

The News Media and Section 230

We want to thank the Department of Justice for holding this workshop on Section 230 of the Communications Decency Act. There is often more heat than light around this topic, but we believe that it is deeply important not only for journalism but also for our civic society as a whole.

The News Media Alliance represents approximately 2,000 news organizations across the United States and Europe. These publishers are critical to the communities they serve, but many are struggling financially -- in large part because the online marketplace is dominated by a few platforms that control the digital advertising system and determine the reach and audience for news content.

News publishing is the only business mentioned in the First Amendment, and we have been at the forefront of fighting for freedom of speech since well before that amendment was written. Therefore, we approach this issue with seriousness and caution. Section 230 of the Communications Decency Act is an unusual legal protection. Fundamentally, it is a government subsidy that was originally intended to nurture a small and immature online environment. It has since become a huge market distortion that primarily benefits the most successful companies in our economy, to the detriment of other market actors.

However, rather than simply addressing whether Section 230 should be completely preserved or revoked, we believe that it's more important to think about the whole ecosystem for news content and how we can mitigate the negative incentives created by Section 230 and create new incentives that favor quality journalism.

Background

Content moderation is and has always been a complex and nuanced problem. But Section 230 is a not complex or nuanced solution. It is blunt instrument that provides special legal protections for a wide range of commercial behavior. It serves to *disfavor* responsible, high quality journalism (as opposed to cheap, inflammatory content) – and is sustained by obsolete ideas about how the internet economy functions.

First, we should dispense with the idea that accountability and responsibility are inconsistent with business growth. Broad government exemptions from liability certainly make building a business easier, but our history is replete with great companies that have grown and succeeded while also accepting full responsibility for

their products and commercial decisions. News publishers, by way of example, have been legally responsible for their content since at least the 1730s, when the *Crown v. Zenger* decision grappled with the appropriate standard for acceptable speech in newspapers. Yet the responsibility for published content did not hinder the tremendous growth of the news industry in the 19th and 20th centuries. When we were the so-called “information gatekeepers,” we seemed to find a way to both make money and be accountable.

Second, we need to drop the idea that today’s digital “intermediaries” are in any way passive or “dumb pipes.” The days of individually typing “www” web addresses into a portal or browser are long over. The vast majority of digital audiences get to their news through one of the major online platforms – notably Google and Facebook -- and those platforms exercise extreme control over how and whether news is delivered and monetized.

Not only are they not passive, but Google’s and Facebook’s businesses are specifically valued for their capacity to make highly refined, individual content and advertising decisions. They affirmatively curate what news people see and how money is made from it. This algorithmic decision-making is amazing – but also self-interested. Each action represents a commercial choice for the company, and there is nothing wrong with asking them to be responsible for those choices.

In the end, Section 230 has created a deeply distorted variable liability marketplace for media, with one of the largest distortions being that publishers are not compensated for the additional liability they carry. One group of market actors gets the responsibility, and another gets the decision-making authority and most of the money. This separation of accountability from financial return is not only bad for news publishing but for the health of our society. We need to find a better balance.

Section 230 Assumptions

Section 230 is premised on two broad assumptions: 1) that the Good Samaritan provisions encourage good behavior by protecting online platforms when they moderate some limited types of offensive and illegal content; and 2) when someone is harmed by the content published on these platforms, the damaged party can seek remedies from the creators of the content.

Both assumptions have been rendered obsolete by the evolution of technology. First, the online platforms now use Section 230’s protections not simply to police for harmful content (as determined solely by them) -- but also to protect their ability to exercise extreme editorial control through algorithms and determine whether and how

content is exposed. This editorial control is similar to the control exercised by publishers and editors over content created by journalists. But unlike news publishers, the platform companies are absolved of all responsibility for their decisions, and therefore have insufficient incentive to promote quality over virality.

Second, Section 230 absolves companies of any accountability for their commercial decisions around promotion and reach. One person may slander another from a street corner with little impact. But an online platform can decide, for its own commercial purposes, to amplify and promote that same speech to hundreds of millions of others in order to increase traffic and, ultimately, profits. That decision about reach is separate from the underlying speech and should carry its own accountability and consequences.

Finally, any online platform that allows for anonymous or pseudonymous speech is intentionally preventing the accountability assumed by Section 230. You can't "sue the speaker" when the system is designed to allow the speaker to hide. These companies may feel that there are commercial and other benefits to the anonymity of their users but, again, that is their commercial choice for which they should then hold responsibility.

It is also absurd and reductive to argue that the platforms have the right to make tremendous amounts of money by using algorithms to manage billions of interactions -- but they then can't be expected to have any responsibility for those same interactions because of the scale of the effort. If you build it and sell it then you also have responsibility for the impacts and outcomes from it. It's not up to the rest of us to clean-up the mess.

Absent any accountability by the online platforms, the effect of Section 230 is to create a huge embedded bias favoring false and inflammatory content over quality news and information. We know that made-up garbage will always be cheaper to produce than professional journalism. If the online platforms are free to value each kind of content the same way, then there simply won't be journalism in many communities.

What to do about Section 230

There are some problems in the online ecosystem that revocation of Section 230 would not necessarily solve. First, not all bad information is legally actionable. We have extensive caselaw, going back hundreds of years, on what kinds of speech gives rise to causes of action (defamation, certain threats, etc.). But that doesn't necessarily cover a whole range of speech that we may consider extremely bad (many kinds of

hostile speech, anti-vaccine messages, etc.) Getting rid of Section 230 won't automatically stop the amplification of speech that is deeply dangerous and offensive.

In a related matter, brand and customer expectations have a huge impact on the kind of information that is delivered. For our part, news publishers believe that the value of their brands is centered in *trust* with readers, and that delivering false or dangerous information would damage that trust. Google and Facebook, on the other hand, are the means by which many people receive horrible and dangerous information. Yet these companies obviously don't believe it hurts their brands or there would be more proactive filtering and monitoring. Revocation of Section 230 alone would not necessarily make these companies more sensitive to the well-being of their users or the broader society.

But the safe harbor embedded in Section 230 is clearly part of the problem and we would suggest three approaches as it is revised:

- We shouldn't be afraid to be incremental. The government has allowed one of the largest parts of our economy to be built around a huge subsidy, and it doesn't have to change that all at once.
- As part of that approach, we should start by focusing on just the very largest companies and limit the exemption for those who both derive the most benefits from Section 230 and have the greatest capacities to take legal responsibility for their commercial decisions around content and reach. With great scale comes great responsibility.
- Finally, we don't need to start from scratch when it comes to defining impermissible speech. Let's start with the existing (and long-standing) standards around defamation and other harmful speech. We then need to continue to work on other business incentives for the online platforms to ultimately value quality content.

In order to further rebalance the relationship between the major platforms and news publishers, we also support the *Journalism Competition & Preservation Act*. This bill would allow news publishers to collectively negotiate with the platforms and return value back to professional journalism. If done right, this could also drive business incentives for the platforms to value quality journalism over overtly bad sources of information about our world and our communities.