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