

CDA § 230

THE FIRST AMENDMENT OF THE INTERNET

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THE 26 WORDS THAT CREATED THE INTERNET

"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"

WHY IS SECTION 230 IMPORTANT?

- Impact on civil claims
- Impact on criminal exposure
- Reduction of harmful content
- Online innovation
- Free expression
  - Creates the breathing space for user-generated content sites to exists

GOOD SAMARITAN PROVISION

Incentivizes sites to monitor for, respond to reports of, and remove material that is:

- Obscene
- Lewd
- Lascivious
- Filthy
- Excessively violent
- Harassing
- Or otherwise objectionable
  - This last prong allows a site to prohibit even legal content in its Terms of Service or Acceptable Use Policy



A WORLD WITHOUT 230

- No social media platforms
  - Facebook, Twitter, Instagram
- No UGC marketplaces
  - eBay, Amazon, Craigslist
- No user comments and reviews
  - Yelp, AVVO, Ripoffreport
  - Comments under news articles
- No connectivity tools
  - Uber, AirBnB, DoorDash
- No Web 2.0
- Threats of liability and criminal prosecution
- Burdens of litigation

PUBLISHER LIABILITY IN THE PRINT WORLD

- Historical treatment of publishers
- Incompatibility with online environment
- Data flow and content moderation



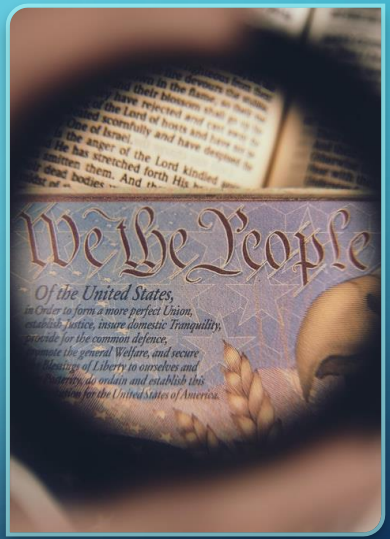
PRE-SECTION 230 ENVIRONMENT



- Notice and takedown regime
- Moderator's Dilemma
- Disincentive to identify harmful content
- Heckler's Veto
- *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)
- *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)

CONSTITUTIONAL SUPPORT FOR 230

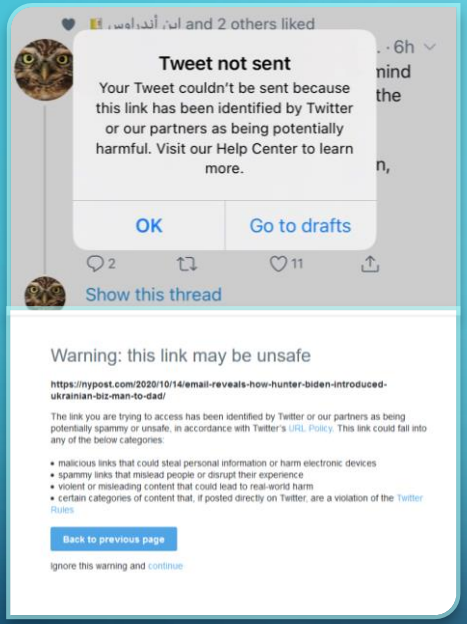
- First Amendment underpinnings
- Editorial rights of publishers
- Protection against intimidation and self censorship
- Insufficient remedies



ADOPTION OF SECTION 230

- Congress accidentally gets it right:
  - Communications Decency Act (CDA) of 1996
    - Passed to restrict Internet porn
    - Banned all indecent material online
    - Immunized online platforms
  - Indecency provisions were struck down by SCOTUS (*Reno v. ACLU,* 521 U.S. 844 (1997))
  - CDA 230 not challenged and remained
    - Result was a free and robust Internet





Top: notification shown to users that attempted to tweet links to NY Post story on Hunter Biden
Bottom: notification shown to users that attempted to click the link in a tweet that was posted before the ban was instituted

ANALYSIS OF 230'S SPECIFIC PROVISIONS

- Congressional Findings
- Section c(1): Treatment as publisher or speaker
  - Effect
  - Immunity or affirmative defense
  - Impact on discovery
- Section c(2)(A) Good Samaritan content blocking
- Section c(2)(B) content blocking tools

TEXT OF SECTION 230

(c)Protection for "Good Samaritan" blocking and screening of offensive material
(1)Treatment of publisher or speaker
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.

(2)Civil liability
No provider or user of an interactive computer service shall be held liable on account of—
(A)any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B)any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)

Broad interpretation of immunity

Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997)

Immunity for false ads selling shirts related to Oklahoma City bombing that resulted in harassment

Blumenthal v. Drudge, 992 F. Supp 44 (D.D.C. 1998)

Immunity for defamation related to story that White House employee assaulted his wife

CLAIMS BARRED BY SECTION 230



Example of Hamas content in Force v. Facebook

- Types of civil claims:
  - Defamation
  - Advertising
  - Providing adult content to minors
    - Nuisance
    - Negligence
  - Discriminatory housing ads
  - Threats
  - Terrorism
  - Products liability
- State criminal prosecution

ILLUSTRATIVE CASES

- Defamation: *Zeran, Drudge*
- Advertising: *Gentry, Goddard*
- Threats: *Delfino v. Agilent Technologies*
- Terrorism: *Force v. Facebook, Inc.*
- Products Liability: *Herrick v. Grindr*
- State crimes: *Backpage v. Hoffman*

- Providing adult content to minors
  - Nuisance: *Kathleen R. v. City of Livermore*
  - Negligence: *Doe v. MySpace*
- Discriminatory housing ads
  - *Chicago Lawyers' Commmittee For Civil Rights Under Law, Inc. v. Craigslist*
  - *Fair Housing Council of San Fernando Valley v. Roommates.com*

IMMUNITY CARVE OUTS FOR INTELLECTUAL PROPERTY



- Patent infringement
- Trademark infringement
- Publicity rights (if treated as intellectual property)
- Copyright infringement (but see DMCA safe harbor)





CRIMINAL CARVE OUTS

- Federal criminal law
- Sex trafficking / prostitution
  - Civil claims under Section 1595 (if conduct violates Section 1591)
  - State criminal prosecution (if conduct violates Section 1591)
  - State criminal prosecution (if conduct violates Section 2421A)
  - State AG *parens patriae* actions (if conduct violates Section 1591)



Example of Twitter flagging Trump tweets for "glorifying violence"

- Twitter has immunity for the material in Trump's tweet
- Twitter does not have immunity for that material in the notification

WHEN DOES A SERVICE PROVIDER BECOME A CONTENT PROVIDER?



Yahoo lost immunity for fraud and negligent misrepresentation claims related to fake dating profiles used to entice users into re-subscribing

- Enabling third party content v. making displayed content illegal
- Material contribution to content
- Editorializing


Choose a
ost ad
Alaban
Auburn
Birmin
Dothan
Gadsde
Huntsv
Mobile
Montgo
Muscle
Tuscal
Alaska
Anchor
Fairba
Juneau
Kenai
Arizon
Flagsta
Mohav
Phoeni
Presco
Show L
Sierra
Tucson
Yuma
Arkans
Fayett
Fort Sm
backpage.com and affiliated websites have been seized
as part of an enforcement action by the Federal Bureau of Investigation, the U.S. Postal Inspection Service, and the Internal Revenue Service Criminal Investigation Division, with analytical assistance from the Joint Regional Intelligence Center.
Other agencies participating in and supporting the enforcement action include the U.S. Attorney's Office for the District of Arizona, the U.S. Department of Justice's Child Exploitation and Obscenity Section, the U.S. Attorney's Office for the Central District of California, the office of the California Attorney General, and the office of the Texas Attorney General.

FOSTA/SESTA



Facebook banned the use of sexually suggestive emojis in response to the law's passage

- New criminal prohibitions
- Limitations on Section 230 immunity
- Impact on the Internet ecosystem
- CityXGuide indictment
- Court interpretations

PROHIBITION OF PROSTITUTION

- (a) In General.--Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.
- ``(b) Aggravated Violation.--Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and--
- ``(1) promotes or facilitates the prostitution of 5 or more persons; or
- ``(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a)

EXPANDED CIVIL LIABILITY

- (c) Civil Recovery.--Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.
- (d) Mandatory Restitution.--Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b)

SECTION 230 CARVE OUTS

(5) No effect on sex trafficking law.--Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

``(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

``(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

``(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

NEW STATE AG ACTIONS AUTHORIZED

``(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief."

WOODHULL CHALLENGE TO FOSTA/SESTA

- Constitutional challenge
- Parties
- Standing issues
  - *Woodhull Freedom Found. v. United States*, 948 F.3d 363 (D.C. Cir. 2020)
- Status



PROPOSALS TO CHANGE 230

SENATE

- See Something, Say Something Online Act
- Don't Push My Buttons Act
- Online Freedom and Viewpoint Diversity Act
- Online Content Policy Modernization Act
- BAD ADS Act
- PACT Act
- Stopping Big Tech's Censorship Act
- Limiting Section 230 Immunity to Good Samaritans Act
- EARN IT Act
- Ending Support for Internet Censorship Act

HOUSE

- Protect Speech Act
- Stop the Censorship Act of 2020
- Stop the Censorship Act
- Protecting Local Authorities and Neighborhoods Act
- Biased Algorithm Deterrence Act

ADMINISTRATION

- DOJ Draft Legislation
- NTIA Draft Regulations
- Attorney General Proposal
- FCC Interpretation



PROS AND CONS OF AMENDING SECTION 230

- Content moderation by Big Tech
- Protecting children
- Crime reduction
- Viewpoint neutrality
- User choice
- Free expression
- Online innovation
- Constitutional requirements



CONCLUSION

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