

Santa Clara University

Liability for Third Party Content

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Agenda

- 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