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The Satellite Has No Conscience: §230 in a World of 'Alternative Facts'

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Section 230 of the CDA continues to be the right policy choice, but it is up to us to be critical readers, calling out untruths, highlighting and promoting that which is reliable and discrediting that which is not.

By **Laura A. Heymann** | November 10, 2017

Twenty-one years after the enactment of the Communications Decency Act, from which §230 survived, and 20 years after the U.S. Court of Appeals for the Fourth Circuit's opinion in *Zeran v. AOL*, which set the standard by which §230 was to be interpreted, an increasing number of voices are questioning §230's scope. The concerns that motivated §230—balancing the flourishing of the Internet against the very real likelihood that some participants would use it for socially undesirable, hateful, or threatening behavior—continue to be relevant today. Indeed, what seems to be a rise in hate speech, false information, and threatening behavior has suggested to some that the balance that Congress struck, and that the Fourth Circuit validated, should be reconsidered.

Section 230 states (https://www.law.cornell.edu/uscode/text/47/230) that "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" and that "no

provider or user of an interactive computer service shall be held liable" on account of any good faith, voluntary actions to restrict access to material that the provider or user considers to be objectionable. In short, service providers may either publish the material of others or remove the material of others without risk of liability as a publisher or speaker of that material. The assumption is that without such protections, and given the vast amount of user-generated content on the Internet, providers will blindly delete any material claimed to be objectionable rather than risk liability for making the wrong judgment. Section 230 received its first major test when Kenneth Zeran sued America Online, seeking recompense for the harassment he suffered when unknown parties reacted to a false posting on the service claiming that a "Ken" at his business telephone number was selling offensive T-shirts relating to the Oklahoma City bombing. The Fourth Circuit interpreted §230 to bar liability, given that AOL was not the author of the posting and despite AOL's reported inaction in the face of Zeran's requests to immediately remove the posting. (Disclosure: I served as in-house counsel at America Online for three years in the early 2000s.)

The events in Charlottesville, Virginia, on Aug. 12 provide a sobering moment to re-engage with these concerns. Some platform providers have since taken a more active role regarding hateful content on their services (with some deciding to cease providing service (https://www.theatlantic.com/business/archive/2017/08/companies-white-supremacist-customers/537390/) altogether to white supremacist groups and other hate groups), while some third parties, in a replay of what befell Kenneth Zeran, publicly misidentified (https://www.nytimes.com/2017/08/14/us/charlottesville-doxxing.html?_r=0) participants in the aftermath of the march, leading to harassment and threats—all activities that, absent §230, could have given rise to service provider liability. These scenarios are further complicated by the fact that, as with the poster in Zeran's case, the authors of the problematic content may remain forever unknown to those harmed, either because the injured party would not be able to satisfy the legal process courts typically require to disclose user identity information or because of incomplete recordkeeping on the part of the service provider. The combination of

these two limitations, some might say, creates an even greater likelihood of bad behavior: service providers freed *de jure* from the specter of liability and users freed *de facto* from responsibility for their activity.

Yet §230 continues to be, I believe, the right policy choice. As a result of §230, millions of individuals can communicate with the world virtually instantaneously, without supervision, editing, or permission. Section 230 gives us a world that provides hundreds of book, film, and restaurant reviews; warns us about unscrupulous businesses; gives us first-hand reporting from war zones and disaster areas; and helps us to understand the plight of individuals who would not feel comfortable sharing their stories through intermediaries. We have moved from a world in which there were fewer content producers and relatively more distributors to a world in which we have many online authors and relatively fewer online distributors. Absent §230, a service provider would be put in the position of a newsstand with an endless supply of unknown publishers seeking to have their papers put out for sale. The scale alone would require any reasonable distributor to turn almost all of them away.

This means, for better or for worse, that more of the work on the Internet must be done by us. We cannot rely on an imprimatur of a newspaper publisher or a broadcast television network for much of the information we read online. We must be critical readers (https://www.npr.org/sections/ed/2017/10/31/559571970/learning-to-spot-fake-news-start-with-a-gut-check), calling out untruths, highlighting and promoting that which is reliable and discrediting that which is not. (Threats or other criminal behavior should, of course, be reported to and investigated by appropriate authorities.) We must reject information dressed up in the validation of look and feel and recognize that speed sometimes comes at the cost of truth. These are all responsibilities that Congress anticipated in enacting §230 by including in its findings (https://www.law.cornell.edu/uscode/text/47/230) its belief that the better policy is to leave control over the information they receive primarily in the hands of users so as to preserve the possibility of "true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" with "a minimum of

government regulation." The Fourth Circuit's decision (http://caselaw.findlaw.com/us-4th-circuit/1075207.html) in *Zeran* recognized that these findings were not simply rhetorical preamble but part and parcel of §230's existence.

I say all of this this knowing that, as Kenneth Zeran discovered, we are often porous filters of information conveyed via the Internet, whether through inability, inexperience, inertia, or ignorance. The fourth player in Zeran's story was KRXO Radio in Oklahoma City. Mark Fullerton, who co-hosted a morning drive-time radio show under the name Mark Shannon, was reportedly (http://wwwtmrcom.blogspot.com/2010/05/mark-shannon-dead-of-leukemia.html) known for his "caustic observations" and "ridicule of his verbal targets;" he delighted in the "heated opinions" he fomented. Shannon saw the AOL posting when a listener unknown to him forwarded it to him. He tried to e-mail "Ken" at the AOL screen name in the posting and discovered that the screen name was inactive. He decided not to call the telephone number in the posting because it was before business hours. Despite this complete lack of vetting, Shannon read parts of the post on air and encouraged (http://law.justia.com/cases/federal/district-courts/FSupp2/19/1249/2530510/) listeners to call the number and "let the seller know what Oklahomans thought of him." (During his deposition, Shannon acknowledged that had he talked to Zeran before the broadcast, he would not have broadcast the phone number.)

Kenneth Zeran sued (http://law.justia.com/cases/federal/district-courts/FSupp2/19/1249/2530510/) Diamond Broadcasting, the radio station's parent company, in a separate action in which, of course, §230 was not available to the defendant. Nevertheless, every claim was dismissed. Zeran, the court held, could not succeed on a defamation claim because he could not show that his reputation had been sullied. (No one who knew him heard the broadcast, and no one who heard the broadcast knew him.) He could not succeed on a false light claim or a claim of intentional infliction of emotional distress because the radio station's employees had been careless but not reckless or intentionally tortious. An on-air apology was apparently Kenneth Zeran's total redress. (Mark Shannon, for his part, was fired

(http://newsok.com/article/2678327) in December 1999 from a later broadcasting position, reportedly for a producer's offensive on-air comment about the Texas A&M bonfire tragedy that killed 12 students. *The Oklahoman* reportedly (http://wwwtmrcom.blogspot.com/2010/05/mark-shannon-dead-of-leukemia.html) closed reader comments on the article (http://newsok.com/article/3460037) about Shannon's death in 2010 because of the offensive nature of some of the remarks.)

Kenneth Zeran's story was rewritten largely because he pursued litigation. Although he lost his lawsuits against both AOL and Diamond Broadcasting, the opinions in those cases, and the publicity that surrounded them, confirmed for any reasonable reader that he was not the "Ken" of the posting on AOL and was, instead, the victim of a cruel hoax. But §230 had not then been tested, and filing today what we would now recognize as meritless litigation against a service provider cannot be the means of historical correction. So the burden is on us, as readers, to do better. As scholar Cathy Davidson writes (https://www.insidehighered.com/news/2017/08/24/cathy-davidson%E2%80%99s-new-book-manifesto-teaching-students-and-institutions-how-survive), we must teach others "to be hypervigilant about veracity, analysis, critical thinking, historical depth, subterfuge, privacy, security, deception, manipulation, logic, and sound interpretation." We should encourage service providers to consider the implications of their content (http://womenactionmedia.org/fbagreement/) policies (http://www.huffingtonpost.com/soraya-chemaly/freethenipple-facebook-changes_b_5473467.html). And we should engage in these efforts publicly, so that the Kenneth Zerans of the world can have the record, if not fully corrected, at least significantly amended.

This undertaking can sometimes seem, admittedly, like rowing against the current. What we should not do, however, is jettison the statute that almost certainly has kept the Internet as we now know it afloat, even as we know that this will bring both harms and benefits. Indeed, although these are incredibly difficult and, for the individuals involved, painful problems, they are not new ones. Section 230 was a response to the medium, not to the message. In his last public speech, in 1964, Edward R. Murrow said

(https://archive.org/details/primetimelifeofe00kend), "The speed of communications is wondrous to behold. It is also true that speed can multiply the distribution of information that we know to be untrue. The most sophisticated satellite has no conscience. The newest computer can merely compound, at speed, the oldest problem in the relations between human beings and, in the end, the communicator will be confronted with the old problem of what to say and how to say it." Section 230 recognizes that the satellite indeed has no conscience. We do, however, and if we acknowledge that we are better off with the satellite than without it, it falls on us to exercise that conscience as much as we are able.

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This essay is part of a larger collection (http://www.law.com/therecorder/sites/therecorder/2017/11/10/commemorating-the-20th-anniversary-of-internet-laws-most-important-judicial-decision/) about the impact of *Zeran v. AOL* curated by Eric Goldman and Jeff Kosseff.
