

Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 33 • NUMBER 1 • JANUARY 2021

Online Communications and Content: How Section 230 Reform Has Catapulted Into Relevancy

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Throughout much of 2020, Members of Congress, the Trump Administration, and even Associate Justice Clarence Thomas have highlighted the reasonableness in reevaluating Section 230 of the Communications Decency Act¹ and reining in the liability protections afforded to “interactive computer services” (including e.g. search engines and social media companies).

Particularly throughout the 2020 presidential election cycle and leading into the November polls, perceived threats to political free speech online have further inflamed the dialogue around these “Section 230 protections” in the nation’s capital and beyond.

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Policymakers are responding in rapid succession, including the Federal Communications Commission’s proposal of bold regulatory reforms in mid-October, the introduction of several pieces of federal legislation, and two separate congressional subpoenas sent to big tech chief executive officers.

SECTION 230 BACKGROUND

Passed as part of the Communications Decency Act (“CDA”) in 1996, Section 230 refers to a specific provision within the law providing immunity from civil liability for online publishers of third-party content on websites and other fora. The law states that “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.”

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or host obscene and even unlawful material. Online intermediaries include search engines, social media platforms, online marketplaces, domain name registries, and domain name registrars. There are targeted exceptions to the law including a “good Samaritan” provision that allows the deletion of obscene content removed in good faith and liability exclusions when copyright or prostitution/sex trafficking laws are infringed.

RATIONALES FOR REFORM

Despite these limited attempts to protect consumers from illegal content online, unlawful content on the internet remains prevalent. Many online intermediaries cite Section 230 protections in defense of allowing certain content to remain posted. In recent years, stakeholders like the Alliance for Safe Online Pharmacies² have argued for Section 230 reforms that would require – at minimum – interactive computer service providers to report illegal activities including the sale of illegal drugs via the internet. Not surprisingly, the internet remains a problematic source, fueling the ongoing opioid epidemic and misinformation related to the COVID-19 pandemic.

Historically, Section 230 has been lauded as essential to the development of the free and open internet as we currently know it, where speech – including user-generated content, corporate communications, and online sales offers – may be published online.

However, many now argue that the internet of today no longer resembles that of the internet in 1996 and warrants Section 230 protections to develop and flourish.

Further, the political tables have turned – and continue to change daily – as politicians and voters alike have expressed alarm with the removal or restriction of specific political speech online via platforms like social media. Equally alarming is the continued presence of illicit narcotics and counterfeit medical products easily accessible on search engines and social media platforms.

STATE OF PLAY

Recent actions by social media platforms to seemingly target and remove politically motivated posts have further added fuel to the Section 230 policy fire. Not surprisingly, activities like this have enabled the politicization of Section 230 despite policymakers on both sides of the aisle arguing for reforms and even working together in attempts to

advance these reforms. Efforts to pare back Section 230 and promote consumer protections appeared to first take hold in the passage of the Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act (“FOSTA/SESTA”) into law³ by a near unanimous vote in both the House (388-25) and Senate (97-2).

In September, Senators Joe Manchin (D-WV) and John Cornyn (R-TX) introduced bipartisan legislation aimed at solving this evolving problem, and the Senate Commerce Committee unanimously agreed to subpoena big tech CEOs to testify on the topic before the panel. These recent actions followed the introduction of the Platform Accountability and Consumer Transparency Act by Senators John Thune (R-SD) and Brian Schatz (D-HI) this summer. Despite these attempts at bipartisan progress, the underlying political climate and increasingly political nature of Section 230 protections in general make comprehensive reforms difficult to achieve this election year.

The chart on the next page details some of the recent attempts.

Notes

1. 47 USC §230.
2. <https://buysaferx.pharmacy/>.
3. PL 115-164, <https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf>.
4. <https://www.commerce.senate.gov/services/files/94D0F3C6-B927-46D2-A75C-17C78D0D92AA>.
5. <https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation>.
6. <https://www.schatz.senate.gov/imo/media/doc/OLL20612.pdf>.
7. <https://www.manchin.senate.gov/imo/media/doc/092420%20See%20Something%20Say%20Something%20Online%20One%20Pager.pdf?cb>.
8. <https://www.commerce.senate.gov/2020/10/committee-to-hold-hearing-with-big-tech-ceos-on-section-230>.
9. https://www.supremecourt.gov/orders/courtorders/101320zor_8m58.pdf.
10. <https://docs.fcc.gov/public/attachments/DOC-367567A1.pdf>.
11. <https://www.fcc.gov/news-events/blog/2020/10/21/fcc-authority-interpret-section-230-communications-act>.
12. <https://www.congress.gov/bill/116th-congress/house-bill/8636?s=2&r=1>.
13. <https://www.judiciary.senate.gov/press/rep/releases/senate-judiciary-committee-to-call-twitter-facebook-over-censorship-of-new-york-post-articles>.

2020 Proposed Actions to Reform Section 230			
Action	Policymaker	Short Summary	Date
Online Freedom Viewpoint Diversity Act ⁴	Senators Wicker (R-MS) and Graham (R-SC), chairmen of Senate Commerce and Senate Judiciary Committees	Republican-led Section 230 legislation aimed largely at curtailing freedom of speech monitoring online.	9/8/2020
Released Draft Legislation ⁵	Department of Justice	Trump Administration's draft legislation to reform Section 230 with the goal of addressing illicit online content.	9/23/2020
Platform Accountability and Consumer Transparency Act ⁶	Senators Thune (R-SD) and Schatz (D-HI)	Bipartisan Section 230 legislation would require content to be removed within 24 hours if a court deems it illegal.	6/29/2020
See Something Say Something Online Act ⁷	Senators Manchin (D-WV) and Cornyn (R-TX)	Bipartisan Section 230 legislation would require reporting to the Justice Department user activity detected on their services that could be linked to a "major crime."	9/29/2020
Big Tech CEOs Subpoenaed to Testify before Senate Commerce Committee ⁸	Senator Wicker (R-MS), Chairman of Senate Committee on Commerce, Science, and Transportation	On October 1, Chairman Wicker held a committee vote, which passed unanimously, to subpoena the CEOs of Google, Facebook, and Twitter to testify on Section 230 Reform. The hearing is scheduled for October 28.	10/1/2020; 10/28/2020
<i>MalwareBytes Inc. v. Enigma Software Group</i> ⁹	SCOTUS Justice Clarence Thomas	Justice Thomas wrote in a filing following the court's decision to not hear this case that he would welcome the chance to scale back Section 230.	10/13/2020
FCC Intent to Issue Rulemaking ¹⁰	FCC Chairman Pai	Chairman Pai announced a legal interpretation that the agency can "interpret" and essentially reform 230 without legislation. On October 21, FCC General Counsel Johnson detailed the legal rationale ¹¹ and the FCC's interpretive authority.	10/15/2020; 10/21/2020
Protecting Americans from Dangerous Algorithms Act ¹²	Representatives Tom Malinowski (D-NJ), Anna Eshoo (D-CA)	Democrat-led Section 230 reform legislation to strip protections when large platforms use an algorithm to "rank, order, promote, recommend, amplify" or otherwise boost material connected to claims of civil rights violations or acts of international terrorism.	10/20/2020
Big Tech CEOs Subpoenaed to Testify before Senate Judiciary Committee ¹³	Senator Graham (R-SC), Chairman of Senate Judiciary	Following reports that Twitter blocked the sharing of anti-Biden news from the <i>New York Post</i> , Chairman Graham held a committee vote to subpoena the CEOs of Facebook and Twitter. On October 22, the committee unanimously approved the subpoena. The CEOs voluntarily testified on November 17.	10/22/2020

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