reviews with which to deceive consumers.”
- ❑ Commissioners Holyoak and Ferguson issued dissenting statements arguing the complaint “suggests to all cutting-edge technology developers that an otherwise neutral product used inappropriately can lead to liability—even where, like here, the developer neither deceived nor caused injury to a consumer.”
  - ❑ The commissioners noted there were no allegations that misleading reviews had been posted, just that the service *could* be used to create potentially misleading reviews.
- ❑ Rytr agreed to settle the case by promising not to offer a similar functionality in the future.



# Communication Decency Act – Section 230

# Communication Decency Act – Section 230

Protection from liability for information provided by a third party

Good Samaritan provision allowing platforms to moderate/remove content without losing their immunity

Protection applies to a wide range of services as long as they are not the creators or developers of the content

Certain exceptions to immunity: does not apply to laws “pertaining to intellectual property”

# Communication Decency Act – Section 230 Cases

*Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023)

- ❑ In 2017, a terrorist attack was carried out on the Reina nightclub in Istanbul, Turkey, by an individual on behalf of the ISIS, killing 39 people.
- ❑ One of the victims' families brought suit under the Antiterrorism Act (“ATA”) (18 USC § 2333) alleging that Facebook, Twitter, and Google aided and abetted ISIS by allowing ISIS to use the platforms' recommendation algorithms as tools for recruiting, fundraising, and spreading propaganda.
- ❑ The district court dismissed the complaint for failure to state a claim; the Ninth Circuit reversed.
- ❑ SCOTUS granted certiorari to resolve whether plaintiffs adequately stated a claim under § 2333(d)(2).

# Communication Decency Act – Section 230 Cases

*Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023)

- ❑ The critical question was whether defendants’ conduct constitutes “aid[ing] and abett[ing], by knowingly providing substantial assistance,” such that they can be held liable.
- ❑ SCOTUS noted that courts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct; therefore, the defendant has to take some “affirmative act” “with the intent of facilitating the offense’s commission.”
  - ❑ Plaintiffs’ argument: Defendants can be liable if they aided and abetted ISIS generally—there is no need for defendants to have aided and abetted the specific attack.
  - ❑ Defendants’ argument: They are liable only if they directly aided and abetted the specific attack, with a strict nexus between their assistance and that attack.

# Communication Decency Act – Section 230 Cases

*Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023)

- ❑ SCOTUS disagreed with both parties: “a defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism.”
  - ❑ Because Plaintiffs are trying to hold Defendants liable for the Reina attack, Plaintiffs must plausibly allege that Defendants aided and abetted ISIS in carrying out that attack.
- ❑ The allegations failed to show Defendants gave such knowing and substantial assistance to ISIS that they culpably participated in the Reina attack.
  - ❑ Plaintiffs never allege that, after defendants established their platforms, they gave ISIS any special treatment or words of encouragement. “The mere creation of those platforms, however, is not culpable . . . defendants’ ‘recommendation’ algorithms are merely part of that infrastructure.”



# Communication Decency Act – Section 230 Cases

*Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023)

- SCOTUS further stated that “[b]ecause plaintiffs’ complaint rests so heavily on defendants’ failure to act, their claims might have more purchase if they could identify some independent duty in tort that would have required defendants to remove ISIS’ content.”
  - However, Plaintiff’s failed to identify such a duty, and while there may be situations where such duty exists, SCOTUS decline to resolve that issue.

**REVERSED.**

# Communication Decency Act – Section 230 Cases

*Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023)

- Parents of a 2015 ISIS terrorist attack victim in Paris, sued Google under 18 U.S.C. §§ 2333(a) and (d)(2), alleging Google was directly and secondarily liable for the attack based on ISIS' and ISIS supporters' use of YouTube (owned by Google).
- The district court dismissed the complaint for failure to state a claim with leave to amend. Instead, Plaintiffs appealed.
- The Ninth Circuit affirmed and held that most claims were barred by Section 230 except the direct and secondary liability claims based on allegations that Google approved ISIS videos for ads and then shared proceeds with ISIS through YouTube's revenue-sharing system.

# Communication Decency Act – Section 230 Cases

*Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023)

- ❑ SCOTUS granted certiorari to review the Ninth Circuit's application of Section 230 as Plaintiffs did not seek review of the Ninth Circuit's holdings regarding their revenue-sharing claims.
- ❑ SCOTUS held that, in light of the Court's holding in *Twitter v. Taamneh*, the complaint failed to state a claim for relief independent of Section 230.
- ❑ Therefore, SCOTUS declined to address the application of Section 230 and vacated and remanded the judgment for the Ninth Circuit to consider the complaint in light of the Twitter decision.

# Communication Decency Act – Section 230

## Cases

*Anderson v. TikTok, Inc.*, No. 22-3061, 116 F.4th 180 (3d. Cir., 2024)

- ❑ The mother of a ten-year-old girl who died as result of attempting to participate in the “Blackout Challenge” sued TikTok for the child’s death, asserting claims for, among other things, strict products liability and negligence because TikTok recommended and promoted videos of the challenge on the child’s “For You Page.”
- ❑ The district court dismissed the complaint holding Section 230 immunizes TikTok.
- ❑ The Third Circuit reversed in part, vacated in part, and remanded.



# Communication Decency Act – Section 230

## Cases

*Anderson v. TikTok, Inc.*, No. 22-3061, 116 F.4th 180 (3d. Cir., 2024)

- ❑ Plaintiff asserted that TikTok's algorithm “amalgamat[es] [ ] third-party videos,” which results in “an expressive product” that “communicates to users . . . that the curated stream of videos will be interesting to them[.]”
- ❑ The court recognized that the Supreme Court’s recent discussion in *Moody v. NetChoice LLC* about algorithms, although in the context of the First Amendment, supported Plaintiff’s assertion.
- ❑ Therefore, the Third Circuit stated “it follows that [curating compilations of others’ content through expressive algorithms] amounts to first-party free speech” which was not immunized by Section 230.

# Communication Decency Act – Section 230 Reform

- ❑ Various proposals have been introduced to amend Section 230, but no amendments have been enacted since the Stop Enabling Sex Traffickers Act (SESTA), enacted as part of the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) of 2017 (creating fifth exception to immunity for claims under certain sex trafficking provisions).
- ❑ Other proposals include:
  1. Eliminating Section 230 liability protection for content that exploits children (**EARN IT Act**);
  2. Modifying the procedural aspects of Section 230 (**SAFE TECH Act**);
  3. Requiring more transparency and accountability to users regarding content moderation decisions (**Internet PACT Act**);
  4. Clarifying meaning of the protections (**Online Freedom and Viewpoint Diversity Act**); or
  5. Repealing Section 230.

# Communication Decency Act – Section 230 *Reform*



- ❑ In May 2024, members of the Congressional Subcommittee on Communications and Technology held a hearing to present a legislative proposal to sunset Section 230 effective on December 31, 2025.
- ❑ Opening statements noted that “the internet is dominated by powerful trillion-dollar companies” who have been shielded by Section 230 from liability when people are harmed by their practices. Sunsetting Section 230 would be the first step in reining in “Big Tech.”
- ❑ “The intent of the legislation is not to have Section 230 actually sunset, but to encourage all technology companies to work with Congress to advance a long-term reform solution to Section 230.”



# DMCA Safe Harbor and Notice and Takedown System

# DMCA Safe Harbor Elements

- § 512(a): Platform is a “service provider”
- § 512(c)(1): The infringement is “by **reason of the storage** at the **direction of a user.**”
- § 512(i): The service provider:
  - Does not interfere with “standard technical measures” and
  - Has “**adopted and reasonably implemented**” a copyright infringement policy that provides for the termination of “**repeat infringers.**”
- § 512(c)(1)(A): Service provider meets the statute’s knowledge requirements.
- § 512(c)(1)(B): Does not:
  - Receive a financial benefit from infringing activity; and
  - Have the “**right and ability to control**” the infringing activity.
- § 512(c)(1)(C): **Upon receiving DMCA Notice**, responds “**expeditiously**” to remove or disable access.
- § 512(c)(2): Service provider must have a **designated agent** to receive DMCA notices.

# DMCA Notice and Takedown System

- DMCA Takedown System is outlined in 17 U.S.C. § 512:

Notice Requirement	Takedown Procedure	Counter-Notice	Restoration of Content
Copyright owners (or authorized agents) send notice to ISP.	Upon receiving a valid notice, the ISP is required to remove the infringing material and take steps promptly to notify the user that its material was removed.	If the user has a good faith belief that the material was removed by mistake or misidentification of the material, the user may submit a counter-notice.	If counter-notice is submitted, the content may be restored after a specified period unless the ISP first receives notice that the person who submitted the notification filed an action seeking to prevent the user from engaging in the infringing activity.

# DMCA Notice and Takedown System for Social Media Platforms Cases

*Sony Music Ent. v. Cox Commc'ns, Inc.*, 93 F.4th 222 (4th Cir. 2024)

- ❑ Sony and others sued Cox claiming it was responsible for customer's alleged copyright infringement in downloading and distributing songs over the internet without permission.
- ❑ A jury found Cox liable for both willful contributory and vicarious infringement of over 10,000 copyrighted works owned by the plaintiffs and awarded \$1 billion in statutory damages.



# DMCA Notice and Takedown System for Social Media Platforms Cases

*Sony Music Ent. v. Cox Commc'ns, Inc.*, 93 F.4th 222 (4th Cir. 2024)

□ On appeal, the Fourth Circuit:

<b>REVERSED</b>	District court's order denying Cox judgment as a matter of law on Sony's claim of vicarious copyright infringement
<b>AFFIRMED</b>	District court's order denying Cox relief from the jury's contributory infringement verdict
<b>VACATED</b>	Damages award and remanded the case for a new trial on damages

# DMCA Notice and Takedown System for Social Media Platforms Cases

*Cox Commc'ns Inc. v. Sony Music Ent.*, U.S., No. 24-171; *Sony Music Ent. v. Cox Commc'ns Inc.*, U.S., No. 24-181

- The Fourth Circuit decision set up petitions for certiorari by both sides.

## Questions Presented by Cox

- Did the Fourth Circuit err in holding that a service provider can be held liable for “materially contributing” to copyright infringement merely because it knew that people were using certain accounts to infringe and did not terminate access, without proof that the service provider affirmatively fostered infringement or otherwise intended to promote it?
- Did the Fourth Circuit err in holding that mere knowledge of another’s direct infringement suffices to find willfulness under 17 U.S.C. § 504(c)?

- Whether the profit requirement of vicarious copyright infringement permits liability where the defendant expects commercial gain from the enterprise in which infringement occurs (as the First, Second, Third, Seventh, and Ninth Circuits have held), or whether the profit requirement of vicarious copyright infringement permits liability only where the defendant expects commercial gain from the act of infringement itself (as the Fourth Circuit has held).

## Question Presented by Record Labels

# DMCA Notice and Takedown System for Social Media Platforms Cases

*Cox Commc'ns Inc. v. Sony Music Ent.*, U.S., No. 24-171; *Sony Music Ent. v. Cox Commc'ns Inc.*, U.S., No. 24-181

- ISPs in support of Cox filed a brief arguing:
  - The Fourth Circuit's decision to uphold contributory infringement distorted “common-law notions of culpability beyond all recognition” and would require ISPs to carry out mass internet evictions to avoid liability.
  - Contributory copyright infringement is rooted in the law of aiding and abetting, the principles of which were clarified by SCOTUS in *Twitter v. Taamneh*, which requires the defendant to have “consciously and culpably participated in a wrongful act so as to help make it succeed.”
  - Creating an overbroad termination requirement based on infringement allegations could jeopardize access for educational, medical, or other critical purposes based on flawed and often automated processes to flag infringement that often result in incorrect notices and takedowns.



# DMCA Notice and Takedown System for Social Media Platforms Cases

*Cox Commc'ns Inc. v. Sony Music Ent.*, U.S., No. 24-171; *Sony Music Ent. v. Cox Commc'ns Inc.*, U.S., No. 24-181

- ❑ Music recording organizations in support of Sony argue:
  - ❑ The Fourth Circuit adopted “an unjustifiably narrow view” of vicarious copyright infringement that shields businesses from liability unless plaintiffs can prove profit from the infringing act itself.
  - ❑ Regarding “draw,” the organizations argue (1) that financial interest in infringement isn’t limited to situations where infringement is a “draw” and (2) the Fourth Circuit’s conception of “draw” as limited to situations where the infringing activity is the sole attraction for customers is contrary to the well-established contours of the doctrine.
  - ❑ Finally, the safe harbor hinges on the ISP’s demonstration of willingness to terminate repeat offenders, which Cox’s “thirteen-strike” policy and failure to terminate demonstrate was non-existent.



# DMCA Notice and Takedown System for Social Media Platforms Cases

*Amazon.com Inc. et al v. Morton et al*, 2:24-cv-01471 (W.D. Wash. Sept. 19, 2024)

- ❑ Amazon's Counterfeit Crimes Unit sued an attorney and a Chinese company who engaged in a coordinated scheme that involved obtaining fraudulent trademark registrations and using those registrations to gain access to Amazon's Brand Registry Program and take advantage of the IP protection services.
- ❑ A subset of Defendants' clients, once admitted to the Brand Registry program, submitted false IP infringement notices to Amazon in an effort to remove content from the platform.
  - ❑ Over 5,400 false notices were submitted, resulting in harm to Amazon selling partners, whose temporarily delisted products resulted in financial losses, and Amazon, who expended resources to address the false notices.
- ❑ As part of its prayer for relief, Amazon is seeking an injunction under 17 U.S.C. § 512(f) prohibiting defendants from submitting false notices.

# DMCA Notice and Takedown System for Social Media Platforms Cases

*Benson Mills Inc. v. Fortenberry*, 2024 U.S. Dist. LEXIS 115844 (W.D. Was. Jul. 1, 2024)

- ❑ Plaintiff alleged that Defendant's false takedown notices caused Amazon to remove the Plaintiff's listings where the Plaintiff owned the copyrights.
- ❑ Plaintiff alleged violation of Section 512(f) of the DMCA and moved for default judgment and a permanent injunction for DMCA violations and common law unfair competition.
- ❑ Court entered default judgment under *Eitel* factors and found Plaintiff was entitled to a permanent injunction:
  - ❑ Plaintiff demonstrated it has suffered irreparable injury through removal of its products on Amazon;
  - ❑ Defendant was likely to continue its actions (all occurred over at least 5 months);
  - ❑ The narrow injunction would only "requires [Defendant] to follow the law."



# Questions?

# Your Presenters



**Anna Naydonov**

Partner, Washington D.C.

T +1 202 637 6197

E [anna.naydonov@whitecase.com](mailto:anna.naydonov@whitecase.com)

Anna is a first chair litigator with a reputation of staying in front of emerging market trends. Being at the forefront of trademark, copyright, and false advertising litigation with deep experience in intellectual property and advertising law, class action defense, and jury and bench trials, she has an impeccable ability to partner with clients, providing practical solutions and counseling for their most complex issues. She routinely litigates high-stakes cases for some of the world's most renowned brands before federal trial and appellate courts, the Trademark Trial and Appeal Board (TTAB) of the US Patent and Trademark Office (USPTO), and the National Advertising Division.



**Rosie Norwood-Kelly**

Associate, New York

T +1 212 819 7017

E [rosie.norwood-kelly@whitecase.com](mailto:rosie.norwood-kelly@whitecase.com)

Rosie Norwood-Kelly focuses on trademark, false advertising, and copyright litigation. Rosie has worked with clients across a broad range of industries, including fashion and apparel, consumer goods, food and beverage, technology, hospitality, and media and entertainment.

Rosie's practice includes trademark prosecution and counseling for clients on the selection, registration, maintenance, portfolio management, and enforcement of trademarks in the United States and abroad. Rosie is regularly involved in cases before the federal trial courts and the Trademark Trial and Appeal Board (TTAB) of the US Patent and Trademark Office (USPTO).



**Brandee Winikoff**

Assistant General Counsel, Unilever

E [brandee.winikoff@unilever.com](mailto:brandee.winikoff@unilever.com)

Brandee Winikoff works as Assistant General Counsel of the Health & Wellbeing collective at Unilever. In her role she focuses on all aspects related to e-commerce and direct to consumer legal and regulatory matters. Prior to joining Unilever, Brandee held senior legal and executive roles at beauty and cosmetic companies both in San Francisco and Miami. Brandee's experience also includes working at large law firms both in California and Toronto. On her down time Brandee enjoys spending time with her husband and four young kids, trying any new fitness craze, new foods, traveling the world and mentoring.

# A Seamless International Network for Global Clients

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offices

**30**  
countries

**6**  
continents



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# Thank you

