Censorship, Fake News, and Viewpoint Discrimination: What is the role of the government versus market forces in enabling free and responsible speech?

Amy R. Lee

608 Broadhead Drive

Midland, MI, 48642

leear@midlandps.org

(989)-948-5713

12th Grade, H. H. Dow High School

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Since 1996, the legal frontiers of the internet have been predominantly shaped by 26 words. The law in question? Section 230. The boon bestowed by this law has spurred many ordinary folks to explore and tinker around with creating online blogs. Meta, Twitter, and TikTok all rose to global prominence benefitting from the expansive Section 230 legal protections. These platforms allowed people around the world to connect and share exciting news, common interests, or cat memes. Internet platforms offered an unprecedented level of communication to anywhere or anyone around the globe.

28 years since then, a Pew Research Center study notes "Democrats and Republicans are farther apart ideologically today than at any time in the past 50 years" (DeSilver, 2022). What happened? Indubitably social media has played a significant role in the greater polarization, as several studies (Bavel et al., 2021) have shown evidence of echo chambers, a result of people seeking out similar political views. Fortunately, in a study conducted by Allcott, Gentzkow, and Yu (2019), researchers recorded user interaction among scam websites for 3 consecutive years and noticed that Meta significantly decreased fake news diffusion by 60% compared to its counterpart—Twitter (p.1). Although Meta's algorithm tweaks don't comprehensively address the major misinformation crisis, social media companies show potential in being responsive and industrious with their efforts to mitigate the dispersion of fake news.

However, rarely are people satisfied with incremental progress. Some are advocating for the government to step in and impose more regulations on businesses. Two new and ongoing Supreme Court cases—*Gonzalez v. Google* and *Twitter, Inc. v. Taamneh*—address concerns about these tech giants hosting pertinent information for terrorists to assimilate. At the core of the issue

lies responsibility: who is to be held accountable for the content on the platform? Currently, Section 230 grants companies intermediary status, which means they are released of any liabilities over a user's content.

In this essay, through careful analysis of business models, incentives, and speech rights, it is determined that the government needs to take a bigger role in enabling free and responsible speech. Specifically, a reform of Section 230, considered to be the Magna Carta of the internet, is overdue.

Understanding Section 230

Section 230 can be found in the Telecommunications Act of 1996 underneath the Communications Decency Act. In regards to content, there are two protections that have been subject to much deliberation. In Section 230(c)(1), it states, "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" (47, 1996). Essentially, it demarcates the boundary between a publisher and distributor and establishes internet platforms as the latter. Hence, platforms aren't liable to anything stated in the claims posted by users.

Section 230(c)(2) grants a different protection: "No provider or user of an interactive computer service shall be held liable on account of—any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be … objectionable" or "any action taken to enable or make available to information content providers or others the technical means to restrict access to material" (47, 1996). This section was created to encourage platforms to develop their own means of moderation without litigation concerns.

Upon acquaintance with the content, it is important to know what prompted the creation of Section 230. Over judicial history, there has been much deliberation about who is responsible

for illegal speech. Through a monumental court case, *Smith v. California,* it was established that bookstores hold no liability for the content contained inside the books. Through similar court cases, there arose a significant distinction between publishers and distributors. However, as the internet gained in popularity, it brought a new format of media available to the public.

There existed a moment in time where there were no intermediary laws regarding online content. For a while, judicial courts had to judge based on outdated legal precedents. There was an undefined legal gray area: are internet companies considered distributors or publishers? Two judicial court cases, *Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services Co.* started addressing the issue of liability in the online realm. In the former, the defendant was treated as a distributor, whereas in the latter the defendant was considered a publisher.

In response to the two conflicting cases, Congress sought to clarify matters and passed provisional legislation that would allow internet companies to focus on innovation without worrying about legal liabilities in 1996. Ideally, it would allow companies full freedom to remove harmful content while still promoting free speech with diverse opinions. It's become the "central piece of legislation governing online intermediary liability in the United States" (Johnson & Castro, 2021).

However, judiciary courts have taken this "Good Samaritan" law and interpreted it beyond its legal means. Bad actors have taken advantage of the broad protections and stretched its boundaries. Court cases have dismissed platforms that hosted malicious activity upon the basis of Section 230. A review of proper jurisdiction is currently in the process (Gonzalez v. Google and Twitter, Inc. v. Taamneh) which will further resolve the varied interpretations of Section 230.

I. Change in Mission

The first observation is a conflict of interest in regards to a company's business model and promoting a free and responsible speech platform. Many social media companies were born out of the desire to create a platform for free expression. They all had strong aspirations in helping people discover ideas and people by leveraging power the internet had in comparison to media companies based in print, radio, television, or cable. Creating an account on major social media platforms is free, but how do the companies pay for maintaining infrastructure and employee salaries? Mostly through advertisement. In 2020, 97.9% of Meta's global revenue consisted of advertising (Dixon, 2023).

It has been shown that people react more strongly to items that make them angry in the social network setting (Fan et al., 2014). Such insights are not novel to companies, as they leverage this behavior by highlighting such content to garner more revenue. In fact, their level of data mining has developed beyond basic means (e.g. race, wealth, age, and interests) to much more comprehensive data: combining offline with online data and lookalike-audience targeting (Wei et al., 2020). Companies operate on a behavioral advertising business model—it's always in their best interest to amplify interesting or provocative content.

This business model has attracted the attention of the Federal Trade Commission (FTC). In fact, former member Rohit Chopra recognized that this model is the "root cause of widespread and systemic problems" (Franks & Citron, 2020). Consumers and their actions on the platforms become assembled data points for marketing companies. Tech companies may even be inversely incentivized and end up ignoring or aggravating online abuse.

However, there have been instances where companies moderated and filtered content. These small steps signify great potential in future filtering and moderating capabilities.

Unfortunately, these features were implemented almost always at the behest of the European Commission (Franks & Citron, 2020). They have banned types of content considered online abuse but only when urged to by lobbies formed by users, advocate groups, and advertisers. This solution only partially addresses the overwhelming problem with online abuse. Businesses still continue to turn a blind eye towards negative content because it provides revenue in the form of greater interaction, clicks, and shares.

II. Lack of Compelling Incentive

The second observation is the lack of strong incentives to encourage the market to harness greater resources towards content moderation policy and enforcement. There are scores of people who have strong confidence in a laissez-faire approach towards the social media market. They espouse the ideas of the free market, stating that Section 230 allowed great innovation and advancements made in the internet age. Section 230 provided broad protection. Under the Act, companies thrive without the worry of liability.

Although Section 230 allowed companies like Meta and Twitter to flourish, it has also allowed platforms that operate on online abuse to flourish. A Pew Research Center survey conducted in 2020 notes that 41% of Americans have experienced some form of online harassment (Vogels, 2021). Even worse, more severe harassment has become more common since 2017 (Vogels, 2021). Not addressing online abuse leads to a plethora of consequences for the victims: emotional distress, job loss, or physical relocation (Franks & Citron, 2020).

With these issues in mind, free market advocates reason that as long as the market remains competitive, then these issues will resolve without need of government intervention. Over time, the platforms will evolve and develop proper responses towards these heavy issues, such as improved filters and better content moderation techniques. But given that Section 230

grants protection for companies to moderate and remove content, why haven't they developed such techniques in an extensive manner? The answer lies in the previous point of contention: the companies choose to optimize and hone the art of advertising. The customers of the social media market are data companies, not the users on the platforms.

Under Section 230, these platforms are merely considered as intermediaries. They are not subject to any liabilities made by third parties using the platform. Judicial courts have consistently ruled in favor of the companies. In general, courts have found preemption (nullifying a state law due to collision with Section 230) for at least one claim in approximately 60% of the decisions (Ardia, 2010, pg.435). With great power comes great responsibility is a well known maxim. Unfortunately, with Section 230 social media platforms benefit from all of the power, while acquiring no responsibility. It's clear there needs to be better lawful incentives to encourage more companies to look into improving moderation techniques.

III. Changes Made to Section 230 Will Not Infringe Free Speech

This section serves to allay the major fear that permeates Section 230 absolutists: revoking free speech rights on the internet. Court jurisdictions have already broadened the scope of the interpretation of Section 230. Rights granted to companies have extended well beyond what would be accepted according to the First Amendment.

The Dirty (an online rumormill blog) is such an instance of Section 230 abuse. Nik Richie, the owner, created the site to contain a plethora of posts that have images showing inappropriate images of people. Courts have dismissed cases against Richie to hold him accountable for defamatory content that caused emotional, physical, and financial problems (Citron & Wittes, 2017). Writing defamatory content is not protected under the First Amendment, leading some to claim that Section 230 is a better version of the First Amendment.

The Dirty is not a unique case, with the internet it has become easier to commit acts of abuse. Malicious actors can preserve their identity by hiding under the guide of anonymity. With the internet, large scale attacks on people or corporations have become easier to accomplish. Rumors run rampant. The web has become a double-edged sword that provides information at an unprecedented magnitude, but also lowered the barrier for committing attacks of hate such as discrimination, harassment, and threats. The most affected people are marginalized groups: women and people of color. To them, censorship is not a foreign concept. These same groups often battle against government censorship in real life. There exists unequal free speech rights on the internet.

To some it may be surprising that more regulation may promote better discussion. In a study conducted in 2017, it was found that media regulation may actually encourage more speech and expression by common targets: women. (Penney, 2017) The author notes that when women feel the environment is safer, they are willing to participate more by sharing, speaking, and engaging online (Penney & Citron, 2018). Similar principles would apply to others, especially those considered as racial minorities. Contrary to a 230 absolutist's belief, more laws can lead to more freedom in expression and sharing among a greater breadth of the population.

Potential Solutions

There exists a wide variety of proposals that have been suggested (Anand et al., 2019) from completely repealing Section 230 to restricting certain activities protected under Section 230 such as online pharmaceutical websites, nonconsensual child photography, and unsolicited emails (Reidenberg et al., 2012). Striking a balance between maintaining First Amendment rights yet accelerating a company's development in proper moderation will be difficult to achieve but is

plausible. The current legislation provides many broad protections for companies that need to be revised.

Both Republicans and Democrats recognize the issue and much different legislation has been written about. For instance, the Platform Accountability and Consumer Transparency Act (PACT Act) is a bipartisan bill that was constructed in the hopes to "increase accountability for big internet platforms and enhance transparency regarding content moderation for online consumers" (Thune, 2021). It was conceived from Republican Senator John Thune along with Democrat Brian Schatz. They recognize the urgency and growing need for greater transparency in content moderation practices. The PACT Act would require sites to inform users of their moderation methodology, explain their reasons behind removing user posted material, and require an appeals process. This Act sets a good framework to provide negative legal incentives for companies to address and establish a better platform for free and responsible speech.

Ultimately, the government should only intervene in a market if businesses are not prioritizing innovation for their customers. The market forces have coerced platforms to innovate and receive money for the real clients: advertisers. It is time for the government to put legal consequences that galvanize companies to spend greater efforts in moderation. A good first step would be governments merely requiring greater proof of effort towards content moderation, not dictating certain criteria. The government is not designed to make decisive choices quickly, it makes choices thoughtfully and deliberately. Meanwhile, companies are resourceful enough to determine the appropriate policy on their own. The internet is still growing at an increasing rate, thus only the framework of a business is quick enough to adapt.

Conclusion

Although social media companies advertise their platforms as an outlet for people to communicate, express, and find novel ideas, its profits are driven by consumer data and advertisement. In the end, spending more money on content moderation is money inefficiently allocated. Additionally, current measures cannot solve problems of free speech inequality, as the jurisdiction for Section 230 gave companies benefits that extend beyond the First Amendment. Modifications to Section 230 will not limit the First Amendment, but rather improve rights for marginalized populations as more regulations allow a greater diversification of perspectives to be shared. It's time companies start serving the interests of the public by maintaining a responsible platform.

With the recent renewed interest in tech giants, the ruling of Gonzalez v. Google and Twitter, Inc. v. Taamneh will be closely followed by tech companies, as it could shape the future of the internet. Awareness of the problem has led to action. The jurisdiction of the Supreme Court has great potential to correct the path of extreme lenience that previous courts have granted to companies.

While the government need not oversee the entire moderation process (as the criteria is left to the company's discretion), it's time for the government to enforce stricter regulations on platforms to encourage better moderation practices. In turn, as long as companies demonstrate they have reasonable content moderation established, they should enjoy the intermediary benefits acknowledged by Section 230.

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