Section 230, Communications Decency Act

Section 230 of the U.S. Communications Decency Act is the centerpiece American Internet law. It greatly limits the legal liabilities of those who facilitate and transmit others' content electronically. For this reason, it has encouraged everyone to participate in the Internet, enabled that medium to grow, and thereby allowed its electronic content to dominate communications. But for the same reason, it has engendered criticism and concern, particularly because of the almost unlimited freedom it has given large technology companies to grow and dominate the Internet, largely based on customer content for which, under Section 230, they have no liability. This entry examines pre-Internet laws and several early legal cases that led to the development of Section 230 of the Communications Decency Act. This entry further examines the enactment of Section 230 of the Communication Decency Act and ongoing opposition to the Act.

Pre-Internet Law

To understand Section 230, one must understand preexisting law. Traditional publication law made practically everyone in the path of publication liable for unlawful or tortious published content,

such as statements or articles that were libelous or invaded someone's privacy. In the classic case of a newspaper that published a libelous article, this meant potential liability for everyone in the chain of publication—reporter, editor, publisher, even a newsstand operator.

The law distinguished between knowing participants in publication (the reporter, editor, and publisher) and mere distributors unfamiliar with the content. So distributors were liable only if they knew of the wrongful content. A newsstand operator was safe when the bundle of newspapers was plopped on the store's doorstep. But once someone told the newsstand operator (or other distributor) that a particular newspaper contained libelous content, it would face liability if it continued to sell the challenged material.

Under this broad publication liability system, publishers took care as to every item they published. News editors carefully edited reporter's copy, advertising managers checked out advertising content, and editorial page editors vetted reader letters before publishing them. Because wronged persons had full remedies against those in the direct chain of publication, distributors were rarely challenged. This publication liability system covered newspapers, magazines, books, and broadcasting, as well as less traditional media such as videotapes, electronic games, and recordings. A "common carrier" exemption excluded telephone companies from this system; common carriers were not liable for the content they carried.

Online Service Cases

Prior to the widespread commercial use of the Internet, several commercial online services introduced the public to electronic news and information. Two cases stemming from those services revealed the consequences of applying the traditional publication liability system online.

In *Cubby v. CompuServe*, the online service CompuServe was sued for libel based on an article, published on Rumorville USA, an online newsletter, which was included in CompuServe's Journalism Forum, one of the 150 forums that CompuServe made available to its subscribers. The court viewed CompuServe as akin to a distributor of publications, and thus liable only once it had notice of tortious conduct, such as the allegedly disparaging messages carried on Rumorville USA. CompuServe evaded liability in that case, but the decision gave potential plaintiffs a roadmap—to make an online service liable, one only need give it notice of the illegal content it was carrying.

The next case, *Stratton Oakmont v. Prodigy*, went farther. The online service Prodigy, unlike CompuServe, engaged in some content screening. (Seeking to be family-friendly, it screened for, and excluded, content containing the so-called seven dirty words.) In assessing Prodigy's potential liability to a libel plaintiff, a court followed a similar analysis as in *Cubby v. CompuServe*, but found that Prodigy fell into the "publisher" category, because it had engaged in content editing. Prodigy thus was as much liable for the alleged libelous article as the article's author.

The *Stratton Oakmont* case came down in 1995, just as it was becoming apparent that the Internet, then still predominantly used by government and universities, would soon be opening up to broad commercial and public use. If *Stratton Oakmont* (and *Cubby*) were the law, Internet service providers could become directly liable for all of the content they carried. Under *Stratton Oakmont,* any service that edited content took on direct liability. And even if a service did not screen or edit content, as Prodigy did, a wronged party's notice could make a distributor liable under *Cubby*. To avoid liability, service providers would have to hire teams of reviewers to vet user content, and to be safe, they would have to take down all questionable and challenged content. This would give anyone bold enough to object an automatic veto on Internet content.

Enactment of Section 230

The nascent Internet service provider industry went to Congress and lobbied for the law that became Section 230. The industry asked for special rules making the traditional publication liability system inapplicable on the Internet. While the industry was concerned with the outcomes of both *Cubby* and *Stratton Oakmont,* the lobbying and debate focused on *Stratton Oakmont*, because its holding was so contrary to public policy—it penalized those who sought to improve content

more than those who did nothing. Congress listened to the industry and enacted a law with two key provisions—a liability exclusion for online service providers as to third-party content they carried, and a "Good Samaritan" provision that specifically approved of, and immunized, good faith content screening and editing.

Though Section 230 represented a major change in the law, it was approved with relatively little controversy, probably largely because the Internet service providers who lobbied for it were strong and united, and there was no countervailing lobbying effort. The discussions during congressional deliberations generally echoed the purposes set forth in the bill's preamble: that it was necessary to enable the Internet and its promise for free and open communications by all.

Title

Section 230's placement within the major legislation known as the *Telecommunications Act of 1996* led to a curious title. Another part of the Telecommunications Act sought to prohibit dissemination of indecent material on the Internet. That part, the Exon Amendment, was placed together with Section 230 into a chapter titled the "Communications Decency Act." The Exon Amendment was challenged and found unconstitutional in 1997 in *Reno v. American Civil Liberties Union*, leaving only Section 230 within the chapter named for its unconstitutional statutory neighbor. Section 230 is often referred to by the ill-fitting chapter title or its CDA abbreviation.

Terms

Section 230 is codified in the federal Communications Act; its full citation is 47 U.S.C. § 230. The section begins with a statement of congressional findings and policy, expressing the purpose of the act to promote the continued development of the Internet and interactive media, and to preserve its vibrant and competitive free market, largely unfettered by regulation. These precatory preamble has significantly influenced the interpretation of the act.

The operative subsection, part (c), contains two provisions: (c)(1), the basic immunity provision, worded such that online intermediaries may not be "treated as the publisher or speaker of any information provided by another," and (c)(2), the Good Samaritan provision, immunizing actions taken in good faith to restrict or take down material. Further sections of the act define terms and set its limitations, including its nonapplication to intellectual property and federal criminal laws.

Because of the intellectual property exemption, Section 230 does not apply to claims of copyright or trademark infringement. Some courts have also classified common law right of publicity claims as exempt because of their intellectual property-like nature. Service providers have a different statutory immunity, in section 512 of the Copyright Act, enacted 2 years after Section 230, as part of the Digital Millennium Copyright Act. Rather than a blanket immunity like Section 230, section 512 sets up a notice-and-takedown scheme, protecting service providers while also providing a means for copyright owners to pursue online infringers. No special statute covers trademark infringement, so service providers continue to have potential contributory liability for their users' trademark infringement once they have notice of the infringement.

Application of Section 230

In practice, Section 230 has immunized most activities of Internet intermediaries like service providers, search engines, social media sites, website, and message board operators, and similar providers, to the extent that they carry third-party content.

Two cases decided shortly after enactment of Section 230 interpreted its grant of immunity very broadly, and proved influential in shaping subsequent cases. The first, *Zeran v. America Online*, involved a post by an unidentified user on American Online (AOL) that made false and defamatory accusations against the plaintiff, Kenneth Zeran. He sued AOL (at least in part because he did not know the identity of the post's creator). The U.S. Court of Appeals for the Fourth Circuit held that Section 230 barred claims, like Zeran's, seeking to hold a service provider liable for its exercise of a publisher's traditional functions, such as deciding whether to publish, withdraw, postpone, or alter content.

Referring to the prefatory policy sections of the act, the court identified Section 230's key purposes as to not deter online speech by imposing tort liability on online intermediaries (since such liabilities would inevitably lead them to censor their customers' content), and to encourage service providers to self-regulate, taking advantage of the section's Good Samaritan provision. To Zeran's argument that AOL was a distributor (and hence potentially liable after notice, like CompuServe in *Cubby*), the court held that distributor liability was a kind of publisher liability, and all such liabilities were immunized by Section 230.

The second case, *Blumenthal v. Drudge*, tested whether Section 230 would immunize a service provider even when it approved and profited from the content at issue. AOL had paid for Matthew Drudge to create content for its service, and had retained contractual authority to approve or remove "Drudge Report" content. But when plaintiff Sidney Blumenthal sued AOL for defamatory content on the "Drudge Report" hosted on AOL, the court found AOL immunized by Section 230 even in these circumstances. All that mattered for Section 230 purposes, the court held, was that the content in issue was third-party content—"material disseminated by them [AOL] but created by others [Drudge]." The court characterized Section 230 as a "tacit quid pro quo" in which Congress exchanged immunity as an incentive for service providers to self-police the content they carry.

Scores of Section 230 cases followed *Zeran* and *Blumenthal*, but the vast majority of them followed their reasoning and results. Even the few notable cases that have not ruled in favor of service providers, often at early procedural stages of litigation, identified only narrow gaps in its immunity. The Ninth Circuit decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, for example, held that a provider may be liable for content if it prescribes or mandates a portion of the content that is challenged as tortious or otherwise illegal. By contrast, many decisions hold, and *Roommates.com* acknowledges, that providers are not liable if they provide only customary editing to a third party's content.

Opposition to Section 230

After its breath and effectiveness in shielding service providers became apparent, various parties began attacking Section 230, on different grounds. In *Wild West 2.0: How to protect and restore your online reputation on the untamed social frontier*, for example, Michael Fertik and David Thompson claimed that Section 230 left people defenseless from online communications, including anonymous disparagement and hateful harassment.

In 2018, Congress significantly restricted Section 230 for the first time, after the online classified advertising forums Craigslist and Backpage repeatedly used Section 230 to successfully defend themselves from allegations that human traffickers were using their services. Congress enacted FOSTA-SESTA, the Fight Online Sex Trafficking Act, and Stop Enabling Sex Traffickers Act, which created an exception to Section 230 that seeks to make website service providers responsible if third parties are found to be posting ads for prostitution on their platforms. As of April 2020, a constitutional challenge to FOSTA-SESTA was pending.

More general concerns about Section 230 grew as the Internet economy changed. When Section 230 was enacted, in the mid-1990s, the Internet was generally seen as an open and diverse medium, full of potential for everyone. By the second and third decades of the 21st century, many people had soured on its promises and focused instead on online content and practices that they found objectionable. Few critics directly criticized the core function of Section 230—allowing third party content free of the need for service providers to prereview all content and prohibit that which could be legally actionable. Rather, criticism focused on what critics felt Section 230 allowed or facilitated: (1) a content free-for-all, often with misleading (sometimes deliberately so), mean-spirited, or partisan messaging, and/or (2) the Internet business landscape, dominated by tech companies like Google, Facebook, and Amazon, so profitable and powerful that they were effectively insulated from government controls or user preferences.

Various changes to Section 230 have been suggested, including creation of a notice-and-takedown system similar to section 512 of the

Copyright Act; removing the Good Samaritan provision or modifying it to make intermediaries liable for their changes to user content; applying a common carrier standard (slightly more limited protection than Section 230); or making intermediaries liable for user content, but limiting remedies against them (for example, only injunctive relief). Some kind of "fairness doctrine" or ideological balance requirement has also been suggested, although such a change seems unlikely to pass constitutional muster.

Section 230 has significantly influenced the development of online communications and culture in the United States. Its successor, if there is one, will do the same.

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See also Censorship; Editing, Online and Digital; First Amendment; Free Expression, History of; Internet: Impact on the Journalism; Libel; Telecommunications Act of 1996

Further Readings

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