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PERSPECTIVE

REFORMING THE INTERNET

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Rep. Adam Schiff, chairman of the House Intelligence Committee, on Capitol Hill in Washington on Dec. 10, 2019.

When Congress first set out to codify the rights and obligations of technology companies and internet service providers on the then-nascent internet, few could have predicted the sheer scale of those companies and the information they control just a few decades later. Recognizing the sea change in information technology in the 21st century, Congress is finally beginning to consider in earnest revisiting landmark legislation of the late 1990s that has governed the internet ever since.

In particular, Sen. Thom Tillis (R-NC) recently announced in an article for The Hill that he would be launching a new initiative in the Senate Judiciary Subcommittee on Intellectual Property to explore ways to revisit and revise the 1998 Digital Millennium Copyright Act. But the DMCA is not the only — or even the most important — law in need of reform in the information age. Another statute desperately deserving attention is Section 230 of the Communications Decency Act.

In the 1990s, as the internet took off as a mainstream feature of public life, courts grappled with the complex question of how and whether to impose liability on website owners and ISPs for defamatory or otherwise unlawful material published on their platforms. In response to conflicting lower court opinions addressing this complicated question, Congress undertook a bipartisan effort to limit liability for providers of such "interactive computer services" primarily to ensure that the infant internet was not suffocated in its crib.

In what became CDA Section 230, Congress established that "[n]o 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." 47 U.S.C. Section 230(c) (1). The safe harbor operates simply and broadly: It shields from liability conduct where: (1) the defendant "is a 'provider or user of an interactive computer service'; (2) the claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information." *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016).

The novelty and expansiveness of Section 230's grant of immunity can be seen by reference to the seminal decision providing constitutional protection in public-figure defamation actions — *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Lest we forget, *Sullivan* involved "information provided by another information content provider" — specifically, a full-page advertisement entitled "Heed Their Rising Voices" that included the names of 64 prominent Americans and was signed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." *Id.* at 256-57. Yet no one suggested — either then or now — that the New York Times, as the "provider" of the forum in which this ad appeared, was immune from all potential liability because it was not the "information content provider."

In a recent opinion assessing the scope of Section 230, the 1st U.S. Circuit Court of Appeals explained that the safe harbor was part of a "hands-off approach" in keeping with "Congress's avowed desire to permit the continued development of the internet with minimal regulatory interference." *Jane Doe*, 817 F.3d at 19. Now, nearly 25 years since the passage of the CDA, in which the internet has indeed continued its development unabated, we are long overdue for a reevaluation of Section 230 immunity and how it operates to stifle state law efforts to regulate false and defamatory speech.

The pernicious effects of Section 230 were highlighted in a recent California Supreme Court decision that permitted judicially adjudicated false and libelous statements to remain available on the internet in perpetuity. In *Hassell v. Bird*, 5 Cal. 5th 522 (2018), Chief Justice Tani Cantil-Sakauye authored a plurality opinion in which she refused to

The 'Allow States and Victims to Fight Online Sex Trafficking Act' of 2017 was signed into law on April 11, 2018, and provides that nothing in Section 230 shall be construed to impair or limit any claims or charges brought under applicable sex trafficking laws. It is time to consider whether state and federal laws restricting the dissemination of defamatory and otherwise injurious material should receive similar treatment.

enforce the trial court's order requiring the review aggregator Yelp.com to remove false and defamatory reviews of an attorney written by a former client.

In that case, the trial court issued an order finding that the reviews were defamatory and requiring Yelp to remove them from its website reviews. Yelp brought a motion to vacate the judgment, arguing (among other grounds) immunity under Section 230 of the CDA. The California Supreme Court ultimately ruled that the lower court's order improperly treated Yelp as the "publisher" of the defamatory content, and so Yelp was entitled to Section 230 immunity and could not be compelled to remove the content. The court concluded it was not permitted to hold Yelp "to account for nothing more than its ongoing decision to publish the challenged reviews." *Hassell*, 5 Cal. 5th at 542. This refusal to uphold an injunction against the continued publication of statements adjudicated to be defamatory cannot be squared with the California Supreme Court's own then-decade-old decision in *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141 (2007). There, the court ruled that "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." *Id.* at 1148. The *Balboa Village* court succinctly explained the rationale for its ruling: "Once specific expressional acts are properly determined to be unprotected by the first amendment, there can be no objection to their subsequent suppression or prosecution." *Id.* at 1156 (internal citations omitted).

The *Hassell* court's holding seems wholly out of step with the modern internet in which extremely large, well-established technology companies dominate the space. Just as ISPs are expected to police and remove content that infringes another's copyright under the DMCA, the time has come to evaluate whether there are any meaningful technological or practical barriers to those companies engaging in the same sort of best practices for defamatory or otherwise illegal content. Recognizing the overbreadth of Section 230's blanket immunity, there is a growing bipartisan consensus that the law needs reformation.

In a hearing before the House Intelligence Committee on the subject of "deepfakes" (a new technology that enables the creation of doctored videos that appear uncannily real), Committee Chair Adam Schiff (D-CA) expressed skepticism about the continuing viability of Section 230 immunity: "If the social media companies can't exercise the proper standard of care when it comes to a variety of fraudulent or illicit content, then we have to think about whether that immunity still makes sense."

In a recent hearing of the Senate Judiciary Subcommittee, legislators on both sides of the aisle — including Sens. Marsha Blackburn (R-TN), Ted Cruz (R-TX), Josh Hawley (R-MO), Richard Blumenthal (D-CT), and Mazie Hirono (D-HI) — all expressed a similar willingness to revisit the scope of Section 230. Sen. Hirono acknowledged that, while Section 230 may originally have been necessary to foster growth and development of ISPs, "I don't think [ISPs] are developing anymore so [Section 230] probably could stand to be reviewed."

Republican lawmakers have expressed particular displeasure with what they view as a lack of content neutrality by ISPs claiming Section 230 immunity. To that end, Sen. Hawley recently introduced a bill that would require tech companies and ISPs to certify their political neutrality with the Federal Trade Commission in order to qualify for Section 230 immunity. During this same hearing, Senate Judiciary Committee Chair Lindsey Graham (R-SC) suggested that Section 230 should be limited to require that tech companies comply with industry best practices for content monitoring before receiving immunity.

This suggestion is echoed by other legal commentators, who argue that Section 230 could be revised to better mirror the DMCA safe harbor, which grants content providers immunity for distributing infringing content only if they implement reasonable notice and takedown procedures. In particular, in an article for the Fordham Law Review, Professor Danielle Keats Citron of Boston University School of Law and Benjamin Wittes, a senior fellow at the Brookings Institute and co-founder of the Lawfare Blog, argue that Section 230 has been judicially expanded far beyond Congress' original intentions. They suggest modest revisions to the law, including the imposition of a "reasonable standard of care" on ISPs in lieu of a blanket grant of immunity.

Congress has already taken some initial steps to limit Section 230's scope. Recently, Congress amended the statute's grant of immunity to expressly exclude the enforcement of federal and state sex trafficking laws. The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 was signed into law on April 11, 2018, and provides that nothing in Section 230 shall be construed to impair or limit any claims or charges brought under applicable sex trafficking laws. It is time to consider whether state and federal laws restricting the dissemination of defamatory and otherwise injurious material should receive similar treatment. At the very least, in order to correct the pernicious impact of *Hassell*, Section 230 should be amended to clarify that ISP immunity "liability" must not extend to court-ordered injunctions requiring the removal of statements that have been adjudicated to be defamatory or are otherwise "properly determined to be unprotected" by the First Amendment.

Given the immense changes in the digital landscape over the past several decades and given Congress's apparent willingness to now revisit the landmark internet legislation of the late 1990s, it is past time for Congress to take a more holistic look at Section 230 of the CDA. There is little reason that large technology companies should be afforded blanket immunity for publishing unlawful content if they fail to take reasonable precautions, consistent with industry best practices, to monitor and remove such content after receiving proper notice.

While awaiting congressional action in this era of truth-challenged pronouncements, there is no reason why ISPs cannot or should not voluntarily amend their own "rules," "terms of service" and "community standards" to include defamation (libel and slander) as among the categories of speech that their sites will prohibit. ■

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