How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act

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[1] I want to thank University of Texas School of Law Professor John Golden for all his help with this article.

In the mid 90's with the internet just beginning to show its true potential, a court decision threatened to stifle it. Not long after, Congress passed Section 230, which removed publisher liability from internet service websites for the content published by their users. Instead of disincentivizing websites from allowing user content, Section 230 promoted websites to grow without fear the of liability for content beyond their control. Today, mainly among conservatives who view that social media companies have too much say in regulating speech regulation, there is a call to reform and do away with Section 230. Wherever you come down on that answer, there is a fundamental misunderstanding about what Section 230 is supposed to do. Section 230 was not constructed to create a neutral field for political thought. Instead, it was created to safeguard the internet and allow it to grow. This paper, however, will not be analyzing that misinterpretation. Instead, it will use that misinterpretation as a jumping off point to examine what Section 230 is and how it came to be. Finally, this paper will conclude by discussing the possible alternatives.

I. Introduction[2]

On November 27, 2018, then United States Senator-elect, Josh Hawley posted to his personal Twitter account:

> The new Congress needs to investigate and find out [why Jesse Kelly was banned from Twitter]. Twitter is exempt from liability as a "publisher" because it is allegedly "a forum for a true diversity of political discourse." That does not appear to be accurate.[3]

He has since added that "[w]ith Section 230, tech companies get a sweetheart deal that no other industry enjoys: complete exemption from traditional publisher liability in exchange for providing a forum free of political censorship . . . Unfortunately, and unsurprisingly, big tech has failed to hold up its end of the bargain."[4]

In April of 2018, Senator Ted Cruz expressed a similar concern, while questioning Mark Zuckerburg, the CEO of Facebook, he asked:

> The predicate for Section 230 immunity under the [Communications Decency Act] is that you're a neutral public forum. Do you consider yourself a neutral public forum, or are you

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[2] This article was written and submitted for review on February 2, 2020. This submission was prior to President Trump's tweets being flagged by Twitter as violating its terms of service for inciting violence, and prior to his Executive Order addressing Section 230; See Executive Order on Preventing Online Censorship (May 28, 2020), Exec. Order No. 13925, 85 FR 34079 (2020).

[3] Josh Hawley (@HawleyMO), Twitter (Nov. 27, 2018, 12:22 PM), https://twitter.com/HawleyMO/status /1067483747526815752 (expressing his opinion after Jesse Kelly, a former US soldier, was kicked off of Twitter).

[4] Hawley, Josh, *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies* (Jul. 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies, (last visited on Nov. 5, 2019).

> engaged in political speech, which is your right under the First Amendment[?][5]

Senators Cruz and Hawley are not the only voices to question political bias as a "predicate for Section 230 immunity" that allows social media companies to escape "liability as a publisher."[6] However, there is one big issue with this common concern that some elected officials have raised—Section 230 of the Communications Decency Act does not have a publisher versus platform dichotomy and nowhere does it state anything about social media websites being neutral or "a forum for a true diversity of political discourse."[7] Instead, what Section 230 actually does is let internet companies, like Facebook, Twitter, or really any website with a comment section, behave as a "Good Samaritan" and moderate what users of their platforms post while being immune from liability for illegal content.[8]

Section 230(c)(1) is only twenty-six words long and written in fairly understandable English for a federal statute.[9] Senator Hawley and Senator Cruz are both highly educated lawyers, yet they so clearly misread the meaning of Section 230. So, where does this misinterpretation come from? Mainly two sources.[10] First, Section 230 was largely written against the backdrop of *Stratton Oakmont v. Prodigy* thatwas largely about the liability an online forum faces for the defamatory statements made on its platforms.[11] *Stratton* specifically dives into the distinction between a platform/distributor, which has no liability for the statements made on its website, and an editor, which is directly liable for the statements made.[12] Because Section 230

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5 Padhi, Catherine, *Ted Crus vs. Section 230: Misrepresenting the Communications Decency Act*, Lawfare Blog (Apr. 20, 2018), https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act, (last visited on Oct. 27, 2019).

6 *See* Ben Sasse, (@BenSasse), Twitter (Nov. 26, 2018, 2:55 PM), https://twitter.com/BenSasse/status/ 1067159950949056513; Letter from Frank Pallone, Jr. & Greg Walden, United States Congressman, to Robert E. Lighthizer, United States Trade Representative (Aug. 6, 2019), https://republicans-energycommerce.house.gov/wp-content/uploads/2019/08/USTradeRep.2019.8.6.-Letter-re-Section-230-in-Trade-Agreements.pdf. (expressing concern over the inclusion of a section in a trade deal that mirrors the language of Section 230 of the Communications Decency Act) (last visited on Nov. 3, 2019); *see also* Kirk, Charlie, *It's Time to Treat Tech Platforms like Publishers*, Washington Post (Jul. 11, 2019) ("Social media companies have leveraged Section 230 to great effect, and astounding profits, by claiming they are platforms — not publishers — thereby avoiding under the law billions of dollars in potential copyright infringement and libel lawsuits . . . Let's be clear, when these companies censor or suppress conservative content, they are behaving as publishers, and they should be held legally responsible for the *all* the content they publish. If they want to continue hiding behind Section 230 and avoid legal and financial calamity, they must reform.")

7 *See* 47 U.S.C 230.

8 For the sake of this paper "illegal content" is referring to: (1) defamatory/libelous content; (2) content promoting illegal acts, like sex or drug trafficking; or (3) threats of violence and hate speech. This group of illegal content covers most of the actions brought under Section 230.

9 *See* 47 U.S.C 230(c)(1).

10 *But see* Vaidhyanathan, Siva, *Why Conservatives Allege Big Tech is Muzzling Them*, The Atlantic (Jul, 28, 2019), https://www.theatlantic.com/ideas/archive/2019/07/conservatives-pretend-big-tech-biased-against-them/594916/, ("Cruz and Hawley have to know perfectly well they can't legislate or regulate the editorial choices that private companies make in America. And they are not making serious proposals, nor introducing any evidence for their complaints.")

11 *Stratton Oakmont v Prodigy Serv. Co.*, 1995 WL 323710 (N.Y Sup. Ct., May 24, 1995). *reh'g denied*, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995).

12 *Id*. at *3-*5.

was written to directly overturn *Stratton* there may be some force to this argument.[13] Second, the findings of the bill state that, "[t]he [i]nternet and other interactive computer services offer a forum for a true diversity of political discourse. . ." which also tends to further the two senators' stance by indicating some aspect of the law is predicated on promoting political viewpoints.[14]

However, neither of these explanations are reflected in the plain and ordinary meaning of the statute or the legislative history.[15] Yes, *Stratton* was about publisher/ editorial liability of online forums, but Section 230 quashes any previous distinctions between publisher and editor.[16] Section 230 states, "[n]o provider or user of an interactive computer service shall be treated as the publisher." Beyond the actual words of Section 230, the goal of the statute was to promote the growth of the internet.[17] Consequently, Section 230 was designed to do away with any threats and impediments some of the early online businesses felt regarding user content, as demonstrated in *Stratton*. It was understood that for the internet to grow and become a great source of information and discourse, online forums could not be held liable for the content of their users.

While I believe that the current misunderstanding of Section 230 is ultimately unfounded, there may be some room to explore political censorship by social media companies; however, I do not believe this to be as major a problem as some of the outspoken critics of Section 230.[18] Instead this paper will use this misunderstanding as a jumping off point to examine one of the most important laws in the development of the internet.

Part I of this paper will start by examining the factual background including the social media technology, *Stratton Oakmont v. Prodigy*, the development of Section 230, and how Section 230 applies to social media and online content moderation

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13 *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep).

14 47 § U.S.C. 230(a)(3); *but see* 47 § U.S.C. 230(a)(1)-(2) (2018) (Although (a)(3) speaks about political discourse, it is outweighed by the other findings of the bill that talk about expanding the internet because it "represent[s] an extraordinary advance in the availability of educational and informational resources to our citizens[,]" and allowing "[t]hese services [to] 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.")

15 *See* § 230(c)(1) (2018).

16 *Id.*

17 *See* § 230(a)-(b) (2018); *See also* Wyden, Ron, *Floor Remarks: CDA 230 and SESTA*, Medium (Mar. 21, 2018), https://medium.com/@RonWyden/floor-remarks-cda-230-and-sesta-32355d669a6e (last visited on Nov 5, 2019) ("There were innovative new businesses sprouting up all over, and novel forms of communication and media connecting and informing people in new ways. But it was clear that the quickest way to strangle that revolution in its infancy was for those new companies to be held legally liable for every piece of content users posted on their platforms.")

18 *See generally* Coaston, Jane, *The Facebook Free Speech Battle Explained*, Vox (May 14, 2019) https://www.vox.com/technology/2019/5/6/18528250/facebook-speech-conservatives-trump-platform-publisher (listing some of the figures who have been banned or censored from Twitter and what they did to deserve it); *see also generally* Joseph Cox & Jason Koebler, *Why Won't Twitter Treat White Supremacy Like ISIS? Because It Would Mean Banning Some Republican Politicians Too*, VICE (Apr. 25, 2019). https://www.vice.com/en_us/article/a3xgq5/why-wont-twitter-treat-white-supremacy-like-isis-because-it-would-mean-banning-some-republican-politicians-too.

today. Part II will examine the alternatives to Section 230—Senator Hawley's proposal and European alternatives. Finally, Part III, will argue that while it may be flawed in some respects, Section 230 is a good framework for content moderation online.

II. Background

A. Twitter, Facebook, and Internet Content Creation

Social media is more prevalent in our lives than ever before. Even after years of social media controversies, over two-third of Americans use some sort of social networking site.[19] The most widely used are YouTube and Facebook, but other sites like Instagram, Twitter, Pinterest, and Reddit are not too far behind.[20] From conversations between family members to possibly swinging elections, it cannot be understated just how important social media sites are today.[21]

Each of these social media platforms are unique in their own way and offer different forms of content creation tools for users. For example, YouTube is predominantly a forum for video; Twitter, Facebook, and Instagram primarily deal with textual content, photos, and short videos; however, they are all similar in a couple of important ways. First, there are essentially three actors on social media sites: (1) nation-states, (2) the social media companies themselves, at (3) third party users/content.[22] These three actors play sort of a triangular "tug of war" regarding speech on the platforms.[23] On one side of the triangle there are states and "supra-national entities like the European Union."[24] These entities use both "old school speech regulation," and "new school speech regulation to coerce, coax, and coopt the owners of the digital infrastructure."[25] On the second point of the triangle are digital infrastructure companies, like social media platforms.[26] These companies have their own terms of service and are the "governors of digital expression."[27] They wield the ultimate power over users and can kick users off of the platform. On the final point of the triangle is the end user or the actual speaker who is using the digital

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[19] *See* Lee Raine, , *Americans' Complicated Feelings About Social Media in the era of Privacy Concerns*, PEW RESEARCH CENTER (Mar. 27, 2018), https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/, (last visited on Nov 1, 2019); *see also, Social Media Fact Sheet*, PEW RESEARCH CENTER (Jun. 12, 2019), https://www. pewresearch.org/ internet/fact-sheet/social-media/, (last visited on Nov 1, 2019).

[20] *See Social Media Fact Sheet*, PEW RESEARCH CENTER, *supra* note 17(73% and 69% of US adults use YouTube and Facebook and Facebook respectively.)

[21] *See*Danielle Kurtzleben, *Did Fake New on Facebook Help Elect Trump? Here's What We Know*, NPR (Apr. 11, 2018), https://www. npr.org/2018/04/11/601323233/6-facts-we-know-about-fake-news-in-the-2016-election, (last visited on Nov. 1, 2019).

[22] Jack M. Balkin, *Free Speech is a Triangle*, 118 Col. L. Rev. 2011, 2014-15; *see also Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (this is mainly a federal issue, but the court does reason that in certain scenarios states could write laws restricting access to social media services).

[23] Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U. of Cal., Davis L. Rev. 1149, 1196.

[24] *Id*. at 1187.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 1188.

infrastructure to communicate.[28] The two other sides of the triangle enforce different rules on the users and the users assert their voice back on the other sides.

Second, all social media/internet companies are similar because they all have some sort of content policy to regulate the speech on their platforms. These policies lay out what kinds of content users are allowed to post and what they are not. Social media and comment sections on websites can be used to promote great conservations and dialogue about issues, but far too often the devolve into name calling and *ad hominem* attacks.[29] What about protecting users from increasing harassment and hate speech?[30] Or what about stopping the spread of misinformation?[31] That is why these websites created content policies about what can and cannot be posted on to their webpagesContent posted on most social media websites will generally be removed if it is hate speech, distasteful, misinformation, or threatening violence; this moderation would not happen if it weren't for Section 230. [32]

Social media sites, like Facebook and Twitter, are not the only places where third party users can post content. Any website that has a comment section or that allows for readers' responses intuitively also allows third party content. For example, most New York Times articles that are posted to its website allow readers to comment. For the sake of this paper, comment sections of popular websites, like The New York Times or Wall Street Journal, will be grouped with social media websites. When I am referring to social media websites it is safe to assume the same things apply to websites with comment sections.[33]

B. Don't Speak Poorly About the "Wolf of Wall Street"[34]

In 1994, just a couple of years prior to the eventual fall of Stratton Oakmont,[35] an anonymous user of Prodigy's "Money Talk" online forum posted a number of critical statements about Stratton and its management.[36] The statements included the

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28 *Id*.

29 *See* The University of Texas at Austin Center for Media Engagement, *Comment Section Survey Across 20 News Sites* (last visited Nov 1, 2019) https://mediaengagement.org/research/comment-section-survey-across-20-news-sites/ (on average 44% of comments found comment sections to be "somewhat civil").

30 *See* Mondal, Silva & Benevenuto, *A Measurement of Hate Speech in Social Media*, Proceedings of HT '17 (Jul. 4, 2017), https://homepages.dcc.ufmg.br/~fabricio/download/HT2017-hatespeech.pdf. *See also infra* Section I.d.

31 *See* Pew Research Center, *Many Americans Say Made-Up News Is a Critical Problem That Needs To Be Fixed*, https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed, (last visited on Dec. 3, 2019).

32 *See generally Stratton Oakmont*, 1995 WL 323710.

33 *See* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 431 (Table 4 breaks summarizes which types of cites get what type of lawsuits under 230.)

34 *See* THE WOLF OF WALL STREET (Paramount Pictures 2013). The movie, based on a book of the same name, chronicles Jordan Belfort's notorious career in the financial industry and the founding and eventual downfall of his brokerage firm, Stratton Oakmont.

35 *See* Lohse, Deborah, *NASD Moves to Shut Down Troubled Stratton Oakmont*, Wall St. J. (Dec 5, 1996), https://www.wsj.com/articles/SB849825118417332500, (last visited on Oct. 23, 2019).

36 *Stratton Oakmont*, 1995 WL 323710 at *1.

following: "[Stratton and its president] committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page;" "the Solomon-Page offering was a major criminal fraud and '100% criminal fraud;'" "[Stratton's president] was soon to be proven criminal;" and "Stratton was a cult of brokers who either lie for a living or get fired."[37] Stratton sued Prodigy for ten causes of action, including *per se* libel, on the theory that Prodigy was "a publisher of the aforementioned statements," and thus "should be subject to liability as if [it] had originally published the statements."[38],[39]

Prodigy's online bulletin boards were very much the predecessor to social media and comment sites today.[40] Back in 1995, there were over two million Prodigy subscribers who could post and communicate on Prodigy's website.[41] "Money Talk" was known as the leading and most read financial bulletin board in the United States.[42] "Money Talk" users could "post statements regarding stocks, investments, and other financial matters."[43] Each post on "Money Talk," as well as the other Prodigy boards, was reviewable by a "Board Leader."[44] In addition to the "Board Leaders," Prodigy also used custom software that automatically prescreened all postings for offensive material.[45]

The court began by reviewing the applicable law.[46] Prior to Section 230, in order for Prodigy to be found liable for *per se* libel, Stratton first had to establish that Prodigy was a publisher of aforementioned comments.[47] A publisher, as the court described it, is an organization like the editorial board of a newspaper.[48] "The choice of material to go into a newspaper and the decisions made as to the content of the paper constitute the editorial control and judgment, and with this editorial control comes increased liability."[49] In contrast to a publisher, "a distributor is considered a passive conduit [of information] and will not be found liable in the absence of fault."[50] A distributor is something like a bookstore or library, who "may be liable for

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37 *Id*. (cleaned up).

38 *Id*. at *2-*3 (what's ironic about these statements is that they are not necessarily incorrect) (cleaned up).

39 *See* Antilla, Susana, Wall Street; *Look Who's Selling Solomon-Page*, N.Y. Times (Nov. 13, 1994), https://www.nytimes.com/1994/11/13/business/wall-street-look-who-s-selling-solomon-page.html, (last visited on Oct. 24, 2019) (at the time of the Solomon-Page IPO it was well known that Stratton was not the epitome of brokerage firms).

40 *See, e.g.*, Selyukh, Alina, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change, (last visited Oct. 26, 2019); Edwards, Benj, *Where Online Services Go When They Die: Rebuilding Prodigy, One Screen at a Time*, The Atlantic (Jul. 12, 2014), https://www.theatlantic .com/technology/archive/2014/07/where-online-services-go-when-they-die/374099/, (last visited on Oct. 26, 2019).

41 *Stratton Oakmont*, 1995 WL 323710 at *3.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*. at *2.

46 *Stratton Oakmont*, 1995 WL 323710 at.*3-*5.

47 *Id*. at *3.

48 *Id*.

49 *Id*. (citing *Cubby Inc. v. CompuServe Inc*., 776 F.Supp. 135, 139 (S.D.N.Y., 1991).

50 *Id*. (citing *Auvil v. CBS 60 Minutes*, 800 F.Supp. 928, 932 (E.D.Wash., 1992).

defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue."[51]

The court held that Prodigy was a publisher of the information on the "Money Talk" website and thus liable for the information posted to its site.[52] The court noted two distinctions that required the finding that Prodigy was a publisher.[53] "First, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards."[54] Second, Prodigy was actively utilizing technology and power to delete content from its bulletin boards on the basis of offensiveness and "bad taste," and "such decisions constitute editorial control."[55] The court understood that its ruling could have a chilling effect "on [the] freedom of communication in Cyberspace."[56] The court tried to dismiss these fears as overblown. The court argued that "bulletin boards should generally be regarded in the same context as bookstores, libraries, and network affiliates;" however, Prodigy was unique, and its own policies mandated the finding that it was a publisher.[57]

To understand why this is so important, it is important to understand exactly what Prodigy's bulletin boards were. Prodigy's bulletin boards, like the aforementioned "Money Talk," were very much a forefather for today's social media websites, online forums, and comment sections. Prodigy's "content guidelines" called for users to refrain from posting "insulting notes," "notes that harass other members or are deemed to be in bad taste," or notes that "are deemed harmful to maintaining a harmonious online community."[58] These rules, as the court based its analysis, qualified Prodigy as an editor who was liable for the defamation it published.

Removing things for "on the grounds of bad taste" is the basis for nearly every online platform speech policy. For example, Twitter's speech policy says that it will review and take action against content that has: "violent threats;" "wishing, hoping or calling for serious harm on a person or group of people;" "references to mass murder, violent events, or specific means of violence where protected groups have been the primary targets or victims;" "inciting fear;" "repeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone;" and "hateful imagery."[59]

Twitter's policy is just one of many similar policies promoting content moderation and policing what can be posted online.[60] So are today's social media

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51 *Stratton Oakmont*, 1995 WL 323710 at *3.
52 *Id.* at *4.
53 *Id.*
54 *Id.*
55 *Stratton Oakmont*, 1995 WL 323710 at *4.
56 *Id.* at *5.
57 *Id.*.
58 *Id.* at *2.
59 TWITTER, *Twitter Rules and Policies: Hateful Conduct Policy*, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Oct. 24, 2019).
60 See, e.g., FACEBOOK, *Objectionable Content*, https://www.facebook.com/communitystandards/

websites and pretty much any other website liable for the third-party content posted on their websites? No, Section 230 of the Communications Decency Act exempts providers of an "interactive computer service [from being] treated as the publisher or speaker of any information provided by another information content provider."[61] Without Section 230, it is arguable that we would have little to no platforms that allow user content.[62]

C. Section 230 of the Communications Decency Act

Before the decision from the New York court even came down, there was already talk about a new federal law that would preempt the decision.[63] There was a group of Congressmen—led by Congressmen Cox, Wyden, and Goodlatte—who believed that the *Stratton* decision was the wrong one and, in particular, it was going to crush the promise of the internet.[64] They began developing a federal law that they believed would allow the internet to blossom.[65]

In 1996, as part of the Communications Decency Act, the United States Congress passed Section 230. The Communications Decency Act provided for many things, but most important to this paper is Section 230, which is titled "Protection for private blocking and screening of offensive material."[66] The purpose behind the Section 230 is very clear.[67] There were millions of internet users, billions now, and the amount of information communicated on the internet was therefore staggering.[68] As the Fourth Circuit has summed up:

> The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[69]

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objectionable_content (last visited Oct. 24, 2019); NEW YORK TIMES, Comments, https://help.nytimes.com/hc/en-us/articles/115014792387-Comments, (last visited Oct. 24, 2019); FOX NEWS, Online Community Commenting, https://help.foxnews.com/hc/en-us/articles/233195048-What-is-the-Fox-News-Commenting-Policy-, (last visited Oct. 24, 2019).

61 47 U.S.C. § 230(c)(1); *See also* 47 U.S.C. § 230 (c)(2)(moderation of content will not make a website liable as an editor).

62 *See CDA 230 Infographic*, ELECTRONIC FRONTIER FOUNDATION available at https://www.eff.org/issues/cda230 /infographic.

63 *Stratton Oakmont*, 1995 WL 323710 at *5 (acknowledges that there is talk of a federal law to preempt the court's decision).

64 Selyukh, *supra* note 40 ("As [Congressman Chris] Cox read about this ruling, he thought this was 'exactly the wrong result': How was this amazing new thing . . . going to blossom, if companies got punished for trying to keep things clean? '[The Stratton Oakmont decision] struck me as a way to make the Internet a cesspool.'") (cleaned up).

65 *Id*.

66 47 U.S.C. § 230(c).

67 *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

68 *Id*.

69 *Id*; see also141 Cong. Rec. H8460 (1995), https://www.congress.gov/104 /crec/1995/08/04/CREC-

But, Section 230 had another goal. Following *Stratton*, any form of content moderation could be seen as making editorial decisions and open the website up to liability.[70] Congress wanted to encourage websites to "self-regulate the dissemination of offensive material over their services."[71]

> Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "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." In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.[72]

To enact these goals, Section 230 has two significant provisions regarding content moderation known as the "Good Samaritan" provisions.[73] Subsection (c)(1) is essentially a grant of broad immunity from liability for user-generated content.[74] Section 230(c)(1), "Treatment of publisher or speaker," states, "[n]o 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."[75] These twenty-six words have been described by some as the "[Twenty-six] words that created the internet."[76]

However, Section (c)(2) does more than grant broad immunity as it also is a direct rebuttal of *Stratton*.[77] It prevents internet providers from losing their immunity when they take "[voluntary action] in good faith to restrict access to or availability of material that the *provider or user* considers to be obscene, lewd, filthy, excessively violent, harassing, or otherwise objectionable, *whether or not such material is constitutionally protected*."[78] After Section 230(c)(1) would internet companies likely be liable as an editor for moderating content posted on their websites? Arguably, yes. Although Section 230(c)(1) states that the websites should not be held

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1995-08-04-pt1-PgH8460.pdf; H.R. REP. NO. 104-458 (1996) (Conf. Rep.).

70 *See Stratton*, 1995 WL 323710.

71 *See* 141 Cong. Rec. H8460 (1995); H.R. REP. NO. 104-458 (1996) (Conf. Rep.); *See also Zeran*, 129 F.3d at 331.

72 *Zeran*, 129 F.3d at 331.

73 *See* 47 U.S.C. § 230(c)(1)-(2) (subsection (c) is titled "Protection for 'Good Samaritan' blocking and screening of offensive material.")

74 *See* 47 U.S.C. § 230(c)(1).

75 *Id*.

76 Kosseff, Jeff, *The Twenty-Six Words that Created the Internet* (1st ed. 2019)

77 H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services").

78 47 U.S.C. § 230(c)(2) (emphasis added)

liable for speech of their users, it does not state that websites will not be held as publishers if they moderate the content posted on their websites. But Section 230(c)(2) makes clear that content moderation is expressly approved and shielded from liability.

That is the extent of the law in Section 230. In total, there are two subsections with less than one hundred words.[79] The two subsections in general grant: (1) immunity from liability for content posted by third party users, and (2) the ability to moderate objectionable content. Nowhere, is there any provision that restricts this immunity to companies that are a "neutral public forum."[80]

D. Application and Analysis of Section 230 Today

Section 230 has remained largely unchanged since its creation in 1996.[81] While there has been some narrowing of Section 230 in recent court decisions, it has generally remained pretty constant.[82] Most cases follow the very first 230 decision, *Zeran*.[83]

First it was the "Wolf of Wall Street" who forced Congress to create Section 230, and then it the Oklahoma City Bomber who was the first test of that new law. Following the Oklahoma City bombing in 1995, someone posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts."[84] These shirts featured offensive and tasteless slogans referring to the Oklahoma City bombing.[85] The seller listed Zeran's home number for interested purchases, but Zeran was not affiliated in anyway with the seller.[86] After receiving "a high volume of calls," Zeran asked AOL to remove the bulletin, and after they failed to do so, he sued for negligence based on the theory that once AOL had been notified they had the duty to remove the postings.[87] The court held that:

> By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus,

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79 *See* 47 U.S.C. § 230(c)(1)-(2).

80 *See* Josh Hawley (@HawleyMO), Twitter (Nov. 27, 2018, 12:22 PM), https://twitter.com/HawleyMO/status /1067483747526815752

81 *But see* 47 U.S.C. § 230(e)(5) (In 2018, Congress amended Section 230 by adding language regarding sex trafficking).

82 *See* Kossef, 18 Colum. Sci. & Tech. L. Rev. 1, at *36-*37 ("these [recent] opinions, when taken together, reflect a growing reluctance of courts to apply Section 230 in the broad manner of the [early] days. . . courts are [now] increasingly reluctant to dismiss cases under Section 230, even when the complaint does not credibly allege that the online intermediaries developed or created the content.")

83 *See* David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of 'Zeran v. America Online,'* 66 N.Y.U. Ann. Surv. Am. L. 371, 385 (2010). ("Decided by the Fourth Circuit in 1997, barely a year after the statute went into effect, no case has had more influence on section 230 jurisprudence than *Zeran*. Cited over 1,400 times, virtually every subsequent opinion regarding section 230 references *Zeran*.")

84 *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997).

85 *Id*.

86 *Id*.

87 *Id*.

> lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.[88]

Consequently, the court dismissed Zeran's lawsuit because "§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role."[89] This has been pretty much the understanding that most courts follow today.[90]

However, Section 230 does have its drawbacks. [91] Some critics argue that by not holding internet platforms liable for the content of their users, it "creates a clear moral hazard."[92] Yet, as noted in *Zeran*, the Communications Decency Act reflects Congress' attempt to balance promoting of the internet on one hand and protecting users from harm on the other.[93] However, Professor Mary Franks notes that there "is no evidence that broad immunity from liability has done anything more than encourage websites and ISPs to be increasingly reckless with regard to abusive and unlawful content on their platforms."[94] What's worse is that Section 230's immunity has arguably enabled and promoted discriminatory and hate speech online.[95] Because

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88 *Id.* at 330 (dismissing the lawsuit).

89 *Id*.

90 *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2nd Cir. 2019) (The court dismissed the plaintiffs' claims against Facebook under Section 230 and stated that it "disagree[d] with plaintiffs' contention that Facebook's use of algorithms renders it a non-publisher"); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) ("The obverse of this proposition is equally salient: Congress sought to encourage websites to make efforts to screen content without fear of liability. Such a hands-off approach is fully consistent with Congress's avowed desire to permit the continued development of the internet with minimal regulatory interference.") (citations omitted); *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1272 (D.C. Cir. 2019) (affirming the district court's dismissal of the complaint as barred by § 230); *Cox v. Twitter, Inc.*, 2019 WL 2513963, at *3 (D.S.C. Feb. 8, 2019) (dismissing the plaintiff's claim after he was banned for repeated hate speech because "to the extent Plaintiff seeks to hold [Twitter] liable for exercising its editorial judgment to delete or suspend his account as a publisher, his claims are barred by § 230(c) of the CDA.")

91 *See* Mary Anne Franks, Moral Hazard on Stilts: Zeran's Legacy, LAW.COM: THE RECORDER (Nov. 10, 2017), https://advance.lexis.com/api/permalink/be5f04e0-24f6-47c4-86a4-f3a35eeedfd5/?context=1000516, (last visited Dec. 3, 2019) (230 may shield defamation that "disproportionately burden[s] vulnerable private citizens including women, racial and religious minorities, and the LGBT community"); *See also* Cecillia Ziniti, *The Optimal Liability System For Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It*, 23 Berkeley Tech. L.J. 583, 614 (2008) ("Despite these benefits, the Zeran framework does have costs. It can sometimes result in unfortunate victims, who, especially when the original provider of the information at issue evades identification, pay the price for the free speech and growth that the Zeran regime enables.").

92 Franks, *supra* note 91.

93 *Zeran*, 129 F.3d at 330.

94 Franks, *supra* note 91.

95 Sylvain, Oliver, *Discriminatory Designs on User Data: Exploring How Section 230's Immunity Protections May Enable or Elicit Discriminatory Behaviors Online*, Columbia University (Apr. 1, 2018), available at https:// knightcolumbia.org/content /discriminatory-designs-user-data, ("By providing intermediaries with such broad legal protection, the courts' construction of Section 230 effectively underwrites content that foreseeably targets the most vulnerable among us. In their ambition to encourage an "unfettered" market for online speech, the developers of Section 230

Zeran and Section 230 have provided immensely broad immunity for almost any claim against a third party internet platform, the group treated unfairly is the victim, who is often from a minority group.[96] Tracking down the original poster is often expensive and worthless, and worse yet, victims have no recourse against the third-party platform.

An example of just this issue can be seen in the recent *Backpage* decision.[97] Backpage.com was a website, similar to Craigslist, that allowed users to post products or services for sale.[98] In this case, three women, who were all minors at the time, were posted to the "Escorts" section.[99] Jane Doe #1 was advertised on Backpage from 2012-2013 and was raped numerous times as a result.[100] The appellants claimed that Backpage engaged in sex trafficking of minors under the Massachusetts statute.[101] Backpage moved to dismiss the action because it argued that under Section 230(c)(1) it could not be held liable for the content users posted on its website.[102]

The Court of Appeals affirmed the district court and held that:

> We hold that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1). This holding is consistent with, and reaffirms, the principle that a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection.[103]

The court further noted that this decision is "entirely [in] keeping with policies animating Section 230."[104] It states that Congress went out of its way to grant broad

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immunity have set up a regime that makes online engagement more difficult for children, women, racial minorities, and other predictable targets of harassment and discriminatory expressive conduct.")

96 Id.; *see also* David Lukmire, C*an the Courts Tame the Communications Decency Act?: The Reverberations of 'Zeran v. America Online*, 66 N.Y.U. Ann. Surv. Am. L. 371 (2010).

97 *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (affirming district court holding that Backpage was shielded by Section 230.); *See also Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (under a similar, although less egregious, fact pattern to *Backpage* the court held that the claim against Craigslist for facilitating prostitution was barred under Section 230.); *M.A. v. Village Voice Media*, 809 F.Supp.2d 1041 (E.D. Miss. 2011).

98 *See generally* Lynch, Sarah, *Sex Ads Website Backpage Shut Down by US Authorities*, Reuters (Apr. 6, 2018), https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP.

99 *Backpage.com*, 817 F.3d at 16 (after Craigslist banned its "adult section," Backpage expanded its website to facilitate sex trafficking).

100 *Id*. ("Jane Doe # 1 was advertised on Backpage during two periods in 2012 and 2013. She estimates that, as a result, she was raped over 1,000 times. Jane Doe # 2 was advertised on Backpage between 2010 and 2012. She estimates that, as a result, she was raped over 900 times. Jane Doe # 3 was advertised on Backpage from December of 2013 until some unspecified future date. As a result, she was raped on numerous occasions.")

101 *Id*.

102 *Id*.

103 *Id*.

104 *Backpage.com*, 817 F.3d at 28.

protections to internet publishers.[105] "A showing that a website operates through a meretricious business model is not enough to strip away those protections. If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation."[106] The court then concluded by noting that it believes this is the correct legal decision, but not necessarily the right outcome for the country.[107]

Rightfully, there has been a lot of backlash to this decision. Backpage was blatantly promoting sex trafficking and hiding behind Section 23o to escape liability. There is no doubt that it is more difficult to justify immunizing a provider like Backpage than a provider like Prodigy because the allegations are far more troubling; yet, under Section 230 both providers are given the same immunity.[108]

Section 23o "protects vitally important free speech interests that deserve careful consideration as well," but to what extent do we want to allow websites to use it to escape liability?[109] Sex trafficking is just one example of things that have thrived under Section 230. For example, other sites that host child and revenge porn have also used Section 230 as a shield.[110] Moreover, Section 230 has also promoted hate speech and other objectionable content and illegal content.[111] As the internet has grown so has the objectionable content, but Section 230 has barely changed.[112]

Yes, Section 230 has had its hiccups, but it has arguable been the most important law in shaping the internet.[113] The *Backpage* debacle and sex trafficking issues are as bad as it gets, but any significant revisions or the repeal of Section 230 may "unintentionally shut down lawful speech."[114] The following sections will look at some of the possible ways we could address internet platform liability and how they would affect speech on the internet.

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105 *Id.* at 29.

106 *Id*.

107 *Id*.

108 *See* Kossef, 18 Colum. Sci. & Tech. L. Rev. 1, at *37; *See also Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir., 2016) ("This is a hard case—hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage.")

109 Goldman, Eric, *Big Win For Free Speech Online in Backpage Lawsuit*, Forbes (Mar. 17, 2016), https://www.forbes.com/sites/ericgoldman/2016/03/17/big-win-for-free-speech-online-in-backpage-lawsuit/#26f17e8d1067.

110 *See generally Doe v. MySpace, Inc.*, 474 F. Supp 2d 843 (W.D. Tex. 2007); *Doe v. Bates*, 2006 WL 38135758 (E.D. Tex., 2006).

111 Freivogel, William, *Does the Communications Decency Act Foster Indecency?* 16 Comm. L. & Pol'y 17, 48, ("Neither Oliver Wendell Holmes nor John Milton could have imagined that the marketplace of ideas would look like this. They would be horrified by some of the nasty, mean and obscene turns that the human mind takes when it is truly set free. But there is no turning back with the tens of millions of postings that are published each day. The notion that a free market of ideas is the best way for society to find the truth will be tested for its own truthfulness on this strange new battlefield in cyberspace.")

112 *See* 47 U.S.C. § 230(e)(5) (This section was added in 2018 to remove Section 230 immunity for websites that host sex trafficking).

113 Kessof, Jeff, *The 26 Words That Created the Internet*.

114 Rottman & Fulton, Anti-Backpage.com Bill Will Shut Down Free Speech, ACLU(May 20, 2014).

E. The First Amendment Does Not Apply

To keep this section short, these social media websites are private companies and the First Amendment does not apply to them.[115] The Supreme Court over the past six decades has moved "from an expansive view of state action to an increasing reluctance to impose constitutional obligations on nongovernmental actors."[116] The First Amendment only applies to state actors, which the tech companies and platforms clearly are not.[117]

This is not to say that the ideals of free speech are not important, but just that the protection of First Amendment only applies to state action. Plaintiffs have tried to bring First Amendment cases against these companies, but the courts have not entertained them.[118] There has also been a movement to bring social media websites under the "public forum" jurisprudence. But again, the courts, and in particular the Supreme Court, has yet to accept this argument.[119] For all intents and purposes, the First Amendment, as the Supreme Court currently understands it, does not apply.

II. The Not So Great Alternatives

So what alternatives are there regarding liability of internet companies for the postings on their webpages? Are there any good ones?[120] The following is a breakdown of Senator Hawley's proposal to amend Section as well as a quick overview of how the EU deals with internet platform liability.

A. Senator Hawley's Proposal[121]

Following his public knocking of Section 230 for "censoring" conservative voices, Senator Hawley proposed his own bill to deal with online content moderation. The subtlety named "Ending Support for Internet Censorship Act" is more about issues regarding political speech moderation than anything else. This is odd because he acknowledges that the "Congress passed [Section 230] in 1996 when the Internet was in its infancy and Congress was concerned that subjecting hosting platforms to

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115 *See generally Civil Rights Cases*, 109 U.S. 3 (U.S. 1883); *Edmonson v. Leesville Concrete Co.*, Inc, 500 U.S. 614 (U.S. 1991).

116 *See* Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political* Debate, 73 GEO. WASH. L. REV. 101, 130 (2004).

117 *See generally id*. at 128 (describing that "the Supreme Court [concluded] that no constitutional cause of action lie[] against a nongovernmental defendant).

118 *See e.g., Fed. Agency of News LLC v. Facebook, Inc.*, 395 F.Supp.3d 1295, 1303 (N.D.Cal., 2019) (reasoning that "Plaintiffs' Bivens claim for violation of the First Amendment fails because Facebook is neither a state actor nor a private actor whose actions amount to state action.").

119 *See Constitutional Law: First Amendment — Freedom of Speech — Public Forum Doctrine — Packingham v. North Carolina*, 131 HARV. L. REV. 233 (2017); Tyler Lane, *The Public Forum Doctrine in the Modern Public Square*, 45 OHIO N.U. L. REV. 465 (2019); Johnathan Groffman, *The Modern Public Square: Digital Viewpoint Discrimination in the Age of @RealDonaldTrump*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 69, 79 (2018).

120 *See* William Freivogel, *Does the Communications Decency Act Foster Indecency?* 16 Comm. L. & Pol'y 17, 46 (declaring "[e]ven the judicial and academic critics of the broad interpretation of Section 230 acknowledge that many traditional legal solutions are not up to the reality of the Internet").

121 Ending Support for Internet Censorship Act, S. 1914, 116th Cong. §2 (2019). [hereinafter ESICA]

the same civil liability as all other businesses would chill their growth."[122] Yet, he still believes that Section 230 should be amended to, in essence, remove liability protection from any online company that does anything that could be considered more favorable to one political party over the other.[123] He believes that the liability shield is important to the internet, which is evident because he is trying to find a way to keep it around, but he wants to balance the liability shield with some responsibility on the part of the big tech.[124]

Senator Hawley's proposal can be boiled down to a few important characteristics. First, the proposal does away with automatic immunity for large tech companies.[125] Large tech companies, which are defined as "companies with more than 30 million active monthly users in the U.S., more than 300 million active monthly users worldwide, or who have more than $500 million in global annual revenue,"[126] must apply to a newly formed FTC committee for the protection every two years.[127] The committee is made up of two democrats and two republicans.[128] To retain the legal protection "the company [must prove to three members of the committee that it does] not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint." [129] Essentially, big tech companies would need to convince at three committee members—one of which from an opposing party—that their algorithms and content-removal practices are politically neutral.

This might not sound like a bad option; however, there is clause in the proposal that is, for lack of a better word, unreasonable. A company who has been granted immunity can lose its immunity status for actions of employees; however, it can maintain its 230 status by ''publicly disclosing in a conspicuous manner that an employee of the provider acted in a politically biased manner with respect to moderating information content; and terminates or otherwise disciplines the employee."[130] In other words, a company who believes it might lose its protection because of an act of employee can publicly name and shame that employee in order to attempt to retain its immunity.

Besides the naming and shaming, there are a few drawbacks to Senator Hawley's proposals. First, the supermajority on the FTC committee is going to be very hard to

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[122] Josh Hawley, *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies* (Jul. 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.

[123] *See ESICA, supra note 121.* §2.

[124] Hawley, Josh, *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies* (Jul. 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies, (last visited on Nov. 5, 2019) (Big Tech companies should "not receive this government subsidy free of any responsibility.")

[125] *See ESICA, supra note 121.* §2 (2019).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

meet.[131] We are in a political climate where there is very rarely bipartisan support for anything, let alone content moderation that could in any way be seen as in favor of one party or another. Will this actually lead to platforms that are politically neutral or will it lead to platforms restricting the majority of speech? If a company knows it's going to have a tough time convincing a bipartisan group that it is neutral, why would a company political speech at all and risk its immunity? Instead, this proposal may just lead to a general political speech ban on many platforms.

Second, this bill does not touch on is the previously mentioned issues regarding hate speech and other objectionable content that has been allowed to grow under Section 230. Hawley's proposal is directed solely to political speech. All of the current issues regarding the proliferation of discriminatory and other illegal content are unscathed by Senator Hawley's proposal.

Yet, even with these negatives, Senator Hawley does do a good job at promoting the growth of the internet, like the designers of Section 230 intended. The application of this idea is right with the goals of Section 230. By limiting his amendment to only large platforms, Senator Hawley is promoting the growth of the small internet companies and the growth of the internet in general. The small companies, who do not meet the requirements of the bill, are the companies who need the protection of Section 230 in order to sustain their online presence.

This bill likely will not pass, but instead it will get the ball rolling and get people talking about Section 230. Hopefully Senator Hawley's idea that any amendment to Section 230 should only apply to large internet platforms is something that gains traction.

B. European Laws

The European Union also allows for a liability exemption for third party content, but its exemption has one important condition. The provider must not have had "actual knowledge of illegal activity or information," and if the provider does obtain knowledge, it must act to remove or disable access to the information.[132] An example of this, is the recent Estonian ruling, in which Delfi was held liable for the content posted by its users.[133] In the *Delfi* case, users posted "highly offens[ive] or threatening posts about [a] ferry operator and its owner" on an article Delfi published about a controversial route change.[134] The owner sued Delfi for defamation and the court held for the owner.[135]

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[131] It is also worth noting that the FTC is simply not equipped to be making these decisions. I believe this would be ironed out later, but the bill does not address how it would support the adequate decision making within the FTC.

[132] *See* 2000 O.J (L 178) 13.

[133] *Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. 319.

[134] *See* English, Rosalind, *Internet trolls and why Strasbourg doesn't want to get involved*, UK Hum. Rts. Blog (Oct. 14, 2013), https://ukhumanrightsblog.com/2013/10/14/internet-trolls-and-why-strasbourg-doesnt-want-to-get-involved/. ("Delfi published an article on its webpage about a ferry company. It discussed the company's decision to change the route its ferries took to certain islands. This had caused ice to break where ice roads could have been made in the near future. As a result, the opening of these roads – a cheaper and faster connection to the islands compared to the ferry services – was postponed for several weeks.")

[135] *Id.*

After reviewing how the EU law applied to Estonia, the court assessed four factors in determining whether Delfi was liable for the posts of its users—(1) the context of the posts, (2) the steps taken by Delfi to limit the defamatory comments, (3) whether the actual authors of the comments could be found liable for them, and (4) the consequences of holding Delfi liable.[136] On the first and second points, the court reasoned that Delfi knew this was going to be a controversial article, and while the software did remove comments with vulgar words, it was not enough to "prevent a large number of insulting comments from being made, and they were not removed in good time."[137] Next, the court stated that most of the comments were anonymous and it would be "practical and also reasonable" to hold Delfi responsible for the comments.

Finally, the court considered whether Delfi had actual knowledge of the illegal activity. Delfi deleted the comments with in 24 hours of receiving notice; however, the posts were available for over six weeks.[138] Consequently, the question was "whether Delfi's attempts to keep its portal free of harmful comments could be interpreted as leading to constructive knowledge."[139] The court held that Delfi should have known about the comments prior to the notice at six weeks.[140] It knew the comments were going to be very vulgar, it had a filter system, and it actively deleted other comments.[141] Taking all this into account, the court held Delfi liable for the defamatory posts.[142]

The decision could have the chilling effects that Congress worried about with *Stratton*.[143] Yes, Delfi did know its story was going to draw lots of bad comments, but it actively took steps to help reduce the number of bad comments and a few bad comments slipped through the cracks. Delfi was trying to promote a discussion about this topic and actively monitored the conversation. Yet, it is going to have to pay the ferry operator for comments it didn't make.

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136 *Id.*

137 *Id.*

138 *Delfi AS*, 2015-II Eur. Ct. H.R

139 Aleksandra Kuczerawy & Pieter-Jan Ombelet, , *Not so different after all? Reconciling Delfi vs. Estonia with EU rules on intermediary liability*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Feb. 19, 2016), https://blogs.lse.ac.uk/ mediapolicyproject/ 2015/07/01/not-so-different-after-all-reconciling-delfi-vs-estonia-with-eu-rules-on-intermediary-liability/, (Stating "[t]he decision could result in website operators shying away from any voluntary monitoring in fear of possible repercussions.")

140 *Delfi AS v. Estonia*, 64569/09 Eur. Ct. H.R. (2015)

141 *Id.*

142 *Id.*; *see also* Newman, Lily, *EU Court Unexpectedly Rules Estonian Website is Responsible for User Comments*, Slate (Jun. 17, 2005), https://slate.com/technology/2015/06/european-court-of-human-rights-rules-estonian-site-delfi-is-liable-for-comments.html.

143 *Not so different after all? Reconciling Delfi vs. Estonia with EU rules on intermediary liability*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Feb. 19, 2016), https://blogs.lse.ac.uk/medialse/2015/07/01/not-so-different-after-all-reconciling-delfi-vs-estonia-with-eu-rules-on-intermediary-liability/, (The decision could result in website operators shying away from any voluntary monitoring in fear of possible repercussions.")

An argument can be made that Delfi should have never allowed the comments to begin with. It clearly knew the conversation was going to be toxic. But, is that what we want? Because Delfi had a screening publicity and monitored the conversation, it was held liable for the posts of its users. This is exactly why the second clause of Section 230 was added. Not only did Congress want to promote the growth of the internet, but it wanted to promote active moderation by internet platforms.[144] Yet, I can't help but think this is the right outcome. Delfi knew that there were going to be defamatory comments and failed to act. Not only do we want to promote moderation, but we want to promote proper moderation. Moderation isn't worth it, if you simply fail to moderate some illegal content (especially when you knew the comments were going to be defamatory, like in the *Delfi* case).

The UK has also incorporated the EU E-Commerce Directive, which for all intents and purposes is the same as Estonian law; however, not all of the EU has adopted similar laws.[145] Consequently in the EU, you can be held liable not because of where the portal is located, but where the content is read.[146]

Putting aside the piecemeal approach, the European approach is interesting. For better or worse, it puts the responsibility of removing illegal material on the internet platform. If you have any sort of knowledge that there are or are going to be illegal materials posted on your website, you need to be on guard and actively moderating the content. This makes sense for a number of reasons. First, this incentivizes companies to take action when users post illegal content.

Second, the internet companies are arguably in a much better place than anyone else to monitor and guard against the posting of illegal content. Not only have they already developed tools to guard detect illegal information, but they have much more resources to dedicate to the issue. By putting requiring that websites remove illegal content promptly that they know or should have known about, Europe is shifting the burden of guarding against illegal content to the internet companies.

III. Concluding Thoughts

Despite the fact that over the past few years some courts are refusing to grant full 230 immunity, Section 230 is still a strong framework for online content moderation.[147] The goal was never to create an internet that was politically diverse,

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144 *See* 47 U.S.C. § 230(a)-(b); 141 Cong. Rec. H8460 (1995); H.R. REP. NO. 104-458, at 185 (1996) (Conf. Rep.).

145 Park, Ahran, *Internet Service Provider Liability for Defamation: United States and United Kingdom Compared*, The University of Oregon (Mar. 2015), available at https://scholarsbank.uoregon.edu/xmlui/handle/1794/19210

146 Worstall, Tim, *Every Website that Accepts Comments Now has a European Problem*, Forbes (Oct. 11, 2013), https://www.forbes.com/sites/timworstall/2013/10/11/every-website-that-accepts-comments-now-has-a-european-problem/#2e9caa21ec97, (last visited on October 31, 2019).

147 *See* Kossef, supra note 76.("To be clear, Section 230 is alive and well. In approximately half of the cases reviewed [over 2015 and 2016], courts declined to impose any liability on online intermediaries because of Section 230. Moreover, some plaintiffs, knowing of courts' relatively broad interpretation of Section 230, may be discouraged from ever bringing a lawsuit against online intermediaries. Accordingly, it would be ill-advised to downplay the role that Section 230 continues to play in promoting growth and innovation on the Internet. Standing alone, no single court opinion issued from July 1, 2015 to June 30, 2016 represents a significant downfall of Section 230. . . Rather, these opinions, when taken together, reflect a growing reluctance of courts to apply Section 230 in

as some Congressmen currently believe. Instead, the goal was to foster the growth of the internet and promote moderation policies, which it has done.[148] We do not need to repeal or change Section 230 to promote political discourse, if that's our new goal. Instead, there are a few alternatives to changing the law.

First, we could simply enforce our antitrust laws and break up some of these social media monopolies. One of the ways that these newly broken apart companies could compete is on their content policies. If you don't like how Facebook is moderating your speech, you could go somewhere else. Right now, however, this is just not possible. For example, Facebook owns 3 of the top 6 most popular social media websites and they all have similar speech policies.[149] If Instagram was broken off of Facebook, it could differentiate itself from Facebook based on its more relaxed or more strict speech policy. There are wide ranging ways that competition among social media website could benefit the public, but this is a topic for another paper.[150]

Another possibility is that the courts could step in with First Amendment protections. The Supreme Court could look to expand its "public forum" First Amendment jurisprudence and expand First Amendment protections to Twitter and Facebook because they are the "modern public square."[151] "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard [and] [t]hey allow a person . . . to become a town crier with a voice that resonates farther than it could from any soapbox."[152] The Supreme Court has already, for better or worse, began expanding its "public forum" jurisprudence, but this alternative should be explored fully in another paper.

I am not convinced that Section 230 has led to political censorship online and that's why my proposal does not address it.[153] That being said, political censorship is not something we should simply gloss over. I believe that Section 230 was meant to promote the growth internet and moderation policies. If we want to address political censorship, we should do it under a different law, that doesn't spell out its motivations so clearly. Assessing 230 under the guise of political censorship is unfair to the original goals of the law.

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the broad manner of the [early] days. The analysis reveals a general hesitance to dismiss cases, and to instead allow them to proceed through discovery, summary judgment, and trial, on the off chance that the intermediary may have contributed to the third-party content. In other words, courts are increasingly reluctant to dismiss cases under Section 230, even when the complaint does not credibly allege that the online intermediaries developed or created the content.").

148 *See* Electronic Frontier Foundation, *supra* note 62

149 Pew Research Center, *supra* note 19.

150 *See e.g,*Specer Waller, *Antitrust and Social Networking*, 90 N. C. L. Rev. 1771 (2012).

151 *Packingham supra* note 22.

152 *Id*. citing *Reno v. American Civil Liberties* Union, 521 U.S. 844, 870 (1997) (cleaned up).

153 *See* Siva Vaidhyanathan, *Why Conservatives Allege Big Tech is Muzzling Them*, The Atlantic (Jul, 28, 2019) (Social media websites are banning prominent conservative voices often for outright hate speech and discriminatory views, not political reasons);Jane Coaston, *The Facebook Free Speech Battle Explained*, Vox (May 14, 2019) (this article lists some of the figures who have been banned or censored from Twitter and what they did to deserve it); Cox & Koebler, *supra* note 18.

So, where does this leave us? I'm not exactly sure. If we assess Section 230 under the original goals of the bill, 230 is working exactly as Congress intended when it passed it over twenty years ago. While there are some major hiccups that need correcting, there is no need to completely overhaul the law. I think the best understanding of what 230 is and what it should be is summed up by this quote, "[s]hould businesses be liable for the graffiti [sic] on their walls? No, it's the one who put it there who should be in trouble."[154]

[154] Ziniti, Cecillia, *The Optimal Liability System For Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 583 (2008).