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Online Liability for Publisher/ Speaker Claims

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Overview

- ◆ 47 USC 230 provides expansive safe harbor from liability for third party content
- ◆ Under majority view, online providers can respond to non-IP complaints about third party content however the provider wants
- ◆ CA Sup Ct has important case pending (Barrett v. Rosenthal)



47 U.S.C. §230

“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”



Elements

- ◆ “Provider or user of interactive computer service”
 - ICS: “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server”
 - Definitely covers: IAPs, AOL
 - Usually covers: websites, web hosts, email list operators, chatroom operators
 - Extreme position: anyone connected online is an ICS “user”



Elements

- ◆ “Treated as a publisher or speaker”
 - 230 does not apply to:
 - ◆ Federal criminal laws (47 USC §230(e)(1))
 - ◆ IP claims (47 USC §230(e)(2))
 - ◆ ECPA/state law equivalent (47 USC §230(e)(4))
 - Dominant view: 230 preempts all other claims
 - Minority view: 230 not available when ICS knows/should have known of problem
 - ◆ Barrett (on appeal)
 - ◆ Grace (vacated)
 - ◆ Franco (dicta)



Elements

- ◆ “Information provided by another information content provider”
 - ICP: “any person or entity that is responsible, in whole or in part, for the creation or development of information”
 - Majority view: ICS not responsible for any information that third party provided *in part*
 - Minority view: Sufficient involvement can convert third party information into ICS’s own



Implications

- ◆ Under majority view, ICS eligible for safe harbor even if ICS:
 - Owns third party content
 - Edits third party content
 - Receives a complaint about problematic third party content and deliberately ignores it



Implications

◆ Defendant's perspective

- Courts routinely reject plead-arounds
- Cases frequently disposed on motion to dismiss
- At some point, FRCP Rule 11 will apply to preempted complaints

◆ Plaintiff's workarounds

- Plead an IP claim
- Argue that ICS is ICP
- Argue that defendant isn't ICS provider/user



Defenses Beyond 230(c)(1)

◆ §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 ... objectionable”

◆ Common law safe harbor

◆ Attack the elements

◆ Contract-based defenses