

Section 230

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Internet Law

Fall 2007

Class 9

Where we are

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

In today's class

- Online defamation law before § 230
 - Offline: publishers and distributors
 - Online: *Cubby* and *Stratton Oakmont*
- The § 230 revolution
 - In Congress: the CDA revisited
 - In the courts: *Zeran*

Old-school ISP / portal / services



Pre-230 Online Defamation Law

A little defamation law

- Subject to various constitutional limits, you can't write false and harmful things about other people
- If you repeat the message, you're a "publisher" and liable as though you were the original speaker
- But mere "distributors" (e.g. bookstores) aren't liable if they "neither know nor have reason to know of the defamation"

Cubby v. CompuServe (1991)

- CompuServe contracts with CCI to supply a “Journalism Forum”
 - CCI subcontracts with DFA to upload Rumorville to the Journalism Forum
- Rumorville allegedly defames Skuttlebut
- *Held*: CompuServe is a distributor
- *Held*: CompuServe lacked knowledge of the defamation

Stratton Oakmont v. Prodigy (1995)

- Prodigy runs a set of bulletin boards
 - It advertises itself as family-friendly
 - Board Leaders enforce a set of content guidelines by deleting insulting, harassing, or repugnant posts
- A party unknown defames Stratton on the “Money Talk” board
- *Held*: Prodigy is a publisher

Cubby and Stratton

- Are these rules reconcilable?
- If you're running an online service, what incentives do these decisions create?
 - Are they healthy for society?
- Should intermediaries be held responsible for defamatory content?
 - Does the answer depend on technology?
 - Will the answer change technology?

Some arguments for liability

- It's often easier for intermediaries to monitor than for defamees to monitor
- The defamers are often hard to find
- Liability encourages the development of better monitoring technologies
- Intermediary monitoring is sometimes cost-justified

Some arguments against liability

- Self-help is much easier online
- Knowledge tests encourage ignorance
- Activity tests encourage passivity
- Liability encourages inactivity
- Internet intermediaries work at scales incompatible with human monitoring

Section 230

47 U.S.C. § 230(c)(1)

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

47 U.S.C. § 230(c)(2)

“No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”

Section 230

- *The* single most important statute in Internet law
- (Another provision requires interactive computer services to notify customers that filtering tools are available)
- It was part of the CDA—the part that survived *Reno*
- Courts have had to interpret almost every word of it

*Zeran v. America
Online (1997)*

April 19, 1995



April 25, 1995

- “Ken ZZ03” posts an ad on an AOL for t-shirts with slogans such as:
 - “Visit Oklahoma . . . It’s a BLAST!!!”
 - “Putting the kids to bed . . . Oklahoma 1995”
 - “McVeigh for President 1996”
- The ad tells customers to call “Ken” at a Seattle number (which belongs to Zeran)

Ken Zeran and the angry mob



- KR XO tells its audience to call “Ken”
- He gets “an abusive phone call approximately every two minutes”
- Not to mention the death threats

The easy part

- The anonymous poster behind “Ken ZZ03” is liable . . . if he can be found
- KR XO is potentially liable as a publisher
 - *But see Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000) (why?)
- AOL is not liable as a publisher
 - Textually, how do you get there?

The surprise

- AOL isn't liable as a distributor, either!
- Judge Wilkinson gets there by treating “distributors” as a subset of “publishers”
- Is this the right way to read the distributor cases?
- Maybe, but the issue is closed
- *Zeran* is now almost universally followed

Notice liability?

- If you go into the bookstore and point out the smut to the owner, what result?
- After *Zeran*, if you call AOL and point out the defamation, what result?
- What incentives would a notice regime give to AOL?
 - What harms would it prevent?
 - What abuses would it enable?

Next time

Does § 230 have *any* limits?