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IN FOCUS

February 2, 2024

Section 230: A Brief Overview

Section 230 of the Communications Act of 1934, 47 U.S.C. § 230, provides limited immunity from legal liability to providers and users of "interactive computer services." Under Section 230(c)(1), those providers and users may not "be treated as the publisher or speaker of any information provided by another information content provider." Under Section 230(c)(2), they may not be held liable for restricting access to objectionable material in good faith. These immunities are subject to several express exceptions and do not preclude liability for content the providers or users developed themselves. This In Focus summarizes the scope of Section 230 immunity and discusses proposals to reform the statute. For more information about Section 230, see CRS Report R46751, *Section 230: An Overview*, by Valerie C. Brannon and Eric N. Holmes.

Definitions and Application

The terms "interactive computer service" and "information content provider" are defined in Section 230. "Interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." This definition is broad. Courts have construed it to include well-known online service providers, like Google and Meta, as well as web hosting, internet access, and private server providers. Although most Section 230 cases involve online services, the definition can also include brick-and-mortar entities such as libraries or employers that provide computer access.

"Information content provider" means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Providers or users of interactive computer services can themselves meet this definition. Section 230(c)(1) immunity frequently turns on whether the provider or user created or developed the content at issue in a particular lawsuit.

Section 230(c)(1): Publisher Activity

Section 230(c)(1) bars a legal claim that (i) is brought against a provider or user of an interactive computer service, as defined above; (ii) treats the defendant as a publisher or speaker; and (iii) is based on information provided by another information content provider.

Liability as Publisher or Speaker

In an early, widely adopted interpretation of Section 230(c)(1), a federal appeals court held that the provision bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). This "traditional editorial functions" standard requires courts to look at the nature of the legal claim to determine whether liability would be based on publisher or speaker activity. If it would, the claim is barred by Section 230(c)(1). Courts applying this standard have dismissed a variety of claims against service providers—including defamation, negligence, housing discrimination, and cyberstalking claims—to the extent those claims would hold defendants liable for publishing content. Plaintiffs asserting failure to warn claims, promissory estoppel claims, and claims founded on economic regulations have had more success arguing that immunity should not apply because liability would not be based on publisher activity. Claims alleging online services have flawed product designs have yielded mixed results.

Information Provided by Another

Section 230(c)(1) applies only to claims based on "information provided by another information content provider." As interpreted by some courts, this language preserves immunity for some editorial changes to third-party content but does not allow a service provider to "materially contribute" to the unlawful information underlying a legal claim. Under the material contribution test, a provider loses immunity if it is responsible for what makes the displayed content illegal. For instance, courts have analyzed whether algorithms that filter, promote, or sort content materially contribute to unlawful activity, such as by suggesting content promoting terrorism. So far, most courts have held that Section 230(c)(1) bars claims arising from the use of "neutral" algorithms that treat the challenged content similarly to other content. For more information about liability related to the use of algorithms, see CRS Report R47753, *Liability for Algorithmic Recommendations*, by Eric N. Holmes.

Section 230(c)(2): Restricting Access to Objectionable Material

Section 230(c)(2) provides two additional immunities. Section 230(c)(2)(A) immunizes service providers and users against suits based on "good faith" actions "to restrict access to or availability of material that the provider or user considers to be obscene ... filthy, excessively violent, harassing, or otherwise objectionable." Courts have ruled that defendants do not act in "good faith" when they restrict content for anticompetitive or pretextual reasons. Some courts have interpreted Section 230(c)(2)(A) to grant significant discretion to service providers and users to determine what material is objectionable, but a few courts have suggested some limits on the scope of "otherwise objectionable" material.

Section 230(c)(2)(B) provides immunity from claims based on actions that "enable or make available to ... others the

technical means to restrict access to" the same categories of "objectionable" material.

Exceptions

Section 230(e) provides five exceptions to the immunity described above. First, a defendant in a federal criminal prosecution cannot claim protection under Section 230. Most courts to consider this exception have held that Section 230 still bars civil claims based on violations of criminal laws. Second, Section 230 immunity does not apply to laws "pertaining to intellectual property." The statute does not define "intellectual property," but courts have found the term to encompass, for instance, copyright and trademark infringement claims. Third, states can "enforc[e] any State law that is consistent with" Section 230. Fourth, Section 230 immunity does not apply to the Electronic Communications Privacy Act of 1986—which governs wiretapping and electronic eavesdropping—or similar state laws. Fifth, after passage of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Section 230 immunity does not extend to claims under certain sex trafficking provisions.

Reform Proposals: Overview and Select Legal Considerations

Overview of Section 230 Reform Proposals

Members of Congress have introduced dozens of proposals to amend Section 230 in the 116th, 117th, and 118th Congresses—although no further amendments have been enacted since FOSTA, and some Members have defended Section 230 immunity in its current form. Those who seek to amend Section 230 have often pursued one of two distinct goals.

First, bills have proposed limiting Section 230 immunity for hosting another's content, with the goal of incentivizing sites to take down harmful content. Some bills have focused on specific types of content. Others have proposed exceptions for certain types of legal claims, such as lawsuits brought under drug trafficking or nondiscrimination laws. Still other bills have focused on general hosting practices: for example, allowing liability if the site promoted the challenged content through a personalized algorithm.

Second, bills have proposed limiting Section 230 immunity for restricting content, seeking to incentivize hosting lawful content. Some bills have proposed removing the general category of immunity in Section 230(c)(2) for restricting "otherwise objectionable" material. Some bills have sought to limit immunity to decisions that restrict content in a viewpoint-neutral manner. Other bills have focused on procedural aspects of decisions to restrict content, such as by conditioning immunity on publishing terms of service or explaining decisions to restrict specific content.

General Legal Considerations

Removing Section 230 immunity will not necessarily result in a provider or user being liable for sharing or restricting content. Liability depends on whether there is another law prohibiting the challenged activity, and whether a plaintiff brings a meritorious lawsuit under that law. Accordingly, it may be difficult to predict how providers or users will respond to any given Section 230 reform. Providers may respond by avoiding the activity that could create liability: for instance, removing content that might fall within a new exception. Alternatively, they may continue that activity if they believe lawsuits are unlikely or if social or economic considerations outweigh possible legal liability. Further, some have predicted, based on pre-Section-230 caselaw, that providers might attempt to avoid liability by stopping all content moderation.

Another general consideration with Section 230 reform is who might be subject to liability. Blanket reforms would affect all interactive computer service providers and users. Members concerned only with a subset of interactive computer services, such as larger services or social media companies, or concerned only with service providers and not users, could consider more targeted reforms.

Free Speech Considerations

Some have questioned whether, if Section 230 is repealed, the First Amendment would nonetheless prevent lawsuits premised on hosting or restricting others' content. The Supreme Court has said that private parties sometimes engage in protected speech when they decide whether to host others' speech. For example, the Court ruled that newspapers exercise protected "editorial control and judgment" in choosing what material to print and how to present it. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Supreme Court has extended this right of editorial discretion beyond traditional media, and some lower courts have held that this doctrine can protect websites such as search engines and social media sites from liability for decisions about how and whether to publish others' content.

There is significant overlap between the traditional editorial functions courts have held are protected by Section 230(c)(1) and the editorial discretion that is protected by the First Amendment. Scholars have claimed, though, that Section 230 allows quicker and more certain dismissals of lawsuits. Section 230 grants complete immunity for publisher or speaker activities regardless of whether the challenged speech is unlawful. In contrast, the First Amendment requires an inquiry into whether the challenged speech is constitutionally protected and may provide limited or no immunity for certain activities.

Another constitutional question is whether some proposals to amend Section 230 violate the First Amendment. Section 230 does not directly restrict or require speech, but reform proposals may create incentives to exercise editorial discretion in specific ways, preferencing certain speech activity. Some have argued that because Section 230 is not required by the First Amendment, Congress can limit this discretionary benefit without triggering constitutional concerns. Others have pointed to Supreme Court cases ruling that conditions on government benefits can sometimes violate the First Amendment when they deter protected speech. Such conditions may be of particular concern if they prefer certain speech based on its content or viewpoint.

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