DigitalFrontiers Advocacy℠

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

October 1, 2020

In re Section 230 of the Communications Act of 1934, RM-11862

Dear Secretary Dortch:

Senator Ron Wyden and former Congressman Chris Cox incorrectly state in their reply that I seek to "add to Section 230 'a duty of care' or a 'reasonableness' standard that cannot be found in the statute."[1] I write to correct the record, as well as to note that other language in the reply of Senator Wyden and Congressman Cox ironically supports the position I *do* take.

The Common Law Duty of Care

Contrary to the phrasing by Senator Wyden and Congressman Cox, the issue is not whether section 230 creates a duty of care. The question is whether the FCC can reasonably conclude that section 230 *does not preempt* the duty of care that would otherwise already apply to internet platforms under common law.

Ordinarily, businesses have an affirmative duty to take reasonable steps to prevent someone from using their service to harm others, *and so can be held liable if they don't take such steps*.[2] Courts have essentially construed section 230(c)(1), however, as preempting this duty of care.[3] As a result, platforms cannot be held liable even when they do little or no content moderation.

Consequently, despite conventional wisdom and Congress' best intentions, section 230 as applied by the courts makes platforms less likely to moderate content, putting the public at greater risk of harm.[4] To address that problem, I and others have suggested in this proceeding

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[1]Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934, at 15-16 (Sept. 17, 2020).

[2]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 6 & n.28 (citing DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 9.2, at 191, § 20.1, at 459-60, § 20.6, at 465-66, § 25.1, at 615-16, § 25.4, at 620-21, §§ 26.1-26.5, at 633-44, §§ 26.9-26.10, at 651-55 (2d ed. 2015)); Reply of DigitalFrontiers Advocacy, at 2.

[3]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 5-6 & nn.26, 29-34 (citing Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997); Doe v. AOL, Inc., 783 So.2d 1010 (Fla. 2001); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, 519 f.3d 666 (7th cir. 2008); Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009); Jones v. Dirty World Enter. Recordings LLC, 755 F.3d 398 (6th Cir. 2014); Herrick v. Grindr LLC, 18-396 (2d Cir. Mar. 27, 2019); Force v. Facebook, 934 F.3d 53 (2d Cir. 2019)); Reply of DigitalFrontiers Advocacy, at 1-2.

[4]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 4-8; Reply of DigitalFrontiers Advocacy, at 1-2. *Accord* Comments of Common Sense Media, at 1-2 (stating that "Section 230's broad liability shield protects bad actors and makes interactive computer services unaccountable when online harms emerge"); Comments of Consumer Reports, at 9 (stating that "Section 230's 'Good Samaritan' provision allows for good faith moderation, but it does not encourage it."); Comments of Carrie Goldberg at 1-2 (stating that "[c]ompanies take no initiative to stop active abuses because there are zero consequences if they don't. They have zero incentive to identify or prevent harm. And in one of my cases, the court even pointed to Section 230 as a logical reason for a tech company to not take action to help a crime victim actively stalked and impersonated, because the immunity from liability meant no action was legally necessary…. Big Tech monopolies have abused Section 230 as

and in congressional testimony that *Congress*—not the FCC—add to section 230 an explicit requirement that platforms take reasonable steps to curb unlawful behavior as a condition of receiving the section's protections.[5]

Short of that, however, the FCC can play a positive role *not by inserting a new requirement* into section 230, but by adopting the reasonable construction that section 230 *does not preempt the existing common law duty of care*.[6]

FCC Authority to Construe Section 230

The Supreme Court has held that an agency may construe ambiguous statutory provisions within its jurisdiction.[7] When doing so, the agency is not bound by prior court interpretations so long as its own construction is reasonable.[8] Courts, however, are then bound to apply that agency construction going forward, even if they believe another construction is better.[9]

The FCC has authority to construe section 230.[10] Section 230 falls within the FCC's jurisdiction, as it is part of the Communications Act.[11] Section 201(b) of the Act also authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of … chapter [five],"[12] which includes section 230.[13] Moreover, section

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a license to allow revenge porn, cyberstalking, sex trafficking, dissemination of child sexual abuse material, and criminal harassment on their platforms—the exact type of content that Section 230 was meant to stop.").

[5]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 13; *Disinformation Online and a Country in Crisis: Hearing before H. Subcomm. on Commc'ns. & Tech, and H. Subcomm. on Consumer Prot. and Commerce, H. Comm. on Energy and Commerce*, 116th Cong. (2020) (statement of Neil Fried, Principal, DigitalFrontiers Advocacy), https://digitalfrontiersadvocacy.com/6-24-20-sec-230-testimony; *Fostering a Healthier Internet to Protect Consumers: Hearing before H. Subcomm. on Commc'ns. & Tech, and H. Subcomm. on Consumer Prot. and Commerce, H. Comm. on Energy and Commerce*, 116th Cong. (2019) (statement of Prof. Danielle K. Citron, Boston University School of Law), https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fostering-a-healthier-internet-to-protect-consumers. *Accord* Comments of Common Sense Media, at 1, 3 (suggesting Congress should reform section 230); Comments of Consumers Reports, at 9 (stating that "Congress can and should strengthen the incentives for platforms to carefully moderate harmful or false content on their sites and networks. Lawmakers should also hold platforms responsible, commensurate with their powers and resources, for protecting consumers from content that causes demonstrable harm."); Comments of Carrie Goldberg, at 1 (advocating legislation); Comments of the Information Technology & Innovation Foundation, at 1 (advocating Congress clarify or update section 230); Comments of Public Knowledge, at 1 (stating that "[t]here are of course legitimate debates to be had about the interpretation of Section 230 in some cases, and even ways it could be amended.").

[6]Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 13-17; Reply of DigitalFrontiers Advocacy, at 4-13.

[7]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 15 & n.50 (citing NCTA v. Brand X, 545 U.S. 967, 980-83 (2005)); Reply of DigitalFrontiers Advocacy at 9-10.

[8]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 15; Reply of DigitalFrontiers Advocacy at 9.

[9]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 15; Reply of DigitalFrontiers Advocacy at 9.

[10]*See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 4-10; Reply of DigitalFrontiers Advocacy, at 14-15; Comments of the Free State Foundation, at 2, 4.

[11]*See* 47 U.S.C. § 230.

[12]*Id.*, § 201(b).

[13]*See id.*, ch. 5, https://www.govinfo.gov/content/pkg/USCODE-2018-title47/pdf/USCODE-2018-title47-chap5.pdf.

554(e) of the Administrative Procedure Act allows an agency, "in its sound discretion, [to] issue a declaratory order to terminate a controversy or remove uncertainty."[14] The FCC has previously relied on section 554(e) to construe provisions of the Communications Act, as the Free State Foundation has pointed out.[15]

The Ambiguity of Section 230

Section 230(c) is ambiguous regarding platform liability for failing to moderate content.[16] Although subsection (c)(2) states that "[n]o provider or user of an interactive computer service shall be held liable [for] action *voluntarily taken* to restrict access,"[17] it says nothing about action *not taken*. And although subsection (c)(1) states that "[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,"[18] it does not say anything about a platform's action or inaction. Nor does it mention the word "liability." A prohibition on treating platforms as speakers or publishers is not necessarily the same as a general prohibition on assessing liability.

Subsection (c)(1)'s language certainly can be—and has been—interpreted by courts as precluding liability for both action and inaction regarding third party conduct over a platform. But no language in section 230 clearly indicates a congressional intent to preempt the affirmative duty of care that platforms—like most businesses—would ordinarily have under common law to take reasonable steps to prevent use of their services to harm others.

In fact, statements in the reply comments of Senator Wyden and Congressman Cox are consistent with the view that Congress did not intend section 230 to preempt the ordinary duty of care. "In writing Section 230," they say, "we—and ultimately the entire Congress—decided that [legal rules, such as those governing defamation, deceptive and unfair practices, and negligence] should continue to apply on the internet just as in the offline world. Every business, whether operating through its online facility or through a brick-and-mortar facility, would continue to be responsible for all of its legal obligations."[19]

One such legal obligation of every business is to reasonably mitigate use of its service to harm others. This is the ordinary negligence standard of the common law duty of care.

An Alternative, Reasonable Construction of Section 230

A different and reasonable interpretation of section 230(c)(1) would be that although it *does* preclude treating platforms in defamation cases as speakers or publishers of their users'

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[14] 5 U.S.C. § 554(e).

[15] Reply Comments of the Free State Foundation, at 5-6 & n.12 (citing *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, *Declaratory Ruling*, FCC 07-30, at ¶ 2 & n.3 (rel. Mar. 23, 2007); *In re* United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, *Memorandum Opinion and Order*, FCC 06-165, at ¶ 2 & n.2 (rel. Nov. 7, 2006)).

[16] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 15-16, Reply of Digital Frontiers Advocacy, at 10.

[17] 47 U.S.C. § 230(c)(2) (emphasis added).

[18] *Id.*, § 230(c)(1).

[19] Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934, at 10-11.

content, it *does not* preclude treating platforms in defamation cases as distributors of their users' content.[20] Nor does it preclude holding platforms liable in non-defamation cases for negligently, recklessly, or knowingly failing to curb unlawful use of their services.[21]

Congress' decision to adopt section 230 was prompted by its consternation with the court decision in *Stratton Oakmont v. Prodigy*, a libel case.[22] That makes it reasonable to construe the language of section 230 in the context of libel law. Libel law has developed specific ways for treating the original author—or "speaker"—of defamatory material, the "publisher" of the material, and the "distributor" of the material.[23] The fact that section 230(c)(1) mentions the first two terms but not the third could reasonably be construed to mean that subsection (c)(1) precludes treating a platform in a defamation case as either a speaker or publisher, *but does not preclude treating it as a distributor* in a defamation case, notwithstanding that courts today have concluded that it precludes treating platforms as any of the three.

Under this interpretation, platforms *could* be held culpable for the defamatory statements of their users *if they knew or should have known about the defamatory statements*—the standard that applies to distributors. This interpretation would make sense in light of the fact that there was no allegation in the *Stratton* case that Prodigy knew or should have known about the defamatory statement, which means there is no reason to assume Congress wanted to preclude holding platforms culpable for defamation in such cases.

Congress clearly disagreed with the *Stratton* court's decision to treat Prodigy *as a publisher*—which can be held culpable *even if it is not aware of a defamatory statement* in content it publishes—merely because Prodigy had engaged in content moderation. Precluding the *Stratton* decision's treatment of platforms in defamation cases as publishers of specific content *they did not moderate* merely because of other content *they did moderate*, would remove a significant deterrent to content moderation. It would therefore reasonably meet Congress' objective even without precluding distributor liability for defamatory content that platforms know or have reason to know about, such as when they have been alerted to its existence.

Subsection (c)(2) under this interpretation would still preclude assessing liability on platforms *for their actual moderating of content*, which is consistent with Congress' goal to remove disincentives to content moderation. Neither subsection (c)(1) nor (c)(2) would preclude assessing liability on platforms *in non-defamation* cases *where they did not moderate* the specific content at issue. And without that shield, platforms could still be held culpable if they breached the ordinary duty of care by negligently, recklessly, or knowingly failing to curb unlawful conduct over their services. Another way to think of this is that platforms would not be held liable for defamation as a speaker or publisher of their users' content, or for moderating content, but for *not* moderating content and breaching the duty of care.

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[20] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 16-17; Reply of Digital Frontiers Advocacy, at 11-13.

[21] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 16-17; Reply of Digital Frontiers Advocacy, at 12-13.

[22] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 2-4.

[23] *See id.*, at 2-3; Reply of Digital Frontiers Advocacy, at 11.

This Construction Is Not Just Reasonable—It's Better

This would not just be a reasonable construction of section 230. It would be a better construction than the prevailing one applied by the courts, even though it need not be to warrant deference under Supreme Court precedent.[24]

Congress' goal with section 230 was to protect the public from harmful conduct by encouraging content moderation through a liability shield for platforms that *do* take proactive measures. It seems odd to construe section 230 as granting a shield to platforms even when they *do not* take such measures, thereby removing the duty of care. Doing so increases the likelihood people will be harmed, rather than decreases it.

Congress presumably would have spoken more explicitly if it intended to broadly eliminate for platforms the general duty of care, shielding them even when they do not moderate content and negligently, recklessly, or knowingly fail to curb unlawful conduct over their services. That Congress may not have intended to grant such sweeping immunity when platforms do not act is buttressed by the fact that Congress explicitly precluded liability in subsection (c)(2), which applies when platforms take action, but did not use the word "liability" in subsection (c)(1), which is not contingent on platform action. As one commenter observed: "'[W]here Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[25]

Conclusion

Despite the framing by Senator Wyden and Congressman Cox, the question is not whether section 230 *creates* a duty of care, but whether it *preempts* the duty of care that would ordinarily apply. Section 230 is ambiguous on that point, and the FCC can reasonably construe the provision as allowing platform liability for negligently, recklessly, or knowingly failing to curb unlawful activity. Indeed, even Senator Wyden and Congressman Cox state that Congress did not seek to change platforms' ordinary legal obligations, such as those related to negligence.

Respectfully Submitted,

x Neil Fried
Neil Fried
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cc by email:

Chairman Pai	Matthew Berry	Tom Johnson
Commissioner Rosenworcel	Travis Litman	Patrick Webre
Commissioner O'Rielly	Joel Miller	
Commissioner Carr	Joseph Calascione	
Commissioner Starks	William Davenport	

[24] *See* Statement of DigitalFrontiers Advocacy in Support of Petition for Rulemaking, at 16; Reply of Digital Frontiers Advocacy, at 13.

[25] Comments of Michelle Banayan, at 11 (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)).