

## JETLaw Blog Post

### *Can the EU's Digital Services Act Provide a Roadmap to Modifying Section 230?*

As the “primary statute governing hosting of user-generated content online,”<sup>1</sup> Section 230 of the Communication Decency Act of 1996<sup>2</sup> has shaped the Internet as we know it. In response to a 1995 New York state court decision ruling that platforms who policed their users were legally liable for harmful content found on its site<sup>3</sup>, Congress stepped in. This new statute allowed platforms to be insulated from liability for any harmful content posted by their users and should they chose to police the content, to retain immunity even if they choose not to remove it.<sup>4</sup> This statute permitted the platforms to grow virtually undeterred for over twenty years, yielding the growth of innovative companies like Facebook, Instagram, and Twitter.<sup>5</sup> However, with this growth came a public and political movement to curb the resulting “wild West” online environment.<sup>6</sup>

Despite its innocuous beginnings, Section 230 has become a political hot-topic in which Republicans generally think the statute gives too much power to platforms to police user content while Democrats believes it gives too much protection to platforms for failing to stop illegal behavior.<sup>7</sup> Both President Trump and Biden have called for the law to be repealed or modified<sup>8</sup> and the House Energy and Commerce Committee has recently held hearings to discuss curbing the dissemination of misinformation on the platform.<sup>9</sup>

Across the ocean, the European Union has proposed a comprehensive framework for online services operating in Europe—the Digital Services Act (“DSA”).<sup>10</sup> While the legislation is still in development, it has already gone through one round of public feedback and is expected to address the liability protection of internet companies.<sup>11</sup> Specifically, the DSA would eliminate the “one size fits all” approach to liability and adopting “asymmetric”

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<sup>1</sup> Daniel Lyons, *Facebook's First Amendment rights complicate Section 230 debate*, YAHOO (Oct. 22, 2021 6:45AM), [https://news.yahoo.com/facebook-first-amendment-rights-complicate-114500369.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAD8cbErRrtwM46qoEAq4tw9gHisKkR1A7xhkkVd5-gZvAcZg24w7hCjC4k1yJY8d6BOzy1gxNSSSta9Vf5qnXhUuI8ERrLOVtNVPxAdzMoWP8ogt3qk3z5eaeVFEOsYhcTf01s0P8V6HjZfS7FCvR2fJZLbDEmSgG\\_Gz2QmmhXu](https://news.yahoo.com/facebook-first-amendment-rights-complicate-114500369.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAD8cbErRrtwM46qoEAq4tw9gHisKkR1A7xhkkVd5-gZvAcZg24w7hCjC4k1yJY8d6BOzy1gxNSSSta9Vf5qnXhUuI8ERrLOVtNVPxAdzMoWP8ogt3qk3z5eaeVFEOsYhcTf01s0P8V6HjZfS7FCvR2fJZLbDEmSgG_Gz2QmmhXu).

<sup>2</sup> 47 U.S.C. § 230.

<sup>3</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 23, 1995).

<sup>4</sup> 47 U.S.C. § 230(c)(1), (2).

<sup>5</sup> Matt Reynolds, *The strange story fo Section 230, the obscure law that created our flawed, broken internet*, WIRED (Mar. 24, 2019 6:00AM), <https://www.wired.co.uk/article/section-230-communications-decency-act> (quoting Daphne Keller from Stanford Law School's Center for Internet and Society).

<sup>6</sup> *Id.* (quoting Representative Chris Cox).

<sup>7</sup> Shira Ovide, *What's Behind the Fight Over Section 230*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/technology/section-230-explainer.html>.

<sup>8</sup> David McCabe, *Tech's Legal Shield Appears Likely to Survive as Congress Focuses on Details*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/2021/03/09/technology/section-230-congress.html>.

<sup>9</sup> David McCabe, *Zuckerberg, Dorsey and Pichai testify about disinformation*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/technology/zuckerberg-dorsey-and-pichai-testify-about-disinformation.html>.

<sup>10</sup> Aline Blankertz and Julian Jaursch, *How the EU plans to rewrite the rules for the internet*, BROOKINGS INSTITUTE (Oct. 21, 2020), <https://www.brookings.edu/techstream/how-the-eu-plans-to-rewrite-the-rules-for-the-internet/>.

<sup>11</sup> *Id.*

regulation that is cognizant of different platforms.<sup>12</sup> For instance, platforms that limit user content to images, text, and video would retain limited liability while platforms used to sell products would face greater liability due to the commissions earned.<sup>13</sup>

While the DSA remains in development, the U.S. should consider its asymmetrical structure as a viable option to amending Section 230. Rather than giving companies blanket immunity, differentiating between them may redress the imbalance between over policing users and under-monitoring platforms. Despite many of the largest online companies being American-based, they host users internationally and Europe's current liability framework mirrors that of Section 230. A coordinated or complementary regulatory scheme between the EU and the US would decrease possible loopholes abused by the platforms and protect users in a uniform way. The formation of the EU-US Trade and Technology Council ("TTC") already provides the perfect forum within which to formulate and discuss platform regulation schemes.<sup>14</sup> With a common priority of increasing scrutiny on technology companies, the U.S. should look to Europe's innovative DSA legislation as an opportunity not only to address an ongoing domestic policy debate but also advance foreign relations.

Summary: The political debate over repealing or amending Section 230 of the Communications Decency Act of 1996 has grown in intensity, with prominent politicians from both sides of the aisle weighing in and Congress investigating the collateral consequences of limiting platform liability for harmful user content. In light of the newfound formation of the EU-US Trade and Technology Council, the domestic debate should consider the Europe's Digital Services Act as a viable template to reform Section 230.

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<sup>12</sup> Bruna Martins dos Santos and David Morar, *Four lesson for U.S. legislators from the EU Digital Services Act*, BROOKINGS INSTITUTE (Jan. 6, 2021), <https://www.brookings.edu/blog/techtank/2021/01/06/four-lessons-for-u-s-legislators-from-the-eu-digital-services-act/>.

<sup>13</sup> Blankertz and Jaursch, *supra* note 10.

<sup>14</sup> Samuel Woolley and Dominika Hajdu, *An agenda for US-EU cooperation on Big Tech regulation*, BROOKINGS INSTITUTE: TECH STREAM (Aug. 9, 2021), <https://www.brookings.edu/techstream/an-agenda-for-us-eu-cooperation-on-big-tech-regulation/>.