Shaking Up The Fundamental Laws Of US Internet

By **Susan Goldsmith** (July 14, 2020)

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Your recent news feed likely has included a lot of alarmed chatter about an executive order[1] threatening to end certain protections for social media platforms.

Given the onrush of other news, you probably missed several additional internet-related developments, including a report[2] from the U.S. Copyright Office recommending changes to the Digital Millennium Copyright Act of 1998.

It's a good time to take a break from the fire hose of the daily news to talk about these fundamental laws of the internet and the movement to shake them up — a movement that predates the current administration and likely will go on into the next.

News about these laws is coming quickly. Some history will give you context for better understanding of legislative proposals and administrative actions.

In the early days of the commercial internet, roughly 25 years ago, Congress determined that the private businesses operating online platforms generally should not be held responsible for legal violations arising from content that originates with others and is posted by users. These platforms — among them tech giants Facebook Inc., Twitter Inc. Google Inc. and YouTube Inc. — make content created by others widely available, and almost anyone can post or upload content.

These and other internet services relied on two highly protective laws.

First, Section 230[3] of the Communications Decency Act of 1996 provides that, in general, these platforms should not be considered publishers, speakers or authors of any information provided by their users, so they are not liable for the content. The platforms are permitted but are not required to restrict access to material that they might consider to be objectionable, "whether or not such material is constitutionally protected." For their own benefit and branding, most of these platforms set up terms of service and community standards for content.

Second, Section 512[4] of the DMCA provides a safe harbor from claims of copyright infringement with a notice and takedown process.

As the internet has matured, frustrations have arisen across the political spectrum.

Over time, Section 230 has been criticized for not requiring the platforms to take action against particular users or with regard to particular subjects. Additionally, exceptions to the safe harbor have been found based on a platform's own conduct.

A leading case is Fair Housing Council of San Fernando Valley v. Roommates.com LLC.[5] Roommates.com matched renters based on mandatory user profiles that included racial information and preferences. The U.S. Court of Appeals for the Ninth Circuit held that these racial profiles violated the Fair Housing Act. By requiring these profiles, Roommates.com became an information content provider and thus was ineligible to receive the protection of

Section 230 for that content.

Then in 2018, the Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act, or FOSTA-SESTA, was signed by President Donald Trump. The goal was to prevent sex trafficking, and the law created the first true exception to Section 230 by making website operators responsible if third parties were posting ads for such sex work. This law has led to Craigslist's removal of its personals page and to many other sites shutting themselves down for fear of prosecution, even for consensual sex-related posts.

That 2018 law has been chilling in its own right, but Section 230 also has come under attack for the way that platforms like Facebook and Twitter have enforced their community standards.

For example, on the political left, there have been complaints about bans on pages that feature editorial cartoons criticizing certain politicians. On the right, conservatives complain about being censored. In the middle, the iconic Pulitzer Prize-winning photo of the Vietnamese girl fleeing napalm was briefly banned for nudity.

There is a cursory appeal process but little or no actual recourse, and it is generally held that these private companies can do as they please with user accounts and posts.

Arguments have been made, particularly by conservatives, that platforms like Facebook and Twitter are places of public accommodation that should be as open and uncensored as the town square. However, these are private companies, not state actors subject to First Amendment constraints. U.S. Supreme Court precedents hold that the hosting of speech by others is not a traditional, exclusively public function.

These First Amendment arguments also run up against the reality that allowing anyone to post anything would result in extremist, dangerous and just plain offensive postings that may be technically legal but might damage the businesses of the platforms.

One recent Ninth Circuit case, Fyk v. Facebook, for example, involved the litigant's objections to Facebook's takedown of his pages that featured photos of people urinating. The owner brought his anti-censorship campaign to "Fox & Friends,"[6] without mentioning those photos, before losing his case.[7] Query whether "Fox & Friends" would have been censoring Fyk if it had declined to host him on the show after fact-checking that content.

Similar cries of censorship are leveled at Google and other search engines that use algorithms to determine search results. Failure to appear on the first Google page of search results basically sends a site to cyber Siberia. We have seen the rise of the search engine optimization industry for businesses, but people also game results for amusement and social commentary. For instance, a Google image search of the word "idiot" produces many photos of Trump.

The other pillar of the legal framework is the DMCA, which has been criticized by both copyright holders and those who feel the process is being abused. Application of the DMCA means that sites like YouTube need not worry about being sued for copyright infringement when users post content that does not belong to them.

The copyright owner can demand a takedown, and there is a process for contesting that takedown. One problem is that there are repeated posts of the same video, and sending takedown notices is burdensome to copyright owners— even for Hollywood studios or TV networks with armies of lawyers. Even removing revenge porn or extremely violent postings

has become difficult or impossible. At the same time, abusive claims of copyright ownership have resulted in takedowns that are not warranted under applicable law.

Enter the Trump administration. The executive order on preventing online censorship issued on May 28, immediately after Twitter slapped a fact-checking label on a presidential tweet, complains about Section 230 as allowing the technology platforms to exercise unfair editorial control over posted content and thus stifling free speech.

Again, this has become a fairly typical complaint from the political right. Editorial control, however, is sanctioned by Section 230 with respect to these private companies, which have their own First Amendment rights. Indeed, the executive order tries to make the kind of public square argument that has been rejected by courts, and no president can make Twitter a state actor.

This fairly toothless executive order does direct federal agencies to review their spending on advertising and marketing paid to online platforms, thought to be a minuscule fraction of the ad spend of any tech giant.

It also asks that the Federal Communications Commission and Federal Trade Commission consider rulemaking to address truthfulness and openness in handling complaints by users.

In my view, the one good thing that could come out of this executive order is that the tech giants might establish better ways to contest being put in "Facebook jail." A little sunshine on that process would not be so bad and may be a way to stave off more serious attacks on Section 230.

And more serious attacks are definitely coming, in the form of proposed amendments to Section 230. After just a few months of study, on June 17, the U.S. Department of Justice delivered to Congress several proposals that are supposedly aimed at protecting children but actually would severely limit the ability of the platforms to operate as they have been doing.[8]

Among other things, the DOJ asks Congress to replace vague terminology in Section 230(c)(2) by removing the ability of the platforms to eliminate otherwise objectionable material and to limit them to being allowed to remove unlawful material or material that promotes terrorism.

To quote the report:

> This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230 — to reduce online content harmful to children — while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms of service simply by deeming it "objectionable."

Of course, this change would not protect children from seeing some materials currently banned by Facebook, such as Fyk's photos of people urinating, provided they are legal. While the recommendation does not stand up to scrutiny, it is going to be taken seriously and may result in limitations on Section 230, so please do watch this space for updates.

The report of the Copyright Office on the DMCA, issued on May 21, is much more rigorous than either the president's executive order or the DOJ recommendations and potentially has consequences that would be just as far-reaching.

The report, which was issued after years of investigation and runs about 200 pages, recommends to Congress legislation concerning, among other things, eligibility qualifications for service provider safe harbors, reformation of repeat infringer policies, changes to the standards for what constitutes knowledge of infringement, and changes in the requirements for takedown notices.

Among its most interesting suggestions is consideration of wholesale takedown mechanisms for copyright infringement. Currently, each posting found by a copyright owner requires its own takedown notice, so repeated postings result in a whack-a-mole game that has been a real problem. The problem might be solved with artificial intelligence or digital fingerprinting.

Another suggestion is establishment of a rapid dispute resolution process similar to the one in which domain name disputes are often handled out of court. We have seen claims of copyright infringement that would have greatly benefited from such a mechanism.

Rapid dispute resolution could also tie in with the proposed small claims copyright court, as approved by the U.S. House of Representatives in 2018 in the Copyright Alternative in Small-Claims Enforcement, or CASE, Act of 2019. That small claims court within the Copyright Office would handle copyright infringement claims from individual creators and small businesses that cannot afford to litigate in federal court. The CASE Act has not been passed by the U.S. Senate.

The question of how to enforce legitimate copyright claims while disallowing false ones is very difficult and deserves serious study. Copyright claims can cover everything from music and poetry to novels to movies to sculptures to cartoons to fabric designs — and all the combinations of those things and much more. The copyright registration process is archaic and takes too long, and compliance is difficult. People making claims often do not understand the difference between trademark and copyright, and those rights are often conflated.

The concept of fair use is extremely challenging, as is the concept of parody. Today, both good and bad claims are submitted under simple, limited forms posted on the websites of tech giants, whose employees make snap decisions on legal rights that affect businesses and individuals. The accused have little recourse. Small wonder there are so many complaints.

Unlike the DOJ's suggestions for changes to Section 230, the Copyright Office is not recommending any wholesale changes to the DMCA. Changes to either law will have to go through the legislative process that starts in congressional committees.

The industry recognizes that there are issues with enforcement of community standards and with management of allegedly infringing posts.

Two organizations were launched on June 17, the very same day the DOJ released its report on Section 230. They are the Trust & Safety Professional Association[9] and the Trust & Safety Foundation Project.[10] The mission of the association is to support the global community of professionals developing and enforcing principles and policies that define acceptable behavior online. The mission of the foundation is to improve society's understanding of trust and safety through educational programs and multidisciplinary research.

These organizations grew out of a conference[11] held in February 2018 on content moderation and removal at scale, featuring people from major industry players discussing then-current policies and procedures. These new organizations, together with lobbyists from the tech industry, will surely provide input for legislation and rulemaking.

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[1] Executive Order on Preventing Online Censorship, 85 Fed. Reg. 34,079 (May 28, 2020).

[2] Copyright Office Releases Report on Section 512: Issue No. 824, Copyright.gov (May 21, 2020), https://www.copyright.gov/newsnet/2020/824.html.

[3] 47 U.S.C. § 230 (2012).

[4] 17 U.S.C. § 512 (2012).

[5] 521 F.3d 1157 (9th Cir. 2008).

[6] Lawsuit Alleges Facebook Devalued Entrepreneur's Page, Fox News, (Aug. 25, 2018), https://video.foxnews.com/v/5826827894001#sp=show-clips.

[7] Fyk v. Facebook, Inc., No. 19-16232, 2020 U.S. App. LEXIS 18714 (9th Cir. June 12, 2020).

[8] Department of Justice's Review of Section 230 of the Communications Decency Act of 1996, The United States Department of Justice, https://www.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited July 2, 2020).

[9] Trust & Safety Professional Association, https://www.tspa.info/ (last visited July 2, 2020).

[10] Trust & Safety Foundation Project, https://www.tsf.foundation/, (last visited July 2, 2020).

[11] Content Moderation & Removal at Scale, Conference at Santa Clara University School of Law (Feb. 2, 2018), https://law.scu.edu/event/content-moderation-removal-at-scale/ (last visited July 2, 2020).