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The Potential Antitrust Impact Of High Court Section 230 Case

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Section 230 of the Communications Decency Act was originally thought of as "force for securing decency on the Internet," as the late Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit explained in a dissenting opinion in the 2019 Force v. Facebook Inc. case.

But its enactment under Title 47 of the U.S. Code, Section 230 also represented a commitment to the preservation of "the vibrant and competitive free market."[2]

The free market ideal — explicitly codified in the statute — has taken prominence over the decent-internet ideal, and Section 230 has become the most powerful legal protection for online platforms that rely on content created or shared by others.

Section 230 protects these platforms by stating broadly that they "shall [not] be treated as the publisher or speaker" of such content,[3] and also by making clear that the platforms are immune from liability as publishers even if they choose to moderate and/or remove content they consider to be "objectionable, whether or not such material is constitutionally protected."[4]

At the time of Section 230's passage in 1996, one of the statute's most common applications was protecting bloggers from liability for someone else's comments or similar third-party interactions on their websites.

But courts have tended to apply the provision broadly, including extending its liability protection to advanced platforms that use complex algorithms to organize, repackage or recommend user-generated content. The liability protection is just as available to the largest and most powerful online platforms as it is to small blogs.

For this reason, discussions about Section 230 frequently overlap with discussions about market concentration and antitrust law.

Like Section 230, the antitrust laws seek to "preserv[e] the vibrant and competitive free market," as the U.S. Supreme Court explained in the 1958 Northern Pacific Railway decision.[5] And many have argued that neither Section 230 nor the antitrust laws are particularly aligned with the modern internet economy.

As Judge Morgan B. Christen of the U.S. Court of Appeals for the Ninth Circuit recently stated in the 2021 Gonzalez v. Google decision, "[t]here is no question that § 230 shelters more activity than Congress envisioned it would."[6]

But, this term, the Supreme Court is considering whether Section 230 does, in fact, shelter as much activity as courts have held to date. Specifically, Gonzalez v. Google concerns whether online platforms can assert Section 230 against claims alleging that their content curation algorithms facilitate terrorist acts.

There is not a traditional split on this issue among the lower federal courts, but there is a substantial split among jurists. The cases raising this issue have resulted in divided panels.

In Gonzalez, the Ninth Circuit majority followed the dominant school of thought, which construes these suits as advancing "claims that [online platforms do] not do enough to block or remove content," and conclude that Section 230 immunity is available because "such claims necessarily require the court to treat [such platforms] as a publisher."[7]

The alternative school of thought, associated primarily with Judge Katzmann, emphasizes that an "algorithm ... communicate[s] its own message: that [the platform] thinks you, the reader — you, specifically — will like this content,"[8] and concludes that Section 230 immunity is unavailable because such claims only require treating platforms as publishers of their own content — not someone else's.

The various interpretive and policy approaches described in this article were on full display among the justices themselves during oral argument. Justice Neil Gorsuch's questions showed he may agree with the view that algorithms carry their own message.

Justice Ketanji Brown Jackson emphasized the original purpose of the Communications Decency Act — protecting internet users from indecent internet content — and was skeptical that Section 230 could be properly interpreted to protect platforms promoting offensive material.

And Justices Elena Kagan and Brett Kavanaugh seemed open to the position that any changes to Section 230 must come from Congress, rather than the Supreme Court. However the high court comes out, this case will have implications for antitrust law. This article discusses these implications.

In the Event of Affirmance: Renewed Focus on Section 230 Legislation

An affirmance of the dominant approach could send ripples within antitrust legislation and litigation. In the event of an affirmance, the Supreme Court would likely follow lower courts in emphasizing the boundaries of its role relative to that of Congress. This, in turn, would likely encourage renewed focus on the many legislative proposals for antitrust-focused Section 230 reform.

One route taken in such legislative proposals is amending subsection (e). Section 230(e) currently provides that its liability protection does not extend to claims arising under federal criminal law, intellectual property law, federal and state communications privacy law, and state sex trafficking law.

In 2020, the U.S. Department of Justice submitted a legislative proposal that would amend subsection (e) to "make clear that Section 230 cannot be used to immunize actions that would violate the federal antitrust laws."[9]

Another such proposal is the SAFE TECH Act, sponsored by Sen. Mark Warner, D-Va., and introduced in February 2021.

The Warner bill goes slightly further than the 2020 DOJ proposal and proposes an amendment to subsection (e) that would provide "[n]othing in this section shall be construed to prevent, impair, or limit any action brought under Federal or State antitrust law."[10]

Amendments like these would significantly reduce the usefulness of Section 230 in defending against potential antitrust actions.

That usefulness is illustrated in a 2019 U.S. Court of Appeals for the District of Columbia Circuit case, Marshall's Locksmith Service Inc. v. Google LLC, where appellants, a group of locksmith services, sued Google, Microsoft Corp., and Yahoo Inc. under Sections 1 and 2 of the Sherman Act alleging that those companies conspired to "extract payments from legitimate locksmith companies" by flooding their maps and search engine results with fake locksmith listings, thereby inducing legitimate companies into paying for more favorable positioning.[11]

Finding that the fake listings were third party content, the D.C. Circuit held that Section 230 compelled dismissal.

At least one bill, the American Innovation and Choice Online Act, takes a different approach. Rather than directly amending Section 230, it has the potential to implicitly limit the scope of Section 230's protections.

The AICOA provides that it:

> [S]hall be unlawful [for] covered platforms [to]engage in conduct . . . that would . . . preference the products, services, or lines of business of the covered platform operator over those of another business user on the covered platform, ... limit the ability of the products, services, or lines of another business user to compete on the covered platform relative to the products, services, or lines of business of the covered platform operator, [and] discriminate in the application or enforcement of the terms of service of the covered platform among similarly situated business users, [in a manner that would materially harm competition.][12]

In a letter reply to four senators who expressed concerns about the effect of the AICOA on the ability of social media platforms to continue to moderate content, Rep. David N. Cicilline, D-R.I., stressed that "the bill incorporates a harm-to-competition requirement that is consistent with current antitrust law, under which platforms regularly engage in content moderation" and explained that the continued applicability of Section 230(c) would be ensured by AICOA, Section 5, which states "[n]othing in this Act may be construed to limit... the application of any law."[13]

Some tech industry groups opposed to the AICOA subsequently sent their own letter to those same senators explaining that Cicilline understated the bill's potential effect on Section 230.

Their concerns stem from the possibility that AICOA will make it easier for plaintiffs to repackage legal theories that cannot overcome Section 230 into claims that stress the anti- competitive results of content moderation.

At least one U.S. court of appeals, the Ninth Circuit, has held that Section 230 does not provide limitless immunity for online platforms, and declined to read the provision as a bar to certain unfair competition claims brought under the Lanham Act, in the 2019 MalwareBytes decision.[14]

In their letter, the industry groups stress the "substantial risk that courts will extend the [Ninth Circuit's] reasoning to exclude AICOA claims from Section 230 protection — including politically motivated claims aimed at content moderation."[15] If such a judicial extension does happen, this may also facilitate state antitrust and unfair competition claims.

In the Event of Reversal

There are also antitrust implications in the event of a reversal. In two recent writings appended to summary dispositions issued by the Supreme Court, Justice Clarence Thomas seems to have made clear that he will likely vote to reverse the Ninth Circuit.

In his 2020 statement respecting the denial of certiorari in MalwareBytes, Justice Thomas endorsed what we referred to above as the alternative school of thought, writing that lower courts "depart from the most natural reading of the [statute] by giving Internet companies immunity for their own content" and "strain the English language" by holding that these companies act as publishers when they engage in algorithm-based content recommendation.[16]

And in addition to narrowly construing Section 230's liability protection, in the 2021 Knight First Amendment Institute case, he issued a concurrence arguing the statute is evidence that these companies "focus on distributing speech [to] the broader public" and therefore resemble common carriers — a legal characterization that would result in more, not less, regulation and potential liability.[17]

The Supreme Court may adopt a middle ground and limit the protections of Section 230 in a more targeted manner. Justice Thomas' recent opinions may also provide insight into possible legal reasoning for such a middle ground.

For example, Justice Thomas characterized claims like the one at issue in Gonzalez as a product-defect claim — in other words, that the algorithm's tendency to recommend content created by terrorist organizations made it a defective algorithm.[18]

He used a similar label to describe a claim based on algorithms' facilitation of illegal human trafficking,[19] as well as a claim that a dating application lacked basic features to prevent harassment and impersonation.[20]

If the Supreme Court does choose to limit the scope of Section 230's liability protection, companies will have to deal with a drastically different legal status quo. And regardless of the breadth of a hypothetical scale-back, any change, even small, to how Section 230 is applied will undoubtedly have huge implications for how online platforms are run and how competition unfolds on, and with, them.

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[1] See Force v. Facebook, Inc., 934 F.3d 53, 79 (2d Cir. 2019) (Katzmann, C.J., concurring in part, dissenting in part) (explaining that Section 230 represented one of two competing legislative approaches to combatting the proliferation of harmful content).

[2] 47 U.S.C. § 230(b)(2).

[3] 47 U.S.C. § 230(c)(1).

[4] 47 U.S.C. § 230(c)(2).

[5] Pac. Ry. Co v. United States , 356 U.S. 1, 4 (1958).

[6] Gonzalez Google , 2 F.4th 871, 913 (9th Cir. 2021) (Christen, J.).

[7] Id. at 891; see also Force, 934 F.3d at 65.

[8] Force, 934 3d at 82 (Katzmann, C.J., concurring in part, dissenting in part); see also Gonzalez, 2 F.4th at 921–22 (Gould, J., concurring in part, dissenting in part).

[9] Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act (justice.gov); see also DOJ Section by Section Explanation; Cover Letter to

[10] Warner Bill Text - S.299 - 117th Congress (2021-2022): SAFE TECH Act | gov | Library of Congress (emphasis added).

[11] Marshall's Locksmith Inc. v. Google, LLC , 925 F.3d 1263 (D.C. Cir. 2019).

[12] AICOA § 3(a)(1)–(3). Text - S.2992 - 117th Congress (2021-2022): American Innovation and Choice Online Act | Congress.gov | Library of Congress

[13] Letter from Cicilline to Sens. Schatz, Wyden, Luján & Baldwin, June 15, 2022 61522-cicilline-letter-to-senators-re-content-moderation.pdf (documentcloud.org)

[14] Enigma Software Grp. USA, LLC v. MalwareBytes, Inc ., 946 F.3d 1040, 1044–45 (9th 2019), cert. denied 141 S. Ct. 13 (2020). An important note: although Section 230(e)(2) withholds immunity from certain intellectual property-based claims, the Ninth Circuit explained that exception was not relevant in this case.

[15] Letter from Tech Industry Groups to Sens. Schatz, Wyden, Luján & Baldwin, June 27, 2022 2992-response-to-cicilline-letter.pdf (documentcloud.org)

[16] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC , 141 S. Ct. 13, 16–17 (2020) (Thomas, J., statement respecting the denial of certiorari).

[17] Biden Knight First Am. Inst. , 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

[18] 141 Ct. at 17 (citing Force, 934 F.3d at 65).

[19] Id. (citing Jane Doe No. 1 v. Backpage.com, LLC , 817 F.3d 12 (1st Cir. 2016)).

[20] Id. (citing Herrick v. Grindr LLC , 765 F. App'x 586 (2d Cir. 2019)).

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