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CLIENT & FRIENDS ALERT[2]

A Preview of our Upcoming Web Series

CONTENT REGULATION IN THE AGE OF MISINFORMATION - AN UPDATE

This week we put the finishing touch on our upcoming webinar (see Client Alert attached), the first in a series on "Content Regulation in the Age of Misinformation." We will discuss the much anticipated U.S. Supreme Court Decision in *Gonzales v. Google* (U.S. Supreme Court Docket No. 21-1333), one that will address Section 230 of the Communications Decency Act, codified at 47 U.S.C. § 230, a controversial code section that largely immunized Big Tech from liability for publishing (or not) content deemed objectionable. Google, a defendant, calls it one of the most important to come before the High Court since its inception in 1996: "[T]he stakes could not be higher" according to its Counsel https://www.investors.com/news/technology/section-230-internet-law-under-threat-nightmare-for-twitter-meta-google-stock/, with others saying the case

[1]Sapronov Group is a trade name for Sapronov & Associates, P.C. and its affiliate, Sapronov & Naglis LLC.
[2] While accurate to the best of our knowledge, this alert is not a legal opinion and is not to be treated as legal advice. Please contact us if you have any questions regarding this disclaimer.

has the power to reshape the Internet. https://www.brookings.edu/events/gonzalez-v-google-and-the-fate-of-section-230/.

The discussion will focus on how Section 230(i), originally drafted as a bipartisan, technology neutral method of moderating Internet content by Democratic Sen. Ron Wyden and Republican Rep. Chris Cox, has been expanded to shield social media companies from liability for content on their sites. See https://www.cnn.com/business/live-news/supreme-court-gonzalez-v-google-2-21-23/index.html). The language at issue is subtitled "Protection for 'Good Samaritan' blocking and screening of offensive material" 47 U.S.C. §230(c)(1)(2) and provides constitutional protection to providers and/or users who in good faith take action to restrict access to or availability of offensive material..

Oral argument was held on February 21.

A bit of history: in 1996, the Good Samaritan language of § 230 was introduced on behalf of our client, Prodigy Services, an early information service provider and the defendant in *Oakmont v. Prodigy* that had previously been held liable for publisher liability. Together with colleague Bob Butler, a partner at Wiley (f/k/a Wiley, Rein and Fielding), following extensive review by a coalition of ISPs, we brought the draft to late Senator Bob Dole. Eventually, along with the rest of the 1996 Amendments to the Communications Act of 1934, it was passed. As expected, the Communications Decency Act was struck down by the U.S. Supreme Court in *ACLU v. Reno* (521 U.S. 844, 117 S. Ct. 2329 (1997)) – but the Good Samaritan provisions of Section 230 survived.

All this was a time of excitement that came with a new frontier - a bubbling nascent Internet soon to burst, a time of monopolies against competitors, a time of Clinton, Gingrich, Hyde, and Monica. Little did we know that the language of the Good Samaritan (well intentioned as its name implies) would be twisted beyond recognition, decades later, to wreak havoc on online free speech, political expression, and consumer protection alike. With apologies, it was not what was intended.

We hope you enjoy our webinar.

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CLIENT & FRIENDS ALERT[4]

January 20, 2022

CONTENT REGULATION IN THE AGE OF MISINFORMATION

(A Preview of our Upcoming Web Series)

Continuing our collaboration with West LegalEdcenter (formerly owned by Thomson Reuters), we are pleased to announce a new online series focused on Section 230 of the Communications Decency Act (47 U.S.C. §230). Part I of *"Content Regulation in the Age of Misinformation"* will be available in late March as a podcast. The webinar will be hosted by Walt Sapronov of our Firm and Joshua Turner of Wiley Rein. Speakers will include Joseph Srouji (Sapronov Group), Dr. Martyn Roetter (D. Phil Physics and Advisor to Sapronov Government Affairs, Inc.), and Ashkhen Kazaryan (Senior Fellow, Free Speech and Peace at Stand Together).

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We will let you know when the program becomes available. In the meantime, here is an outline of discussion topics.

I. Theme: Implications of Section 230 of the Communications Decency Act: Balancing Free Internet Speech with Governmental, Political and Social Constraints

The webinar will discuss content regulation of social media. Content moderation to one media subscriber is censorship to another. Who decides (or should) what is or is not permitted on social media? Or to paraphrase Dostoevsky, without regulators, is everything on social media permitted? And if social media companies can select what content may be seen, what protects the viewer from misinformation?

II. Background and Discussion Topics

A. Internet Liability: Communications Decency Act ("CDA") Section 230; U.S. Supreme Court Review (*Gonzalez v. Google*).

1. Section 230: CDA (47 U.S.C. § 230) Immunizes Information Service Providers ("ISPs") and Info service users from publisher or speaker liability for others' Internet content.

2. Online intermediaries (*e.g.*, ISPs, YouTube, Amazon, Facebook, and bloggers) are not responsible for third-party content.

3. But the media companies also decide what content to select or publish. Is that power a private constraint on free speech? One driven perhaps by political preference?

4. Will that change in the next Congressional session? The Section 230 liability shield is unique to the U.S., not found in foreign jurisdictions. So, will Congress adopt § 230 reform legislation? Compare this to the EU Digital Services Act. Stated otherwise, as with privacy trends,[5] will the U.S eventually move to a European framework for regulating Internet Content?

5. Or will that change with U.S. Supreme Court review (currently pending)?

B. U.S. Supreme Court Review of *Gonzalez v. Google*.[6]

1. Plaintiffs (victims' families) brought complaint against Google, Twitter, Facebook, seeking relief for terrorist acts under anti-terrorism legislation (Anti-Terrorism Act). Complaint alleged inter alia, secondary liability for publishing terrorist Internet content. The California District Court largely held that § 230 barred most of these claims.

2. *Gonzalez v. Google* 9th Circuit Court Decision, on review of this District Court decision, affirmed the dismissal on grounds that claims (other than those for revenue sharing) were barred by § 230 immunity.

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[5] See Sapronov & Associates, P.C. *"Privacy in the New World Order"* https://wstelecomlaw.com/2020/12/privacy-in-the-new-world-order-the-privacy-shield-falls/ (Related client Alerts, available upon request at info@wstelecomlaw.com.

[6] 3 F.4th, 871 (9th Cir., June 22, 2021), rehearing en banc denied (Jan. 3 2022).

a. "Material Contribution" test. Case precedent cited in the 9th Circuit Decision holds that a website making a "material contribution" to illegal content on its website (and thus responsible for its illegality) loses § 230 immunity. Merely taking action necessary to display the content does not.

b. Judge Berzon (in her concurrence) argues § 230 publisher liability should be read narrowly, applicable only to traditional activities of publication and distribution – and does not include the promotion or recommendation of content or connection of content users to each other, "Traditional publication has never included selecting the news, opinion pieces, or classified ads to send to each individual reader based on guesses as to their preferences and interests, or suggestion that one reader might like to exchange messages with others."

3. U.S. Supreme Court Review of the 9th Circuit Decision (Pending)[7]

a. Issue presented: Does § 230(c)(1) immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?

III. Content Regulation Today

A. Social Media and § 230 (the "Liability Shield").

1. Internet Liability for Media Companies - essentially none.

a. Section 230 was originally passed in 1996 as a carveout to publisher liability for editing online content. In other words, the legislative intent was to overturn *Oakmont v. Prodigy Services*.[8] Section 230 – specifically, its provisions known as "the Good Samaritan" (47 U.S.C. § 230(c)) - was intended to accomplish this by shielding ISPs from liability for editing (or removing) offensive content.

2. Under § 230 today, censorship is broadly permitted.

a. The "Good Samaritan" provisions of Section 230(c) today have been expansively interpreted to support blanket immunity from all editorial actions by ISPs. In other words, media companies may enforce private policies permitting only politically correct content (or blocking "incorrect" varieties) on their platforms.

b. But the U.S. Supreme Court may or may not change all that. A well-known example of such political editing is Twitter's cancellation of former

[7] https://www.supremecourt.gov/DocketPDF/21/21-1333/220254/20220404211548101_GonzalezPetPDF.pdf.
[8] See Sapronov & Associates, P.C. Special Client Alert, *"The Death of a Good Samaritan (maybe),"* guest editorial by Robert J. Butler, Esq., distributed October 22, 2020.

President Trump's accounts. Depending on the outcome of *Gonzalez v. Google*, such actions, and similar ones prescribing who may publish such content, may prove immunized under an expansive interpretation of § 230 – or an editorial action exposed to publisher liability under a narrow one. All of this will happen against the backdrop of Elon Musk's acquisition of Twitter and its unpredictable implications. What impact this will have on future online content regulation remains to be seen.

c. The response from Media companies – especially, Google, the defendant in the *Gonzalez* case, has been vociferous. Google argues that the U.S. Supreme Court "should decline to adopt novel and untested theories that risk transforming today's Internet into a forced choice between overly curated mainstream sites or fringe sites flooded with objectionably content."[9]

d. How are E-commerce companies such as Amazon and Airbnb using § 230 as a defense to liability for content placed by third-parties on their Internet platforms?

3. Content Regulators - are there any – or does § 230 give Big Media a blank check?

a. Today, media companies do not fall under common carrier regulation and are thus not regulated by either the Federal Communications Commission (FCC) under so-called "Title II" of the Communications Act or by state public service commissions (under state utility laws).
   i. Net neutrality – not the same as "Content Neutrality."
   ii. Media Companies (*e.g.*, Twitter, Facebook) are "edge providers under FCC Net Neutrality rules.
      a. Therefore, no Title II (common carrier) regulation.

b. Possible Future Regulation
   i. Future Legislation? Not likely in today's fractious Congress

c. Federal Trade Commission – Historically challenged anticompetitive practices but recently broadened scope of enforcement (e.g., restrictive covenants).

d. State Social Media Regulation
   i. Texas law prohibiting media censorship under First Amendment Grounds upheld by the Fifth Circuit Court of Appeals
   ii. Florida law regulating media content censorship enjoined by 11th Circuit now pending before U.S. Supreme Court. *Moody v. Netchoice, LLC* [10]

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[9] McKinnon, John D., **"**Google Says Supreme Court Ruling Could Potentially Upend the Internet**:** Tech giant files brief in YouTube case brought by family of woman killed in Paris terrorist attacks." The Wall Street Journal, Jan. 12, 2023.

[10] https://www.mtsu.edu/first-amendment/post/3412/court-rules-in-favor-of-texas-law-on-social-media-regulation.

e. Foreign Regulators (Digital Services Act)[11]
   i. European Union regulation enacted October 27, 2022 imposes sweeping regulations on digital services.
   ii. Extraterritorial reach applies to U.S. companies doing business in the E.U.

Our upcoming webinar will include a discussion of these complex topics. Please mark your calendars for late March and we will update you with a link as soon as the podcast becomes available.

[11] https://www.wsgr.com/en/insights/european-union-adopts-flagship-digital-services-act.html.