Regulating liability for the sticky parts

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EXCLUSIVE: A new study shows how pervasive and wild it really is.
Can we protect our kids—and free speech?
US Congress just passed HR 1865, "FOSTA", seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully.

Any tool or service can be misused. We can't take such risk without jeopardizing all our other services, so we are regretfully taking craigslist personals offline. Hopefully we can bring them back some day.

To the millions of spouses, partners, and couples who met through craigslist, we wish you every happiness!

_**Fight Online Sex Trafficking Act (FOSTA)**_
But wait? How did we get here?

A brief history of Section 230 in ~ 10 slides.

- The wondrous wins --
- The stunning reversals --
- The return to grace --
- The continuing battle against evil.

- In Compuserve’s Journalism Forum, a charge of defamation by “Skuttlebut” against competing broadsheet “Rumorville”.
- Ruling: U.S. SD NY court found for CompuServe.

“CompuServe's CIS product is ... an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications.”
CompuServe is not a publisher

“CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.”

- Prodigy user accused securities firm (*aka* “The Wolf of Wall Street”) of fraud in Prodigy’s “Money Talks” BB.
- Firm couldn’t find user, so sued Prodigy for defamation.
- Ruling: Plaintiffs won summary judgment of $200MM*
- Plaintiffs noted Prodigy claimed editorial control, that it had published content guidelines; and utilized software screening.
Publishers could be liable for user content

“[T]he court held that these representations and policies were sufficient to treat Prodigy as a publisher.”
Protecting open platforms

• Rep. Chris Cox (CA) read about the *Prodigy* ruling on an airplane trip, recognized new Internet platforms could not afford liability nor possibly screen all contributed content.

• Rep. Cox joined with Sen. Ron Wyden (OR) to draft a bill that would protect Internet platforms from the majority of the liability for their users’ generated content.

• *Explicitly* intending to overturn the Prodigy ruling.
The Great Irony: Section 230 and the CDA

• The 1996 Communications Decency Act, authored by Sen. James Exon, sought to regulate a wide range of speech on the Internet – akin to TV, radio.
• The “Internet Freedom and Family Empowerment Act” inserted as amendment to the pending CDA, passing on a 420-4 vote.
Our heros
§ 230 - key language

“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.” 47 USC 230 c (1)
47 U.S. Code Section 230: Balancing editorial control and openness

**Good Samaritan** protections:

1. Section 230 limits the liability of platforms for user generated content (i.e., they are not publishers or speakers).

2. Protects platforms from liability for exercising editorial control over content (e.g., content filters, language, etc).  
   *And also*, prevents States from imposing conflicting law.  
   *And*, an exemption carveout for child sexual exploitation.
§ 230 - gasoline for the Internet

• Yelp, Google, Facebook, YouTube, Instagram – these and other platforms are possible only through its protections

• Constant challenges to Section 230 in Congress and Courts (e.g. *Hassell v. Bird* (2018), Yelp not required to remove a defamatory review).

• Still often misinterpreted to presume any editorial act creates liability exposure – exactly as per *Prodigy*. 
The long arc: 1997 - 2017

- Since CDA, U.S. courts have repeatedly protected the basic principle of free speech on the Internet.
- “[T]he strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects . . .” – Judge Stuart Dalzell, ACLU v. Janet Reno.
Legal crusades against sexual expression

• Under law enforcement pressure in 2008-09, Craigslist removed its Erotic Services and Adult Services forums.
• From 2011, sex trafficking lawsuits hit Craigslist and Backpage.
• Craigslist placed a “censored” bar over their sex forums — covered in newspapers across the country.
• The sex forums went live again after self-surveillance systems were put in place to discourage trafficking.
By 2017 . . .

- Congress again concerned about online sex trafficking.
- Stimulus of Backpage.com adult services section; later removed by Backpage after suits and rulings.
- Two bills authored, modified, combined:
  - Senate’s Stop Enabling Sex Traffickers Act (SESTA)
  - House’s Fight Online Sex Trafficking Act (FOSTA)
- Consolidated into FOSTA; signed into law, April 2018.
A new law intended to curb sex trafficking threatens the future of the internet as we know it
FOSTA amends Section 230

- Key issue: vague language, very difficult to interpret.
  - Good law requires careful delineations and definitions.
  - "Promotion or facilitating prostitution and reckless disregard of sex trafficking"
  - and … If an online provider “acts in reckless disregard of the fact that such conduct contributed to sex trafficking”
FOSTA and Federal criminal law

- Expands criminal sex trafficking law
- Defines *participation* in sex trafficking to include “assisting, supporting, or facilitating.”
- Expands the *exception* from liability protection in § 230
- FOSTA nullifies immunity for State lawsuits for State code that mirrors the Federal language
- Permits low-threshold private civil lawsuits.
Impacts of FOSTA

- Craigslist, Reddit took down Personals and subreddits.
- Microsoft issued warnings on language in Skype, Xbox
- Harmful impact on sex workers and others
  - Workers used online forums to warn of predators;
  - Shared health and safety tips, and “whisper networks”;
  - Trafficking in minors was easier for DAs to monitor.
  - Could impact libraries with community channels.
Sex workers are mobilizing
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WOODHULL FREEDOM FOUNDATION
1601 18th Street NW #4
Washington, DC 20036,

HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299,

ERIC KOSZYK
5632 SE 68th Ave
Portland, OR 97206,

JESSE MALEY, a/k/a ALEX ANDREWS
1050 Louis Pkwy, #1011
Altamonte Springs, FL 32714, and

THE INTERNET ARCHIVE
3300 Parus Ave
San Francisco, CA 94118,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA
and JEFFERSON B. SESSIONS, in his
official capacity as ATTORNEY GENERAL
OF THE UNITED STATES
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendants.

Case No. _______________

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF
Woodhull Freedom Foundation et al. v. U.S.

• Human Rights Watch and Internet Archive are parties.
• Woodhull and HRW advocate the decriminalization of sex work – unclear whether advocacy is “facilitating.”
• IA concerned that its archives of web sites, books, and metadata may be interpreted as promoting or facilitating prostitution, or assisting, supporting, or facilitating sex trafficking.
Woodhull currently on appeal

• Case was dismissed for “lack of standing” -- *i.e.*, no indication that the plaintiffs have “something to lose” from the law.
• Plaintiff attorneys appealed the ruling on Oct 9, 2018.
• Appeal will be heard by a panel of three Circuit Panel judges.
Two sides of the regulatory content coin

• Creative expressions, criticism, news, research …
• Copyright is the other side of content regulation.

• DMCA (17 U.S. Code § 512) provides safe harbor.
  “A service provider shall not be liable for monetary relief, or … for injunctive or other equitable relief, for infringement of copyright, if — …”
Copyright in the Digital Single Market ***I

Copyright Article 13

Platforms with large amounts of user-generated content would be liable for copyright infringement by their users.

• Two possible cures proposed:
  – Technical intervention via upload filters or post-upload content identification algorithms. Available primarily to most powerful platforms and still prone to errors and trolling.
  – Collective licensing agreements which cover liability for works uploaded by online service platform users.
Bad consequences

• Extremely likely to have dampening consequences for smaller or startup firms,
  – Avoidance of market entry;
  – Restrictions of service offerings;
  – Enactment of aggressive content filtering.

• Much dissension from Germany, Italy.

• Not clear if resolution can be reached.
You are Fake News!

• Recent manipulation of large social media platforms creates new threats for Section 230 exemptions;
• Makes likely new regulatory discussions in Congress;
• Risks mangling of 230: “The predicate for Section 230 immunity under the CDA is that you’re a neutral public forum. Do you consider yourself a neutral public forum ...” – Sen. Ted Cruz, questioning Mark Zuckerberg, Facebook.
Twitter limits “dehumanizing” speech

• In response to public outcries, Twitter is seeking to curb some forms of hurtful speech.
• Draft policy prohibits “content that dehumanizes others based on their membership in an identifiable group, even when the material does not include a direct target.”
• Vague: dependent on context and v. hard to define.
In the end

• The wild and wooly open internet had a good run …
  – With many lasting beneficent changes,
  – And suddenly apparent great costs.

• A ubiquitous, global network must generate a dialogue on corporate, educational, and not-for-profit responsibility.

• And, is it time for a library/nonprofit/academic platform to provide an outlet for cultural conversation?
Thanks!

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