

# Making Sense of CDA Section 230, the Law Communicators Love to Hate

3CMA Webinar – April 7, 2021

Daxton R. “Chip” Stewart, J.D., Ph.D.

@MediaLawProf

Professor of Journalism, TCU

# What is Section 230?

- CDA Sec. 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”
  - [Prof. Jeff Kosseff](#) calls them “the 26 words that created the Internet”
- Also, CDA Sec. 230(c)(2) makes ISPs not liable for content moderation/takedown decisions
- Does NOT apply to copyright or criminal law – Sec. 230(e)

# A bit of history

- *Cubby v. Compuserve* (S.D.N.Y. 1991): ISPs are “distributors” (like a bookstore), thus generally not liable for defamation by users
- *Stratton Oakmont v. Prodigy* (N.Y. Sup. Ct. 1995): ISPs are “publishers” (like a newspaper), thus ARE liable for acts by users
- Congress passes [Sec. 230](#) in Communications Decency Act in 1996
  - Specifically aimed to end publisher/distributor debate; ISPs are *never* liable as either under (c)(1)
  - Purpose: To “promote continued growth of the Internet” and “preserve the vibrant and competitive free market” by protecting ISPs from constant lawsuits from users; to encourage moderation

# CDA Sec. 230 today

- Almost all of CDA was struck down by Supreme Court in *Reno v. ACLU* (1997), but Sec. 230 survived
- [Zeran v. AOL](#) (4th Cir. 1997): AOL not liable for harm to Zeran from fake ad by anonymous user b/c Sec. 230
  - Courts since have followed this; SCOTUS hasn't heard a case
  - Only exception was [Roommates.com](#) case (2008) on FHA law
- Challenges: *Herrick v. Grindr* (2nd Cir. 2019, [cert denied](#))
- Reform efforts underway now; [7 bills filed in 2021](#)

# Zeran v. AOL (4<sup>th</sup> Cir. 1997)

Subj: ### GREAT OKLAHOMA T-SHIRTS . 95-04-26 14:23:58 EDT  
From: KEN ZZ033

EXERCISE YOUR FREEDOM OF SPEECH  
NEW OKLAHOMA T-SHIRTS - ORDER YOURS TODAY !!!!

Item#	slogan
#520	- "Rack'em, Stack'em, and Pack'em - Oklahoma 1995" SOLD OUT
#522	- "Shit happens.....to EXPLODE - Oklahoma 1995"
#524	- "Dear IRS.....The check is in the van - Oklahoma 1995"
#568	- "Visit Oklahoma...It's a BLAST !!!"
#569	- "Putting the kids to bed.....Oklahoma 1995" ONLY SMALLS LEFT
#583	- "McVeigh for President 1996"

## NEW ITEMS

#633 - "2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995"  
#637 - "Forget the rescue, let the maggots take over - Oklahoma 1995"  
#651 - "Finally, a day care center that keeps the kids quiet - Oklahoma 1995"

\*\*\* I WILL BE DONATING \$1 FROM EVERY SHIRT TO THE VICTIMS \*\*\*

- > \$14.95 each plus \$2.00 shipping/handling
- > Shirts are a white cotton 50/50 blend with black ink.
- > SIZES: Small, Medium, Large, X-Large, XX-Large
- > Please order by number and size
- > All orders are shipped out same day

Please call (206) 362-XXXXXXXXXX  
Ask for Ken  
Due to high demand please call back if busy

# Sec. 230 Myths

- **Myth:** Sec. 230 requires ISPs to be politically neutral or else they lose liability protection
  - Nope. And that’s a huge First Amendment problem.
- **Myth:** Sec. 230 distinguishes between “platforms” and “publishers”
  - Nope. The whole point was to get rid of that.
- **Myth:** Once you make editorial decisions about user posts, you are a “publisher” and lose Sec. 230 protection.
  - What did I just say? Yet this myth has persisted for decades.
- **Myth:** Sec. 230(a) or (b) or (c)(2) limit (c)(1) protection
  - Nope. (a) and (b) are findings & policy. They don’t change (c)(1).

# What Sec. 230 means for you

- Good news! If somebody posts something hurtful on an online page, forum, comments section you manage, etc., you are not legally responsible.
- Good news! If you retweet, share, forward an email that turns out to be false/hurtful, you are not legally responsible.
- BUT – City & county communicators are the government, and the First Amendment still presents moderation issues
  - A “virtual public forum” means [blocking, takedown](#) are hard

# That pesky First Amendment

- You work for the government, so the First Amendment applies to you. But what does that mean in the context of Sec. 230?
  - People may speak, do speech-related activities, assemble/petition for change with very few limits on your platforms
  - Yes, even jerks

# Cautionary tale: PETA and A&M

- In 2018, [Texas A&M barred posting](#) by or about PETA, including the words “cruelty,” “abuse,” “torture,” “lab,” “testing,” and “shut”
- PETA had a campaign targeting A&M for breeding golden retrievers with muscular dystrophy so they can be studied for a human cure
- PETA sued with help of Electronic Frontier Foundation, arguing First Amendment violation

# What happened?

- Texas A&M settled, paid \$75k in attorney fees, promised no more viewpoint discrimination – then got sued again

In light of the COVID-19 pandemic, Texas A&M held its spring commencement ceremonies online, with broadcasts over Facebook and YouTube. Both the Facebook and YouTube pages had comment sections open to any member of the public—but administrators deleted comments that were associated with PETA's high-profile campaign against the university's muscular dystrophy experiments on golden retrievers and other dogs.

Where government entities such as Texas A&M open online forums to the public, the First Amendment [prohibits them from censoring comments](#) merely because they don't like the content of the message or the viewpoint expressed. On top of that, censoring comments based on their message or viewpoint also violates the public's First Amendment right to petition the government for redress of grievances.

# CPC at TCU update

- Cohort 9 (summer 2021) is full with a short waitlist
- Will be accepting applications for Cohort 10 (2022) in summer
- Go to [certifiedpubliccommunicator.org](https://certifiedpubliccommunicator.org) for details
- Or contact Dr. Jacque Lambiase: [j.lambiase@tcu.edu](mailto:j.lambiase@tcu.edu)