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New Developments in Section 230 Immunity and the DMCA Safe Harbor: A Discussion of Legal Issues for Experienced Internet Counsel (and Those Who Want to Be)

January 24, 2011

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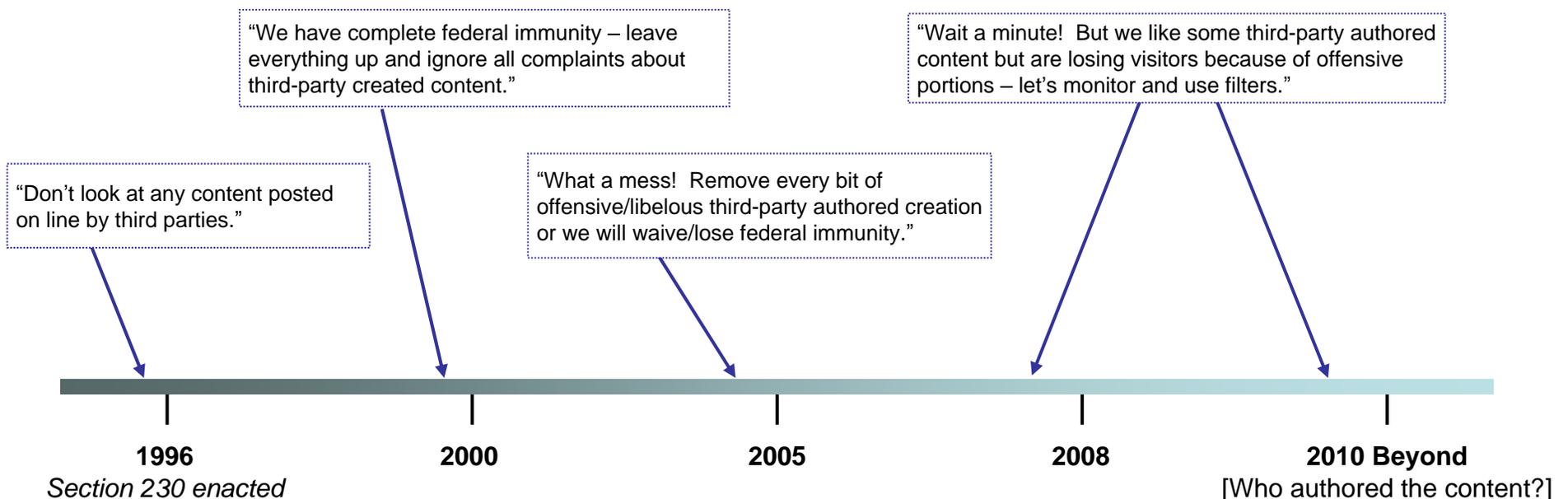
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Timeline Showing Generalized Reactions to Section 230's Federal Immunity

Pre-1996 to Present



What does that mean?

Pre-Roommates.com Section 230 Caselaw

- Section 230 Absolute Immunity is Uniformly Recognized and Upheld by courts across the country. Decisions are many, but light on legal analysis.
- Confusion and misunderstanding as to how Section 230 immunity works:
 - Does Section 230 recognize monitoring of conduct?
 - Is Section 230 immunity lost if some offensive (or even non-offensive) content is removed?
 - Isn't it "safer" to remove all content rather than edit portions deemed offensive?
 - How does Section 230 apply in mixed content situations? — where the content is authored by both employees of the content provider and third parties?

Roommates.com Section 230 Test

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2009) (*en banc*)

- Did the owner of the website or its employees “materially contribute” to the challenged content?

“Information Residing On Systems or Networks At Direction of Users”

- A service provider may not be held liable for monetary or any equitable relief other than certain enumerated injunctions due to copyright infringement.
 - “Service provider” here means any “provider of online services or network access”
 - Must have designated agent (and must provide required contact information)
 - Must have policy of terminating repeat infringers
 - Must accommodate and not interfere with “standard technical measures”

“Information Residing On Systems or Networks At Directory of Users”

- By reason of “storage at the direction of a user” of “material that resides on a system or network controlled or operated by or for the service provider”, if:
 - (A) Service provider does not have actual knowledge of infringement or awareness of facts **or** circumstances making infringement apparent (**red flags**) **or** acts “expeditiously” to take down material upon obtaining such knowledge or awareness; **and**
 - (B) Service provider does not receive financial benefit directly attributable to the infringing activity, in a case in which it has the right and ability to control such activity; **and**
 - (C) Upon receiving notice in the required form, provider responds expeditiously to take down.

Required Knowledge/Awareness

- Provider must have knowledge/awareness of red flags of specific instance of infringement to lose immunity.
- Notice must comply with formal requirements of §512(c)(3) in order require takedown.
 - Written communication to designated agent that substantially complies with all required elements **or**
 - Written communication to designated agent substantially complying with elements (ii), (iii) and (iv) **and** service provider fails to take “reasonable steps” to obtain notice that substantially complies with all other elements.
- Safe harbors are not conditioned on monitoring service or “affirmatively seeking facts indicating infringing activity” (even when service provider has generalized notice of infringement).

Storage at the Direction of a User

- Storage
- Reviewing/Screening
- Copies
- Display
- Transmission to Users
- Alteration of Format
- Selling Third-Party Content, Running Ads
- Light Editing
- Substantial Involvement in Development (milestones, standards, substantive changes)
- Eliciting Illegal Content
- Business Based on Sale of Infringing Content
- Ignoring Specific Notice of Infringing Activity

Current Legal Issues

- The implications of revenue-sharing arrangements between publishers and freelancers
- To what extent can a publisher assign, direct, edit or set standards for — but not "author"— third party content?
 - Guest bloggers and citizen journalists
 - Apps
 - Corporate social networking pages
- Republishing previously posted or emailed third party content
- Mixed content situations
 - Where the website automates the mixing
 - Where user-generated content is integrated into publisher's content
 - Feeds