Liability for Third Party Content

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User who posts content is always liable for any associated harms

Two issues:
- How to find the originator?
- Who else is liable?
Finding Liable Individuals

- **Who has the data?**
  - Website
  - Third party service providers (ex: ad network)
  - Internet access provider

- **How to get the data?**
  - Just ask
  - 512(h) subpoena
  - John Doe lawsuit

- **Problems:**
  - Some users are untrackable
  - Some users are turnips
  - Policing/enforcement costs
  - Defendant numerosity
Pursuing Intermediaries (47 USC 230)

- Offline rule: publisher vs. common carrier
- Online rule: 47 USC 230: websites and other intermediaries aren’t liable for third party content... *period*

230 limits
- Does not apply to ECPA or federal criminal claims
- Does not apply to “intellectual property claims”... but what is an IP claim?
  - Yes = federal copyright and trademark
  - Depends = state CR/TM, trade secrets, publicity rights, others?
    - ccBill (9th Cir. 2007): state IP claims preempted
    - Friendfinder (DNH 2008): state IP claims not preempted
- Intermediaries may be liable for “their” words
  - Mazur (NDCal 2008): eBay potentially liable for some marketing representations about third party vendors

Practice tips
- Polite requests go a long way
- Take advantage of extrajudicial tools
- Don’t waste money bringing lawsuits preempted by 230
Pursuing Intermediaries (17 USC 512)

- 17 USC 512(a): IAPs not liable for third party infringement
- 17 USC 512(c): Websites not liable for hosting user-supplied infringing content
- 17 USC 512(d): Websites not liable for linking to infringing content
- 512(c)-(d) limits
  - Defendants must satisfy formalities
  - Notice-and-takedown scheme
  - Safe harbor may not apply to contributory/vicarious infringement
  - Safe harbor doesn’t protect other technological implementations (such as P2P)
- Practice tips
  - Submit proper 512(c)(3) notices or equivalent (e.g., eBay’s VeRO NOCIs)
  - Build infringement-resistant business models