

# Digital Content Next

Legal and Legislative Committee  
October 17, 2017

## Agenda

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- Legal and Legislative Day NYC - November 9
- Section 230's Relevance For Digital Publishers

**12 Noon to 2:30 PM (new time)**

Thursday, November 9

Hearst Building

300 W 57th Street, NYC

- Closed-door, DCN members-only event
- Goal to foster conversation on key policy issues between business executives and lead legal/policy personnel
- RSVP to [chris@digitalcontentnext.org](mailto:chris@digitalcontentnext.org)

### Agenda

- 2018 Legislative and Regulatory Landscape (Panel)
- Economic Climate for Publishers
  - Presentation by Jason Kint, CEO, DCN
- Update on Coalition for Better Ads
  - Presentation by Chuck Curran, Venable

# Section 230's Relevance For Digital Publishers

A Presentation to Digital Content Next's Legal and Legislative Committee

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\*Views expressed herein are personal and not on behalf of the firm or any of its clients.



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## Quick Overview of 47 U.S.C. § 230

- Enacted in 1996 as part of the Communications Decency Act, which in turn was part of the Telecommunications Act of 1996
- Aside from First Amendment, most important federal law protecting online free speech and innovation
- Construed by courts for two decades as a broad immunity for online intermediaries from liability for harms arising from 3rd-party content
- Where applicable, a powerful tool for quickly short-circuiting lawsuits



## Quick Overview of 47 U.S.C. (cont.)

- By far the most frequently invoked component is § 230(c)(1). Three necessary elements for asserting this defense are:
  - Defendant is a “provider or user of an interactive computer service.”
  - Plaintiff’s claim concerns 3rd-party content – that is, the aspect of the content claimed to be harmful or unlawful was neither “created nor developed,” even partly, by the Defendant.
  - Plaintiff’s claim seeks to “treat” the Defendant as “the publisher” of that content.
- A second, much less used, component is § 230(c)(2).
  - Bars suits that seek to impose liability for “good faith” actions to block or remove objectionable content
  - Mainly protects online platforms from legal challenges by their own users.



## Quick Overview of 47 U.S.C. § 230 (cont.)

- Paradigm Defendants: ISPs, websites that host 3<sup>rd</sup> party content, social media platforms.
  - Yet statutory language can encompass anyone who provides or uses the Internet or a service that provides access to multiple computers
- Paradigm Claims: Defamation, Invasion of Privacy, etc.
  - Yet courts have held the statute provides immunity for a wide range of state law and federal law claims, including, for example:
    - Infliction of emotional distress claims
    - Wrongful death claims
    - Civil claims based on child pornography
    - Civil claims based on federal terrorism laws
    - Civil claims based on federal civil rights and fair housing laws
    - Claims based on federal sex trafficking laws



## Quick Overview of 47 U.S.C. § 230 (cont.)

- Congress has twice expressly endorsed broad application of § 230.
  - 2002: committee report on “Dot Kids” Act said decisions to date, including landmark *Zeran v. AOL*, were correctly decided.
  - 2010: SPEECH Act blocks enforcement of inconsistent foreign judgments.
- Several narrow exceptions to immunity spelled out in § 230(e). No immunity from:
  - “enforcement” of (i.e., prosecution under) any federal criminal law
  - claims under any intellectual property law (mainly copyright and trademark law)
  - claims under federal or state “Communications Privacy” laws
- SESTA would limit Section 230’s reach mainly by adding a new exception for private lawsuits and State AG actions accusing platforms of facilitation of sex trafficking.

## Why Does Section 230 Matter to Digital Publishers?

- Defense to claims based on user comments or other 3<sup>rd</sup>-party content appearing on, or disseminated through, the publisher's platform.
  - But see *Huon v. Denton* (7<sup>th</sup> Cir. 2016) (refusing to dismiss claims based on user comments posted on Gawker-related website based on speculation that some of the comments were anonymously authored by a Gawker employee)
- Potential defense to claims based on content originating with “freelancers” or independent contractors.
  - Precedent: Sydney Blumenthal's defamation suit against AOL and Matt Drudge
    - Held AOL to be immune from content Drudge created and provided to AOL for \$.
    - AOL affirmatively promoted Drudge's “runaway gossip column.”
    - Drudge's sole source of income then was royalty from AOL.
    - Case turned on Drudge's status as an “independent contractor.”
    - Decided by a lower federal court in D.C.; no certainty other courts will follow.



## SESTA Legislation: What Is Its Motivation?

- For 20 years, legislators and governmental actors have largely accepted, and not called to cut back, broad immunity under § 230.
- Main counter-example, however, has stemmed from sites hosting ads alleged to promote prostitution and cause sex-trafficking of minors.
  - State AGs' pursuit of craigslist for its “Erotic Services” and “Adult Services” ad categories prompted craigslist to close those categories.
  - Backpage.com seems to aggressively fill the vacuum.
  - State AGs' efforts against Backpage gain little traction, based on § 230.
  - State AGs' calls to amend § 230 generate noise but not much traction.
  - Civil litigation by victims against *Backpage* mostly fails based on § 230.
  - Jan. 2017: SCOTUS declines to review 1<sup>st</sup> Cir. in *Doe v. Backpage*.

## SESTA: “Stop Enabling Sex Traffickers Act of 2017”

- Second bill targeting Backpage in two years
  - 2015 SAVE Act amended federal criminal sex-trafficking law (18 U.S.C. § 1591) to apply to those who knowingly or recklessly advertise in support of sex trafficking.
  - Because enforcement of federal criminal laws are excepted from § 230, it did not alter the scope of immunity.
- SESTA introduced on Aug. 1, 2017 as S.1693 by Sen. Portman
  - 34 Cosponsors
  - House counterpart: “Allow States to Fight Online Sex Trafficking Act,” H.R. 1865
  - At least two rounds of hearings in Senate so far
  - Momentum on Capitol Hill?
- Two significant policy impacts:
  - Arguably expands scope of acts and actors subject to federal prosecution
  - Creates new exceptions to Section 230 immunity



## SESTA Arguably Expands Liability Under The Federal Criminal Anti-Trafficking Law

- By defining a single, previously undefined term – “participating in a venture” – it seems to expand the actors and actions that may violate 18 U.S.C. § 1591.
  - Relevant subsection of SESTA is titled: “Ensuring Federal Liability for Publishing Information Designed To Facilitate Sex Trafficking . . . .”
  - Existing § 1591 prohibits not only those who engage directly in illegal sex trafficking (including by advertising it), but also anyone who knowingly “benefits,” financially or otherwise, from “participation in a venture” that has done so.
  - SESTA would define “participation in a venture” to include “knowing conduct by an individual or entity, by any means, that assists, supports, or facilitates the [direct] violation . . . .”
  - This change obviously targets Backpage, but some have argued that “facilitates” language could lead to prosecutions of a broader range of platforms.



## What Would SESTA Do to Section 230?

- Add, as a new “policy” objective, “ensur[ing] vigorous enforcement of Federal criminal and civil law relating to sex trafficking.”
- Create new exception for “State criminal prosecution or civil enforcement action targeting conduct that violates” federal criminal anti-trafficking laws. (proposed § 230(e)(1)(B))
  - Would open door to State AG criminal and civil claims barred under current law.
  - Arguably also would open door to civil suits under state law by persons alleging harm from conduct that allegedly also violated a federal sex-trafficking law.
- Creates new exception for civil claims under 18 U.S.C. § 1595, the civil remedy provision for victims of conduct violating federal anti-trafficking laws. (proposed § 230(e)(5))



## Why Is SESTA Problematic for Platforms?

- Of course sex trafficking is a horrific and intolerable crime that must be stopped.
  - But would an approach that could have serious impacts on Internet speech and innovation be the right solution?
- Creating a new zone, of uncertain scope, in which State AGs and civil litigants can haul online platforms into court, would risk the very sorts of harms Section 230 was enacted to avoid.
  - Cause platforms, out of fear of liability, to cut-off ordinary users from lawful speech
  - Create disincentive to responsible self-policing (“head in sand”)
  - State AGs and civil claimants are far more likely than federal prosecutors to pursue groundless claims in hopes of coercing unjustified settlements.
  - Discovery and other litigation costs could be huge for responsible platforms.
  - Given the extraordinarily volume of content flowing online, platforms face “death by ten thousand duck-bites.” (Kozinski, J., in *Roommates.com*)



## Countervailing Considerations

- Rationales offered in favor of amending § 230 include:
  - Sex trafficking is so heinous, and has been so difficult to control, that an exception to a foundational law protecting online speech is warranted.
  - Legislation reasonably targeted at this particular problem may relieve pressure to curtail statutory immunity more generally.
  - Certain large platforms have become so dominant, and are so successful, that special protections needed 20 years ago can/should be curtailed.
    - But what about the next generation(s) of innovative start-ups?



Questions?

## Section 230 – Members-only Discussion

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