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Anthony Sanders 00:07
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on March 25, 2021. And there's still plenty of time to register for our online event on Tuesday, April 20th, where we and several experts and civil rights lawyers will celebrate the 150th anniversary of the adoption of Section 1983, one of the most important civil rights laws and our history. To join us use the link in the show notes or go to ij.org/CJE and click on the icon that says outrage legislation. So I am the last person who can claim to have an informed opinion on technology, as my family often reminds me. But two very interesting cases came out the last couple of weeks that are all about the hottest and newest controversies on how technology the law and the Constitution intersect with each other. Thus, I needed some help. So we have on today two experts to help you but especially me, get just a little bit more high tech. First of all, we are thrilled that a special guest is joining us. Mike Masnick is someone that many of you too many of you needs no introduction. He is the founder and editor of Techdirt as well as the founder of the Copia Institute, and writes on many technology and civil liberties issues. And in other areas as well. He also is one of the few people who manages to stay sane while discussing what we'll be talking about today. Section 230. Mike, welcome to Short Circuit.

Mike Masnick 01:49
Yeah, thanks for having me. I'm always happy to talk about 230.

Anthony Sanders 01:52
Great, well, we're going to 230 away and in a moment. Also joining us though, is the ever popular IJ attorney, Josh Windham, who we have on from time to time to talk about various issues, including state constitutions and zoning. And today an intersection of all that while throwing in the D word, drones, Josh, thanks for coming on, again.

Josh Windham 02:17
Happy to be here.

Anthony Sanders 02:19

So I asked Mike to join us because of a recent case from the Second Circuit, Domen v. Vimeo, yes, that Vimeo, the one you upload videos to. We're going to hear from him about the case, which involved Section 230. And among other things, but more broadly about what's true and what's not about that statute, and how it applies to our lives. Mike, first, let's hear about what Section 230 has to do with Vimeo's dispute with its former customer.

Mike Masnick 02:51

Sure. So you know the basics of Section 230 is that it gives any website the ability to moderate content without facing liability for the choices that they make or for the content that a user posts. And in this particular case, it involved the plaintiff, James Domen. And his organization, which is called Church United, I guess. And Domen describes himself as a as an ex-gay individual, and posted videos about that topic. And Vimeo found that that violated its policies, that it had policy against the promotion of sexual orientation change efforts. S.O.C.E is the way it described it, and told Mr. Domen, that those videos that he was posting violated its policies and that he needed to take them down or they would shut down his account. And he ignored them. And so they did exactly what they said. And they shut down his account. And he sued, arguing a whole bunch of things, civil rights violations and other things. And this, you know, at first pass seems like a pretty typical Section 230 kind of case, Section 230 very broadly protects any website from the moderation choices that they make both the content that they leave up, and the content that they take down. And contrary to what some people think there aren't a whole bunch of conditions on that. It's pretty broad, and it's pretty much a very clear immunity. It does not involve having to be neutral. It does not involve some difference between being a platform or a publisher. It applies to any website that is hosting third party content. So that is content that they did not create themselves. So, you know, to some level, this case seems fairly straightforward and a rather typical Section 230 style case, but actually the appeals court ruling is a little different in an interesting way, a lot of people get very confused about Section 230, not just because of the sort of false descriptions of it. But even people who read it get confused, the important part of Section 230 is Section (c), that's the only thing that really matters in Section 230. And (c) is divided into two sections itself, A and B are sorry, (1) and (2). And (1) is the part that is most famous. That is the part that says that no website is responsible for, it should not be held as a publisher of third party content. And then section (2), Section (c)(2) is the part that says that they can remove all sorts of, of content, including it, there's a list, but then it also says or otherwise objectionable, but also says if the removal is done in good faith, and a lot of people have really seized on two things, one, the otherwise objectionable framing, and then secondly, the good faith term. And so lots of people have argued that various takedowns were not done in good faith and therefore not protected by 230. Most courts have said that

doesn't matter. And really what they've done is said that section (c)(1) that simply says, no website should be liable for any third party content, covers all moderation decisions leave up or stay down. Because if they decided to punish a website for taking down content, that would be holding them liable for third party content. It feels a little strange, but lots of courts have ruled this way. And therefore, the (c)(2) part of Section 230 almost never comes up. And that's the only part that mentioned that has the good faith requirement. So it's very rare that good faith has been litigated. There's a separate argument, which actually doesn't come up in this case that even determining whether or not the moderation is good faith has First Amendment issues, because you have a court basically saying, Do we agree with this editorial decision or not? And from a First Amendment standpoint, that gets very iffy very, very quickly, because you don't want court saying what's this editorial choice in good faith or not? But what's interesting here is that the court does this entire the appeals court does this entire ruling based on (c)(2), rather than (c)(1), which is different than almost every other court ruling around 230. It's not entirely clear why they did this, because the lower court decision that they're reviewing, ruled on both (c)(1) and (c)(2), and said, you know, you could dismiss this case on (c)(1) grounds like every other moderation decision. But this ruling in the appeals court focused entirely on (c)(2) and, and mostly on the question of good faith, and then gave a very broad ruling that said, similar to the way that that courts have interpreted (c)(1), that (c)(2) is also a very broad immunity. And it gives Vimeo, very, you know, open ended powers to moderate their own site the way that they want to, and that the good faith limit on it requires a lot more than just saying, I thought this was unfair, you know, I don't like this. Or, you know, the other arguments that Mr. Domen made, including, he pointed out other content that was left up on Vimeo that he felt show that he was treated unfairly. He you know, within the within his complaint, he argued and, and throughout the case, he argued that, you know, Vimeo was treating him differently than others and pointed to examples of content that they didn't take down. And the court very clearly said that even under (c)(2), and the good faith standard, just because you find other content that does not establish that it was done in in bad faith. It also noted that, you know, the policy here was clear, and that the company, you know, explained the policy to Mr. Domen and they warned him that he was going to lose his account. And there's just therefore no evidence that anything was done in bad faith. And therefore said that, you know, Vimeo's decision here was completely protected by 230. And the case can be dismissed on 230 grounds, including (c)(2), which is which is rare. I mean, it's a rare sort of 230(c)(2) case.

Anthony Sanders 09:53

And so could the court have just done what most other courts have done and just gone with (c)(1) here Was there something kind of different about this fact pattern that might have led it there?

Mike Masnick 10:05

I think they could have easily just unsee one or as other courts have done, actually skip 230 altogether and jump straight to the First Amendment. Because there have been a bunch of cases where that's happened. I mean, it is interesting in that there, you know, a lot of 230 cases have actually not been about removals, a lot of the 230 cases have been about content that was left up, and like defamatory content or something like that. And the website would argue that, like, we don't know, and we don't, we don't, we're not liable for content that we've left up. So it's a slightly different case, in that this is about content that was taken down or an account that was shut down. There are a few other cases, but uh, most of those other cases involving takedowns have actually been decided on First Amendment grounds. And the courts have skipped over the 230 analysis altogether. So, you know, it. It's not entirely clear why they didn't just go with (c)(1) I think they could have. I think there are other courts that have you know, and so I think it's interesting, I will note that the appeals court does reference, there is one other sort of famous (c)(2) case, which was decided in the Ninth Circuit, I guess I didn't mention this is the Second Circuit case. But there was a famous Ninth Circuit case involving two like malware detecting software companies, and one Malwarebytes decided that the other one and Enigma Software, that their software, they're supposedly, you know, antivirus anti malware software was itself malware. And so the company Enigma, that had its software so deemed, sued Malwarebytes, and said that they were, you know, it was that they couldn't refer to their software as malware. Malwarebytes claimed that it was protected by 230. I think that was true, or it should have been true, but the Ninth Circuit decided otherwise. And on (c)(2) grounds, said that, because it was possible that the decision was on anticompetitive grounds, and that they were trying to block a competitor, that that would get around the (c)(2) to provision because anticompetitive grounds could suggest not that not good faith or bad faith. I have problems with that case. But this case, the Second Circuit here references that decision, and says that's a different situation, because they're saying that (c)(2) wouldn't be considered good faith in anticompetitive situations, but there's no anticompetitive nature to Vimeo just shutting down this, this guy's account for his crazy videos. And so they distinguish it that way. And so those are, you know, that's, you know, these are sort of the two key (c)(2) cases out there now, I guess.

Josh Windham 13:10

So is it the case that whether it's good or bad faith under Section 230 really turns on, whether it's a good faith exercise of discretion, in that instance, rather than it being some sub pretext or setter, you

know, kind of sly way of kicking somebody off that you just don't like for other reasons that are independent of your own content guidelines?

Mike Masnick 13:39
So it's, it's not clear. And that's part of the problem with it. And, you know, certainly a lot of people have said that the wording of (c)(2) of CDA 230 is messy. Like, it's nice that most of the courts have decided these cases on (c)(1), because (c)(1) is just clear and straightforward. And it has this bright line, it says that no, you know, no service provider should be held liable for content created by third party period. That's it, you know, there's no sort of test involved. (c)(2) is weird, because it has that good faith phrase in there. And that's why it's, it's been good. I think that most of these cases have been decided on (c)(1) grounds because it's just a clear dividing line. Whereas the (c)(2) cases, you know, this is a good ruling. And I think it's the correct ruling. But the worry is that it will lead to cases that challenge that point that you're making, that any, you know, people will start to argue that, oh, this this was a pretextual attempt to kick me off the site. And I didn't really violate their policies and they're just saying that because they don't like me, or they don't like my political views or some other reason. And therefore, just the use of (c)(2) hear and the fact that the court you know, did an analysis of it might lead to a whole bunch of other people trying to somehow, you know, get around to (c)(1) analysis and focus on (c)(2).

Josh Windham 15:05
Is it possible that, you know that the reason the court might have chosen to go the (c)(2) route here was it was interested in sending a signal that this is really intended to give platforms like Vimeo, and you know, by extension, YouTube, Facebook, Twitter, a fair amount of discretion and leeway deciding, you know, what can be done on their platforms?

Mike Masnick 15:30
Yeah, maybe. I mean, and, that's like the good reading of this ruling. And looking at and saying, like, yeah, you know, it says all the right things, and I think will be helpful in there, there are good lines in there to pull in other cases, if there are other (c)(2) cases that come up, and you can highlight that it does say very clearly that, you know, you know, the law does not prescribe specific things that you have to do, it is not creating, like, you know, an ABC test that you have to hit each of these points, in order to get your (c)(2) protections, it was designed to give very broad protections for the sites to decide for themselves, these things. And so I think there are some good elements to the ruling, but just the fact that they had to go through that analysis of whether or not this is good faith leads to the possibility that others will sort of try and, you know, wiggle their way around it. And that's why (c)(2) is just inherently a

messier part of the law to rely on then (c)(1). So it's, it's a good ruling, I just, I do wonder if others will, even though it is good and clear that others will then try and distinguish their cases from this one and say, Well, you know, in that case, you know, it says that he violated this specific rule, and they gave him warnings, you know, does that mean that (c)(2) can't be used in the case where it's not as clear which rule was violated, or they don't give you a warning, because I think that the law is still intended to cover that those situations, if a side says you violated our policies, we don't have to tell you which one, and you violated them in such an egregious way that we're kicking you off the site right away. I could see someone stepping in and saying, well, that's different than then the Domen case. And therefore, you know, this was done in bad faith.

Josh Windham17:20
I do have a more not to monopolize your time here, Anthony. But I do have one more quick question, which is, I mean, or maybe just comment. I mean, it seems like there's an impression among the general public and in like the quote, unquote, "discourse about Section 230, that there's some sort of requirement that platforms be like good actors or something." And I just don't see that in Section 230. I don't see it as a, you know, you have to be a good guy to get immunity statute. It just seems more categorical than that. Is that a fair take?

Mike Masnick 17:53
Yeah, it is. There is no good guy part. You know, part of the reason why there is that belief is that they do call that the whole Section (c) is referred to as the Good Samaritan clause. So that sort of does imply some nature of that, but there's nothing in the text of the law that that does require, you know, require you to be a good actor, except for that one part of (c)(2), so if you are relying specifically on that there is an element that things need to be done in good faith. But you know, the other two parts of C, or (c)(1) and then (c)(2)(b) do not require good faith and are designed to be a broad immunity. And then there's just that, that question of, you know, whether or not it is possible to necessarily judge whether or not somebody is a good actor, you know, whether or not things are done in good faith opens up an entire can of worms that I think is kind of dangerous,

Josh Windham 18:52
But like the premise of your platform could be actually that you like, say, this guy who's the plaintiff opens his own platform, the premise of which is that this is kind of the worldview behind the platform, and the people he's kicking off his platform have the opposite perspective like it, wouldn't that be a good faith exercise of his discretion under 230?

Mike Masnick 19:13
Right, yes, and that's the way most courts have, you know, interpreted it, which is that the platform's get to set their own rules. And in fact, that's what the authors of Section 230 have said, that was their intention in writing 230 was to allow many different websites to create their own rules and to create their own communities, and to create the policies that match that community. And therefore, you know, you get a variety of different kinds of communities with different rules. And if you wanted to create a community that was focused on, on, you know, content that other people disagreed with, well, that's, you know, that's part of what 230 is designed to, to enable. So yes, in theory, you could create a community that is explicitly designed to, you know, to be of a bad faith. factor in some sense, and to encourage again, there are communities out there that, you know, that have done that they may have trouble surviving for other reasons such as that there's not a very good business model necessarily, and in sort of, you know, creating a site that is specifically aimed at sort of trollish, bad behavior, but 230 does allow that,

Anthony Sanders 20:21
Mike, is there any example of any court, state, federal, whatever, ever finding something to be bad faith under this law?

Mike Masnick 20:30
I mean, the Malwarebytes case is the closest that I can think of, and that is they sort of argued that because something is done for anticompetitive reasons, that's not done in good faith. But that's, you know, that's a very fact specific case. And, and I don't think applies to, you know, any other sort of 230 style moderation case.

Anthony Sanders 20:54
So this, I did not prepare for today. So, I may be getting this wrong. But a few months ago, I think it was a dissent from a denial of cert. Justice Thomas, said he wanted to take a case that had to do with section 230. And he talked about good faith, what was the issue that was talking about that there? And is that something that's likely to come our way?

Mike Masnick 21:23

Yeah, it might be. And he was, this was basically the issue, he sort of did want to extend that he had a few different issues. And I haven't looked over what he wrote in a couple months. So I don't have it, you know, perfectly in memory. But that was one of the issues that he did want to look at. So his argument would be more aligned with this one. And that was a surprise, because it kind of came out of nowhere. And there weren't any courts, really, that had expressed significant interest in doing this. So he stated that, yeah, he thought that more of the moderation decisions should have to show good faith in order to get 230 protections. He also argued, and this, this is, again, this gets really deep in the weeds.

Anthony Sanders 22:06
That's what we're here.

Mike Masnick 22:07
Cool. But, you know, he argued that 230 had been interpreted much too broadly. And, you know, so, before 230, you had sort of, there were a few different liability regimes that you would talk about four, sort of, you know, third party content. And so there's publisher liability, right. So if you publish it, you're liable for it. That makes sense. There was then also distributor liability. And this was focused on like, cases around like bookstores, carrying books, like the famous cases, there involved, you know, whether or not they can be fined for obscene books. And you know, and how you judge that. And the general theory or doctrine, I guess, around distributor liability was that you were not liable unless you had knowledge of the violation of the law. So if you knew that you were stocking obscene books, then you could be held liable for violating, you know, laws against obscene content. And so the argument was that you had publisher liability and distributor liability. And so one of the things that some people have argued, and Clarence Thomas raised this in his, in the bit that he wrote, was that he thought 230 was designed to say that that websites could not be held on publisher liability claims in which you're fully liable for it, but could still be held liable for distributor liability. So in other words, if they had knowledge, so in that realm, you could say that like, if somebody notifies a website, that this content is obscene, or defamatory, or violate some other law than under distributor liability, if they ignored that notice and did nothing about it, then maybe they could be held liable for that content. All of the cases so far have said no, 230 wipes out all liability, distributor liability, publisher liability, all of it. And so there is no such thing as distributor liability online today because of 230. And one of the things that Clarence Thomas said was like, I think that's wrong. And I think that distributor liability still should still apply. And that's, that's different than what any Court has said. And so that issue might come up. And I would bet now that there are there are folks out there trying to set up a case for that. I think that's wrong, I think and the authors of 230 have argued that 230 was meant to wipe out both publisher and distributor

liability, in part because of the nature of the internet. Enabling distributor liability for things like defamation in particular would create a huge mess online. You know, because then it'd be really easy to get any content you want taken down, you just tell the website. This is defamatory. You know, without any, you know, standard adjudication process to determine whether or not is defamatory. And, you know, as I'm sure you know, lots of people claim stuff is defamatory when it is absolutely not defamatory. But if you can just say this is defamatory, tell a site, and that site to avoid liability has to pull it down. What are they going to do? They're going to pull it down.

Anthony Sanders 25:30
And indeed that was probably impractical in 1996, was much more impractical today with social media. Right? Yeah. Then it just some GeoCities website that someone had in 96.

Mike Masnick 25:45
Right. Right. And, you know, there was a, there was an interesting analysis that we recently republished a few months ago, that somebody had done in, like, 1995, in 1996, about whether or not distributor liability would apply on the internet for defamation. And it was for this a treatise on internet law that was published in the 90s, that chapter then got wiped out because section 230 made it superfluous. And so we were able to get permission to republish that chapter just to look at, you know, the state of the law right before 230 came about. And the general conclusion back then was that like, that would be absolutely crazy, like to assume that distributed liability would apply to the internet in 1995, for like, for defamation claims, in particular. But if we were to switch it today, I mean, websites would just get flooded with complaints, right? This is defamatory, and you have to take it down, or you're going get sued, and it would be an absolute mess. So I think, you know, to switch to that world, would completely undermine, you know, 80 to 90% of the benefits of 230. And enabling all of these places for speech online. I think it would be a disaster.

Anthony Sanders 26:58
Finally, a question I had. And recently I was looking at and wrote a bit about some of these state legislators that are coming up with proposals to criminalize, taking down posts that they, that Twitter, disagreed with, essentially, I think it most of its just performative. But the I saw some commentary about how 230 interacted with that, but I wasn't sure was quite right. And so I wanted to ask you about the 230 sub e, which is the preemption and it's pretty, I think it's pretty straightforward, and most our listeners get the preemption means that federal law override state law, but it does it says "nothing in this section shall be construed to prevent any state from enforcing any state law that is consistent."

Well, that's just consistent with preemption doctrine, also says “no cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent.” Well, that's pretty straightforward about say a defamation claim. But how does that language apply to a criminal statute? Is it a criminal statute read to just be liability is in that language? And so it's the same process? Or is it a little different than with civil liability?

Mike Masnick 28:16
No, it is actually the same. So state criminal law is preempted by 230. And so they cannot enforce and this upsets state attorney generals to no end they absolutely hate this. And, you know, you can go back a decade and you can find, you know, every couple years like 48 out of the 50, State Attorney General's send a letter to Congress saying like get rid of this preemption for state criminal law. But yeah, it preempts state criminal law. So the state cannot go after platforms for their for their moderation choices as well. Federal Criminal Law is not. Right. It's not exempted from the law. So the you know, the justice department can and sometimes does go after websites for violating federal criminal law. But both state civil and criminal law is preempted. And so the various state laws that are now trying to sort of get around 230 are all not going to work. I mean, beyond mostly being unconstitutional. Yeah,

Anthony Sanders 29:21
Yeah, they already violate the First Amendment was my opinion, but this problem?

Mike Masnick 29:26
Yes, yeah. And so, you know, and we'll see what happens. I don't know if any of those state laws. Utah recently passed one, but the governor just vetoed it. So that one is not going into effect. And you know, but there are a bunch of laws. But yeah, I think they're all unconstitutional, and they're preempted by 230. And you would think that, you know, it would be nice if state legislatures paid attention to those things, but they don't seem to care very much.

Anthony Sanders 29:56
Well, let's move now from virtual technology to technology you can touch, well, at least technology that you can see flying above your house. Now coincidentally, this week we at IJ filed a new case about drones where an entrepreneur Michael Jones of North Carolina, is using drones to photograph his various clients land, with their consent, of course, to help them map their properties. The engineering Board of North Carolina has given him a hard time. So we've filed a First Amendment lawsuit on his behalf that you can read all about at ij.org and we'll put a link to up to it in the shownotes. But what if

the government took photos of your property without your consent from a drone? Well, the Michigan Court of Appeals addressed that last week in Long Lake Township v. Maxon. Josh, who won the property owners or the drone?

Josh Windham 30:56
Well, in this case, it was the property owners, although the drone wasn't a party to the case.

Anthony Sanders 31:03
Okay. It didn't intervene?

Josh Windham 31:05
No, no, no, it was, it was a town. So this case is really fascinating. It arises out of a zoning dispute, as you alluded to earlier, and just to go give a little bit of backstory about how this case arose. In about 2008, there was a town in Michigan that, I guess apparently had been receiving complaints about a property owner, Maxon, who was operating an illegal junkyard on their property, I guess the zoning ordinance doesn't allow that. And after discussions with the property owner and filing complaint against them, the parties ultimately settled that dispute. And it seems like the property owner agreed, it's not quite clear from the opinion, but it seems like the property owner agreed to comply with certain parameters in exchange for the city dismissing the case. So over the next decade, the city surreptitiously monitored the property owner to ensure they were complying with the parameters of the agreement. And the way they did this was by working with a third party, drone operator to fly above the property and take pictures of it to see whether you know, certain amounts of junk were being stored in the property in excess of what the parties had agreed to. And in 2018, after taking photos over the course of several years, the city ultimately filed a civil case against the property owner and said, “Look, you're violating the zoning ordinance. We need to stop you from doing that.” And so the first thing the owner did was say, Okay, well, I don't remember giving you consent to come on my property. And I'm not aware of any warrant you might have had. So I'm going to move to suppress the pictures that you've attached to your complaint. And for those unfamiliar, this is a common kind of tool for vindicating your fourth amendment rights. It's kind of the primary tool if the government enters or searches your property without a warrant. The way that you vindicate that, right is to say, I want the evidence you collected from the illegal entry from the illegal search or seizure to be suppressed, it can't be used against me in court. So that's what's going on here. Now, the trial court, ruled for the city and said, “You know, we're going to deny the suppression most motion. And the reason we're going to do that is a case called Riley from the US Supreme Court, in the 80s.” And for a little bit of background on Riley,

this is actually it's a hotly contested decision, it was five-four. But what happened in that case was that you had a property owner in Florida, I think they had about five acres of land. And they had some greenhouses out back where they were growing marijuana. And so the police had gotten a tip about these kind of weed houses. And they thought, okay, we need to go investigate. But the problem was, the officer couldn't see the greenhouses from the street. So he got in a helicopter. And the opinion says circled the property until he found an opening in the greenhouses where he could see the weed, use that information to get a search warrant and then went to go search the property

Anthony Sanders 34:14
just like any normal citizen with their own helicopter.

Josh Windham 34:16
Exactly. So in that case, the US Supreme Court said the, it was not a search, because the marijuana was visible from the sky. And the officer had viewed it from a place where they had a legal right to be. In other words, you're allowed to fly over property as long as you're a certain height above the property. In that case, it was 400 feet. And so it was analogous to, you know, if I walk by Anthony's house from the street and I just happened to look through his window and see him watching, you know, the office, right? I haven't looked at anything that I don't have a right to see and so therefore I haven't like searched his property. He is willing to expose that information to my site. And so the court kind of took that logic and said, okay, in the Riley case, the officer didn't search the greenhouses for the weed. Alright. So the trial court says in the, in the Michigan drone case, that logic definitely controls here, because in this situation, the drone operator had a legal right to fly the drone where he was flying it. And, you know, it was just taking pictures of things that anybody above the property could have seen, you know, junk on the yard and stuff like that. The Court of Appeals reverses that decision. And there's a lot to unpack here. So I want to give Anthony some discretion over how we choose to do that. But I'll tell you, just briefly, what happened. So the Court of Appeals says, okay, Riley's you know, it's a big part of this discussion, but we don't think it controls, we actually think this case is kind of governed by the principles of two other cases, Kyllo and Carpenter, and mostly the case that that kind of, we should talk about as Kyllo. Because in that case, Justice Scalia holds that the use of a thermal heat radiation sensor to look into somebody's house and detect the radiation levels, that is a search under the Fourth Amendment, because it's, you know, peering into someone's most protected place their home in a way that wouldn't have been conceivable at the founding. So you're using a technology to invade somebody's private space, their private property. And so the court says, look, surely if the use of that kind of innovative technology and Kyllo was a search, that's closer to kind of the use of drones as a

kind of innovative new technology, to, you know, pure onto this guy's private property. And it's worth noting that the images taken couldn't have been captured by somebody, like just walking by on the street, apparently, you know, trees, blocked anybody's view of the places the pictures were taken of. So it's, it's, it's clear that this was a private space that you only could have viewed from the sky. And I think the courts, what's key to the opinion is the courts reliance on this reasonable expectation of privacy tests, for what constitutes a search, and this is a test that goes back to a case called Katz from the 60s, but the essence of it is that the government's only searched you or your property if you have a reasonable expectation of privacy in it, and being free from that search. And so the court says here, okay, even though you know, a plane flying over, could have seen the junk on the on the property. Nobody thinks that the plane flying over is actually a drone that's taking high res photos of your property and flying around, you know, being remote controlled by somebody.

Anthony Sanders 37:58
And the key, the drone is low was lower, everyone agreed it was definitely lower than what like a plane can be at?

Josh Windham 38:05
Well, this is fascinating, because it, it was lower than the court key to a number of factors that this is the reason I mentioned the Carpenter case. And we don't have to go into Carpenter. But the essence of that from 2018 is that when the government's using like fancy new technologies that are super cheap, and give them massive surveillance capabilities, that can violate this reasonable expectation of privacy tests. And it seems like the court really heavily relied on that and said, there are lots of things about drones that are just qualitatively different than planes. So they're super cheap. Your ability to control them when they're going through your property is you have a lot of mastery over that, where they go. They're hard to detect. They can gather information, sort of 24/7, if you want to just fly them around, and they have a lot of, you know, charge, right? So you don't have I mean, just really a lot you can do with drones. And so yeah, so this was to the core just far more intrusive than a plane happening to fly over your property. It's basically just like, an invasion of your property by, you know, without feet, right.

Mike Masnick 39:10
But isn't one of the things that was interesting, though, is because they rely on the Kyllo case, too. But in the Kyllo case, part of the reasoning was that, you know, the technology for the infrared scanning was not readily available to the public. And yet, for this case, you're talking about drones, which are readily available to the public. And in fact, the reason they pull in Carpenter, because it is this sort of,

you know, new cool technology that is that is all over the place. So I was a little confused about how they could rely on both Kyllo and Carpenter when in some ways they sort of disagree over the sort of availability of the technology. Well,

Josh Windham 39:47
I mean, I have to be honest with you, I think the dissent. I'm not sure they have the better of this argument in terms of the ultimate result of the case. But the dissent was very compelling because from the defense from the defense perspective, You're not talking about the situation in Kyllo, where, where it's actually in somebody's home. And so it's concealed from just plain view, you're talking about a situation where if somebody has a legal right to be in the place, and they're looking at it would be visible, that is the junk. And so I think here, the crucial question is really, you know, did the city have the right to have their drone where it was when it took the photos? And that's a question, it doesn't seem like the court really addressed. And there's a lot, this is why I said earlier, Anthony there's a lot to unpack here, because this is really a sticking point for me that the court super glosses over. But just to get back to Michael's point, really quickly, about Carpenter, it just seems like the court kind of relied on Carpenter to say, this just seems wrong. This just seems intrusive. And so regardless of Riley, which I think seems like it should probably control here, just as on a plain reading of Riley, you know, it feels too intrusive.

Anthony Sanders 41:10
And so we have to say no, yeah, just you're absolutely right, that we could go on and on about this case, there's so much to unpack to unpack something that that you and I know are especially interested in the court doesn't do an analysis on a property rights view that the of the Fourth Amendment, like in recent cases, like Jones and Jardines, where the court says, you know, we have the reasonable expectation of privacy, but there's also it's never gone away, is this other property rights view of the Fourth Amendment, and you can win under either theory. And so in this case, they go with the with the reasonable expectation of privacy, analysis, but this kind of in the background, there is a little bit of property rights, because, you know, it's a little unclear, where, I mean, seems like the drone was legally where it was at, but it's definitely lower than what the FAA says, a helicopter or a plane can go it's I think it's 400 feet. But circling around in there is like, we don't really know. And I know some of this because I actually found out about this case on Twitter, from Greg McNeal at Pepperdine, who's a professor who studies drones. And I saw him give a fascinating talk a few years ago about this issue. We don't really know how high above your house, you own the air. That's never really been sorted out and under, under, as Richard Epstein would say, under Roman law, you owned all the way to the

heavens. And that was true under you know, Blackstone or whenever this was relevant. But when airplanes came along, he said, Well, of course you don't you can't own like miles and miles up and airplanes have to be able to fly over your house. So like, there's a certain point above your house where drones can't go, right. That's your airspace. But then it seems like above that, there is. So it's a little murky where the drone can go. And yet there's an argument there that if the drone went low enough, maybe not even legally where you want, which, again, is not defined. It's a little bit like the cops bringing a drug dog in the Jardines case, where they said that so in Jardines, this case from few years ago that the Supreme Court said, the police can come up to your front door just like anyone else and knock. That's not a search. And then if you don't answer the door, after a couple of minutes, you're expected to leave that's just part of an implied easement of having a house unless you have a no trespassing sign. But you can't bring up a drug dog, because that's not part of the implied easement. I think most people would say there is no implied easement for a drone to float over your house and take photograph.

Josh Windham 43:54
Well, this is so you're keying on what I think is the most interesting part of the opinion and the part that I think the court treats with the most gloss. So what the what the court does. It says just a quote here, it says “we think there's little meaningful distinction for present purposes between quote ‘just inside the property line’ and quote ‘just outside the property line’, in terms of where the drone is.” I think that's totally wrong. I mean, the court, the court quotes Jones just before that, or at least cites Jones and says, Yeah, physical trespass of a property can constitute a search. And so for me, it's like, well, that seems like a dispositive question that you can just decide based on state law and like you’re the Michigan Court of Appeals, why can't you figure this out? Now, the reason I think they decided not to answer it is the footnote they drop. Have you seen footnote six Anthony?

Anthony Sanders 44:49
Remind me.

Josh Windham 44:50
Okay, footnote six says, well, let's read the sentence that that has a footnote in the footnote itself. So it says “although a physical trespass by a governmental entity may constitute a violation, The fourth amendment, a trespass into an open field might not implicate the Fourth Amendment.” And in this footnote, you know, the sixth footnote says, “we observe however, that defendant's property can hardly

be described as an open field by any lay understanding of the term. Most of it is not visible from the ground." I mean, this is dodging. Right. It's, it's the question that I think really matters here is, if you if you happen to own a certain amount of airspace above your house, and I think you do, the court even acknowledges that. The question is, how much do you own? And then is that part of the curtilage? Or is that part of the open field?

Anthony Sanders 45:38
Yes, because it's open field, there's no Fourth Amendment at all. And it'd be weird if airspace was more protected than like a lawn?

Josh Windham 45:46
Well, I think it really, it really drives home. How silly the phrase open fields is, and the doctrine is because the court you know, Supreme Court has said over and over, it doesn't even have to be open. It doesn't even have to be a field, right? So it's really any property other than the home in its curtilage. And so the question is really just do you own it or not?

Anthony Sanders 46:08
Well, whatever you own issues like this are going to keep coming up, and we will stand ready to talk about them. And we would love to sometime, again, have Mike Masnick on to discuss the latest in technology. And of course, our friend Josh Windham, when he's not out litigating Fourth Amendment cases. So thanks to both of our guests for coming on. And to all of you, whatever kind of new technology you're using, we ask that you get engaged.