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A SPECIAL CLIENT ALERT[1]

THE 2020 PRESIDENTIAL ELECTION: Politics And Telecommunications

"The Death of the Good Samaritan (maybe)"
(Section 230 of the Communications Act)

Guest Editorial
by
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Preface

As a post-script to our recent Alert on the 2020 Presidential Election[2] – now only two weeks away - we are privileged to publish a guest editorial on one of the most controversial issues haunting it: the blocking of political content on certain media platforms in reliance on Section 230 of the Communications Act. Originally introduced by Representatives Chris Cox and Ron Wyden as "The Internet Freedom and Family Empowerment Act," Section 230 essentially immunizes Internet providers from publisher liability when blocking the access of children to pornography and similar objectionable content. Republican lawmakers have charged that the "moderating" of the President's messages and pro-Trump news on social media sites by Twitter, Google and Facebook amounts to political censorship.[3]

By Executive Order, the Federal Communications Commission ("FCC") has begun a proceeding reexamining Section 230's liability shield for the Internet giants.[4] Congressional hearings on this topic are expected to follow. Most controversial at this juncture: The alleged suppression of news reports discussing former Vice President Biden's son, Hunter Biden, and his dealings in the Ukraine and China.

To better understand Section 230 at the heart of this crucible, we offer the following from one of the "authors" of Section 230 - our friend, world-class lawyer and former colleague, Bob Butler[5] who, as a partner at Wiley Rein LLP, represented Prodigy Services Company in a coalition of online companies conducting negotiations over legislative attempts to ban pornography on the Internet through the Communications Decency Act ("CDA"). That effort eventually led to the passage of Section 230, including its Good Samaritan immunity provision. Bob discusses the current controversy surrounding this code section from both a historical perspective and as an eye-witness to its legislative intent. With our thanks, we are pleased to publish his editorial, "The Death of the Good Samaritan (maybe)" – along with the text of Section 230 – below. Enjoy!

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[2] Sapronov & Associates, P.C. client alert, *"A Special Political Alert, The 2020 Presidential Election, Politics and Telecommunications,"* dated October 16, 2020 and available at http://wstelecomlaw.com/client-alerts/. We take this opportunity to also thank our Law Clerk, Nikita Zlatopolsky, for his research and contributions to this alert.

[3] Cole, Christopher. "House GOP Demands Hearing On Social Media Bias." *Law360*, 20 Oct. 2020, 7:55 PM, www.law360.com/telecom/articles/1321242/house-gop-demands-hearing-on-social-media-bias?nl_pk=735e8396-8e4f-4241-aafb-172d0d3b674b.

[4] Johnson, Thomas M. "The FCC's Authority to Interpret Section 230 of the Communications Act." *Federal Communications Commission*, 21 Oct. 2020, 10:30 AM, www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act.

[5] Now retired, Bob was Of Counsel to our Firm from 2008 – 2013.

THE DEATH OF THE GOOD SAMARITAN (maybe)?

The current controversy over the censoring of news reports about the Hunter Biden emails by Twitter and Facebook threatens the existing immunity of online companies from liability for content posted by others on their Internet platforms.

Trying to "balance" personal safety versus quality of life if your isolated family members wither, and your favorite restaurants and bars close for nonsupport during the Covid-19 pandemic is an unfortunate hallmark of 2020. A similar conundrum is facing those interested in the health and vibrancy of today's online world. Back in 1996 the balance was clear, and we were able to convince an initially hostile Congress that the nascent Internet merited protection for the good of all, even where it presented a risk for the distribution of harmful content.

The unprecedented success of the Internet has proven us to have been absolutely correct in our analysis back then. But like almost everything else in 2020, things have changed. Some historical perspective will be helpful to understand the implications of the current controversies involving Twitter's and Facebook's censorship of reports regarding the alleged Hunter Biden emails for a seminal piece of Internet legislation, Section 230 of the Communications Act.

Enacted in 1996, Section 230 reflected bipartisan agreement that, unlike under prior law, interactive computer services like Twitter, Facebook and Google should not be held liable for defamatory comments posted by others on their platforms simply because they screen such comments to protect kids from four letter words. That legislation overturned the Stratton Oakmont v. Prodigy decision that had held Prodigy liable for wholly unrelated statements about a financial services company simply because it exercised such pro-family screening efforts. Back then, we understood that online service providers could not review and approve all posts on their platforms, but also that their efforts to protect children should not be deterred by increased, crippling liability exposure.

However, our underlying assumption may no longer be correct. Facebook and Twitter now boast of computer algorithms and so-called "outside fact checkers" capable of detecting and removing posts that assertedly violate their terms of service. The exercise of such editorial judgment goes far beyond the protection of children from pornography and similar objectionable material that we sought to immunize in Section 230. Indeed, it arguably moves those entities into the category of "information content provider" for all of the information on their platforms under Section 230, thus leaving them exposed to liability for such information.

It is one thing for media companies like the New York Times, CNN and Fox to exhibit their own editorial bias in their news reporting and commentaries, and be held liable for everything they publish and broadcast; it is another for ubiquitous social media platforms like Facebook and Twitter to actively censor certain viewpoints, particularly those inconsistent with their corporate and employees' political preferences, yet assert immunity for the content they display. Unfortunately, as set out above, I believe that their claimed ability to do so with impunity rests in large part on their and numerous courts' misinterpretation of the scope of our 1996 efforts to exempt them from liability for protecting children.

The outcry against the tech behemoths' censorship efforts has been intense and widespread. The President has issued an Executive Order against online censorship. Justice Thomas recently observed in a statement accompanying the denial of a petition for certiorari in MALWAREBYTES, INC. v. ENIGMA SOFTWARE GROUP USA, LLC., No. 19–1284, that he believes it is time to reexamine online companies' assertions of immunity under Section 230. (I have suggested my view of where that reexamination might lead above.) The Department of Justice has examined the issue and sent recommendations to Congress to narrow the scope of the immunity. Multiple pieces of legislation have been introduced in Congress to clarify Section 230 and establish platform neutrality.

Further, the CEOs of Twitter and Facebook are being summoned to testify before Congress to defend their censorship policies. The Federal Communications Commission has announced an investigation under Section 230. A complaint for improper in kind political contributions to the Biden campaign for suppressing the Hunter email story has been filed at the Federal Election Commission. Commenters have suggested that the Federal Trade Commission investigate these companies for violation of their terms of service. Still others have called for action against their failure to effectively ban hate speech. And, of course, various antitrust actions to break them up remain ongoing or threatened. Accordingly, those with an interest in these issues will have plenty of forums from which to choose.

Notably, like in 1996, many of these efforts are bipartisan. No matter their political persuasion, many are concerned by the concentration of economic and censorship power in the social media giants of today. What may be most intriguing is the speculation that, if their Section 230 immunity is limited or eliminated, these companies may find themselves under potentially fatal legal assaults from the same liberal cancel culture they are accused of supporting. We shall see … the fate of the Internet as we know it and democracy itself may lie in the "balance."

Robert J. Butler, Esq.
(Retired)

ATTACHMENT "A"

Section 230 of The Communications Act of 1934 (as amended) Including the "Good Samaritan" Provision

47 U.S.C. § 230 - Protection for private blocking and screening of offensive material

(a) FINDINGS - The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b)POLICY It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

(1) TREATMENT OF PUBLISHER OR SPEAKER - 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.

(2) CIVIL LIABILITY - No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE
A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) EFFECT ON OTHER LAWS

(1) NO EFFECT ON CRIMINAL LAW - Nothing in this section shall be construed to impair the enforcement of section 223 or231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW - Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW - Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW - Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON SEX TRAFFICKING LAW - Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) DEFINITIONS - As used in this section:

(1) INTERNET - The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE - The term "interactive computer service" means any information service system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER - The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER - The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)