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## Platform Companies Beware! Section 230 of the Communications Decency Act Is Not Always There to Protect You.

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*This presentation is provided for informational purposes and does not constitute legal advice.*

# The First Amendment and Speech

- **Freedom of speech is not absolute, and various categories of speech can lead to liability, e.g.:**
  - **Libel/Slander**
  - **Obscenity**
  - **Sedition**
  - **Violation of confidentiality**
  - **Violation of right to privacy**
  - **Perjury**

# Protection of Distributors Against Liability for Non-Protected Speech

## Liability of Publishers vs. Distributors:

- ***Smith v. California*, 361 U.S. 147 (1959)**
- ***Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)**
- ***Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (1995 WL 323710)**

# Section 230 (47 U.S.C. § 230)

- **Within the Communications Decency Act (CDA) of 1996**
- **Two Protections:**
  - **230(c)(1): “No provider or or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”**
  - **230(c)(2): No liability for voluntary good faith restriction or enabling user restriction of materials the provider or user deems to be objectionable**
- **“Interactive computer service” vs. “information content provider”**
- **Goals:**
  - **Promote free exchange of information and ideas**
  - **Encourage voluntary monitoring for offensive material**

# Protections Afforded by §230

**No platform liability for:**

- **Posting third-party content that would not result in liability for a distributor; or**
- **Restricting third-party content deemed “objectionable” by the platform**
- **Claims subject to Motion to Dismiss. See, e.g. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009)**

**But §230 is not always a free pass . . .**

# Limitations (1)

## Federal Criminal Law Violations

- Broad shield against *civil* liability
- No protection from criminal speech, e.g.:
  - Obscenity
  - Stalking
  - Harassment
- ***Gonzalez v. Google*, 2 F.4th 871 (9th Cir. 2021)**

# Limitations (2)

## Promotion or Facilitation of Sex Trafficking

- **Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)**
- **Issue for platforms hosting user communications/personals-style advertisements**
- ***Woodhull Freedom Found. v. United States*, 948 F.3d 363, 368–69 (D.C. Cir. 2020)**

# Limitations (3)

## Intellectual Property Infringement

- **Affirmative obligation to remove infringing materials**
- **But note DMCA protections**
- **What about state IP claims (e.g., right of publicity)?**
- ***Craft Beer Stellar, LLC v. Glassdoor* (2018 WL 5084837) (D.Mass Oct. 17, 2018)**



# Limitations (4)

## Electronic Communications Privacy Act

- ECPA prohibits interception, use, or disclosure of electronic communications
- Liability remains for violation
- But many activities of platforms necessarily involve the use of electronic communications
- *Doe v. GTE Corp.*, 347 F.3d 655, 658–59 (7th Cir. 2003)

# Limitations (5)

## Product Design Flaws

- Liability remains for defects in platform's own products
- *Lemmon v. Snap Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021)

# Limitations (6)

## Failure to Warn

- Turns on knowledge of platform regarding use for criminal activity
- Does this create a duty to monitor/moderate?
- *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016)

# Limitations (7)

## Transactions Arising From Third-Party Posted Content

- ***HomeAway v. Santa Monica*, 918 F.3d 676 (9th Cir. 2019)**
- **Liability based on state/local laws**
- **Transaction vs. speech**
- **Advertisement vs. transactions**

# Limitations (8)

## Anticompetitive Conduct

- No duty to moderate third-party content
- But once decision is made to do so, moderation decisions must not be made for a competitive advantage
- *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13, 208 L. Ed. 2d 197 (2020)

# Limitations (9)

## Tortious Content Created by the Platform

- Platform here is more than a distributor of third-party information
- More significant action taken on user content creates more likelihood of liability
  - Framing
  - Directing
  - Developing
  - Editing
  - Repurposing
- *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008)
- *Anthony v. Yahoo Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006)
- *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011)

# Potential Additional Limitations and the Future of §230

**Attacked from both sides of the aisle, but  
any likelihood of action?**

- **The right: protection enables politically-motivated moderation/removal decisions**
- **The left: protection enables proliferation of dangerous misinformation**
- **But would removal of protection address either concern?**
- **Concerns about platforms vs. speech itself**

# Questions?



**Thank you!**



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