The Section 230 Immunity Provision Debate Continues

By **Jordan Rice and Caleb Hayes-Deats** (January 22, 2024, 5:01 PM EST)


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In December, the U.S. Court of Appeals for the Fifth Circuit in Doe v. Snap Inc. came one vote shy of reconsidering en banc its decade-old interpretation of Section 230 of the Communications Decency Act.[1]

The judges voting for en banc reconsideration urged that the Fifth Circuit's precedent defied the act's text, misconceived how modern online services function and erroneously expanded the immunity granted by the statute.

In their view, the Fifth Circuit and other courts had for too long read "extra immunity" into a statute where it does not belong. Those judges are not alone in their willingness to more narrowly interpret the immunity provided by Section 230.

Section 230 was enacted in the days of dial-up modems, but it remains a cornerstone of the internet. Many who do not regularly practice in this space are surprised by how broadly courts have interpreted Section 230 immunity.

Websites and other online services frequently invoke it as a defense against two types of claims: those seeking to hold a website liable for making available harmful content posted by a third party, and those seeking to hold a website liable for removing a user's content or banning a user from the platform.

With respect to the latter type of claim, courts have held Section 230 to provide a powerful defense, granting websites broad latitude to determine what third-party content they host and what they remove or prohibit.

But the defense is not without limits, and some new limits have recently begun to gain traction. Courts have for some time interpreted that Section 230(c)(1) does not apply to claims seeking to hold websites to promises made to users, even if those claims relate to user bans or content removal.

And more recently, courts have begun to find Section 230(c)(1) inapplicable where claims are content neutral — where the websites are alleged to have removed or barred content for reasons unrelated to whether that content is in some way objectionable.

Whether courts more narrowly interpret the immunity granted by Section 230 has broad implications. Online services are multibillion-dollar marketplaces. The interpretation of Section 230 thus determines whether courts can review a wide range of economic activity.

Section 230(c)

Section 230(c)(1) provides websites with defense against claims that seek to treat them as the "publisher or speaker" of content provided by a third party.[2] The defense is broad; there are no

additional requirements a website must satisfy. Section 230(c)(2)(A) provides a narrower defense in comparison.

Under that provision, a website may not be held liable for removing or barring third-party content that the website in "good faith" considers "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[3]

At first glance, it appears that Section 230(c)(1) protects websites when they make available harmful content posted by a third party — like a defamatory restaurant review posted by a disgruntled diner on Yelp — and Section 230(c)(2) protects websites when they remove or prohibit content posted by a third party, such as removing a user's hate speech on a social media platform.

Justice Clarence Thomas and others have observed that this is the "most natural" reading of the statute.[4] But that is not how courts, most notably the U.S. Court of Appeals for the Ninth Circuit, have interpreted the statute.

That court — in Barnes v. Yahoo! Inc. in 2009 and Enigma Software Group USA LLC v. Malwarebytes Inc. in 2019 — read Section 230(c)(1) to protect against both making third-party content available and choosing to remove or prohibit it.[5]

Thus, where a plaintiff challenges a website's decision to remove its content or ban it from the platform entirely,[6] the website may rely on Section 230(c)(1), bypassing the need to prove good faith, as required under Section 230(c)(2).

Limits on the Defense

Section 230(c)(1) grants broad immunity for websites' decisions to remove content or ban users. But limitations exist. First, where a plaintiff's claim does not stem from a website's conduct as a publisher or speaker, Section 230 provides no defense.[7]

For example, Section 230(c)(1) does not bar claims for breach of contract, promissory estoppel, and breach of the implied covenant of good faith and fair dealing.[8] Such claims seek to hold a website liable based on its promises, not based on its status as a publisher or speaker.

For example, if a website promises to remove conduct only in compliance with a particular procedure, Section 230(c)(1) does not bar a user from enforcing that promise.[9]

Second — although less established than the limitation just discussed — courts have begun to suggest that the applicability of Section 230(c)(1) may depend on why a website removed or prohibited content.

Section 230(c)(2)(A) protects websites' ability to remove only objectionable content. Section 230(c)(1), in contrast, lacks that explicit limitation.

Some courts, such as the U.S. District Court for the Northern District of California in 2021 in In re: Zoom Video Communications Inc. Privacy Litigation, have nonetheless indicated that Section 230(c)(1) does not apply where the plaintiff's claims are content neutral, meaning claims that do not relate to the harmfulness of third-party content on the defendant's platform.[10]

That is consistent with Section 230(c)'s purpose, as reflected in its title: "Protection for 'Good Samaritan'

Block and Screening of Offensive Material."[11]

If courts broadly accept that Section 230(c)(1) is inapplicable to content-neutral claims, it will significantly limit the scope of the defense.

Websites would be unable to avail themselves of Section 230(c)(1) where they bar a user — or take down a user's content — for reasons unrelated to whether the plaintiff's content was objectionable. That means, for example, a website could not block a competitor's content to further an anti-competitive scheme.[12]

Nor could a website block a user simply to retaliate against it for reasons unrelated to the content it posted or wished to post on the website, such as to extract a concession as part of a negotiation or to penalize purported wrongdoing unrelated to content.[13] If the same content could be posted to the website regardless of the success of a plaintiff's claim, Section 230(c)(1) would not apply.[14]

The implications of Section 230(c)'s limits extend far beyond speech. Interactive computer services are not just forums for publishing information. They are multibillion-dollar marketplaces.

Decisions about what content can appear in those marketplaces, and which users may participate in them, affect how they function and who profits.

In Dangaard v. Instagram LLC, for example, the plaintiffs alleged in 2022 in the Northern District of California that a social media company removed their posts — or reduced the frequency with which users saw them — to benefit competitors.[15] The limits of Section 230 determine whether such conduct is subject to judicial review.

Conclusion

Section 230(c) of the Communications Decency Act immunizes a broad swath of conduct, generally allowing websites to police objectionable content as they see fit. But the statute has limits, and a growing number of judges appear motivated to further limit the scope of immunity provided by Section 230.

The statute does not free websites from acting in accordance with their promises to users. And courts have begun to suggest it may well not allow websites to remove content or bar users for reasons unrelated to moderating objectionable content.

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[1] Doe v. Snap, Inc., No, 22-20543, 2023 WL 8705665 (5th Cir. 2023).

[2] §230(c)(1); see Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100-03 (9th Cir. 2009).

[3] §230(c)(2)(A).

[4] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020) (Thomas, J., statement respecting the denial of certiorari); see, e.g., Al-Ahmed v. Twitter, Inc., 648 F. Supp. 3d 1140, 1162 (N.D. Cal. Jan. 3, 2023); e-ventures Worldwide, LLC v. Google, Inc., No. 14-cv-646, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017).

[5] See Barnes, 570 F.3d at 1105; Malwarebytes, 141 S. Ct. at 17 (Thomas, J., statement respecting the denial of certiorari).

[6] See, e.g., King v. Facebook, Inc., 572 F. Supp. 3d 776, 795 (N.D. Cal. 2021) (Communications Decency Act immunity applied where defendant disabled the plaintiff's account).

[7] Barnes, 570 F.3d at 1107.

[8] Barnes, 570 F.3d at 1109; King, 572 F. Supp. 3d at 795; In re Zoom Video Commc'ns Inc. Privacy Litig., 525 F. Supp. 3d 1017, 1035 (N.D. Cal. 2021); Enhanced Athlete Inc. v. Google LLC, 479 F. Supp. 3d 824, 830 (N.D. Cal. 2020).

[9] King, 572 F. Supp. 3d at 795.

[10] Zoom Video, 525 F. Supp. 3d at 1032-34.

[11] §230(c) (emphasis added); see HomeAway, Inc. v. City of Santa Monica, 918 F.3d 676, 684 (9th Cir. 2019) (the Ninth Circuit has "hewn closely" to §230(c)'s title and purpose).

[12] Dangaard v. Instagram, LLC, No. 22-cv-1101, 2022 WL 17342198, at *5 (N.D. Cal. Nov. 30, 2022).

[13] Id.

[14] Doe v. Internet Brands, Inc., 824 F.3d 846, 851 (9th Cir. 2016).

[15] Dangaard v. Instagram, LLC, No. 22-cv-1101, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022).