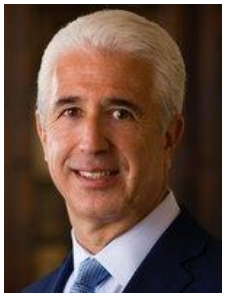
Congress Shouldn't Abrogate Section 230 Immunity

By **Aron Raskas and Nicole Atkinson** (January 4, 2021)



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President Donald Trump's willingness to veto the critical National Defense Authorization Act, primarily because it failed to "terminate" Section 230 of the Communications Decency Act, transformed his earlier assaults on Section 230 into a clear and present danger.

Despite the override of that veto by Congress, Section 230 remains targeted from both sides of the aisle, for different reasons and with varying concerns.[1]

Nearly 90 members of the U.S. House of Representatives and 13 senators refused to override the president's veto. In the latest attack, Senate Majority Leader Mitch McConnell, R-Ky., introduced a bill that tied $2,000-per-person COVID-19 stimulus checks to a repeal of Section 230. The election returns from Georgia may well determine how the Senate opts to address the issues surrounding Section 230.

The internet expanded and thrived for more than two decades because of the policy choice that Congress made in enacting Section 230(c) of the Communications Decency Act. Often referred to as the 26 words that created the internet, Section 230 states that "[n]o provider ... of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider."[2]

As characterized by the U.S. Court of Appeals for the Ninth Circuit in 2016 in Jane Doe No. 14 v. Internet Brands Inc., this section protects websites from liability where the material was posted on the website by a third party.[3] Section 230 was a policy choice that Congress made to immunize from tort liability companies that merely serve as intermediaries for potentially damaging messages posted on their sites by their independent users.[4]

Brinksmanship and impulsive legislative actions generally create disastrous results when tampering with well-crafted policy. While some refinements to Section 230 may be useful, and even necessary, courts have applied existing statutes to generally reach the correct result. A recent Florida case provides a good illustration.

Section 230 recognized that the amount of information communicated via interactive computer services is "staggering" and that service providers cannot possibly screen each of their millions of postings for potential harm.[5] Understanding that interactive computer service providers might choose to severely restrict the number and type of messages posted if they face potential liability for those messages, Congress weighed the speech interests implicated and chose to immunize interactive computer service providers rather than stifle free speech.[6]

In 2018, however, Congress enacted the Fight Online Sex Trafficking Act. FOSTA allows damages claims against interactive computer service providers under the Trafficking Victims Protection Act and removed Section 230 immunity where sex trafficking acts are properly alleged under the TVPA.

But FOSTA derived from findings that some malicious websites deliberately tailored their platforms to facilitate sex trafficking on their websites. The FOSTA exception from Section 230 immunity was, therefore, limited to interactive computer service providers that "knowingly" acted to benefit from sex trafficking on their sites.

The U.S. District Court for the Southern District of Florida's decision last year in Doe v. Kik Interactive Inc.[7] was a ruling of first impression on the interrelationship between Section 230 and FOSTA. In Kik Interactive, the minor plaintiff alleged that numerous adult users of the Kik interactive messaging platform used Kik to target her for sex trafficking acts.

Doe claimed that, under the TVPA, Title 18 of the U.S. Code, Section 1595, Kik should be held liable for knowingly participating in a sex trafficking venture, in violation of the TVPA, Title 18 of the U.S. Code, Section 1591.

She alleged that Kik "knowingly" participated in a sex trafficking venture by benefiting from, and knowingly facilitating, a venture in which Kik users used the Kik Messenger platform to subject her to sex trafficking.[8] She sought to bolster her claim by alleging that Kik knew that sexual predators use Kik to target minors yet did not provide any warnings or establish policies to protect minors from being victimized.[9]

The court granted Kik's motion to dismiss, holding that this was "exactly the type of claim that CDA immunity bars."[10] The court observed that the legislative history of FOSTA demonstrates that Congress sought to impose liability only upon "openly malicious actors" and, therefore, limited the FOSTA exception to Section 230 immunity to circumstances where the interactive computer service provider had actual knowledge of, and overtly participated in, a venture of sexual trafficking.[11]

Doe, however, did not allege facts plausibly establishing that Kik knowingly participated in a sex trafficking venture to traffic her, but alleged only that Kik knew that other sex trafficking incidents occurred on Kik. Therefore, Doe could not meet FOSTA's requirement that the conduct underlying the claim violate Section 1591, which requires the defendant's knowing and active participation in sex trafficking the plaintiff.[12]

In its opinion, the court distinguished the case before it from the circumstances in S.Y. v. Naples Hotel Co., decided by the U.S. District Court for the Middle District of Florida a few weeks earlier.[13] The Naples Hotel case, and others like it cited by that court, found that claims could be sufficiently stated under the TVPA against hotel defendants where those hotels were alleged to have had even constructive knowledge that plaintiffs were being trafficked on their properties.

The Kik Interactive court observed that, because the hotel defendants in those cases were not interactive computer service providers, neither FOSTA nor CDA immunity applied in those cases.[14] Kik, however, was immune precisely because it was an interactive computer service provider.

That was because Congress had made a decision to balance the needs of protecting children with encouraging "robust" speech over the internet and, in doing so, enacted a statute to protect interactive computer service provider from liability for their users' content and conduct unless the interactive computer service providers were themselves affirmatively and knowingly engaged in acts of sex trafficking.[15]

Cases such as this one illustrate the important balancing of interests made by Congress, during rational legislative times, and the ability of the courts to effectively apply the

necessary balancing tests. They further illustrate an important point: Interactive computer service providers may forfeit their immunity when they overstep their role as mere facilitators of communication and act for specific purposes.

With the optics of a presidential veto now dispatched, and a new administration and Congress poised to assume control, it may be possible for a more reasoned debate about the future of Section 230 to emerge. Before tinkering with this statute that has served the country and the digital economy so well, Congress should consider how capably courts have addressed issues that implicate Section 230 by applying the tools that Congress already provided.

Kik Interactive is one such illustration. It establishes the ability of the courts to use existing statutes to determine whether interactive computer service providers have overstepped the freedom to operate that Congress granted them through Section 230.

One lesson that may be derived from Kik Interactive that is applicable to the debates that have been unfolding in Congress concerns the actions that interactive computer service providers have been taking to censor speech on their respective platforms.

Where overzealous or politically motivated executives of interactive computer service providers step into the fray, to knowingly and deliberately make choices affecting the distribution of content, they provide fodder for those seeking to eliminate or reduce their immunity. Yet, where those providers are merely fulfilling their traditional roles of equitably facilitating the distribution of content, existing law provides a reasonable balance of interests.

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Disclosure: Aron Raskas and Nicole Atkinson were counsel for the defendants in Doe v. Kik Interactive Inc.

[1] See, e.g., https://www.businessinsider.com/what-biden-administration-means-for-section-230-2020-11; https://www.theverge.com/2020/10/28/21539458/senate-committee-hearing-section-230-republicans-twitter-facebook; https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/; https://www.bloomberg.com/news/articles/2020-08-11/section-230-is-hated-by-both-democrats-and-republicans-for-different-reasons.

[2] 47 U.S.C. § 230(c)(1).

[3] Doe v. Internet Brands, Inc., 824 F.3d 846, 850 (9th Cir. 2016).

[4] See Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997).

[5] Id.

[6] Id.

[7] Doe v. Kik Interactive, Inc., No. 20-60702-CIV, 2020 WL 5156641 (S.D. Fla. Aug. 31, 2020).

[8] Id. at * 1.

[9] Id.

[10] Id. at * 5.

[11] Id. at * 7.

[12] Id.

[13] S.Y. v. Naples Hotel Co., 2020 WL 4504976, at *2 (M.D. Fla. Aug. 5, 2020).

[14] Kik Interactive, 2020 WL 5156641 at * 7.

[15] Id. at * 6.