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PLENARY 4 Oct. 1 9:15-10:30

Discussion with Anna Edgerton, Bloomberg News reporter covering the tech policy and lobbying on Capitol Hill. She joined Bloomberg News in 2013 covering Congress as a deputy editor and reporter. Anna previously worked as a general assignment reporter at the Miami Herald.

Jeff Hermes currently serves as one of two Deputy Directors of the Media Law Resource Center, where he focuses on digital media law issues. Jeff previously served as the Director of the Digital Media Law Project at Harvard University's Berkman Center, where he led multiple initiatives to respond to the legal needs of independent journalists and online media. Prior to that, he represented a wide array of media clients as a partner in the litigation practice of Brown Rudnick LLP and later as counsel to Hermes, Netburn, O'Connor & Spearing, P.C. in Boston.

Topics

Will Section 230 still exist in some recognizable form in two years?

Does proposed legislation to regulate social media content moderation have any chance of success?

How do Republican and Democratic proposals for social media content regulation differ?

Can Congress suppress online disinformation or without running afoul of the First Amendment?

Will anti-trust regulations be applied to big tech?

# Efforts to Restrict User-Generated Content and/or Punish Platforms for Distributing Certain Content

Executive Action

Betsy Klein*, White House reviewing Section 230 amid efforts to push social media giants to crack down on misinformation*, CNN (Jul. 20, 2021), <https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html>

Legislation

Federal Legislation

116th Congress (2019-2020)

S.3398, Eliminating Abusive and Rampant Neglect of Interactive Technologies (“EARN IT”) Act of 2020, <https://www.congress.gov/bill/116th-congress/senate-bill/3398/text>

Would establish the National Commission on Online Child Sexual Exploitation Prevention, direct the commission to develop best practices for interactive online services providers to prevent the online sexual exploitation of children, limit the liability protections of online service providers with respect to claims alleging violations of child sexual exploitation laws, and replace statutory references to child pornography with child sexual abuse material

S.5054, Stop Internet Sexual Exploitation Act, <https://www.congress.gov/bill/116th-congress/senate-bill/5054/text>

Would impose new verification regulations and functionality restrictions on adult content sites

H.R.8323, Bianca’s Law, <https://www.congress.gov/bill/116th-congress/house-bill/8323/text>

Would require social media companies to establish an office dedicated to identifying and removing violent and gory content that violates such company’s social media platform content moderation standards

H.R.8454, Eliminating Abusive and Rampant Neglect of Interactive Technologies (“EARN IT”) Act of 2020, <https://www.congress.gov/bill/116th-congress/house-bill/8454/text>

House companion bill to S.3398

*See* Riana Pfefferkorn*, House Introduces EARN IT Act Companion Bill, Somehow Manages to Make it Even Worse*, Stanford Center for Internet & Society (Oct. 5, 2020) (discussing differences between how House and Senate bills treat providers’ use of encryption technology), <https://cyberlaw.stanford.edu/blog/2020/10/house-introduces-earn-it-act-companion-bill-somehow-manages-make-it-even-worse>

H.R.8517, Protect Speech Act, <https://www.congress.gov/bill/116th-congress/house-bill/8517/text>

Defines creating or developing information under § 230(c)(1) as including instances in which a person or entity solicits, comments upon, funds, or affirmatively and substantively contributes to, modifies, or alters information provided by another person or entity

117th Congress (2021-2022)

S.27, See Something, Say Something Online Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/27/text>

This bill requires an interactive computer service that detects a suspicious transmission to submit a suspicious transmission activity report to the DOJ describing the transmission.

A suspicious transmission is any post, message, comment, tag, or other user-generated content or transmission that commits, facilitates, incites, promotes, or otherwise assists the commission of a major crime.

Any provider of an interactive computer service that fails to report a known suspicious transmission shall not be immune from liability for such transmission and may be held liable as a publisher for the related suspicious transmission.

S.299, Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (“SAFE TECH”) Act, <https://www.congress.gov/bill/117th-congress/senate-bill/299/text>

In § 230(c)(1), “…shall be treated as the publisher or speaker of any information” now becomes “…the publisher or speaker of any speech”

§ 230(c)(1)’s protection would not apply “to the extent the provider or user has accepted payment to make the speech available or, in whole or in part, created or funded the creation of the speech”

§ 230(c)(1) is explicitly declared an affirmative defense

Adds new categorical exceptions, including: state or federal civil rights laws; state or federal antitrust laws; state and federal stalking, harassment, or intimidation laws; international human rights claims under the Alien Tort Claims Act; and wrongful death claims.

S.797, Platform Accountability and Consumer Transparency (“PACT”) Act, <https://www.congress.gov/bill/117th-congress/senate-bill/797/text>

Would mandate adoption and disclosure of content moderation policies, require notice-takedown-review processes and other transparency requirements, mandate removal of content on receipt of a court order, state that § 230 does not apply where a provider has actual knowledge of illegality, and add exemptions for federal civil laws and regulations as well as explicitly allowing state attorneys general to enforce such laws or regulations

Reintroduction and modification of S.4066 from prior Congress

S.2448, Health Misinformation Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/2448/text>

Would amend § 230 to provide that an interactive computer service shall be treated as the publisher or speaker of health misinformation that is created or developed through the interactive computer service during a declared public health emergency if the provider promotes that misinformation through an algorithm used by the provider (or similar software functionality), unless that promotion occurs through a neutral mechanism

H.R.285, Curbing Abuse and Saving Expression In Technology (“CASE-IT”) Act, <https://www.congress.gov/bill/117th-congress/house-bill/285/text>

Would prevent a company from using § 230 as a defense for a period of one year if that company “creates, develops, posts, materially contributes to, or induces another person to create, develop, post, or materially contribute to illegal online content.”

H.R.2000, Stop Shielding Culpable Platforms Act, <https://www.congress.gov/bill/117th-congress/house-bill/2000/text>

Would amend § 230 to explicitly state that it does not foreclose distributor liability

H.R.2154, Protecting Americans from Dangerous Algorithms Act, <https://www.congress.gov/bill/117th-congress/house-bill/2154/text>

Would treat platforms as the speakers of algorithmically selected user speech for the purposes of claims under 42 U.S.C. § 1985 and the Anti-Terrorism Act

H.R.3184, Civil Rights Modernization Act of 2021, <https://www.congress.gov/bill/117th-congress/house-bill/3184/text>

Would amend § 230 to clarify that such section has no effect on civil rights laws with respect to certain targeted advertisements

H.R.3421, Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (“SAFE TECH”) Act, <https://www.congress.gov/bill/117th-congress/house-bill/3421/text>

House counterpart bill to S.299

H.R.3827, Protect Speech Act, <https://www.congress.gov/bill/117th-congress/house-bill/3827/text>

Reintroduction of H.R.8517 from prior Congress

*See also E&C Republicans Announce Next Phase of Their Effort to Hold Big Tech Accountable* (Jul. 28, 2021), <https://republicans-energycommerce.house.gov/news/press-release/ec-republicans-announce-next-phase-of-their-effort-to-hold-big-tech-accountable/>

Package of 32 draft Republican bills grouped under topic headings including “Section 230 Reform,” “Content Moderation Practices to Address Certain Content,” “Protecting Children from Mental Health Harms and Cyberbullying,” “Improving Transparency,” and “Additional Accountability Bills”

The draft bills are a muddle of various broad limitations on and specific carve-outs from Section 230 protections for both moderation and publication of content; summaries available at the link

State Legislation

California

S.B. 739 (2020), <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB739>, declares it a misdemeanor to distribute or cause to be distributed, with actual knowledge and intent to deceive, by mail, radio or television broadcast, telephone call, text message, email, or any other electronic means, including over the Internet, literature or any other form of communication to a voter that includes certain kinds of election misinformation

Signed by Governor, Sept. 18, 2020

Colorado

S.B. 21-132 (2021), <https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_132_01.pdf>, would create a state commission to “investigate and … hold hearings on claims” that social media sites failed to stop people from: engaging in hate speech; undermining elections; disseminating disinformation, conspiracy theories, or fake news; or authorize, encourage, or carry out violations of user privacy; the hearing officer would be authorized to issue orders to social media sites

Selected court decisions on attempts to hold platforms liable for third party content/behavior

Aiding and abetting terrorism

*Retana v. Twitter, Inc.*, No. 19-11389 (5th Cir. Jun. 16, 2021), <https://www.ca5.uscourts.gov/opinions/pub/19/19-11389-CV0.pdf>

The Fifth Circuit affirmed the dismissal of a claim against Twitter alleging that it had aided and abetted Hamas to radicalize a domestic shooter of Dallas police officers.

The court did not rely upon § 230, instead finding that the shooting was not an “act of international terrorism” under the relevant federal statute and that there was no connection established between Hamas and the shooter’s actions.

*Gonzales v. Google LLC*, No. 18-16700 (9th Cir. Jun. 22, 2021), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/22/18-16700.pdf>

On a consolidated appeal of the dismissal of claims against Google, Twitter, and Facebook related to the alleged use of their services to support domestic and international terrorist attacks, the Ninth Circuit issued a mixed opinion in which it held that most of the claims failed under Section 230 and/or because the pleadings failed to allege sufficient acts on the part of the platforms to render them responsible.

One claim related to an attack in Istanbul was revived, with the court noting that the judge below had not reach the § 230 defense and finding that the plaintiffs had adequately pleaded an aiding-and-abetting claim.

The court called on Congress to reconsider the breadth of § 230(c)(1)’s protection.

Housing discrimination

*Vargas v. Facebook, Inc.*, No. 19-cv-5081 (N.D. Cal. Aug. 20, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.346836/gov.uscourts.cand.346836.105.0.pdf>

A federal judge ruled that plaintiffs whose Third Amended Complaint alleged that Facebook enabled third parties' discriminatory housing ads had failed for the last time to plead how they were injured, and failed to plead around Section 230.

Privacy-related claims

*Callahan v. Ancestry.com Inc.*, No. 3:20-cv-8437 (N.D. Cal. Mar. 1, 2021), <http://business.cch.com/ipld/CallahanAncestrycom20210301.pdf>

Ancestry.com secured dismissal of privacy and right of publicity claims brought by a class of individuals who alleged that their yearbook data were scraped by the genealogy website without their permission.

The court held that § 230 protected the display of the images, which were provided by the third parties who gave Ancestry the yearbooks, and that it did not matter that the third parties did not create that content.

*In re Zoom Video Communications Inc. Privacy Litigation*, No. 5:20-cv-2155 (N.D. Cal. Mar. 11, 2021), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3426&context=historical>

Zoom mostly succeeded on a § 230 defense in privacy claims arising out of the phenomenon of “zoombombing”; the court found that Zoom was an “access software provider” and that the zoombombers were third party providers of the intrusive content.

Section 230 did not, however, foreclose plaintiffs’ contract claims or claims not deriving from the nature of the intrusive content.

*Knapke v. PeopleConnect, Inc*, No. 2:21-cv-262 (W.D. Wash. Aug. 10, 2021),<https://storage.courtlistener.com/recap/gov.uscourts.wawd.296697/gov.uscourts.wawd.296697.25.0.pdf>

The court held that PeopleConnect was not protected by § 230 against a right-of-publicity claim arising out of its creation of advertisements for its online yearbook service using people’s yearbook photos without authorization, holding that the defendant was the creator of the content at issue.

The court distinguished *Callahan v. Ancestry.com*, above, on the basis that the earlier case involved Ancestry’s actual display of yearbook photos on its website rather than advertising.

*Hepp v. Facebook*, Nos. 20-2725 & 2885 (3rd Cir. Sept. 23, 2021), <https://www2.ca3.uscourts.gov/opinarch/202725p.pdf>

The Third Circuit held that Section 230 did not preclude state law right-of-publicity claims, which the Court of Appeals construed as claims “arising out of a law pertaining to intellectual property” and thus falling within the IP exception in § 230(e)(2). The court closely analogized right-of-publicity claims to trademark claims,

The court also found no basis to limit § 230(e)(2) to federal IP claims. The decision directly splits with the Ninth Circuit, which held in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007),that § 230(e)(2) does not apply to state law intellectual property claims.

Defective design of online service

*Lemmon v. Snap, Inc.*, No. 20-55295 (9th Cir. May 4, 2021), <http://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/04/20-55295.pdf>

The Ninth Circuit held that Snap was not protected by § 230 on a defective design claim, in a case brought by the families of people who died in a car accident while recording themselves using Snapchat’s “Speed Filter.”

The Court found that the claim was explicitly not premised on content published by the deceased, as opposed to the design of the app which allegedly led them to undertake reckless behavior.

Facilitation of peer-to-peer services

*Mass. Port Auth. v. Turo Inc.*, 487 Mass. 235 (2021), <https://scholar.google.com/scholar_case?case=15142371780672808138>

The Massachusetts Supreme Judicial Court drew a line between first-party content and editorial choices regarding third-party content in a case involving peer-to-peer car rental service Turo, holding that § 230 protected the latter but not the former

However, it also held that § 230 would not protect Turo if it had “more concentrated involvement” in a particular transaction on the site.

Sex trafficking/FOSTA

*Doe v. Kik Interactive, Inc.*, No. 0:20-cv-60702 (S.D. Fla. Aug. 31, 2020), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3312&context=historical>

The court held that the FOSTA exception to § 230 requires that a defendant knowingly participate in a sex trafficking venture to be held liable on a federal civil claim, and that mere awareness of other trafficking incidents on the defendant’s website does not suffice to eliminate protection under § 230.

*M. L. v. craigslist, Inc.*, No. 3:19-cv-6153 (W.D. Wash. Sept. 11, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.wawd.280469/gov.uscourts.wawd.280469.153.0.pdf>

The court held that the plaintiff had adequately alleged methods by which craigslist’s policies and practices regarding its “erotic services” section contributed to the creation of the ads resulting in the plaintiff’s being trafficked, such that craigslist could be subject to claims based on its development or creation of the ads under state and federal law.

The court noted that FOSTA did not create an exemption under § 230 for all claims under the federal Trafficking Victims Protection Reauthorization Act, but held that the plaintiff’s federal claim could still proceed based on the allegations above.

*U.S. v. Martono*, No. 3:20-cr-274 (N.D. Tex. Jan. 1, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.txnd.333192/gov.uscourts.txnd.333192.28.0.pdf>

In a criminal prosecution involving a website allegedly involved in commercial sex advertising, the district court rejected a First Amendment challenge to FOSTA.

*In re Facebook, Inc.*, No. 20-434 (Tex. Jun. 25, 2021), <https://www.courthousenews.com/wp-content/uploads/2021/06/tx-supreme-facebook.pdf>

The Texas Supreme Court held that three plaintiffs could proceed against Facebook on sex-trafficking related claims under the § 230 exception created by FOSTA.

The decision reads the exception quite broadly to allow civil claims under state law.

*Doe v. Twitter, Inc.*, No. 3:21-cv-485 (N.D. Cal. Aug. 19, 2021), <https://www.courthousenews.com/wp-content/uploads/2021/08/Doe-v.-Twitter-ruling.pdf>

The district court rejected a long list of sex trafficking-related civil claims against Twitter over an alleged refusal to remove links to CSAM videos, including a claim for direct sex trafficking liability, based on § 230 and/or the merits of the various claims.

However, the court found that the FOSTA exception to § 230 did not require a civil claim for beneficiary liability under the federal Trafficking Victims Protection Reauthorization Act to meet the high scienter standards of a criminal charge under the Act, and allowed that claim to proceed.

The court expressly rejected the reasoning of *Doe v. Kik Interactive*, above.

*Doe v. MindGeek USA Inc.*, No. 8:21-cv-338 (C.D. Cal. Sept. 3, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.811224/gov.uscourts.cacd.811224.66.0.pdf>

On a motion to dismiss, the court followed both *Doe v. Twitter* and *M. L. v. Craigslist* in finding that civil sex trafficking claim can proceed under FOSTA against operator of PornHub on “should have known” scienter standard, and declaring that the prevailing interpretation among the courts of the Ninth Circuit.

The court separately held that allegations regarding defendant’s activity crossed the line into creation of the offensive content for the purposes of the plaintiff’s other claims.

*J. B. v. G6 Hospitality, LLC*, No. 4:19-cv-7848 (N.D. Cal. Sept. 8, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.352226/gov.uscourts.cand.352226.178.0.pdf>

Dismissed federal civil claim against Craigslist.

Diverging from other judges in the Ninth Circuit, Judge Gilliam held that a federal civil claim under § 1595 can only survive § 230 via FOSTA if the allegations would also support a criminal charge under § 1591, including meeting the latter section’s actual knowledge standard.