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INTERNET CENSORSHIP IN THE TIME OF A GLOBAL PANDEMIC: A PROPOSAL FOR REVISIONS TO SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Sarah Cheng¹ & Harriet Norcross²

In April 2020, YouTube CEO Susan Wojcicki announced that YouTube would remove any “problematic” content that contradicted the World Health Organization’s (WHO) COVID-19 recommendations. Less than a month later, a 25-minute clip from a well-known anti-vaccine conspiracy theorist was removed from YouTube and Facebook.³ Representatives from Facebook stated the video violated their policies by promoting the theory that wearing a mask can cause illness. At around the same time, YouTube also removed a video by two California doctors who called for an end to COVID-19 lockdowns.

During the era of the novel coronavirus SARS-CoV-2, social media sites have justified removing inflammatory opinions pertaining to COVID-19 in attempts to protect and promote public health and safety by automatically categorizing such opinions as misinformation. While the intention of such censorship is noble, it raises the question of whether social media sites and internet service providers in general

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3 Abby Ohlheiser, *Facebook and YouTube are Rushing to Delete “Plandemic,” a Conspiracy-Laden Video*, MIT TECH. REV. (May 7, 2020), <https://www.technologyreview.com/2020/05/07/1001469/facebook-youtube-plandemic-covid-misinformation/>.

have too much power when it comes to controlling information. In this situation, the grounds for censorship is the threat of COVID-19; in the future, however, there are no guarantees that social media sites will wait for another large-scale social problem before exercising such power to silence the public again.

In order to address concerns about the power of social media companies in the online marketplace of ideas, Section 230 of the Communications Decency Act (CDA)⁴ should be amended to mandate removal of third-party content that violates individuals' basic rights, while holding internet service providers liable for any removal of other third-party content and protecting users from misinformation by requiring companies to tag suspicious content.

According to the Pew Research Center, 55% of adults in the United States relied on social media for their news in 2019.⁵ When it comes to elections, natural disasters, and other important current events, sites like Facebook and YouTube prove essential for keeping the public informed. Their services supply users with information both biased and unbiased, and make possible an individual's exposure to a variety of viewpoints. Thus, these websites could be considered virtual town squares, in the interest of updating the American public and allowing a public discourse of unfiltered opinions necessary to a functioning democracy. Accordingly, they may then be made subject to the provisions of the First Amendment⁶ that protect against the abridgment of free speech. In interest of both social media companies and users, as well as in order to align social media companies with current laws, changes should be made to ensure social media companies act more like public utilities than as "publishers." Rather than immediately removing controversial opinions from the Internet based on keywords and algorithms, social media sites such as YouTube and Facebook should be required by law to flag suspicious

4 47 U.S.C. § 230 (1996)

5 Peter Suci, *More Americans Are Getting Their News from Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), <https://www.forbes.com/sites/peter-suci/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=2b6ea8003e17>.

6 U.S. Const. amend. I.

content in order to alert viewers of its lack of substantiation but still allow perceived misinformation to remain online unless said content directly threatens users' basic rights.

Facebook and YouTube's aggressive approach to policing misinformation about COVID-19, although well-intentioned, could have disastrous effects if allowed to spread beyond this global pandemic. In an age where social media has become intrinsic to the dissemination and formation of opinion, the free exchange of ideas on the Internet is of prime importance, and any threat to that process could mean a disruption of the free speech so necessary for democracy.

This paper intends to propose a solution that could resolve the problem described above. The remainder of this paper is organized as follows: Section I contains background information about the issue, including definitions for misinformation, disinformation, publisher and public utility, an introduction of *Stratton Oakmont v. Prodigy*,⁷ and a brief summary of the Communication Decency Act (CDA).⁸ Section II introduces the flaws in the CDA that give internet service providers, and especially social media companies, power but no accountability and how these powers could be exploited to impede freedom of expression. Section III presents a detailed description of the proposed solutions to amend Section 230 of the CDA. Section IV concludes this paper with a brief discussion on social media and the public good.

I. BACKGROUND

A. *Misinformation vs. Disinformation*

Misinformation generally refers to "false information that is spread, regardless of intent to mislead." *Disinformation* means "false information, as about a country's military strength or plans, disseminated by a government or intelligence agency in a hostile act of tactical political subversion." *Disinformation* is also used more generally to

7 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. Ct. May 23, 1995)

8 47 U.S.C. § 230

mean “deliberately misleading or biased information; manipulated narrative or facts; propaganda.”⁹ In other words, *disinformation* refers to knowingly spreading misinformation.

B. Public Utility vs. Publisher

The term *public utility* describes a business that provides a necessary service, such as water, gas, electricity, etc., to the public.¹⁰ A public utility generally has a monopoly on the service provided. These businesses can be publicly regulated (although such regulation has declined since the 1970s) but are not held liable for user content, if applicable. For example, a phone company is considered a utility and cannot be held liable for any defamatory or slanderous messages communicated through its phone service. The company enables the communication and spread of information but does not have control over the messages communicated.

The term *publisher*, or *publication*, on the other hand, describes a company that has control over content, like a newspaper. Publishers produce and/or curate the content that is distributed. The practice of censoring content indicates that a company is a publisher rather than a public utility, and companies considered to be publishers are thus held liable for user content.

C. Stratton Oakmont v. Prodigy

In a 1995 decision, *Prodigy*, an online service including social media forums, was held liable for screening third-party content for defamation.¹¹ The plaintiff, investment bank Stratton Oakmont, sued Prodigy and anonymous defendants in New York for defamation after an anonymous user posted to a message board statements

9 “Misinformation” vs. “Disinformation”: *Get Informed on the Difference*, DICTIONARY.COM, <https://www.dictionary.com/e/misinformation-vs-disinformation-get-informed-on-the-difference/> (last visited Feb. 4, 2021).

10 *Public Utilities*, THE FREE DICTIONARY BY FARLEX, <https://legal-dictionary.thefreedictionary.com/Public+Utilities> (last visited Dec. 2, 2020).

11 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. Ct. May 23, 1995)

claiming that the bank and its president, Daniel Porush, had committed criminal and fraudulent acts. Oakmont and Porush argued that Prodigy should be considered a publisher and be held responsible for the user's statements. The court agreed that because Prodigy had a reputation for removing content that violated the service's family-friendly guidelines, the company could be classified a publisher, thus making Prodigy liable for removing slanderous and/or defamatory content. This case set a nation-wide precedent that indicated that moderating user content increases a service's potential legal liability for harmful content the said company does not catch.¹² Service providers now have to monitor user content perfectly or avoid accepting liability by choosing to not moderate at all.

D. The Communication Decency Act

The Communication Decency Act (CDA) of 1996 was enacted as Title V of the Telecommunications Act of 1996 by Congress as an attempt to protect minors from accessing pornographic material on the Internet.¹³ Senators James Exon (D-NE) and Slade Gorton (R-WA) introduced the act to the Senate Committee of Commerce, Science, and Transportation in 1995.¹⁴ The act was eventually passed by Congress and has had two significant effects on the Internet, the second being the focus of this paper. First, the CDA prohibits individuals from knowingly transmitting "obscene or indecent" content to minors. Second, Section 230 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

12 Eric Goldman, *Internet Immunity and the Freedom to Code*, 62 COMM. OF THE ACM 22, 22-24 (Sept. 2019), <https://cacm.acm.org/magazines/2019/9/238962-internet-immunity-and-the-freedom-to-code/fulltext>.

13 47 U.S.C. § 230

14 *CDA 230 The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> (last visited Feb. 4, 2021).

provider.”¹⁵ This means that internet service providers are not liable for content posted by third-parties who use their services.

Section 230 of the CDA¹⁶ has arguably been one of the most important instruments in protecting freedom of expression and innovation on the Internet. However, the Department of Justice has recently proposed a recommendation to revise Section 230 of the CDA, questioning whether it nurtures innovation or fosters unaccountability.¹⁷ The department recognized that large tech platforms are no longer fragile and suggested changes to preserve competition, protect free speech on the Internet, and distinguish between hosting defamatory content and enabling criminal activity.¹⁸

The Senate Commerce Committee has also held hearings to discuss these revisions and has invited Big Tech CEOs, including Facebook’s Mark Zuckerberg, Alphabet’s Sundar Pichai, and Twitter’s Jack Dorsey, for questioning.¹⁹ Nevertheless, Congress is divided on the issue, with both parties interested in revising Section 230²⁰ but in conflicting ways. Critics have suggested that Congress is not actually interested in revising the law, but that it instead has different motives in inviting Big Tech CEOs to testify during the hearings while excluding smaller businesses on which a change in the

15 47 U.S.C. § 230

16 *Id.*

17 Dep’t of Justice, *Section 230 — Nurturing Innovation or Fostering Unaccountability?*, BENTON INST. FOR BROADBAND & SOC’Y (Feb. 19, 2020, 3:00 PM), <https://www.benton.org/event/section-230-%E2%80%93-nurturing-innovation-or-fostering-unaccountability>.

18 Eric Goldman, *supra* note 12.

19 Adi Robertson, *Mark Zuckerberg Just Told Congress to Upend the Internet*, VERGE (Oct. 29, 2020, 10:29 AM), <https://www.theverge.com/2020/10/29/21537040/facebook-mark-zuckerberg-section-230-hearing-reform-pact-act-big-tech>.

20 47 U.S.C. § 230

law would have a larger effect.²¹ Big Tech firms are often already equipped to censor information when needed, but smaller firms might have a hard time amassing the manpower to actually adhere to being regulated as a publisher.

A solution that would benefit both big and small businesses would be a law that mandates the removal of third-party content violating individuals' basic rights, while holding internet service providers liable for the removal of any other third-party content and protecting users from misinformation by requiring companies to tag suspicious content. This way, internet service providers are given incentive to refrain from removing content unless it violates individuals' basic rights, due to the risk of being held liable for third-party content on their sites.

II. PROOF OF CLAIM

A. Communication Decency Act

Social media sites like Facebook, Instagram, and Twitter have historically been protected by Section 230 of the Communication Decency Act (CDA) of 1996 which, as mentioned in the previous section, 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” (47 U.S.C. § 230).²² This means that internet service providers are not liable for content posted by third parties who use their services; in this way, social media sites act like utilities, since telephone providers are also not liable for what people say while using their services. However, after a survey of how social media sites actually act—including the most recent case of removing millions of posts that were labeled as

21 Casey Newton, *The Latest Section 230 Hearing Showed that Republicans Want to Make the Internet Smaller*, VERGE (Oct. 28, 2020, 9:08 PM), <https://www.theverge.com/2020/10/28/21539458/senate-committee-hearing-section-230-republicans-twitter-facebook>.

22 47 U.S.C. § 230

COVID-19 misinformation—it can be stated that social media services are increasingly acting like publishers.

It makes logical sense to hold internet service providers liable for any removal of other third-party content when they are acting like publishers, as supported by the court decision of *Oakmont v. Prodigy*.²³ If internet service providers are not to be seen or regulated as publishers, then the law is giving internet service providers, including social media sites, an excessive amount of power to censor information. The Department of Justice has in fact recently recommended revisions to Section 230 of the CDA,²⁴ as was stated in the previous section, questioning whether the act nurtures innovation or fosters unaccountability.²⁵

B. Social Media Sites as Publishers

While there is not a huge barrier to entry for internet service providers, because of the low cost required to enter the social media market, one can still argue that based on the number of people who frequently use these social media services, social media sites can almost be seen as public marketplaces, and therefore utilities; however, when surveying current social media trends, it is obvious that companies are acting more like publishers, bringing them into conflict with past legal discourse about censorship on social media.

When social media companies choose to remove content, whether that be due to violations of a code of conduct or for any other reason, they are acting more like publishers, exposing themselves to risk of liability in accordance with *Oakmont v. Prodigy*²⁶ and testing

23 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. Ct. May 23, 1995)

24 47 U.S.C. § 230

25 Dep't of Justice, *Section 230 — Nurturing Innovation or Fostering Unaccountability?*, DEP'T OF JUST. (2020), <https://www.justice.gov/file/1286331/download>.

26 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. Ct. May 23, 1995)

the limits of the CDA.²⁷ In the case of the removal of COVID-19 misinformation, Facebook and YouTube are clearly acting as publishers by censoring user opinion. Deleting videos about COVID conspiracy theories, taking down rants from anti-maskers, and removing posts from doctors who disagree with WHO recommendations, for example, are all actions indicating that the social media company in question is able to edit their site's content just like a newspaper can. If social media companies take a publisher approach to user content, they are justified in removing whatever content they want, as First Amendment²⁸ protections of freedom of speech and expression do not extend to publishers as they do to utilities. These companies cannot, however, be protected by Section 230 of the Communications Decency Act, meaning they can be sued for slanderous content found on their websites, as was the case in *Oakmont v. Prodigy*.

The case of *Oakmont v. Prodigy*²⁹ introduced a dilemma to the world of big tech companies: either companies must eliminate all slanderous and otherwise potentially dangerous content from their sites, or they must refrain from interfering at all, at risk of facing legal consequences. In the case of Facebook and YouTube, these companies walk a fine line of choosing to manage user content. Yes, they have the right to censor incorrect opinions and remove content which violates their code of conduct; however, in doing so, they open themselves to the possibility of lawsuits if their algorithms miss an instance of hate speech or a derogatory post about a public figure. Scrubbing all 2.8 billion active Facebook users³⁰ content (350 million

27 47 U.S.C. § 230

28 U.S. Const. amend. I.

29 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. Ct. May 23, 1995)

30 H. Tankovska, *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2020*, STATISTA (Jan. 2021), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>.

new posts per day)³¹ borders both on unrealistic and unsustainable—thus necessitating change.

Social media companies acting as publishers while avoiding liability for censoring content conflict with both the precedent of *Oakmont v. Prodigy*³² and the law as outlined in Section 230 of the CDA.³³ In order to avoid this contradiction and promote the freedom of expression, a solution must be implemented to keep these companies from acting as publishers while still protecting the basic rights of users. These companies must move away from acting like publishers in favor of acting more like utilities.

C. A Need for Accountability

On October 28th, 2020, the Senate Commerce Committee held a hearing to examine whether Section 230 of the CDA³⁴ “enabled Big Tech bad behavior.”³⁵ The committee questioned Facebook CEO Mark Zuckerberg, Alphabet CEO Sundar Pichai, and Twitter CEO Jack Dorsey. Both Dorsey and Pichai provided a measured defense of Section 230 of the CDA; however, Facebook chose a different tactic.

“The debate about Section 230 shows that people of all political persuasions are unhappy with the status quo. People want to know that companies are taking responsibility for combatting harmful content—especially illegal activity—on their platforms. They want to know that when platforms remove content, they are doing so fairly and transparently. And they want to make sure that platforms are held accountable,” Zuckerberg said in his opening testimony.

31 *Facebook by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (last updated Feb. 2, 2021), <https://www.omnicoreagency.com/facebook-statistics/>.

32 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. Ct. May 23, 1995)

33 47 U.S.C. § 230

34 *Id.*

35 Adi Robertson, *supra* note 19.

“Changing it is a significant decision. However, I believe Congress should update the law to make sure it’s working as intended.”³⁶

As Zuckerberg pointed out, there are many problems with the way internet service providers are currently regulated under the CDA.³⁷ There should be more fairness and transparency in the way companies are removing content, more responsibility to protect individuals’ basic rights, and more encouragement for innovative ways to promote freedom of speech rather than increased censorship.

This paper will discuss proposed solutions to the concerns above. They are by no means comprehensive but are important steps in the journey to find the best course of action to deal with these problems that have developed in response to the technological advances of our time.

III. PROPOSED SOLUTIONS

To avoid the legal implications associated with censorship, social media companies must find a way to either avoid removing user content, or else identify all problematic content to ensure all dangerous information is taken down—all while avoiding mis-classifying user opinion as misinformation. We believe that the best solution, in order to avoid this complicated dichotomy, would be for social media companies to act as little like publishers as possible.

In order to achieve this, we propose revisions to Section 230 of the CDA³⁸ that would include mandating the removal of certain, dangerous content through mechanisms such as a keyword-specific algorithm, flagging posts that seem suspicious, and providing avenues for users to petition review of those tags.

36 *Id.*

37 47 U.S.C. § 230

38 *Id.*

A. Censorship Appropriate Fields

Before Section 230 of the CDA³⁹ can be revised, it is necessary to define what content internet service providers are supposed to censor. Just as we have the right to free speech but are still not allowed to shout fire in a crowded theatre, the same argument can be applied to not allowing people to shout fire on social media sites, which could be likened to a virtual crowded theatre.

There must be a baseline as to what content cannot be allowed online; for example, violent rhetoric such as pointed threats targeting individuals or groups violates the safety of others and should be censored. The CDA⁴⁰ was originally drafted in part to prevent minors from being able to access pornographic material, so it can also be argued that pornography of any kind would need to be removed from social media sites due to the potential presence of users who are under 18 years of age.

It would be acceptable to employ an algorithm based on a set of keywords in order to take care of scanning the social media site for triggers and subsequently removing unsafe and/or illegal content. To prevent errors and wanton censorship even within these strict boundaries, users could be provided the means to petition administrators for review of their content should they believe a post was unwarrantedly taken down.

B. Public Audit

With the solution for how to protect the basic human rights of individuals also comes accountability: a public audit of how social media sites censor the content on their sites. This solution would give companies a social responsibility to the public, keeping them accountable for the content on their sites. Even though many people will not fully understand the way in which social media sites censor content, this solution will provide the transparency and accountability that is currently lacking. A public audit would make apparent whether or

39 *Id.*

40 *Id.*

not companies are making the mandated effort to censor the content which could violate users' basic rights.

C. Tagging Posts

Under our proposed solution, it is recommended that social media companies implement the practice of aggressively tagging users' posts. Either by using an algorithm or by manually inspecting content, social media companies would flag suspicious posts with warning labels stating, "CAUTION: Possible Misinformation," or a similar message, along with a link to company resources about critical thinking and fact-checking. Tagging posts rather than removing them would preserve the integrity of the free exchange of ideas while keeping users safe from harmful misinformation.

This practice is already in place, to a degree, on many social media platforms. For example, during the 2020 presidential election, Twitter flagged tweets which promoted disinformation about the election results.⁴¹ On Instagram, posts containing possibly sensitive or explicit content are accompanied by a warning. We propose making this a more widespread and rigorous practice in order to prevent immediate censorship of content while still protecting and warning users about potentially misleading or shocking information.

Users should be given avenues for redress, as well. After their posts are tagged for possible misinformation, users could link credible source material to prove their claims and show that their opinions do not warrant censorship. Companies could also give users the ability to attach sources to their posts rather than only allowing source uploads to resolve flags. This would place the responsibility for proving the validity of their content on users rather than company algorithms. Furthermore, allowing users to include their sources would promote critical thinking and the spread of credible information online.

41 Elizabeth Culliford, *Twitter, Facebook Flag Trump Posts on U.S. Election Eve*, REUTERS (Nov. 2, 2020 7:03 PM), <https://www.reuters.com/article/us-usa-election-pennsylvania-trump-twit/twitter-facebook-flag-trump-posts-on-u-s-election-eve-idUSKBN27J051>.

D. Small- to Mid-Sized Internet Service Providers

The reason why internet service providers were given so much protection under the law was because the government wanted to encourage innovation.⁴² When the government regulates internet service providers, it creates a barrier for entry as it becomes more difficult to run a service if internet service providers must follow a long list of regulations. While the proposed solution of tagging posts might still be difficult for small-to-midsize internet service providers to implement, it is a much easier solution compared to a more robust censorship requirement stipulating monitoring all content on their platforms. Tagging encourages companies to act more like utilities instead of publishers in order to not be held liable for third-party content under the CDA.⁴³

There are many other potential solutions, but the tagging solution is one of the simplest. For example, another solution would be to have a third-party fact-checker regulate the content on the internet. However, this solution generates a lot of questions. First, who would be the third-party fact-checker? Or should there be many third-party fact-checkers? Whoever gets to fact-check the internet would have an immense amount of power over what content is allowed and what people actually see. Many people would trust the government to be unbiased, but private companies could be bought out. Any amount of corruption in this third-party fact-checking company could result in disinformation being spread as fact.

IV. CONCLUSION

If social media companies are brought back into line with current law concerning social media censorship, as well as held accountable for infractions, revisions to Section 230 of the CDA⁴⁴ must include some mechanism to move companies away from current

42 *CDA 230 The Most Important Law Protecting Internet Speech, supra* note 14.

43 47 U.S.C. § 230

44 *Id.*

trends of publishing and instead nearer the example of public utilities. Mandating the removal of certain types of dangerous content and then allowing the rest to remain online in order to foster the free exchange of ideas would bring both past legal decisions and current social media companies' practices closer towards harmony with each other, all while preserving the basic intent of the Internet.

If nothing is done to address these instances of content removal, censorship could quickly become the order of the day. While taking down one video contradicting the WHO may seem like nothing, content removal could quickly escalate. If social media companies decide what "truth" means, what is stopping these companies or even the government from using social media platforms to impose and enforce their own ideas of "truth" on the public? When a private company decides what qualifies as misinformation without working under regulations, what is keeping their power in check?

In their own interest, social media companies may err on the side of caution and utilize algorithms to automatically remove all potentially problematic information; however, doing so (as Facebook and YouTube are doing now in removing all content contrary to WHO's COVID-19 guidelines⁴⁵) leads to a slippery slope of unwarranted censorship. When social media companies prioritize profit above the benefit afforded to users in providing an open and unfiltered forum for discussion and expression, that forum is stunted. In a world so guided by the information transmitted through social media platforms, should the government incentivize the promotion of the social good by regulating social media companies' censorship of their users' content? Perhaps social media *should* be deemed a necessary public utility and thus protect users from censorship by subjecting these companies to the restraints of the First Amendment.⁴⁶

There's really no easy answer or solution to this complex problem created by the unprecedented technological advances of this era. However, it is known from past experiences that tragedies happen when basic human rights are not met and protected. The proposed solution of amending Section 230 of the Communication Decency

45 Abby Ohlheiser, *supra* note 3.

46 U.S. Const. amend. I.

Act⁴⁷ to provide for basic, benevolent censorship while limiting internet service providers' power to censor other content is not perfect, yet it attempts to protect the free exchange of unfiltered opinions so that innovations flourish and the quality of human lives increases while also emphasizing the importance of social responsibility by allowing basic censorship to protect the public. It is a workable solution that could prove to be flexible enough to withstand the test of time and technological advances.