Section 230, cntd.

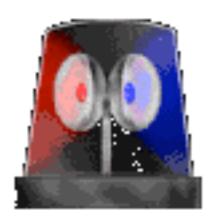
Professor Grimmelmann
Internet Law
Fall 2007
Class 10

Where we are

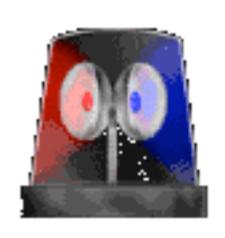
- Introduction
- Part I: Public Law
 - Jurisdiction
 - Free Speech
 - Intermediaries
 - Privacy
- Part II: Private Law

In today's class

Section 230
It grows and grows.
Where will it stop?
Nobody knows.



BLUMENTHAL V. DRUDGE (1998)



World Exclusive

Must Credit the DRUDGE REPORT



Sidney Blumenthal



Matt Drudge

"The accusations are explosive."

"There are court records of Blumenthal's violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT."

Digression: personal jurisdiction

- The Blumenthals live and work in D.C.
- Drudge lives and works in California
 - He sometimes goes to D.C. to rake muck
 - The Drudge Report is on the web, on AOL, and is emailed out worldwide
- This was in the age of Zippo-style tests
- Does D.C. have jurisdiction?

AOL's role

- AOL pays "[m]averick gossip columnist" Matt Drudge \$3000 a month
- His job is to e-mail the Drudge Report to AOL
 - They then put it up on their service
- The contract reserves to AOL the right to remove (or demand changes to) any content that violates their Terms of Service

Section 230 immunizes AOL!

- Walk through the statute:
 - AOL is an "interactive computer service"
 - The Drudge Report is "information provided by" Drudge
 - Drudge is "another information content provider"
- Game, set, and match.

Is your head spinning yet?

- AOL hired Druge because he's an irresponsible rumormonger
 - What's more, they bragged about it
 - They have editorial control
 - They even have a contract with him
 - Two words: indemnification clause
- So why not hold AOL accountable?

How to attack Drudge, part 1

- Policy arguments are all well and good, but they don't win cases on their own
- What's the factual hook that could distinguish this case from Zeran?
 - Hint: focus on the uploading process
- Maybe AOL exercised human review before posting the defamatory Report

How to attack Drudge, part 2

- Pre-upload human review might seem different than post-upload review
 - But you still need a hook in the statutory text
- How about "provided by?"
 - Maybe it's only "provided by" if the provision happens automatically?
- Or "another," and harp on the contract?

How to attack Drudge, part 3

- What do you think of that line?
 - Is it easy for services to follow?
 - Is it easy for judges to enforce?
 - Does it respect the policies behind Section 230?
- My take: yes, maybe, and not really
- It's all academic, anyway; Drudge is generally followed (e.g. Batzel v. Smith)

The last word

"Drudge is not a reporter, a journalist, or a newsgatherer. He is, as he himself admits, simply a purveyor of gossip."

992 F. Supp., at 57

1997-2007

Not a bad first decade for § 230

Other courts get in the game

- Ben Ezra, Weinstein & Co. v. AOL (10th Cir. 2000)
- Doe v. AOL (Fla. 2001)
- Green v. AOL (3d Cir. 2003)
- Batzel v. Smith (9th Cir. 2003)
- Barrett v. Rosenthal (Cal. 2006)
- UCS v. Lycos (1st Cir. 2007)

And extend § 230 to other laws

- Defamation law (Zeran)
- Securities laws (UCS v. Lycos)
- State anti-spam laws (Keynetics)
- State IP laws (e.g. right of publicity) (P10
 v. CCBill)
- State criminal laws (Voicenet v. Corbett)
- Federal Fair Housing Act (Craigslist)

The road not taken

- Doe v. GTE, 347 F.3d 655, 660 (7th Cir. 2003) (Easterbrook, J.):
- "Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?"
- But that's in dicta, and late in the day.
- How would this have worked?

47 U.S.C. § 230(c)

"(1) No [ICS provider] shall be treated as the publisher or speaker of any information provided by another ICP. (2) No [ICS provider] shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of [objectionable material]."

Fair Housing Council v. Roommates.com (2007)

The Fair Housing Act

"[I]t shall be unlawful to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

—FHA § 804(c), codified at 42 U.S.C. § 3604(c)

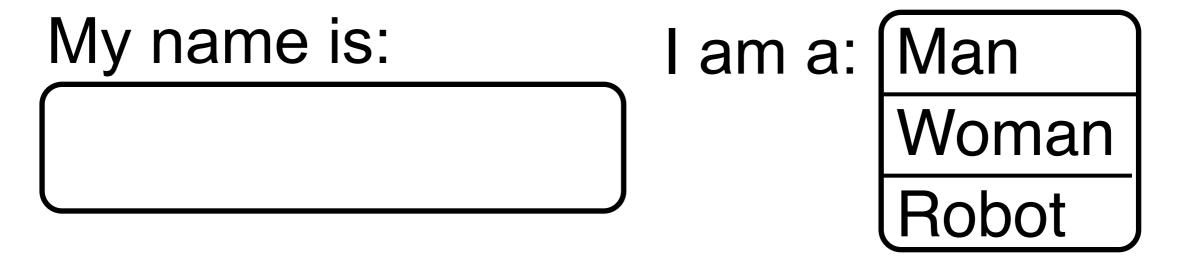
^ Q- Google



















My name is:

Ken ZZ03

I am a: [Man

Woman Robot

ヘ Q- Google

Additional comments:

Men and Christian robots only, please.

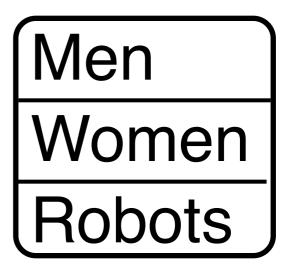








Show me renters who are: [Men



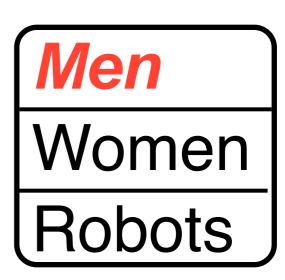








Show me renters who are: [Men











Your search returned 23 potential roommates:

1: **Ken ZZ03** is a **man**.

Additional comments:

Men and Christian robots only, please.

2: **Sen. Exon** is a **man**.

Additional comments:

No pornography in my home

Theory of liability #1

- (1) The drop-downs *themselves* might violate the FHA, even before anyone makes a selection from them
 - Whether they actually violate the FHA is not at issue here. Why not?
- All three judges agree that the CDA doesn't preempt this theory. Why not?
 - The "information" in them is provided by Roommates.com itself

Theory of liability #2

- Returning the information from the dropdowns as search results might violate the FHA
- It's fairly clear that the information was "provided by" the users
- So how does the majority get around that fact?
- Two theories: (1) soliciting; (2) channeling

The harassthem.com hypothetical

- "A visitor to this website would be encouraged to provide private, sensitive, and/or defamatory information about others....[T]he website would encourage the poster to provide dirt on the victim"
- Why does the majority think this would go beyond Section 230's protection?
- How does Judge Ikuta respond?

Channeling

- The majority thinks that Roommates.com does something more by offering its search feature
 - Why, exactly, should that matter?
 - And what's the textual hook?
- There's definitely something ugly going on, but is this the right distinction?
- How does Judge Ikuta respond?

Theory of liability #3

- The "additional comments" contain all sorts of juicy (and discriminatory) tidbits
 - But the majority sees this as core 230 territory
- Reinhardt uses the majority's "solicits" and "channels" tests to find no immunity
 - Both rely on the same move: looking at the entire page

Roommates.com wrapup

- There has to be a line drawn somewhere, and Roommates.com is close to or over it
- But Kozinski's tests are powerful weapons . . .
- . . . and Reinhardt, who would love to roll back § 230, shows how to use them
- This is our first truly cutting-edge case
- Don't treat it as holy writ

The state of the § 230 onion

- Zeran's absolute immunity is the law of the land
 - Coverage of legal subject matter is extremely broad
- The controversy comes when the plaintiff claims the intermediary had an indirect role in creating the harmful content
- Cf. Doe v. Autoadmit

Next time

They know where you live