Recent 47 USC 230 Cases

Prof. Eric Goldman
Director, High Tech Law Institute
http://www.ericgoldman.org • http://hightechlaw.scu.edu
egoldman@gmail.com
47 USC § 230(c)(1): “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 of defense:
- “Provider or user of an 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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions”
- “Treated as a publisher or speaker”
  - Excludes federal criminal law, [federal] IP laws and ECPA
- “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 provided through the Internet or any other interactive computer service”
Does 230 Preempt Claims re Marketing Reps?

- **Arguments against:**
  - Vendors should take responsibility for the words they pick
  - Vendors can misrepresent with impunity for economic benefit

- **Arguments for:**
  - Third party content/actions may make marketing representations false
  - Congress overturned *Stratton Oakmont* holding Prodigy’s marketing representations against it

- **Older precedent:**
    - 230 No: Yahoo disseminated expired dating profiles as if they were still current
    - 230 Yes: information vendor verified information
Does 230 Preempt Claims re Marketing Reps?

- **Recent cases:**
    - 230 Yes: Users were over 18
    - 230 Yes: auction houses were screened
    - 230 No: live bidding is "safe," is conducted against "floor bidders" and involves "international" auction houses
Does 230 Protect Retailing?

- **Argument for:** retailing is just another way to “publish” third party content

- **Arguments against:**
  - Statute only covers “publishing” and “speaking”
  - Offline fulfillment should be outside 230
  - Third party vendors may be so involved in sales

- **Recent cases:**
Does 230 Preempt State IP Claims?

- **Argument for:** if state IP laws aren’t preempted, then state law conflicts curb nation-wide behavior

- **Argument against:** 230(e)(2) says “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”

- **Recent cases:**
  - Perfect 10 v. ccBill, 481 F.3d 751 (9th Cir. 2007)