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PERSPECTIVE

Twitter is in the clear from Devin Nunes' suit over parody tweets

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Like moths to a flame, Twitter's social media platform inevitably draws disputes and litigation arising from tweets from its users. For each of these disputes and lawsuits, Twitter can, and does, rely on the immunity afforded to it and other internet service providers under Section 230 of the Communications Decency Act. However, President Donald Trump's May 28 executive order, which was issued on the heels of Twitter's responses to Trump's tweets about mail-in ballots for the 2020 presidential election, seeks to amend or "clarify" the protections afforded to internet service providers.

Immunity under Section 230 is the reason why Twitter was able to successfully dismiss California Republican Rep. Devin Nunes' lawsuit against Twitter over certain tweets that Nunes claimed defamed him and interfered with his civic duties. In 2019, Nunes filed a lawsuit in the Circuit Court of Henrico County, Virginia alleging claims for negligence and defamation per se against Twitter, as well as claims for defamation, insulting words and common law conspiracy against Twitter user Elizabeth Mair, the LLC managed by Mair, and two anonymous Twitter users with the Twitter handles "@Devin Nunes' Cow" and "@Devin Nunes' Mom." Nunes' complaint claimed over $250 million in damages and sought orders requiring Twitter to disclose the true identities of "@Devin Nunes' Cow" and "@Devin Nunes' Mom" and to suspend the accounts of Mair, "@ Devin Nunes' Cow" and "@Devin Nunes' Mom." Though Nunes' complaint blamed Twitter for allowing the creation of additional parody accounts, such as "Fire Devin Nunes" and "Devin Nunes' Grapes," Nunes' complaint itself is likely responsible

New York Times News Service

Rep. Devin Nunes (R-Calif.), in Washington, Nov. 21, 2019.

for inspiring the creation of numerous additional parody accounts. In particular, the following Twitter accounts were created the same month Nunes filed his complaint: Devin Nunes' Cows' Mom, Devin Nunes' Dad, DevinNunesGrandma, Devin Nunes' Spine, DevinNunesTHEDragQueen, Devin Nunes' Farm and Devin's Dog.

The complaint criticized Twitter for allowing "@Devin Nunes' Cow" and "@Devin Nunes' Mom" to publish tweets critical of Nunes, such as the following: "This is going to be disastrous for #CA22 but please understand @DevinNunes' difficult situation. Between being eyeball-deep in a federal obstruction investigation and then cradling the president's balls full time, he just doesn't have time for you anymore. Surely you understand"; and "If you believe in law and order vote for @JanzforCongress. If you believe in obstruction of justice and perjury vote for @DevinNunes."

Twitter moved to dismiss the lawsuit on the grounds that Section 230 of the CDA shielded it from any liability arising from tweets published by its users. Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and provides immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

Nunes' complaint alleged that Twitter was not protected by the CDA because Twitter is an "information content provider" that created and developed content (i.e., the tweets generated by Mair, "@Devin Nunes' Cow" and "@Devin Nunes' Mom") by, among other conduct, censoring viewpoints with which it disagrees, "shadow-banning" conservatives, and ignoring complaints about offensive conduct. Nunes' complaint also alleged Twitter was negligent in failing to remove the tweets.

On June 24, Judge John Marshall of Henrico County Circuit Court dismissed Nunes' lawsuit as to Twitter on the grounds that Twitter was immune from liability under Section 230 of the CDA. Judge Marshall found that Nunes' classification of Twitter as an "information content provider" was merely a conclusory allegation void of factual support. For example, Judge Marshall noted Nunes' own acknowledgement of the lack of evidence that Twitter "was present with the author of the content" when the author drafted the content at issue in the complaint or "helped draft the content" at issue in the complaint. Therefore, Judge Marshall found the court was not required to accept Nunes' allegation that Twitter was an "information content provider" as true for purposes of ruling on the motion.

Judge Marshall also rejected Nunes' argument that Twitter was a content provider because its "bias is so extreme that it governs its decisions regarding content that is allowed on its internet platform." Such a rejection of Nunes' bias argument touches on the crux of President Trump's recent executive order. In particular, Trump directed Secretary of Commerce Wilbur Ross, Attorney General William Barr and the National Telecommunications and Information Administration, to file a petition for rule making with the Federal Communications Commission for the agency to "expeditiously propose regulations to clarify" certain provisions of Section 230. Of relevance to Nunes' lawsuit, Trump sought clarity on "the conditions under which an action restricting access to or availability of material is not 'taken in good faith' within the meaning of subparagraph (c)(2)(A) of section 230."

Trump's executive order thus far has had no impact on the statutory language or effect of Section 230. As a result, Twitter was able to successfully rely on the current protections afforded by Section 230 to dismiss Nunes' lawsuit. Whether Twitter's continued ability to rely on Section 230 may be impacted by future regulations issued under Trump's executive order remains to be seen. ■

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