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PERSPECTIVE

Twitter, Hunter Biden and the CDA's Section 230 safe harbor

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Twitter is once again making headlines after blocking users from tweeting two New York Post articles on the basis that the articles violated its terms of use. On Oct. 14, the New York Post published two articles regarding Hunter Biden, son of presidential nominee and former Vice President Joe Biden. The articles were based in part on information obtained from emails recovered from a laptop that is alleged to have belonged to Hunter Biden. After the New York Post publicized the articles on its Twitter account, Twitter marked any link to the articles as "potentially unsafe," blocking them from the platform entirely. The articles could not be shared at all, even in direct messages (which are not publicly viewable). Although Twitter initially offered no justification for the decision to block the articles, later in the day, Twitter explained that the articles violated its Private Information and Hacked Materials Policies because they contained personal and private information (e.g., email addresses and phone numbers) and images of content obtained without authorization (i.e., a hacked laptop).

Twitter's restriction of information once again thrusts Section 230 of the Communications Decency Act into the spotlight. Section 230 provides that: "No 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." It goes on to offer interactive computer service providers, such as Twitter, immunity from civil liability 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," or taking actions to restrict access to such content.

New York Times News Service

Hunter Biden in Los Angeles on Nov. 1, 2019.

In addition to protecting interactive computer service providers from liability for posting third-party content, courts also have applied Section 230 protection broadly to permit such providers to engage in blocking and screening of third-party content. Song fi Inc. v. Google, Inc., 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015). It also has been interpreted to shield them from liability for exercising editorial control over the content created by third parties that it publishes, which is traditionally the role a publisher would play. Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158, 174-75 (2d Cir. 2016). It can even apply when an interactive computer service alters content. Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

Here, Twitter's initial decision to block users from accessing the New York Post articles seemingly falls directly within the purview of Section 230, as Section 230 explicitly protects decisions to "restrict access," so long as such restriction was made in "good faith." Nevertheless, Twitter's decision to restrict access to articles from of one the nation's oldest and widely read daily newspapers immediately sparked outrage and renewed the calls from all three branches of government to limit the scope of Section 230's protection.

In May, after Twitter flagged several of President Donald Trump's tweets for violating its policies, he issued an executive order directing government administrators and agencies to file a petition for rulemaking with the Federal Communications Commission for the agency to "expeditiously propose regulations to clarify" certain provisions of Section 230. The executive order also sought to clarify "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."

To date, the executive order has had no impact on the statutory language or effect of Section 230; however, this may not remain the case for long. In a public statement released on Oct. 15 (just one day after Twitter blocked the New York Post articles), FCC Chairman Ajit Pai noted that the broad interpretation of Section 230 used to shield social media companies "has no basis in the text of Section 230" and announced that his agency intended to "move forward with a rulemaking to clarify [Section 230's] meaning."

The U.S. Supreme Court may also soon weigh in on the scope of Section 230 protection. On Oct. 13 (just one day before Twitter blocked the New York Post articles), the Supreme Court declined to review the scope of Section 230 in Malware- Bytes Inc. v. Enigma Software Group USA, LLC, which was previously reviewed by the 9th U.S. Circuit Court of Appeals. Enigma Software Group USA, LLC v. MalwareBytes Inc., 2019 DJDAR 8817 (Sept. 12, 2019), as amended 2019 DJDAR 12178 (Dec. 31, 2019). In a statement regarding the denial, Justice Clarence Thomas expressed the desire to review the scope of Section 230 which he reasoned had been extended "beyond the natural reading of the text." More specifically, he asked that the court review lower courts' tendency to "eviscerate[] the narrower liability shield Congress included in the statute" which should only protect those companies that "decline to exercise editorial functions to edit or remove third-party content … and when they decide to exercise those editorial functions in good faith." He went on to suggest that the current interpretation of Section 230 as "protect[ing] any decision to edit or remove content" provides protection beyond the scope intended by Congress.

In addition, the Senate Judiciary Committee plans to vote Tuesday to issue a subpoena to Twitter's CEO requiring him to testify on this matter. Notably, on Friday, following calls for a Senate hearing and Chairman Pai's statement, Twitter reversed its Hacked Materials Policy; Twitter will now only remove tweets containing hacked content if they are directly shared by hackers or those "acting in concert with them." Twitter CEO Jack Dorsey further addressed the backlash in his own tweet on Friday, stating that, "[s]traight blocking of URLs was wrong, and we updated our policy and enforcement to fix it. Our goal is to attempt to add context, and now we have capabilities to do that."

Twitter's response to the backlash, however, is unlikely to satisfy Twitter's critics. In particular, many critics who question whether Twitter blocked the articles in good faith desire a narrower interpretation of Section 230 that will expose Twitter and other social media companies to liability for what critics believe is politically- motivated behavior. Based on the current jurisprudence, it is unlikely that Twitter's restriction of the articles will expose it to liability. However, based on the recent outcry from all three branches of government, that could all change. Of course, the upcoming election could result in a change in control of at least two of the three branches of government, which could further impact the protections currently afforded to Twitter and other interactive computer service providers. ■

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