

Inside The 'Battleground For The Internet's Soul': Section 230

By **Mike Curley**

Law360 (August 30, 2021, 11:33 AM EDT) -- The once-obscure Section 230 of the Communications Decency Act, which has enabled platforms like Facebook, Twitter and YouTube to shape the digital world, now faces an increasingly harsh floodlight over the broad immunity it confers on those platforms.

Fierce debate surrounds recent calls for stripping or modifying the protections Section 230 grants those platforms against liability for the information and posts they publish. Dozens of bills have been proposed at state and federal levels, and challenges have been filed in federal courts.

Experts doubt the federal bills will go anywhere, thanks to the sharp partisan dispute over what Section 230's biggest problems are: Republicans see it as promoting censorship of conservative voices, and Democrats view it as providing too much protection to Big Tech and not enough incentive to moderate for misinformation.

But experts agree that state bills and some litigation could gain traction.

If so, changes to Section 230's protection clause could open the floodgates to litigation against tech platforms, attorneys said. Defamatory or injurious comments posted by third parties could result in lawsuits against a host if immunity is curtailed. The quandary becomes monumental.

"How do you monitor a torrent of content?" Doug Mirell, a partner at Greenberg Glusker Fields Claman & Machtinger LLP, said in an interview with Law360. "You have millions, literally millions of postings every second on some of these platforms."

For now, the biggest threats to Section 230 are state-based bills like the one passed in Florida, if they're upheld in court, experts say. The Florida law, now contested in the Eleventh Circuit, imposes steep fines against social media for any banning of political candidates.

"Whether these bills pass is not hypothetical," Eric Goldman of the Santa Clara University School of Law told Law360. "This is the battleground for the internet's soul today."

How the Baby Became the Behemoth

Attorneys are divided on what, if anything, should be done regarding Section 230.

Richard Lawson of Gardner Brewer Martinez-Monfort said the whole provision should be tossed, calling it

"fundamentally flawed" and outdated. He said there was no reason that online platforms should enjoy more protections than ink-and-paper publishers.

"At this point, whatever utility there may have been to a nascent industry to have that protection in the 1990s is gone now," he said. "There is an entire body of case law and statutory law dealing with what happens when publishers put out content that is objectionable. ... There's no reason you can't take that and apply that to the internet."

On the other hand, Christopher Cole, who co-chairs Crowell & Moring LLP's advertising and media group, said Section 230 should continue. Growing scrutiny of online expression and debate suggests a continuing need for immunity for platforms, he said.

"I see a lot of rhetoric to the extent that Section 230 was enacted 20 years ago, when the internet was in its infancy, and a lot has changed since then. But I haven't necessarily seen a strong rationale for what has changed so much that you need to disembowel this law," he said. "In fact, some of the things that have changed, to me, signal that the law should remain in effect."

Removing Section 230 would bring "profound" changes to the internet landscape, said Mirell, who believes it would be difficult, if not impossible, for platforms to monitor their content and avoid liability.

"The fact is that Section 230 is what has allowed the baby to become the behemoth," he said. "Because these social media platforms have been able to thrive without any concern for legal liability for anything that users post, they have become effectively immune from the laws of nature that govern the rest of the media landscape."

The law as it stands is what allows Facebook, Twitter and other platforms to decide whether to allow posts to stay up on a case-by-case basis, he said, and to set their terms of service and community guidelines.

Goldman thinks Section 230 is better than the alternatives proposed. The bills introduced so far aren't about making good policy, he said, but rather about marketing to voters.

"We're not seeing any really thoughtful, intelligent proposals that are designed to be good policy," he said. "If they really cared about making good policy, they'd do some research, have some hearings, say, 'OK, what are the potential effects of this?'"

A State Law to Watch

The courts might have the ultimate say in whether Section 230 remains in its current state, through decisions on challenges to the provision or to state laws that take aim at Big Tech.

In Florida, legislators passed a law allowing the Florida Elections Commission to fine social media platforms up to \$100,000 per day for removing political candidates. The law came in response to Twitter, Facebook, Instagram and other social media providers that banned former President Donald Trump following the Jan. 6 storming of the U.S. Capitol.

While the Florida law was enjoined by a federal judge, the case is being appealed to the Eleventh Circuit. If the appeals court overturns the district court, that could open the door to similar legislation being considered throughout the country, Goldman said.

The judicial climate elsewhere is showing signs of warming to Section 230 challenges.

In April, Justice Clarence Thomas was critical of social media platforms and their ability to "cut off speech" when the Supreme Court rendered a decision in a suit filed by the Knight First Amendment Institute at Columbia University, which claimed that Trump's practice of blocking Twitter users from his account was unconstitutional.

"Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors," Justice Thomas said in a concurring opinion. "Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties."

Lawson said this comment shows that if one of these suits gets to the Supreme Court, there could be some movement on Section 230. The most likely path, he added, would be for the appellate courts to change their interpretation of the provision's two main clauses.

The first provision of Section 230 holds that a web platform isn't liable for third-party content. Through court rulings, it has effectively subsumed the second, which holds that a platform isn't considered a publisher if it makes good faith efforts to police its content, Lawson said.

The courts could instead adopt the idea that a web platform loses its protections if it fails to act to police its content despite being on notice. This, Lawson said, would be a "massive" change that would force the platforms to respond more quickly to user reports, or face litigation if they don't.

While Trump has again tried to take on Twitter, Facebook and the others in recent high-profile lawsuits alleging they censored him by banning his accounts, the consensus is that the effort is mainly a publicity stunt focused on his personal grievances, unlikely to lead to a change in the law.

The Law Legislators Love to Hate

A dizzying number of bills have been introduced on both sides of the aisle in Congress. But while these proposals give sponsors an opportunity to grandstand, few, if any, have legs, experts say.

Each party has its high-profile bill in the House: the Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms Act, or Safe Tech Act, proposed by Democrats in February, and the Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression Act, or Discourse Act, introduced by Republicans in June.

There are dozens of such proposals, though Goldman told Law360 many are "messaging" bills — not intended to pass so much as to promote a political agenda and show voters that a Congress member is taking on Big Tech. Even the big ticket bills, however, are unlikely to pass, given the stark partisan divide in Congress.

"Democrats generally want internet services to do more content moderation, and Republicans generally want internet services to do less content moderation," he said. "Their goals are diametrically opposed even if they both are targeting Section 230."

Sen. Marco Rubio's website describes the Discourse Act, which the Florida Republican sponsors, as a measure to remove Section 230's protections for any major platform that promotes or censors certain materials or viewpoints.

The Discourse Act would unleash litigation by anyone who's been deplatformed, said Cole of Crowell & Moring. The proposal would effectively prevent the platforms from moderating, making them "ultimately inhospitable," he added.

The Democrats' Safe Tech Act would exempt paid content from Section 230's protections, effectively giving platforms a duty to screen ads and other sponsored content, Cole said. But what constitutes "paid content" can be murky, as platforms often receive some type of compensation for regularly posted content, and it could be argued that other types of content that generate revenue for the site would be considered "paid content" under the bill.

Lawson of Gardner Brewer Martinez-Monfort, who views Section 230 as giving inadvertent protection to deceptive advertisers, said forcing platforms to screen and verify advertisements would be a game changer.

The Safe Tech Act also includes a provision that would let users go to the courts for an order to, for instance, take down a defamatory post, as well as other provisions that would stop Section 230 from interfering with civil rights and anti-harassment laws.

The Republican and Democratic bills do share some commonalities. Both would turn Section 230 into an affirmative defense rather than immunity. This would allow a lot of litigation to get beyond the dismissal stage, Cole said, imposing a higher cost to the tech companies.

More recently, Sen. Amy Klobuchar, D-Minn., introduced the Health Misinformation Act, which would amend Section 230 to remove liability protections for platforms whose algorithms promote misinformation related to a public health emergency, such as the COVID-19 pandemic.

Goldman, the law professor, is critical of the bill, saying it unconstitutionally designates the secretary of health and human services as a "one-person censorship board" and wouldn't be likely to reduce the amount or visibility of misinformation.

Mirell, however, called the provisions a "welcome and overdue development" as the country struggles with vaccine hesitancy and another wave of COVID-19 cases.

"Though this proposed legislation faces a long road to enactment, I hope it will spur platforms such as Facebook and Twitter to take even more seriously their moral obligation to suspend and remove accounts that continue to promulgate medical misinformation," he said.

An Internet Without Section 230

Goldman posited three possible scenarios for platforms if Section 230 gets taken off the books.

In the first scenario, websites spend big money putting in barriers to ensure posted content doesn't create liability. But lawsuits inevitably arise anyway, and some platforms are unable to afford the litigation.

In the second, platforms decide not to moderate at all, on the premise that they can't be held liable for posts they don't know about. While Goldman is unsure that would fly as a legal defense, he said it definitely wouldn't work from a business perspective, as an unmoderated site would be "overrun by

garbage, and no model succeeds on that."

The third possibility would be "paywalled gardens," or subscription services that pay professional content producers to make posts.

"Not only is that taking away the things we love about the internet, but it also means we're just going to have to pay more to enjoy that stripped-down version of the internet," he said. "It means that there's going to be access-to-information barriers, and it means that we're likely to perpetuate existing socioeconomic divides."

Some envision another scenario.

A world without Section 230 would put internet platforms on the same playing field as ink-and-paper publishers, making them similarly liable for content, Lawson said.

Social platforms would face greater expenses, but they would survive.

"230 immunizes content for people who publish in zeros and ones, for which those who still publish with ink and paper are going to get in trouble," Lawson said.

--Editing by Robert Rudinger and Kat Laskowski.