Why Section 230 Isn't Really a Good Samaritan Provision

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As the House Commerce Committee revisits internet platform responsibility this week, it bears recognizing that section 230 of the Communications Act[*] does not make platforms more likely to protect their users. In fact, despite its description as a "good samaritan" provision, it does the opposite.

The Good Samaritan Misnomer

Good samaritan statutes typically limit liability for individuals who have no relationship to the person in jeopardy, and thus who have no obligation to lend assistance. A stranger, for example, has no duty to help someone who is drowning. If the stranger tries anyway, however, he or she has a duty at common law not to do so

in a way that unreasonably causes harm.

That means that if the stranger injures the person, such as by administering CPR recklessly and breaking a rib, he or she could potentially face liability. This risk can discourage the stranger from providing assistance. A properly functioning good samaritan statute removes the liability risk for someone with no duty of care, thereby eliminating the disincentive to act and creating a net increase in the likelihood of aid.

In section 230 scenarios, by contrast, the platform is not a stranger. It has a business relationship with its users. Indeed, the platform created the environment in which its users are interacting.

Ordinarily, businesses have a duty of care at common law to avoid unreasonably causing harm to their customers, as well as to take reasonable steps to prevent harm to them from other customers. But as applied today, section 230 removes this duty of reasonable care for platforms. That makes it less likely platforms will protect their users, not more, contrary to the goals of a good samaritan statute.

How did we get here?

Stratton Oakmont v. Prodigy

In 1996, Congress wanted online platforms to grow as venues for commerce and communication while at the same time to proactively curb harmful behavior online. Congress saw the recent New York trial court ruling in *Stratton Oakmont v. Prodigy* as an obstacle to that objective, however.

The court had concluded that Prodigy's decision to moderate user content made it a "publisher" and therefore subject to potential liability for defamatory posts, even for user content it did not moderate. Congress worried that ruling would discourage platforms from moderating in the first place.

To overturn *Prodigy*, Congress passed section 230 of the Communications Act. In

particular, section 230(c)(2) states that "[n]o provider or user of an interactive computer service shall be held liable on account of … 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."

Analogizing to protections for people who help others in jeopardy, Congress labelled section 230(c) the "good samaritan" provision. Congress's theory was that limiting the liability of platforms when they seek to prevent harmful behavior on their services would encourage them to take such measures.

The Misapplication of Section 230

Unfortunately, courts have misapplied another part of section 230—subsection (c)(1)—to shield platforms not just when they do moderate content, but even when they don't.

Section 230(c)(1) 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." Courts have concluded this "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."

Consequently, judges have ruled that platforms cannot be held culpable for negligently, recklessly, or knowingly facilitating terrorism, harassment, sexual disparagement, non-consensual dissemination of intimate photos, housing discrimination, distribution of child sexual abuse materials, and other unlawful conduct. Absent that potential liability, platforms are less likely to moderate content, not more.

This creates a net decrease in the likelihood platforms will prevent harm and arguably even increases the likelihood they will put their users in peril, defeating

Congress's goal. For example, platform promotion of divisive content in the quest for engagement might be less likely, or at least more quickly addressed, if platforms could be held liable. Section 230 today is therefore acting as a bad samaritan provision—shielding platforms even when they negligently, recklessly, or even knowingly facilitate harm, and thus making such lack of responsibility more likely.

Restoring the Duty of Reasonable Care

The best way of addressing this problem is to amend section 230 so platforms must take reasonable steps to curb unlawful activity as a condition of receiving the liability limitations, as I and others have previously suggested.

That would restore the duty of care in a way that avoids the criticisms lodged by opponents of section 230 reform. Platforms would not need to stop every harm from the potentially large volume of content they carry so long as they take reasonable steps. The common law reasonableness standard would also take into account the resources of platforms, ensuring small services are not treated the same as large ones.

And it would do so without inappropriately expanding litigation, while reducing the need for Congress to pass piecemeal, issue-specific legislation. The section 230(c)(2) liability limitation would remain, continuing to solve the *Prodigy* problem and ensuring platforms can still moderate content while serving as avenues for free expression.

Most importantly, this approach would increase the likelihood platforms will protect their users and the public from harmful behavior on their services, as Congress intended.

[*]Section 230 was added to the Communications Act by section 509 of the 1996 Telecommunications Act. Section 509 and all the other provisions in 1996 Telecommunications Act title V—which sought to address indecent, obscene, and

violent transmissions by phone, on television, and over the internet—are collectively referred to as the Communications Decency Act.

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