

Michigan State talk (April 2005)

- This talk will focus on the policy benefits of 47 USC 230
 - An distortion-free reputational ecosystem
 - The emergence of heterogeneous communities

Distortion-free Reputational Ecosystem

- Consider websites providing reputational information
 - For example, Epinions captures user-generated reputational opinions about products and services in the marketplace
- Vendors do not like negative statements about their products/services
- If a vendor challenges a user posting, the smartest cost-benefit decision is to remove the post
 - Information asymmetry between website and poster—user knows the truth, website does not
 - Investigation costs + defense costs + expected value of damages > profit derived from challenged post
- This creates a “lopsided” reputational ecosystem—favorable posts are published, unfavorable posts are excised
 - Same dynamic in eBay’s feedback forum
- Lopsided ecosystems prevents rational economic decision-making
 - Diminished consequences of negative vendor behavior
 - Consumers cannot assign appropriate cognitive authority because of distortion
- So 230 is essential to maintaining integrity in the reputational ecosystem

Heterogeneous Communities

- Under a “know/should have known” standard, websites have a dominant risk-management strategy—patrol and control
 - Willful ignorance is not a defense
 - Excessive volume is not a defense
 - So website must patrol to prevent inadvertent “should have known” situations
- This raises the website’s costs to permit user content
 - More people-power to patrol/remove content
 - More liability for mistakes
- Consequences:
 - Websites that voluntarily patrol must now conform to liability-managed patrolling
 - This may be more/different than they would have chosen
 - Websites that don’t patrol must now do so
 - When encountering questionable content on patrols, websites will err on side of removal
- Consequences:
 - Where there might have been heterogeneous approaches to manage user content—from lightly controlled to tightly regulated—websites will regress to a single dominant strategy

- This rewards one type of community (those that can flourish in patrolled environments) and punishes the rest
- Increased expenses will cause websites to exit the community business altogether
 - See COPPA
- “Know/should have known” standard reduces the number of venues for community interaction and constrains those providers to only a single way to manage those community
- In contrast, 230 enables a heterogeneous environment for community formation and management

The Costs of 230

- Cost: individual plaintiffs harmed by user postings
 - Zeran is great example
- Without liability, websites can sandbag
 - Can delay or do nothing, even if website *owns* the content
- But...
 - Posters are still on the hook (unless truly anonymous)
 - Websites may voluntarily intervene (and 230 gives freedom to do so)
 - So real cost is situations not addressed by market and existing liability

Conclusion

- 230’s social welfare impact is hard to determine precisely
- But the social goods jeopardized without 230 are significant
 - Credible reputational information to enable decision-making
 - Some types of communities
 - Meanwhile, there are plenty of ways to deal with individual private harms
- Therefore, we should tread cautiously when considering limits to 230

Other Notes

- How does 230 differ from 512?
 - Copyright doesn’t limit facts, so there are other ways to communicate
 - But 512 notice-and-takedown process works at counter purposes to 230
 - Best strategy is still patrol and control for possible copyright infringements
 - Savvy plaintiffs can use 512 as workaround to 230 safe harbor
- 230 supports judgment on the pleadings
 - No discovery
 - No trial
 - At some point, it will be sanctionable to bring claims preempted by 230
 - Lowered defense costs make it possible for websites to protect low-profit content