

Santa Clara
University

Trends in Internet & Technology Law

Prof. Eric Goldman

Director, High Tech Law Institute

<http://www.ericgoldman.org> • <http://hightechlaw.scu.edu>
egoldman@gmail.com

Are Keyword Ad Battles Winding Down?

- **TM Owner v. Search Engines**

- Google got complete win in Rosetta Stone case
 - "no reasonable trier of fact could find that Google's practice of auctioning Rosetta Stone's trademarks as keyword triggers to third party advertisers creates a likelihood of confusion as to the source and origin of Rosetta Stone's products."
 - Google protected by Functionality Doctrine
- Lawsuits against Google peaked at 12 in 2009. Now only 3 pending + Rosetta Stone appeal

- **TM Owner v. Advertisers**

- TM owners aren't winning trials (College Network v. Moore, Fair Isaac v. Experian)
- Litigation economics don't make any sense

47 USC 230

- **Status Quo: Websites Aren't Liable for Third Party Content**
 - Ex: Johnson v. Arden (8th Cir.), Reit v. Yelp, Miles v. Raycom, Black v. Google
- **Roommates.com Hasn't Shook Up 230 Jurisprudence**
 - Latest ex: Milgram v. Orbitz
- **Recent Bypasses**
 - Promissory estoppel. Ex: Scott P v. Craigslist
 - Expansive agency principles. Ex: Cornelius v. DeLuca
- **230 and FRCP 65 (Bobolas & Blockowicz)**
- **47 USC 230 Conference, March 4, SCU**

State AGs

- State AGs do not feel constrained to seek results consistent with the actual law
- State AGs prefer to believe 47 USC 230 does not exist
- Pre-2010 Examples
 - Facebook and MySpace teen restrictions
 - JuicyCampus and People's Dirt shutdowns
- 2010 Examples
 - Craigslist's shutdown of its adult services category and targeting of Backpage
 - Topix's charging for a takedown fast lane
 - Texas investigation into Google's algorithm

Internet Plaintiffs' Bar

- **Lawsuits over product design choices**
 - Ex: Street View, Buzz, Instant Personalization, Disclosure of Facebook IDs, Google's inclusion of search queries in referrer URLs, Classmates opt-out
 - The real reason we need ECPA reform!
 - Launch-first, iterate-second approach = call-to-action for plaintiffs' lawyers
 - Putting burden on user opt-out = angry users + active plaintiffs
- **Lawsuits by advertisers**
 - Ex: click fraud lawsuits; suits over advertising settings
 - Publishers: tighten up your contract & clean up your marketing collateral

Online Authenticity

- **California E-personation Law (Penal Code §528.5)**
 - “knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person”
- **FTC Endorsement & Testimonial Guidelines**
 - In re Reverb: no astroturfing or undisclosed self-interested reviews
 - No-action over Ann Taylor promotion
- **Eppley v. Iacovelli: griper can't publish content in target's name**

Scraping

- **Scraping is ubiquitous but legally questionable**
 - A successful scraper must navigate copyright, contracts and trespass to chattels doctrines
- **Recent cases I'm watching**
 - Cvent v. Eventbrite: litigation may not remediate a one-time scrape
 - Facebook v. Power.com: API = OK, scrape = not OK
 - Snap-on v. O'Neil: scraping to get your own data may not be OK
 - Oracle v. SAP
- **If you're in charge of anti-scraping protocols:**
 - Use robot exclusion headers, rate limits, analytics on heavy users and IP address blocks
 - Carefully review RSS feeds, APIs, CC licenses, site terms
 - Get your copyright registrations on file within 3 months of 1st publication

First Sale/Exhaustion

- **Copyright**

- Costco v. Omega, pending before SCOTUS
- Vernor v. Autodesk / UMG v. Augusto / MDY v. Blizzard
- Textbook importation cases
- “Digital First Sale” + disappearing ebooks

- **Trademark**

- Midwest v. Beltronics
- Mary Kay v. Weber

- **Patent**

- Quanta v. LGE

- **First Sale and Exhaustion in IP Conference, November 5, 2011**

Are Newspapers the Next Big IP Litigants?

- **Righthaven has filed ~160 copyright infringement lawsuits**
 - Small time bloggers/non-profits, no advance warning, low settlement offers
 - Righthaven v. Realty One: fair use defense *on motion to dismiss*
 - Is Righthaven a profitable business?
 - Is it a good idea for newspapers to participate?
- **Case to Watch: Barclays v. theflyonthewall**
 - Republishing stock recommendations supports an injunction for time-delayed future publication