

## DC Circ. Sides With Google, But Warns Immunity Has Limits

By **Bill Donahue**

*Law360 (June 7, 2019, 3:29 PM EDT)* -- The D.C. Circuit ruled Friday that Google and other tech giants are immune from a lawsuit that claimed they allowed “scam” retailers to appear in search results in an effort to boost ad revenue, but the court warned that such immunity is “not limitless.”

The case, filed in 2016, claimed Google, Microsoft and Yahoo! conspired to “flood the market” with listings for fake locksmiths to force legitimate businesses to pay for promoted search results, but the appeals court ruled that the search engines were shielded by Section 230 of the Communications Decency Act.

Section 230 gives websites broad immunity from liability based on content uploaded by third parties, and the court said Google putting phony locksmiths into the form of a map didn’t forfeit that protection.

“The defendants use automated algorithms to convert third-party indicia of location into pictorial form,” U.S. Circuit Judge Merrick Garland wrote for a three-judge panel. “Those algorithms are ‘neutral means’ that do not distinguish between legitimate and scam locksmiths.”

“Because the defendants employ a ‘neutral means’ and an ‘automated editorial act’ to convert third-party location and area-code information into map pinpoints, those pinpoints come within the protection of Section 230,” the judge wrote.

The decision came as Google and other large technology companies are facing increased scrutiny over their market power. On Monday, federal lawmakers announced a broad antitrust probe into those companies.

Section 230 has also come under fire in recent months for providing websites with too much protection. In April, Speaker of the House Nancy Pelosi, D-Calif., said tech companies were not treating the safe harbor “with the respect that they should” and that it was “not out of the question that that could be removed.”



Friday’s decision comes as Google and other large technology companies are facing increased scrutiny into their market power. (Getty)

On Friday, Judge Garland sounded his own warning about the provision, saying that although Section 230's protection was "warranted in this case, that immunity is not limitless."

"In this vein, we reject the defendants' remarkable suggestion at oral argument that they would enjoy immunity even if they did in fact entirely fabricate locksmith addresses," the judge wrote. "That assertion is plainly inconsistent with the scope of the immunity that Congress has conferred. If the defendants were to fabricate addresses ... defendants would not be entitled to immunity."

In more specific terms, the locksmiths accused Google, Microsoft and Yahoo of false advertising under the federal Lanham Act; antitrust violations under the federal Sherman Act; and various state law violations, including fraud and unfair competition.

An attorney for the plaintiffs didn't return a request for comment Friday. A spokesman for Google declined to comment.

The plaintiff locksmiths are represented by Barry Roberts of Roberts Attorneys PA.

Google is represented by Kathleen E. McCarthy and Taylor T. Lankford of King & Spalding LLP. Microsoft is represented by Amy Ray, Benjamin Aiken and Kelsi Brown Corkran of Orrick Herrington & Sutcliffe LLP. Yahoo is represented by Jeffrey A. Jaeckel and Joseph R. Palmore of Morrison & Foerster LLP.

The case is Marshall's Locksmith Service et al. v. Google LLC et al., case number 18-7018, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Alyssa Miller.