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Section 230

and the future of the internet

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Labrys

Mariana Cunha e Melo
Jonas de Abreu

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Center for Technology and Public Interest, SL
Carrer de Bailèn, 11, Barcelona, Spain, 08010
www.wearelabrys.com

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Summary

The US Supreme Court is considering the fate of Section 230, a law that protects content platforms from liability for user-generated content. The case, Gonzalez v. Google, challenges the intermediary liability protection of Section 230. If the challenge succeeds, it could undermine the foundation of Web 2.0 and the internet's future. The case focuses on whether platforms like Google, Twitter, and TikTok should be held liable for third-party content from their recommendation engines. Challenging Section 230 could have severe consequences for freedom of expression and lead to restrictions on recommendation engines or higher restrictions on publishing or sharing. Section 230 has been settled law for over two decades and protects content platforms, even if they encourage users to post content.

One of the most important pieces of legislation in the history of internet freedom is being questioned before the Supreme Court of the United States. The outcome of that challenge could have repercussions worldwide. Section 230 of the Communications Decency Act shields content platforms from liability for the content their users create on the platform. The provision inspired countless international declarations of internet rights. More than that, Section 230 laid the foundation for what defined Web 2.0 and gave birth to the content creators economy, i.e., user-generated content.

The US Supreme Court will hear arguments in a case that could shake the strength of that foundation and damage the future of the internet as we know it. Gonzalez v. Google reopens the discussion about intermediary liability. The topic is not strange to the internet law community. For years, several international human rights organizations have been reaffirming the same mantra: intermediaries should not be liable for third-party content to avoid censorship (https://manilaprinciples.org/). In all that time, the law in the US upheld that principle and served as a reference in comparison to many other highly litigated, censorship-prone jurisdictions. In Gonzalez v. Google, however, the SCOTUS will stage a debate where the role and liability of content intermediaries are once again brought into question. In particular, the case discusses whether intermediaries like YouTube, Google, Twitter, Facebook, Instagram, and TikTok should be liable for third-party content that emerges from their recommendation engines.

Although the technology of recommendation engines is new, the legal issue underlying its application has been discussed multiple times in US case law, and the principles in play are part of the very foundation of democracies as we know them today. Therefore, the discussion is not actually new, and a well-stated solution does already exist. Reopening this topic could be proven catastrophic.

From a legal standpoint, Section 230 came into law in 1996, and since then, it has been applied to various concrete situations. Throughout this long history of debate and application, something became clear: a content platform is immune under CDA § 230 if it does not contribute materially to the infringing content [1]. According to the 30-years-old consensus interpretation, the platforms fall within the scope of the immunity even if they (a) exercise "a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content" [1]; (b) repost or republishes the content [2]; or (c) encourage its users to post content, as long as it doesn't encourage specifically the publication of information that is on its face invalid [2].

It could be argued that the way recommendation engines are wired to reward popular content puts incentives to extreme forms of materials for being highly engaging. However, US courts have also discussed that content-neutral incentives are insufficient to forfeit Section 230's protection. So unless there was any indication that recommendation engines promote specifically terrorist-

related content – which nothing indicates so – content platforms should fall within Section 230 protection.

From a philosophical point of view, the answer to the discussion at hand is a direct application of “The Federalist X”'s argument about how to protect the nation against factions. In this timeless piece, James Madison argues the only valid way to fight extreme and harmful political ideas is to limit their effects because removing their causes would mean removing the freedom from which all ideas are born. In the post-Web 2.0 era, the abundance of information makes personalized content recommendations indispensable for the meaningful exercise of freedom of expression and information. Being so, removing such enablers, although potentially effective in combating harmful content online, would attack the cause of most effective communication online and could not be morally justified.

Before moving into the deeper analysis, we believe there is an overarching lesson from this case. Technology can enhance, facilitate, accelerate, and automate, but technology rarely, if ever, creates jobs previously unknown to humans. Therefore, the rule of thumb regarding technology regulation is that it should not be defined in isolation, on a case-by-case basis, for every new technique invented. As a general rule, the focus of the regulation should be the job – whichever way it's performed – not the technology itself. The statement may sound frivolous to some, but it's astonishing how often public authorities and industry experts start discussions from a clean slate approach whenever a new technology comes up to enhance

the performance of a job that has been around for ages. But we can't use the technological advancement as an excuse to change how we value and stack our principles. Our hope is that this case can shed some light on the need for a technology-neutral approach to regulation.

Shielding platforms from liability for content to which they did not materially contribute is as important today, with editorial algorithms, as it was when the publisher's role was performed manually – maybe even more so. The fundamental change that took place is in the volume of available information growing exponentially and demanding the editorial function to be automated. The job grew in size, not in essence. So there is no reasonable ground for a change of policy. Now on to the deeper dive.

I. Challenging Section 230 could have a disastrous impact on the internet as we know it

The risk the internet faces now is substantial.

From the Wall Street Journal:

> "If the internet is going to be usable, platforms need some way to sift the deluge created by the online masses. About 720,000 hours of video are posted to YouTube each day. Its algorithms collate relevant videos based on "thousands of inputs, including factors like a viewer's YouTube search and watch history, location, and time of day," Google says. The company says this conduct is akin to publishing, and Section 230 says YouTube isn't legally liable as the publisher of user videos".

From the Financial Times:

> “According to Big Tech’s critics, change is long overdue. They argue that the companies have used the immunity to unfairly penalise some users, while at the same time escaping responsibility for failing to block harmful content. But tech companies and their supporters warn that tampering with the broad freedoms contained in section 230 could upset a delicate balance. Depending on where the court comes down, it could turn the internet into either “a sanitised, anodyne, Sesame Street experience” or an uncontrolled mass of unwelcome content, said Matt Schruers, president of the Computer and Communications Industry Association, one of the petitioners urging the court to take up the Texas and Florida cases. “Most internet users want something in between,” he added. Limiting internet companies’ legal immunity could also have “unintended consequences” that end up blocking the good as well as the bad, said John Villasenor, a senior fellow at the Brookings Institution. He and others pointed to the effects of a new US law in 2018 that limited section 230 immunity when it came to sex trafficking. The change is blamed for prompting a large-scale removal of content from the internet, including of information useful to sex workers at risk of becoming victims of trafficking”.

From Ben Thompson's Stratechery:

> "The fact of the matter is that one of the implications of there being zero marginal costs in terms of the production and distribution of

> content is that there is an overwhelming amount of content. This means that a lot of content, including spam, needs to be deleted; it also means that a superior user experience comes from the platform recommending content that you might be interested in.
>
> To that end, should Gonzalez win, one possible option for platforms would be to return to some sort of content neutral recommendation system, like a chronological timeline. The revealed preference of users, though, which consistently shows much higher engagement with algorithmic timelines (even if their stated preference is for chronological timelines), suggests that this will not be the preferred response; rather, I would suspect far heavier "censorship" of posts. I put "censorship" in quotes because while I don't think (more) potentially questionable posts would be taken down – that's still protected – I do think that there will be very aggressive controls on what gets promoted".

Were the content platform found liable for what pops out of their recommendation engine, three approaches could likely emerge: (i) restrictions on what is pulled into the recommendation engine, limiting the access to potentially controversial content, (ii) restrictions on the recommendation engines, curbing its potential to match content to the user's expectations and needs and placing the burden of discovery (aka distribution) on the user, (iii) higher restriction on what can be published or shared in the platforms, limiting the free flow of ideas that we have today for opinions, scientific debate, and political thought. In any case, it's clear that freedom of expression as we

know it would be severely impacted. Even more so for minority groups, as it's often the case when civil rights are under attack.

We can also reasonably expect that any additional limitation could also have a big impact on less protected forms of speech, such as advertising and allegedly copyright-infringing material. When the highest bar of content protection is lowered, we should expect all standards of protection to go down with it. The ripple effects of restricting the long-lasting interpretation of Section 230 could therefore have impacts on other areas of free speech law. It's also likely to reach other jurisdictions that see the US free speech doctrine as the highest standard for free speech protection.

II. Section 230 interpretation throughout the years

The wording of Section 230 and the context where it was approved by Congress has been discussed in length. As many analysts fail to mention, though, the interpretation of Section 230 in cases of content recommendation has been settled in US courts for over two decades.Section 230 states the defendant is immune from liability if it is sued for information provided by another information content provider, that is, by anyone who is responsible, “in whole or in part”, for the “creation or development” of the contested material. The challenge faced by the courts was to define what “creation or development” means and what its extension is.

II.1. Exercising editorial functions

The first time these terms were narrowed by a federal court was in Zeran v. AOL [1]. The 4th Circuit held AOL was not liable for publishing or refusing to withdraw a certain message [1]. After all, deciding "whether to publish, withdraw, postpone or alter content" [1] is a "publisher's traditional editorial function" [1] and therefore is protected by Section 230. The court decided, moreover, that a "notice-based liability" [1] would defeat Congress's purposes of avoiding the chilling effect online and service providers would be safer by not screening their database for unlawful content, and it would be extremely easy for any user to suppress legitimate speech online simply by alleging defamation and other torts [1]. After this leading case, the reasoning in Zeran v. AOL became something of a "national consensus" [2-3].

II.2. Republishing or affirmatively promoting user content

In Shiamili v. Real Estate Grp. of New York, Inc. [2], the plaintiff sued a competitor claiming it took a defamatory comment a user posted in the company blog and moved it to a stand-alone post with a heading, a sub-heading and an offensive image [2]. The plaintiff requested the blog owner remove the offensive content, but the latter refused [2]. The New York State Court of Appeals – following the understanding of several other state and federal courts – applied the reasoning in Zeran v. AOL and concluded a

service provider does not become a content provider simply by republishing a user's content [2]. That is, by "reposting content created and initially posted by a third party" [2], since it falls within "a publisher's traditional editorial functions" [2-1-4]. Also in Blumenthal v. Drudge and AOL, a federal court confirmed that AOL is entitled to immunity from state law liability even when it affirmatively promotes on its website defamatory content created by a user. [5]

II.3. Encouraging content publication without materially contributing to the infringing content

Finally, also in Shiamili v. Real Estate Grp. of New York, the court confirmed that a service provider does not become a content provider simply by encouraging users to post content onto its website by using neutral (not content-based) incentives. [2-6-7-8] The plaintiff argued the defendant should be considered a content provider because its website "implicitly encouraged users to post negative comments about the New York City real estate industry" [2]. The court, however, decided that providing an "open forum" for its users to speak freely in a positive or negative way is "at the core of what section 230 protects" [2]. The court explained the defendant was unquestionably under the CDA § 230 immunity since the unlawful content was not a response to "any specific invitation" for users to post defamatory messages [2].

These arguments were further explored in Jones v. Dirty World Entm't Recordings, when the 6th Circuit decided a

case brought by a high school teacher defamed by texts and photographs posted on TheDirty.com [4]. The plaintiff asked the defendant to remove the unlawful content, which was not done. The court decided the defendant was immune under CDA § 230 since it did not "materially contribute" to the infringing content.

The 7th Circuit also upheld the understanding that merely encouraging users to post something does not establish the necessary causality to make the service provider a content provider [8]. In that case, Craigslist was sued for displaying notices containing housing ads that indicated discriminatory preferences violating the Fair Housing Act [8]. The court concluded that to become a content provider, the defendant would have to have caused "a particular statement to be made" [8]. That is: to give a special incentive towards a specific content to be produced. In that case, it did not happen since nothing on Craigslist's service induced people to make discriminatory statements, "for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings" [8]. Also in F.T.C. v. Accusearch, the court affirmed that a service provider is considered a "developer" of the actionable information "only if it in some way specifically encourages development of what is offensive about the content" [9]. In Shiamili v. Real Estate Grp. of New York, the New York Court of Appeals endorsed this same interpretation.

II.4. Conclusion

The state of the law, therefore, is that content platforms should not be liable for user-generated content even if they: (a) exercise editorial function, deciding whether to publish, withdraw, postpone or alter content, (b) republishes or affirmatively promotes the user content, or (c) encourages content publication without materially contributing to the infringing content or demanding a particular statement to be made as a condition of use. The recommender algorithms do nothing but automatize and personalize the exact activities the courts affirmed repeatedly are within the protection of Section 230.

III. The underlying policy issue concerning freedom of expression

In the free speech doctrine, one of the most endorsed theories of justification of freedom of expression is rooted in James Madison's writings in The Federalist X. Madison was, of course, one of the Founding Fathers of the United States and tackled a pressing issue any democracy faces: the danger of extreme political opinions contaminate the highest ranks of the State power. He uses the concept of "faction" to describe "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community". Here is Madison's framework to analyze this issue:

“There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency. The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. (...) The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. (...) So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. (...) It is in vain to

> say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole. The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS".

It is striking how current this 1787 text still is. The answer to the recommendation algorithms issue is the Web 2.0 direct application of James Madison's point. To tackle the challenges that the information society faces in our time, we should avoid attacking the causes (the very technology that enables a greater flow of information – good and bad) and instead investigate and mitigate its effects.

The role of technology in human history is that of an enabler. It allows us to save time and to reach deeper and further. It also amplifies voices and connects people. The technology behind the recommendation algorithms, and communication tools in general, are not inherently for good or bad communication. They are nothing but an enabler of freedom of expression. In the post-Web 2.0 era, recommender algorithms are today indispensable for the meaningful exercise of freedom of expression and information.

In a world of high marginal costs for the distribution of information, scarcity was the issue, and making information reach consumers was the hardest problem. Because the internet created a world of zero marginal cost, we face the problem of information overload. It would take over 80 years to watch every video that is uploaded in one day on YouTube. As anyone who has ever had a messy roommate could tell you, there is no value in abundance if you can't find the one thing you need at any given time. Being so, removing or creating a higher level of liability for offering recommender algorithms would be a stroke of death on freedom of information and expression.

The solution to the problem of harmful content online cannot be to punish the employment of a technology that today is indispensible to the exercise of freedom of expression and information. That would be an attack on the causes of the harmful content dissemination. Instead, our focus should be on limiting the effects of such wrongdoings. That means combatting underlying illegal activities that communicate through the platforms and, whenever possible, trusting that, with time, the ample public debate will process and scrap extreme position, as Madison proposed.

References

[1] Zeran v. Am. Online, Inc., 129 F.3d 327, 330, 333 (4th Cir. 1997).

[2] Shiamili v. Real Estate Grp. of New York, Inc., 17 N.Y.3d 281, 284-285, 290-292, 294-295 (2011)

[3] Barrett v. Rosenthal, 40 Cal. 4th 33, 46 (2006)

[4] Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 414-6 (6th Cir. 2014)

[5] Blumenthal v. Drudge and AOL, 992 F. Supp. 44, 51-52 (D.D.C. 1998)

[6] DiMeo v. Max, 248 F. App'x 280, 282 (3d Cir. 2007)

[7] Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008)

[8] Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668, 671-72 (7th Cir. 2008), as amended (May 2, 2008)

[9] F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir.2009)

About the authors

Mariana Cunha e Melo is an experienced lawyer with a background in strategic litigation, public policy, legal research, and regulated markets. She has worked with Supreme Court justices in Brazil, represented Google in high courts and strategic litigation cases, and built the internet law team at a top law firm. At Nubank, she helped structure the Public Policy team and led efforts to work with the Brazilian Central Bank on designing its Real-Time Payments rail. She has also worked in early-stage startups as a strategic projects owner and director of regulation and strategy. Mariana is also a writer and speaker on topics such as privacy, free speech online, and regulation of fintech companies, with numerous international events under her belt.

About the authors

Jonas de Abreu is an experienced security engineer with a strong background in software engineering and security. He worked as an external consultant and instructor in the early stages of his career. Jonas spent almost a decade at Nubank, the leading fintech company in LATAM, where he made significant contributions as the Chief Information Security Officer and later as a Principal Engineer. He played a crucial role in shaping Nubank's infosec team and strategy and made a notable impact on the Brazilian Central Bank's decisions regarding the Pix rail. Jonas was responsible for Nubank's technical proposals during the Pix Forum, which were highly valued by industry experts and had a pivotal role in shaping the future of payment systems in Brazil.