DigitalFrontiers Advocacy℠

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

October 5, 2020

Ex Parte Notice of Conversation with Commissioner Carr re: RM-11862 on Section 230 Reform

Dear Secretary Dortch:

Commissioner Carr and I spoke by phone Oct. 1, 2020, regarding RM-11862 on section 230 reform. We discussed the FCC's authority to construe section 230, possible interpretations of the provision, and whether the FCC could also adopt content moderation transparency requirements. In particular, I made points that I have previously detailed in filings in this docket:

- Despite conventional wisdom and Congress' best intentions, section 230 as applied by the courts makes internet platforms *less likely* to moderate content, *increasing the risk* the public will be harmed by unlawful conduct.
    - Businesses ordinarily have an affirmative duty to take reasonable steps to curb use of their services for unlawful conduct, and can be held liable if they fail to do so.
    - Courts interpretations of section 230(c)(1), however, have eliminated this duty of care for platforms, which means they cannot be held liable for failing to moderate content.
    - As a result, platforms are less likely to moderate, increasing the risk the public will be harmed by unlawful conduct.
- The FCC can adopt a different construction of section 230(c)(1) that allows platforms to be held liable when they negligently, recklessly, or knowingly fail to curb unlawful conduct.
    - Based on Supreme Court precedent, an agency may construe ambiguous statutory provisions within its jurisdiction.
    - In construing such provisions, an agency need not adhere to prior court interpretations, but courts must subsequently apply the agency's construction if it is reasonable.
    - Section 230 is part of the Communications Act and thus falls within the FCC's jurisdiction, and section 201(b) of the Communications Act and section 554(e) of the Administrative Procedure Act authorize the FCC to interpret section 230.
    - Although section 230(c)(2) clearly precludes basing platform liability on the fact that *the platform moderated content*, the language of section 230(c)(1) is ambiguous regarding platform liability *for failing to moderate content*.
        - Section 230(c)(2) explicitly addresses voluntary acts and uses the word "liability."

- Section 230(c)(1) mentions neither action nor inaction by platforms and does not use the word "liability"; all it says is that platforms may not be treated as the "speaker" or "publisher" of their users' content.

- Thus, while section 230(c)(1) can be and has been interpreted by courts as precluding platform liability for their users' content regardless whether the platforms moderated that content, no language in section 230(c)(1) clearly requires that result.

- The FCC can reasonably conclude that section 230(c)(2) precludes platform liability *stemming from their moderation of content*, but that neither section 230(c)(2) nor section 230(c)(1) precludes holding platforms liable for breach of the existing, common law duty of care when they *fail to moderate content.*

  - The FCC can reasonably conclude that section 230(c)(1) does not grant platforms blanket immunity for the content of their users because section 230(c)(1) does not use the word "liability" and, when Congress uses language in one part of a section but not another, that difference is presumed to have meaning.

  - Construing section 230 in the context of defamation law is logical because Congress adopted it in response to *Stratton Oakmont v. Prodigy*, a defamation case.

  - "[S]peaker," "publisher," and "distributor" have distinct meanings in defamation law: because of their editorial control over content, speakers and publishers *can be held liable* for defamation *even when they were unaware* that the content they spoke or published contained defamatory statements; because distributors lack editorial control, they *cannot* be held liable for defamation *unless they knew or should have known* that content they distributed contained defamatory statements.

  - The FCC could reasonably conclude that the use of "speaker" and "publisher" but not "distributor" in section 230(c)(1) *does preclude* holding platforms liable in defamation cases *when they are unaware* that their users' content contained defamatory statements, but *does not preclude* holding them liable *when they knew or should have known* that their users content contained defamatory statements.

  - Because subsection (c)(1) only precludes treating platforms as speakers or publishers, and subsection (c)(2) only precludes holding platforms liable as a result of their content moderation, the FCC could reasonably conclude that section 230 *does not preclude* holding platforms liable for negligently, recklessly, or knowingly failing to take reasonable steps to curb use of their services for unlawful conduct, on the grounds that they would have breached the existing, common law duty of care.

- This would be not only a reasonable construction of section 230, but also a better construction than the prevailing one applied by the courts, even though it need not be to warrant deference under Supreme Court precedent.

  - Congress' goal with section 230 was to protect the public 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 even when platforms *do not*

take such measures, thereby removing the duty of care and increasing the likelihood people will be harmed.

- 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.

- Limiting platforms' discretion to take down or leave up content that is lawful but that they or others find undesirable would pose significant First Amendment issues, but enforcement of terms of service and transparency requirements may provide a way forward regarding issues such as hate speech, bias, and misinformation.

  - The FCC could invoke its authority discussed above to conclude that section 230 does not preclude claims for breach of contract or unfair and deceptive practices when platforms do not honor their terms of service regarding what content they will take down or leave up and their process for making such decisions.

  - Because platforms might draft their terms of service in a way that reserves an unreasonable amount of discretion, is not clear, or leaves important matters unaddressed, the FCC could consider using its authority under section 257 to require platforms to include certain terms of service explaining the content platforms will or will not take down and their process for making such decisions.

Respectfully Submitted,

x Neil Fried
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cc by email: Commissioner Carr
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