

Legal Shield for Social Media Is Targeted by Trump

Section 230, from a 1996 federal law, was meant to protect young internet companies from liability. Lawmakers have threatened to change it.



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When the most consequential law governing speech on the internet was created in 1996, Google.com didn't exist and Mark Zuckerberg was 11 years old.

The federal law, Section 230 of the Communications Decency Act, has helped Facebook, YouTube, Twitter and countless other internet companies flourish.

But Section 230's liability protection also extends to fringe sites known for hosting hate speech, anti-Semitic content and racist tropes like 8chan, the internet message board where the suspect in the El Paso shooting massacre last August posted his manifesto.

The First Amendment protects free speech, including hate speech, but Section 230 shields websites from liability for content created by their users. It permits internet companies to moderate their sites without being on the hook legally for everything they host. It does not provide blanket protection from legal responsibility for some criminal acts, like posting child pornography or violations of intellectual property.

As scrutiny of big technology companies has intensified in Washington over a wide variety of issues, including how they handle the spread of disinformation or police hate speech, Section 230 has faced new focus.

Last year, Senator Ted Cruz, Republican of Texas, said in a hearing about Google and censorship that the law was "a subsidy, a perk" for big tech that may need to be reconsidered, and Speaker Nancy Pelosi of California called Section 230 a "gift" to tech companies "that could be removed."

Now, President Trump is aiming to curtail the protections that Section 230 gives to social media companies with an executive order. The order could be signed as soon as Thursday, and the draft, which refers to what it calls "selective censoring," would allow the Commerce

Department to try to refocus how broadly Section 230 is applied.

Here is an explanation of the law's history, why it has been so consequential and whether it is really in jeopardy.

So why was the law created?

We can thank “The Wolf of Wall Street.”

Stratton Oakmont, a brokerage firm, sued Prodigy Services, an internet service provider, for defamation in the 1990s. Stratton was founded by Jordan Belfort, who was convicted of securities fraud and was portrayed by Leonardo DiCaprio in the Martin Scorsese film about financial excess. An anonymous user wrote on Prodigy's online message board that the brokerage had engaged in criminal and fraudulent acts.

The New York Supreme Court ruled that Prodigy was “a publisher” and therefore liable because it had exercised editorial control by moderating some posts and establishing guidelines for impermissible content. If Prodigy had not done any moderation, it might have been granted free speech protections afforded to some distributors of content, like bookstores and newsstands.

The ruling caught the attention of a pair of congressmen, Ron Wyden, a Democrat from Oregon, and Christopher Cox, a Republican from California. They were worried the decision would act as a disincentive for websites to take steps to block pornography and other obscene content.

The Section 230 amendment was folded into the Communications Decency Act, an attempt to regulate indecent material on the internet, without much opposition or debate. A year after it was passed, the Supreme Court declared that the indecency provisions were a violation of First Amendment rights. But it left Section 230 in place.

Since it became law, the courts have repeatedly sided with internet companies, invoking a broad interpretation of immunity.

Last July, the United States Court of Appeals for the Second Circuit affirmed a lower court's ruling that Facebook was not liable for violent attacks coordinated and encouraged by Facebook accounts linked to Hamas, the militant Islamist group. In the majority opinion, the court said Section 230 “should be construed broadly in favor of immunity.”

Why is the law so consequential?

Section 230 has allowed the modern internet to flourish. Sites can moderate content — set their own rules for what is and what is not allowed — without being liable for everything posted by visitors.

Whenever there is discussion of repealing or modifying the statute, its defenders, including many technology companies, argue that any alteration could cripple online discussion.

The internet industry has a financial incentive to keep Section 230 intact. The law has helped build companies worth hundreds of billions of dollars with a lucrative business model of placing ads next to largely free content from visitors.

That applies to more than social networks like Facebook, Twitter and Snapchat. Wikipedia and Reddit depend on its visitors to sustain the sites, while Yelp and Amazon count on reviews for businesses and products.

More recently, Section 230 has also provided legal cover for the complicated decisions regarding content moderation. Facebook and Twitter have recently cited it to defend themselves in court when users have sued after being barred from the platforms.

Many cases are quickly dismissed because companies assert they have the right to make decisions on content moderation as they see fit under the law.

What are the problems with the law?

The criticisms of Section 230 vary. While both Republicans and Democrats are threatening to make changes, they disagree on why.

Some Republicans have argued that tech companies should no longer enjoy the protections because they have censored conservatives and thereby violated the spirit of the law, which states that the internet should be “a forum for a true diversity of political discourse.”

Facebook, Twitter and Google, which runs YouTube, which are the main targets for bias claims, have said they are baseless.

On the flip side, some Democrats have argued that small and large internet sites aren't serious about taking down problematic content or tackling harassment because they are shielded by Section 230.

Mr. Wyden, now a senator, said the law had been written to provide “a sword and a shield” for internet companies. The shield is the liability protection for user content, but the sword was meant to allow companies to keep out “offensive materials.”

However, he said firms had not done enough to keep “slime” off their sites. In an interview with The New York Times last year, Mr. Wyden said he had recently told tech workers at a conference on content moderation that if “you don’t use the sword, there are going to be people coming for your shield.”

There is also a concern that the law’s immunity is too sweeping. Websites trading in revenge pornography, hate speech or personal information to harass people online receive the same immunity as sites like Wikipedia.

“It gives immunity to people who do not earn it and are not worthy of it,” said Danielle Keats Citron, a law professor at Boston University who has written extensively about the statute.

Is Section 230 in jeopardy?

The first blow came in 2018 with the signing of a law that creates an exception in Section 230 for websites that knowingly assist, facilitate or support sex trafficking. Critics of the new law said it opened the door to create other exceptions and would ultimately render Section 230 meaningless.

Ms. Citron, who is also vice president of the Cyber Civil Rights Initiative, a nonprofit devoted to combating online abuse, said this was “a moment of re-examination.” After years of pressing for changes, she said there was more political will to modify Section 230.

Senator Josh Hawley, a Republican from Missouri and a frequent critic of technology companies, introduced a bill last June that would eliminate the immunity under the law unless tech companies submitted to an external audit that their content moderation practices were politically neutral.

While there is growing political will to do something about Section 230, finding a middle ground on potential changes is a challenge.

“When I got here just a few months ago, everybody said 230 was totally off the table, but now there are folks coming forward saying this isn’t working the way it was supposed to work,” said Mr. Hawley, who took office in January 2019.