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The Evolving Conversation Around Section 230 Immunity

BY [JORDAN DOLL](#)/ ON APRIL 5, 2021



Image by Gerd Altmann from Pixabay

Section 230 of the Communication Decency Act (“CDA”) grants sweeping immunity to interactive computer service providers (“ISP”)¹ against claims arising from content posted on their sites by third parties.² Significantly, this protects websites from tort liability arising from content their users posted. For example, Twitter cannot be sued for defamatory language tweeted by one of its users.³ This immunity helped create the modern internet, allowing platforms like Twitter, Facebook and Google to flourish unrestrained from potential liability arising from the content their users share.⁴ Since the CDA’s passage in 1996,⁵ conversations around regulating the internet and protecting websites from liability around content posted on their sites has drastically changed in the last two and a half decades. Specifically, Congress’s historic interest in fostering the development of the internet free from the threat of liability has morphed in response to the current online environment; today, more and more

lawmakers and commentators have recognized the disturbing amount of power these platforms and their unelected leadership teams wield.⁶ Former President Trump's tweets that helped incite and organize violence on the Capitol in January is just one of the most grievous examples of content with terrible consequences where the platform that gave the content an enormous megaphone is protected from any responsibility of handing the user that megaphone.⁷ In light of renewed calls to amend or remove Section 230 immunity, it is worth considering how drastically the conversation has changed since 1996.

In 1996, the internet was in its infancy. Google did not exist and Mark Zuckerberg was 11 years old.⁸ In 1996, the purpose of the broad immunity was to encourage websites to monitor their sites for pornography and other potentially obscene or offensive content without fear of liability for other user-generated content.⁹ This vast immunity was in part a response to a 1995 case where a New York court held that a web services company could be held liable for allegedly defamatory posts by its users.^{10 11} Because the website moderated or removed some of the posts on its website, the Court reasoned, it acted as a publisher of all user-generated posts, even those the site did not directly monitor.¹² Section 230 immunity sought to remedy the decision's implication that if the site had taken an entirely hands-off approach to regulating posted content, the site could have avoided liability as it would have not acted as the content's publisher; Congress was concerned this implication would lead interactive computer service providers to stop monitoring their sites for pornographic or other lewd material all together to avoid liability under state defamation laws.¹³

The purpose of Section 230 immunity was also to forward the unfettered development of the internet. Congress took the somewhat unusual step of writing its policy goals into the statute, as well as its findings that an unregulated internet benefitted all Americans.¹⁴ The codified goals of Section 230(b) include protecting the vibrant and competitive free market on the internet and promoting the continued development of the internet.¹⁵ The spirit of Section 230(a) findings capture the principle that the internet has flourished unregulated to the benefit of Americans with minimal interference.¹⁶ Section 230 (a)(3) states that "the internet and other interactive computer services offer a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."¹⁷ Taken collectively, the codified findings and goals of Section 230 immunity display Congress's commitment in the 1990s to let the internet grow and flourish with minimal intervention from the government or lawsuits from the websites' users.

Fast forward to 2021. How successful was Section 230? In terms of limiting lewd material on the web, porn is everywhere online,¹⁸ much of it abusive and non-consensual.¹⁹ Indeed, the only amendment to Section 230 Immunity is FOSTA passed in 2018. While not explicitly focused on porn, FOSTA removed immunity from suit for ISPs under limited circumstances concerning prostitution and sex trafficking.^{20 21}

On the other hand, the internet has developed unfettered without undue limitations from tort liability or government interference, leading to a space that, as the pandemic has highlighted, Americans use daily for numberless activities.²² Saying the modern internet contains multitudes feels like an understatement. It's a place where we shop, socialize, find entertainment and love, apply to jobs, and access news and tea. Memes go viral and people can be cancelled with an efficiency not possible without the rapid machinery of Twitter.²³ The internet provides a platform where a sitting President can release tweets that incite a violent mob to attack the U.S. Capitol.²⁴ ISPs profit off this plethora of wide-ranging content and, under the protection of Section 230 immunity, almost never face tort liability for the consequences of that content.

The current debate surrounding Section 230 immunity has strikingly changed since the mid 1990s. The conversation on tort liability has been contextualized by some of the severe consequences mentioned above. In a sense, the ISPs did operate as Congress circa 1996 would have liked during and before the siege of the U.S. Capitol. That is, the ISPs did eventually exercise editorial control by removing the offensive content—the culmination of tweets that helped incite the siege of the Capitol. Indeed, most big tech companies²⁵ took swift action not only to ban Trump but also all people and content that helped organize and incite the violent mob.²⁶

However, Twitter and other ISPs only did not act as quickly as some would have preferred. Indeed, Trump's account survived tweets that were arguably far more inflammatory than those surrounding the siege. For example, during the Black Lives Matter protests over the summer, he tweeted "when the looting starts, the shooting starts." He has also taunted the leader of North Korea with the size of his nuclear button.²⁷ Implicit threats of shooting protesters and engaging in nuclear warfare against another country did not strike Jack Dorsey as particularly egregious enough to violate Twitter's terms, noting that Trump was a public figure and the internet deserved access to his speech.²⁸ Why these particular tweets around the Capitol were seen as crossing the line probably had to do with the fact that Trump had been voted out by January of this year and perhaps was also Twitter's plea to the shifting makeup of the democratic Senate.²⁹

Beyond the country's outrage at the violence at the Capitol, internet users on both ends of the political spectrum seemed generally fatigued at Jack Dorsey's single-handed ability to decide who and who did not have one of the world's most important platforms of speech. Some felt Twitter acted recklessly by giving Trump a megaphone for so long because his tweets were deemed news-worthy;³⁰ others believed depriving someone of an account on such a popular ISP was tantamount to censorship.³¹

Conversations around giving the internet space to grow with minimal interference, which guided Congressional thinking in the mid-1990s, are notably absent.³² The internet is no longer in its infancy but is now the world's most influential millennial. The question remains

what parts of it we are willing to give up in order to condemn others. That is, Twitter gave Trump a megaphone that was instrumental in allowing a violent attack on the U.S. Capitol. However, if Twitter could have, as a start-up, been sued for providing that megaphone we would not have Twitter in its modern capacity today.³³

While the siege on the Capitol put this dilemma in an especially sharp light, the problem is not new. A host of legislation has been proposed before the Capitol riots and these calls for reform have only intensified.³⁴ Most proposed legislation illustrates that revising Section 230 immunity and preserving the modern internet puts Congress in between a rock and a hard place and no legislation has seemed to effectively crack the case. Indeed, a desire for reform and an inability to come up with simple solutions has led the Supreme Court Justice Thomas to threaten to take up Section 230 immunity.³⁵

I have no solution to how correct Section 230 immunity's deficiencies. However, one relatively simple tactic that would provide greater accountability for these major platforms is to require the social media platforms to publish their content moderation guidelines for greater transparency. Most ISPs have moderation policies.³⁶ Indeed, ISPs may be thinking this way as well. Twitter recently called on the public to help it formulate definitive rules on how public figures use Twitter and how to best protect the health of the public conversation.³⁷

Section 230 immunity has given us the modern internet, with all its benefits and consequences. Removal of the shield of Section 230 immunity would significantly change the how major ISPs function, likely leading to far greater content moderation by these platforms.³⁸ However, minor changes, such as greater transparency on how ISPs are regulating content, might be a simple step toward having an honest conversation about how to safeguard a healthy public conversation online while also preserving the benefits of the modern internet.

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1. ISPs are basically websites.
 2. 47 U.S.C. § 230 (1996).
 3. Krista L. Baughman, Defamatory Re-Tweet and Re-Posts – Can I Sue? Dhillon Law Group (Feb. 18, 2020), <https://www.dhillonlaw.com/blog/defamatory-re-tweet-and-re-posts-can-i-sue/> [<https://perma.cc/86H6-662C>].
 4. Barbara Ortutay, AP Explains: The rule that made the modern internet, Associated Press (Oct. 28, 2020), <https://apnews.com/article/what-is-section-230-tech-giants-77bce70089964c1e6fc87228ccdb0618>.
 5. Mary Graw Leary, The Indecency and Injustice of Section 230 of the Communications Decency Act, 41 Harv. J.L. & Pub. Pol'y 553, 559 (2018).

6. Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have A Warning*, NPR (May 30, 2020, 11:36 AM), <https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitthers-legal-shield-experts-have-a-warning> [<https://perma.cc/SE2F-2VTE>].
7. Sara Morrison, *How the Capitol riot revived calls to reform Section 230*, Vox (Jan. 11, 2021, 4:55 PM), <https://www.vox.com/recode/22221135/capitol-riot-section-230-twitter-hawley-democrats>.
8. Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. Times (Dec. 15, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html> [<https://perma.cc/8V79-Z5WC>].
9. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).
10. *Id.* at 331.
11. This case was *Stratton Oakmont, Inc v. Prodigy Services Co.* The plaintiff, Stratton Oakmont, is the brokerage firm that inspired the memoir and 2013 movie, both titled “The Wolf of Wall Street.” While the movie and book center around the fraud committed by the founder of and employees at Stratton Oakmont, the case deals with the alleged defamation of an anonymous user who accused the securities investment banking firm of (as you may have already guessed) criminal and fraudulent acts. See George Fishback, *How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act*, 28 *Tex. Intell. Prop. L.J.* 275, 281 (2020); *Stratton Oakmont v. Prodigy Servs. Co.*, INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 13, 1 (Sup. Ct. May 24, 1994).
12. *Stratton Oakmont*, INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 at 10.
13. *Zeran*, 129 F.3d at 330.
14. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1047 (9th Cir. 2019) (“Perhaps to guide the interpretation of [Section 230’s] broad language, Congress took the rather unusual step of setting forth policy goals in the immediately preceding paragraph of the statute.”).
15. 47 U.S.C. § 230(b).
16. 47 U.S.C. § 230(a) (“The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”).
17. 47 U.S.C. § 230(a)(3).
18. Qayyah Moynihan, *Internet users access porn websites more than Twitter, Wikipedia and Netflix*, Business Insider (Sept. 30, 2018, 10:05 AM), <https://www.businessinsider.com/internet-users-access-porn-more-than-twitter-wikipedia-and-netflix-2018-9> [<https://perma.cc/3QPN-ZDZQ>].
19. See Jessica M. Goldstein, *‘Revenge porn’ was already commonplace. The pandemic has made things even worse.*, The Washington Post (Oct. 29, 2020, 8:00 AM), https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html.
20. Elizabeth M. Donovan, *Fight Online Sex Trafficking and Stop Enabling Sex Traffickers Act: A Shield for Jane Doe*, 52 *Conn. L. Rev.* 85, 94.

21. However, this legislation does not address nonconsensual pornography, such as revenge porn. Some have also argued that the effects of the law have been to limit sex workers' access to safe digital marketplaces while simultaneously failing to protect the populations the legislation sought to protect, further endangering sex workers both physically and financially. See Liz Tung, FOSTA-SESTA was supposed to thwart sex trafficking. Instead, it's sparked a movement, NPR (July 10, 2020) <https://whyy.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement/> [<https://perma.cc/RHF9-JYHK>].
22. See Jeff Kosseff, *The Twenty-Six Words that Created the Internet* (Cornell University Press, 1st ed. 2019).
23. See Matt Binder, 'Bean Dad' becomes Twitter's first 'main character' of 2021, Mashable (Jan. 5, 2021, 9:42 AM), <https://mashable.com/article/bean-dad/> [<https://perma.cc/M65A-QG7K>].
24. Annie Karni, & Maggie Haberman, Trump openly condones supporters who violently stormed the Capitol, prompting Twitter to lock his account, N.Y. Times (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-protesters.html>? [<https://perma.cc/5MCL-W7EP>].
25. ISPs that banned Trump ran the gamut. In a symbolic flex, the niche film review website Letterboxd banned Trump from posting his film opinions. See Reply All: Account Suspended, Gimlet Media (Jan. 14, 2021) (downloaded using Spotify).
26. Morrison, *supra* note 7.
27. Evelyn Douek, Trump is Banned. Who is Next?, The Atlantic (Jan. 9, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/trump-is-banned-who-is-next/617622/>.
28. Andrew Hutchinson, Twitter Seeks Public Feedback on Rules Around What Public Figures Can Tweet, Social Media Today (Mar. 18, 2021), <https://www.socialmediatoday.com/news/twitter-seeks-public-feedback-on-rules-around-what-public-figures-can-tweet/597013/> [<https://perma.cc/A2VF-EA8A>].
29. *Id.*
30. Morrison, *supra* note 7.
31. Poppy Noor, Should we celebrate Trump's Twitter ban? Five free speech experts weigh in, The Guardian (Jan. 17, 2021, 9:27 AM), <https://www.theguardian.com/us-news/2021/jan/17/trump-twitter-ban-five-free-speech-experts-weigh-in> [<https://perma.cc/2J9P-RYYN>].
32. See I Love Section 230. Got a Problem With That?, New York Times: The Argument (Jan. 14, 2021) (downloaded using Spotify); Wakabayashi, *supra* note 8; Rachel Lerman, Social media liability law is likely to be reviewed under Biden, The Washington Post (Jan. 18, 2021, 8:00 AM), <https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/> [<https://perma.cc/LUT5-EGSH>]; Makena Kelly, Democrats take first stab at reforming Section 230 after Capitol riots, The Verge (Feb. 5, 2021, 11:53 AM),

<https://www.theverge.com/2021/2/5/22268368/democrats-section-230-moderation-warner-klobuchar-facebook-google> [<https://perma.cc/KWN9-TKZG>].

33. See Kosseff *supra* note 22.

34. Mark MacCarthy, Back to the future for Section 230 reform, Brookings (Mar. 17, 2021), <https://www.brookings.edu/blog/techtank/2021/03/17/back-to-the-future-for-section-230-reform/> [<https://perma.cc/7MKG-8W5F>].

35. *Id.*

36. Derek Khanna, The Law that Gave Us the Modern Internet—and the Campaign to Kill It, *The Atlantic* (Sept. 12, 2013)

<https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/> [<https://perma.cc/P48M-RE4D>].

37. Twitter Safety, Calling for public input on our approach to world leaders, Twitter Blog (Mar. 18, 2021) https://blog.twitter.com/en_us/topics/company/2021/calling-for-public-input-on-our-approach-to-world-leaders.html [<https://perma.cc/U47G-JZZ3>].

38. Allyn, *supra* note 6.