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Distributor vs. Publisher vs. Provider: That *Is* The High-Tech Question: But is an Extension of Liability the Answer?

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Abstract

Section 230 of the Communications Decency Act of 1996 was enacted to provide distributors of materials found on Internet computer services with immunity from liability based on the content, nature, veracity, or truthfulness of posted materials. Critics maintain that Section 230 acts as a shield for Internet predators, sex traffickers, prostitution, and obscenity. Others maintain that recent legislation is nothing more than an attempt at censorship, which may actually do more harm than good. Interestingly, President Trump vetoes the Defense Authorization Act partly because it did not contain an overhaul of Section 230. Is it time for a reappraisal of Section 230?

Key Words: Communications Decency Act; Internet; Section 230; Sex-Trafficking; Immunity

1. Introduction

In *Reno v. American Civil Liberties Union* (1997, p. 2334), the United States Supreme Court underscored the unique position of the Internet, finding that the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world. [It] is 'a unique and wholly new medium of worldwide human communication.'" As noted by Nunziato (2005, p. 1120), the Internet "has the potential to facilitate a true marketplace of ideas, one that is not dominated by the few wealthy speakers who are able to express themselves effectively via traditional media."

However, has the Internet also become a platform for fraud, harassment, sexual exploitation, and other criminal activities?

Prior to the creation of the Internet, case law indicated that there was a line relating to liability that was drawn between the *publishers of content* and *distributors of content.*

A *publisher* would be expected to have "awareness" of the content, nature, veracity, or truthfulness of material it was publishing, and thus should be held liable for any illegal content it had published. In contrast, a *distributor*, without more, would likely *not* be aware of the content, nature, veracity, or truthfulness of material it was making available on its platform, and thus would be immune from the imposition of liability.

The distinction between a distributor and a publisher was noted in *Doe v. America Online, Inc.* (2001). Citing *Zeran v. America On Line, Inc.* (1997), the United States Court of Appeals for the Fourth Circuit stated:

> "The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although [Zeran] attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of liability. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each allege by [Zeran] here under a negligence label—constitute publication (see also Keeton et al., 1983; *Tacket v. General Motors Corp.*, 1987).

As stated in a Note the *Harvard Law Review* (2018), this principle had been firmly established in *Smith v. California* (1959), where the United States Supreme Court had ruled that creating liability for a *provider* (in this case, a book store) would have "a collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." The position of a provider is more akin to that of a distributor, as described in *Doe v. America Online, Inc.* (2001).

2. The Communications Decency Act of 1996

Section 230 of the *Communications Decency Act of 1996* (CDA) has become the focus of efforts to immunize Internet providers for third-party postings (see Ciolli, 2008). Section 230 of the CDA is codified as *Title V of the Telecommunications Act of 1996* (see Soderman, 1996). The CDA was the product of legislation written by Senator James Exon (Cannon, 1996). The following is a statement of the overall purposes of the Act:

> *"An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."*

At the same time, the CDA was also designed to make *knowingly sending indecent or obscene material to minors a criminal offense*. Alarmed by the prospect of the imposition of criminal liability, representatives of the tech industry reacted by attempting to convince the House of Representatives to amend the base bill which had required service providers to block indecent content, essentially exposing them to liability as publishers, in order to find a more balanced approach. This designation as a publisher might expose providers to liability for other content such as materials judged to be libelous.

> In *Blumenthal v. Drudge* (1998), the United States District Court in Washington, D. C. had noted:
>
> "In February of 1996, Congress made an effort to deal with some of these challenges in enacting the Communications Decency Act of 1996. While various policy options were open to the Congress, it chose to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market" for such services, largely "unfettered by Federal or State regulation ...." Whether wisely or not, it made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others. In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer service like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium" (cited in Ku & Lipton, 2006).

2.1 Legislative History of the CDA

Two Members of the House of Representatives would assume a critical role in the legislative process surrounding the enactment of the CDA—most especially the inclusion of Section 230. Representatives Christopher Cox and Ron Wyden and their staffs wrote Section 509 of the House bill, which was titled as the *Internet Freedom and Family Empowerment Act* (see Rappaport, 1995). The intent of Section 509 was to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.* (1995), so that services providers could "moderate" content as they felt necessary and not act as a wholly neutral conduit of information, and still not assume liability as a publisher for user-generated content. Section 509 was added to the CDA.

In October 1994, an unidentified user of Prodigy's *Money Talk* bulletin board created a post which claimed that Stratton Oakmont, a Long Island securities investment banking firm, and its president Danny Porush had committed fraud in connection with the initial public offering (IPO) of stock of Solomon-Page, Ltd. Stratton Oakmont sued Prodigy and the unidentified poster for defamation.

The *Stratton* court had held that *Prodigy* was liable as the *publisher* of the content that had been created by its users because it had exercised "editorial control" over the messages posted by users on its message boards by (1) posting Content Guidelines for users; (2) enforcing those guidelines with "Board Leaders"; and (3) utilizing screening software designed to remove offensive language. In so finding, the New York Supreme Court had refused to apply *Cubby, Inc. v. CompuServe Inc.* (1991), a case in which the court had found that *CompuServe* was not liable as a publisher for user-generated content. In distinguishing *Prodigy Services* from *Cubby*, the New York Supreme Court's reasoned that Prodigy Services was liable to Stratton Oakmont for defamation because "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability to CompuServe and other computer networks that make no such choice." The decision in *Prodigy Services* (1995) raised immediate concerns.

The *Telecommunications Act of 1996*, which contained both Senator James Exon's base CDA bill and the Cox/Wyden's provision, passed both Houses of Congress nearly unanimously, and was signed into law by President Bill Clinton in February 1996. The Cox/Wyden provision section was codified as Section 230 in Title 47 of the U.S. Code. Fearing that the specter of liability would deter service providers from blocking and screening offensive material, Congress included Section 230's broad immunity found in Section (b)(4) "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material" (see *Zeran v. America on Line*, Inc., 1997).

2.2 A Challenge to the CDA

The "anti-indecency" provisions of the CDA were immediately challenged by the American Civil Liberties Union. The CDA had made it a crime, punishable by up to two years in jail and/or a $250,000 fine, for anyone to engage in online speech that is "indecent" or "patently offensive" if the speech could be viewed by a minor. "The ACLU argued that the censorship provisions were unconstitutional because they would criminalize expression protected by the First Amendment and because the terms 'indecency' and 'patently offensive' are unconstitutionally overbroad and vague" (ACLU, 2017a; see also Jacques, 1997).

On June 26, 1997, the United States Supreme Court in *Reno v. American Civil Liberties Union* ruled all of the anti-indecency sections of the CDA were unconstitutional in violation of the First Amendment (see McGuire, 1998)—but the Court left Section 230 intact.

> In writing for a unanimous United States Supreme Court, Justice John Paul Stevens stated:
>
> "The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship" (*Reno v. American Civil Liberties Union*, 1997, p. 343).

Relating to the issues surrounding immunization of providers from liability found in Section 230 (see Sheridan, 1997), the Fourth Circuit Court of Appeals in *Zeran v. America Online, Inc.* (1997) stated:

> "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. It would be impossible for service providers to screen each of their millions of postings for possible problems. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. The amount of information communicated via interactive computer services is therefore staggering. Interactive computer services have millions of users. [Section] 230 immunity was thus evident. Congress' purpose in providing the Section, Congress made a policy choice—not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."

3. A Focus on Section 230

Section 230 was developed in response to several lawsuits that had been filed against Internet service providers that had resulted in different conclusions on the question whether the services providers should be treated as "publishers or distributors" of the content created by its users.

Section 230 of the CDA has frequently been cited as a foundation of the expansion of the Internet. Some have referred to Section 230 as "The Twenty-Six Words That Created the Internet" (Kosseff, 2019). Ciolli (2008, p. 137) commented that "In 1996 Congress, hoping to preserve and promote a vibrant and competitive free marketplace of ideas on the Internet, passed Section 230 of the Communications Decency Act, a controversial statute that grants the owners of private online forums and other Internet intermediaries unprecedented immunity from liability for defamation and related torts committed by third party users."

> The language of Section 230(c)(1) provides:
>
> *"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."*
>
> Further, Section 230(c)(2) of the Act, Congress provided:
>
> *"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)."*

In analyzing the of immunity provisions of Section 230, courts have generally applied a three-prong test. As noted by Ruane (2018), a defendant must satisfy *each* of the three prongs to gain the benefit of the immunity provision:

> 1. The defendant must be a "provider or user" of an "interactive computer service";
> 2. The cause of action asserted by the plaintiff must treat the defendant as the "publisher or speaker" of the harmful information at issue; and
> 3. The information must be "provided by another information content provider," i.e., the defendant must not be the "information content provider" of the harmful information at issue (see also *Gentry v. eBay, Inc.*, 2002).

In *Barrett v. Rosenthal* (2006), the California Supreme Court wrote that "Congress implemented its intent not by maintaining the common law distinction between 'publishers' and 'distributors,' but by broadly shielding all providers from liability for 'publishing' information received from third parties" (see also Miles, 2007). The *Barrett* court continued:

> "Both the terms of section 230(c)(1) and the comments of Representative Cox reflect the intent to promote active screening by service providers of online content provided by others. Thus, the immunity conferred by section 230 applies even when self-regulation is unsuccessful, or completely unattempted. It would be anomalous to hold less active "distributors" liable upon notice. It chose to protect even the most active Internet publishers, those who take an aggressive role in republishing third party content. Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability."

3.1 Challenges Relating to Section 230

Since *Reno* was decided in 1997, partially on constitutional grounds, numerous cases relating to liability have been filed. However, one fact has become apparent: As the Federal Circuit stated in *Marshall's Locksmith Service Inc. v. Google, LLC* (2019), "Section 230 protections are not limitless" (see also Rubin & Chen, 2019). For example, statutes were enacted which have required providers to remove essentially *criminal materials* relating to copyright infringement. However, a tipping point – or at least reaching a point where blanket immunity for providers would be seriously questioned—would arise in the context of sex trafficking and prostitution (see Goldman, 2017).

4. Time for a Reappraisal?

What events provided the opportunity for a reappraisal of Section 230? Biederman (2019) reports that "online sexual victimization of American children appears to have reached epidemic proportions due to the allowances granted by Section 230." Advocates against exploitation and sex trafficking such as the *National Center for Missing and Exploited Children* pressured websites such as *Facebook*, *MySpace*, and *Craigslist* to refuse to publish or to "pull" such content. Because several of the more "mainstream" sites were blocking objectionable content, those that engaged or profited from trafficking began to use more obscure sites, leading to the creation of sites like *Backpage*. [*Backpage* was launched in 2004 by *New Timed Media*, later known as *Village Voice Media*, a publisher of eleven "alternative newsweeklies," as a free classified advertising website.] Ardia (2010) asks whether Section 230 "a free speech savior or a shield for scoundrels?"

Kiefer (2012) reported that *Backpage* soon had become the second largest online classified site in the United States after Craigslist—operating in *97 countries and 943 locations*. *Backpage* included the various categories found in "mainstream" newspaper classified sections, including "those that were unique to and part of the First Amendment-driven traditions of most alternative weeklies." These included personals (including adult-oriented "personal ads"), certain "adult services," and "New Age" services (see York, 1995; York, 2005), and classifieds generally relating to "sex services."

As early as 2011, critics and law enforcement officials accused *Backpage* and others of being a hub for sex trafficking of both adults and minors (see Gamiz, e.g., 2014), despite claims by the websites that they had on its own initiative sought to block ads suspected of child sex trafficking or prostitution. However, in addition to removing these ads from the public, it was alleged that many of these sites were also working to *subtly* obscure what actual trafficking was going on and who was behind such activities, which had the effect of limiting the ability of law enforcement authorities to take action (Polaris, 2018). *Backpage* and similar sites became the object of numerous lawsuits filed by victims of sex traffickers and exploiters for facilitating criminal activities, but courts consistently found in favor of *Backpage* on the basis of the application of Section 230.

In *Jane Doe No. 1 v. Backpage.com, LLC* (2017), the United States Supreme Court let stand a First Circuit Court of Appeals decision in favor of *Backpage* based on Section 230, holding that Section 230 shielded *Backpage* from liability for the content of the ads (Chung, 2017). Chung (2017) reported that in another case, the Supreme Court refused to consider reviving a lawsuit against *Backpage* filed by three young women who claimed the website facilitated their forced prostitution through classified advertisements posted in its "escorts" section.

The women sued *Backpage* and several of its parent companies in 2014, alleging that they had been "repeatedly forced as minors to engage in illegal commercial sex transactions" in Massachusetts and Rhode Island starting at age 15 by pimps who advertised on the *Backpage* website (Chung, 2017).

However, in both of these cases the First Circuit Court of Appeals ruled that the CDA, which shielded a website operator from being held liable as the "publisher or speaker" of its user-generated content, had granted them immunity from prosecution.

4.2 Had Section 230 Protections gone too Far?

Partially in reaction to generally negative reaction to the dismissal of these lawsuits (see Kende, 2018) and others (*M.A. v. Village Voice Media Holdings*, 2011), Congress simultaneously began an investigation into *Backpage* and similar sites in January 2017. Information indicated that *Backpage* was in fact complicit in aiding and profiting from illegal sex trafficking (see Romero, 2018; Movsisyan, 2019). Volpe (2019) raises an interesting question: Was it time to review Section 230 immunity?

In 2017, Section 230 was amended by the *Stop Enabling Sex Traffickers Act* (SESTA) which requires the removal of material violating federal and state sex trafficking laws (see Liptak, 2017). And, in addition, Congress enacted the *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (FOSTA) which "expresses the sense of Congress that section 230 of the *Communications Act of 1934* was *not* intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" (Section 4) (see also Tiku, 2017).

FOSTA was introduced in the House of Representatives by Representative Ann Wagner in April 2017 (Goldman, 2018; Chamberlain, 2019), and SESTA was introduced in the United States Senate by Senator Rob Portman in August 2017 (see Neidig, 2017). Jackman (2017) notes that the *FOSTA-SESTA* bills would modify Section 230 and would apply to parties who "*knowingly facilitate or support sex trafficking*" (Wagner, 2018). *SESTA* was incorporated into the House version of *FOSTA* and the "joint proposal" became known as the "*FOSTA-SESTA Package.*" On February 27, 2018, the *FOSTA-SESTA Package* was passed in the House of Representatives on a vote of 388-25. On March 21, 2018, the *FOSTA-SESTA Package* passed the Senate on a vote of 97-2. [One of the two negative votes was cast by Senator Wyden.] The bill was signed into law by President Trump on April 11, 2018 (Tracy, 2018; see also Kube, 2018).

Perhaps not altogether unsurprisingly, the bill was controversial. *FOSTA-SESTA* was criticized by First Amendment and pro-Internet groups as a "disguised internet censorship bill" that weakens Section 230 immunity (see e.g., ACLU, 2017b). Other criticisms cited the possibility of placing unnecessary burdens on Internet companies and intermediaries that handle user-generated content or communications with service providers; that the legislation would require internet providers to proactively take action against sex trafficking activities; and that the legislation would require a "team of lawyers" to evaluate all possible scenarios under state and federal law. Others argued that requiring Internet companies to become more proactive against sex trafficking might prove "financially unfeasible for smaller companies" (see generally Liptak, 2017). Quinn (2017) argued that the bills would "stifle innovation" in the high-tech sector.

Interestingly, several major organizations, including the ACLU, the Center for Democracy and Technology, the Electronic Frontier Foundation, the Sex Workers Outreach Project, and the Wikimedia Foundation, as well as representatives of the "adult entertainment industry," maintained that *FOSTA-SESTA* did not distinguish between *consensual*, essentially legal, "sex offerings," from *non-consensual* or otherwise illegal acts broadly identified as "trafficking," arguing that *FOSTA-SESTA* would cause websites that were otherwise engaged in legal "adult entertainment" (see Velek, Schei, & Damm, 2018) to shut down rather than be threatened with liability (Romero, 2018).

Surprisingly, in addition, some online sex workers argued that *FOSTA-SESTA* would harm their safety (Lennard, 2018; Petro, 2018; Burns, 2018), as the online platforms they utilize for offering legal "sex services," were a safe alternative to street prostitution (generally Tripp, 2019). They maintained that the legislation would have the effect of shutting them down entirely and returning them to the "streets," due to the threat of liability (see Zimmerman, 2018).

5. Concluding Comments

The discussion of Section 230 of the *Communications Decency Act* has lead to a reevaluation of the principle of immunity enjoyed by Internet providers—most especially in relation to sex-trafficking. Although the purpose of removing the possibility of liability was designed to guaranty the robust exchange of ideas on the "information super highway," critics now argue that it provides a shield for sex predators who ply their "dark web" schemes and allurements aimed squarely at sex-traffickers and underage visitors to the web. Whether or not legislators and courts can strike the proper balance between claims of censorship and freedom of speech under the First Amendment is quite another thing.

Interestingly, President Trump had vetoed the Defense Authorization Act (Williams, 2021)—partly because of Congress' failure to repeal or significantly modify Section 230—but not on grounds that it protected sex traffickers. Rather, the President had voiced concerns over political issues relation to what he habitually calls "fake news."

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