SECTION 230 REFORM IN THE ERA OF "BIG TECH": WHAT DOES THAT MEAN FOR ANTITRUST?

BY ZHAO LIU[1]

1 Zhao Liu is a counsel in the Washington, D.C. office of O'Melveny & Myers LLP. Zhao represents clients in antitrust and healthcare matters, as well as other complex commercial disputes. The views are those of the author and do not necessarily reflect the views of the firm or any client.

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Today, online platforms such as Facebook, YouTube, and Twitter have become the primary means of expression and source of information for many Americans. Since their inception, these platforms have enjoyed legal immunities under Section 230 of the Communications Decency Act — a 25-year old statute that largely shields them from liability for hosting and moderating content posted by their users. For years, Section 230 was seen as striking the right balance between encouraging free expression on the internet and protecting content moderation by online platforms. But as both sides of the political aisle start to criticize "Big Tech," the once-obscure statute, which is seen as providing sweeping immunities to some of the largest companies in the world, is taking fire from all directions. Multiple reform bills have been proposed by legislators, including ones that would prevent online platforms from using Section 230 as a defense in cases brought under antitrust law. Some have suggested that a Section 230 reform would broaden the reach of antitrust law and make it more likely for an antitrust case against "Big Tech" to succeed. This article explains why we believe a Section 230 reform would have little impact on antitrust law.

I. INTRODUCTION

Section 230 of the Communications Decency Act ("Section 230") has never been in the forefront of national debate like it is today. Once hailed as the Magna Carta of the internet, this 25-year old statute has witnessed the flourish of the internet and social media. Many have attributed the success of the internet to Section 230, which, in providing online platforms immunities for hosting and moderating user-generated content, has allowed them to innovate, grow, and thrive without the burden of examining the legality and appropriateness of every single message posted by their users.

Thanks to Section 230, user-generated content plays an increasingly vital role in our daily life and the digital economy today. Yet there is now a public debate about whether Section 230 immunities are doing more harm than good. Specifically, does Section 230 disincentivize action to combat the spread of disinformation and messages of violence, bigotry, and extremism on internet platforms? On the flip side, does Section 230 give companies too much discretion and control over what information users see or do not see?

These talks have taken place against a backdrop of a recent call to revamp the antitrust law to reign in "Big Tech" companies. Some worry that "Big Tech" companies' tolerance or intolerance of certain types of user-generated content on their platforms may "ha[ve] less to do with making platforms safer or freer and more to do with the companies' commercial interests," and that the broad scope of Section 230 under existing law creates an impediment to enforcement actions or civil antitrust suits against "Big Tech" companies.[2] Legislative proposals, therefore, have been made to eliminate Section 230 immunities in their entirety or in specific areas, such as antitrust. In the Supreme Court's recent denial of a petition for certiorari in a case involving Section 230, Justice Clarence Thomas indicated that the Court might be willing to consider the reach of Section 230 in an appropriate case.[3]

A change to the scope of Section 230 seems on the horizon, whether it takes the form of a legislative or judicial action. But would such reform make it easier for plaintiffs to get past the motion to dismiss stage in antitrust cases against "Big Tech"? We think not. For one, the current debate on Section 230 — and the reform proposals — center on online platforms' handling of user-generated content. But if the allegations in past antitrust cases are any indication, there seems to be very little evidence of harm to competition caused by content hosting, moderation, or removal in the way antitrust law cares about.

In this article, we discuss why some think Section 230 immunities should be revisited in the era of "Big Tech," what form a reform of Section 230 might take, and why, in our opinion, a Section 230 reform, if any, would have little impact on antitrust law.

2 *What Does President Trump's "Crackdown" on Twitter Do?*, The Markup, https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do (June 11, 2020).

3 *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

II. SECTION 230 IMMUNITIES IN THE ERA OF "BIG TECH"

Congress enacted Section 230 in 1996, at a time when the internet was still in its nascent stage. Only 0.9 percent of the world population then used the internet;[4] online propaganda for terrorism and racism was virtually unheard of, and online disinformation, even if existed then, would have very limited reach. By enacting Section 230, Congress intended to promote the continued development of the internet, to preserve the vibrant and competitive free market for the internet, and to remove disincentives for blocking and filtering technologies.[5] To achieve these policy goals, Section 230 shields a "provider or user of an interactive computer service" from liability when they act as a host for third-party speech, when they, acting in good faith, remove third-party speech that they consider to be objectionable, and when they enable others to restrict access to third-party speech.[6]

Today, at the Silver Jubilee anniversary of Section 230, online platforms have become increasingly indispensable to our daily life and the digital economy: people socialize with friends, colleagues, acquaintances, and even strangers on Facebook and LinkedIn, comment on current events on Twitter, and watch and share videos on YouTube, Vimeo, and TikTok. The prevalence of online platforms have also contributed to the emergence of "Big Tech" — a term coined to refer to the major U.S. information technology companies, the business model of many of which relies on user-generated content and consumer data. Some have questioned whether Section 230 immunities are still necessary to protect online companies, especially "Big Tech" companies, when they apparently are much bigger and more powerful than any provider of "an interactive computer service" that Congress could have envisaged when enacting Section 230.[7] Many are also concerned that "Big Tech" companies have become too big and used their size, profit, and control of data to hurt small businesses and stifle innovation,[8] and that Section 230 immunities only serve to maintain the status quo and the power of "Big Tech" companies.

One aspect of that power, according to some, is the ability of "Big Tech" to grow bigger and become more dominant by deterring and eliminating nascent competition.[9] The concerns with that "power" could potentially be addressed by more targeted enforcement actions — for example, the lawsuits that federal and state antitrust authorities launched against Google and Facebook in recent months — or legislative actions that afford more protections to nascent rivals of "Big Tech" companies. But many are specifically concerned that Section 230 gives "Big Tech" a *carte blanche* to remove content posted by or tools developed by their smaller competitors, harming innovation and competition in products and services. Some have thus proposed to eliminate Section 230 immunities altogether or in certain areas, including antitrust. For example, the Department of Justice under the Trump Administration proposed to clarify that federal antitrust claims are not covered by Section 230 immunities.[10] Last month, three Democratic senators also announced a proposed bill that would prevent online platforms from using Section 230 as a defense in cases brought under antitrust law.[11]

The other aspect of the power of "Big Tech" is their perceived role as "information gatekeepers that have huge control over what information users see and how it's organized"[12] and the perceived concentration of "the avenues for engaging in" online speech in the hands of a few large online platforms[13]. This is potentially problematic in two ways. One, as some on the left have argued, is a lack of incentive by "Big Tech" to take proactive measures, including develop new technologies, to combat dissemination of disinformation and messages of violence,

4 *Internet Growth Statistics*, Internet World Stats, https://www.internetworldstats.com/emarketing.htm.

5 47 U.S.C. § 230(b).

6 47 U.S.C. § 230(c).

7 See Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum, Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general.

8 See Elizabeth Warren, *Here's How We Can Break up Big Tech*, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c (March 8, 2019).

9 *Id.*

10 See U.S. Department of Justice, Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations, June 2020.

11 *All the Ways Congress Wants to Change Section 230*, Slate, https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (Mar. 23, 2021).

12 *What Does President Trump's "Crackdown" on Twitter Do?*, The Markup, https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do (June 11, 2020).

13 See U.S. Department of Justice, Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations, June 2020.

bigotry, and extremism on their platforms.[14] The other, as some on the right and some free speech advocates have argued, is the power of "Big Tech" to moderate or remove online speech that they dislike, including content posted by people who hold a political view that is at odds with the platforms' own, which would potentially harm free competition in ideas and values.[15]

In recent years, online platforms have invoked Section 230 to defend their alleged inaction as to alleged dissemination of disinformation on their platforms, in some circumstances, and removal of accounts and user-generated content, in other circumstances — all at their own discretion.[16] Although people on the two sides of the political aisle cannot agree on why Section 230 should be revamped, both sides have made proposals to reform or repeal Section 230. At least 18 bills were introduced in Congress last year, and more have been introduced in the current congressional session.[17] CEOs of several "Big Tech" companies have been called to testify before Congress twice this year about disinformation and extremism on social media.[18]

On the other hand, some have argued against revamping Section 230.[19] Tim Wu, who is a prominent critic of "Big Tech" and has been named to the National Economic Council by President Biden, wrote in December 2020 that "[r]epeal of 230 would . . . hurt smaller platforms or startups more than the larger ones" and would not affect the content moderation policies of "Big Tech" companies.[20] Others disfavoring eliminating Section 230 have warned that doing so would "only incentivize platforms against moderating al all," and suggested leaving the law intact but using alternative means to combat harmful content.[21] Some have also suggested that the concerns over Section 230 could, at least partially, have been addressed by more rigorous antitrust enforcement actions against "Big Tech," reasoning that enhanced competition in the online platform space may dilute concentration of the avenues for engaging in online speech and potentially promote more divergent views on the internet, as well as give online platforms more competitive pressure to combat misinformation.[22]

With little consensus over whether Section 230 should be reformed, the reasons for reform, or how it should be reformed, both across party lines and within Democrats, and given the Biden Administration's other priorities, such as immigration and plans for economic recovery, it remains to be seen whether a legislative resolution may come to fruition in the near future.

Meanwhile, judicial reshaping of Section 230 is likely to take place before the passage of any reform bill. Last October, joining the Supreme Court's denial of a petition for certiorari regarding the interpretation of Section 230, Justice Clarence Thomas criticized "questionable

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14 *Big tech CEOs face Congress in House hearing on social media's role in extremism, misinformation*, The Washington Post, https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/ (Mar. 25, 2021); Keith Hylton, *Digital Platforms and Antitrust Law*, No. 19-8 Boston University School of Law, Law and Economics Research Paper (2019), available at https://scholarship.law.bu.edu/faculty_scholarship/605 ("Given Section 230 immunity, the key factor that motivates Google in screening content is a concern for its own brand, which may be tarnished by the hosting of offensive material on its search engine or on the YouTube platform. This is a different set of incentives than those created by defamation or by copyright law. It is not at all clear that a concern for brand tarnishment will lead a platform to exercise the same care in monitoring postings than would a concern over the risk of liability.").

15 See U.S. Department of Justice, Section 230—Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations, June 2020.

16 *What Does President Trump's "Crackdown" on Twitter Do?*, The Markup, https://themarkup.org/ask-the-markup/2020/06/11/what-does-president-trumps-crackdown-on-twitter-do (June 11, 2020).

17 *All the Ways Congress Wants to Change Section 230*, Slate, https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (Mar. 23, 2021).

18 *Big tech CEOs face Congress in House hearing on social media's role in extremism, misinformation*, The Washington Post, https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/ (Mar. 25, 2021).

19 See, e.g. Tim Wu, *Liberals and Conservatives Are Both Totally Wrong About Platform Immunity*, https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117 (Dec. 3, 2020) (arguing that "[r]epeal of 230 would . . . hurt smaller platforms or startups more than the larger ones" and would not affect the content moderation policies of "Big Tech" companies); Ashley Gold, *The People Trying to Get Biden's Head on Holding Tech Accountable*, AXIOS (Oct., 2020), https://www.axios.com/the-people-trying-to-get-in-bidens-head-on-holding-tech-accountable-383b5866-164d-42aa-8531-0c24ff8a8f30.html (eliminating Section 230 have warned that doing so would "only incentivize platforms against moderating al all").

20 Tim Wu, *Liberals and Conservatives Are Both Totally Wrong About Platform Immunity*, https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117 (Dec. 3, 2020).

21 See, e.g. Ashley Gold, *The People Trying to Get Biden's Head on Holding Tech Accountable*, AXIOS (Oct., 2020), https://www.axios.com/the-people-trying-to-get-in-bidens-head-on-holding-tech-accountable-383b5866-164d-42aa-8531-0c24ff8a8f30.html.

22 See Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum, Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general ("[U]ltimately, fair competition can cure many of the ills we see. In a functioning free market, consumers can demand alternatives that better address their preferences, including for greater privacy, more transparency, or increased safety. For consumer choice and the free market to work, however, firms have to be playing by the established rules of competition.").

precedent" under that statute and signaled a willingness to consider, in an appropriate case, whether the text of the "increasingly important statute" aligns with the immunities enjoyed by internet platforms under existing case law.[23] He suggested a fresher look at Section 230 to avoid bestowing unwarranted and "sweeping immunity on some of the largest companies in the world."[24]

That would almost certainly invite more litigation aimed at challenging the boundaries of Section 230 immunities set forth in precedents. Indeed, courts are already seeing an influx of cases against "Big Tech" online platforms that would potentially implicate Section 230: in the first three months of this year alone, at least six federal district courts have dismissed claims against internet platforms, including Google and Facebook, on the basis of Section 230 immunities. We expect that at least some courts will take cues from Justice Thomas and venture to start redrawing the boundaries of Section 230. Specifically, some courts are likely to reconsider where the line should be drawn to strike the right balance between encouraging free expression by platform users and protecting content moderation by platforms. Courts, for example, may reconsider whether an online platform is protected by Section 230 even when it "distributes content that it knows is illegal" and whether Section 230 "protect[s] any decision to edit or remove content" by an online platform.[25]

III. WHAT SECTION 230 REFORM MEANS FOR ANTITRUST

Section 230 and antitrust law have often been mentioned together in the broader discussion of the power of "Big Tech" and the competitive health of digital markets. But any reform of Section 230, including one that eliminates Section 230 immunities to antitrust law, would likely have little impact on antitrust law or the likelihood of success for antitrust cases against "Big Tech."

One of the reasons is that Section 230 immunities are largely a "non-antitrust" issue,[26] and most of the concerns over Section 230 immunities discussed in this article are not antitrust ones in and of themselves. To be clear, Section 230 and antitrust are not completely unrelated. After all, one of Section 230's goals is to preserve the vibrant and competitive free market for the internet, which echoes the goal of antitrust law. But they achieve that goal through two completely different means. Section 230, on the one hand, encourages online platforms to rely on user-generated content to innovate and grow without worrying about legal liabilities. Antitrust law, on the other hand, punishes online platforms when they conspire to harm competition in price, quality, or quantity of products or services or when a monopolist (even one who earned that status lawfully) "use [its] power to engage in anticompetitive conduct to preserve [its] dominant position."[27] As discussed above, a Section 230 reform would likely focus on an online platform's content moderation, whether you think the online platforms are doing too much or too little in that respect. But antitrust law is ill-equipped to police the boundaries of online speech, at least in its current form.

That does not mean Section 230 and antitrust have no overlap. Section 230 allows a court to dismiss antitrust claims when the claims fall squarely within Section 230 immunities without answering the sometimes-more-difficult question of whether plaintiffs' allegations meet the heightened pleading standard for antitrust claims under *Twombly*.[28] For example, in *Marshall's Locksmith Serv. Inc. v. Google, LLC*, plaintiff locksmith companies' alleged that Google, Yahoo!, and Microsoft conspired to "flood the market" of online search results with information about so-called "scam" locksmiths, in order to extract additional advertising revenue.[29] According to the plaintiffs, the defendants furthered this scheme by publishing the content of scam locksmiths' websites, translating street-address and area-code information on those websites into map pinpoints, and publishing the defendants' own original content.[30] The plaintiffs further alleged that the defendants used their market power with respect to online search to extract payments from legitimate locksmith companies like themselves, in violation of Sections 1 and 2 of the

23 *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

24 *Id.*

25 *Id.*

26 See *Top DOJ official signals intensifying state and federal antitrust probe of big tech*, The Washington Post (Aug. 20, 2019), https://www.washingtonpost.com/technology/2019/08/20/top-doj-official-signals-intensifying-state-federal-antitrust-probe-big-tech/.

27 See Attorney General William P. Barr Delivers Remarks at the National Association of Attorneys General 2019 Capital Forum, Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-national-association-attorneys-general.

28 For example, under *Bell Atl. Corp. v. Twombly*, stating a claim under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. 544, 556-57 (2007).

29 925 F.3d 1263, 1265 (D.C. Cir. 2019).

30 *Id.*

Sherman Act.[31] The D.C. Circuit affirmed the district court's dismissal of these antitrust claims, holding that these claims are barred by Section 230 because the plaintiffs were trying to hold the defendants liable for third-party content hosted by the defendants.[32]

Cases like *Marshall's Locksmith* demonstrate that if a court does not wish to engage in a full antitrust and *Twombly* analysis, Section 230 could provide an "easy out" in an appropriate case. But to our knowledge, only very few published cases have applied Section 230 to dismiss claims brought under antitrust law. That is probably due to the limited overlap between Section 230 and antitrust: Section 230 immunities only apply to an online platform's hosting and moderation of user-generated content. How often would conduct like that harm competition in the way that antitrust law cares about? In other words, how often would content hosting, moderation, or removal have an impact on price, quantity, or quality of a product or service? How often is that done to maintain the predominance of an incumbent online platform? As discussed above, some are concerned that Section 230 gives "Big Tech" a *carte blanche* to remove content posted by or tools developed by their smaller competitors, harming innovation and competition in products and services. While that concern is certainly plausible, it remains to be seen, in the real world, how often an online platform's removal of user-generated content is motivated by anticompetitive malice. We have seen very little evidence of that happening in published cases.

Given the limited overlap between Section 230 and antitrust law, even if Section 230 immunities are significantly curtailed or completely eliminated to take that "easy out" under Section 230 away from courts, we are doubtful that would materially change a plaintiff's odds of getting past the motion to dismiss stage in antitrust cases against "Big Tech." For one, a plaintiff is still required to meet the heightened pleading standard for antitrust claims, including antitrust injury. Take *Brittan v. Twitter*.[33] In that case, the plaintiff, whose accounts were suspended by Twitter, alleged, among other things, that Twitter engaged in anticompetitive practices in violation of Section 2 of the Sherman Act, by "deceptively and illegally limiting users who reference new/competing networks and/or utilize Third Party API services, and exaggerating their own stock values/prices."[34] Although the court did not find Section 230 applies to these antitrust claims, the court held that the plaintiff failed to allege an antitrust injury under the heightened pleading standard under *Twombly*.[35]

Moreover, perceived political bias in content moderation, which some on the right and some free speech advocates are particularly concerned about, is unlikely to give rise to antitrust violations, and allegations on that basis is unlikely to pass muster under *Towmbly*.[36] A Section 230 reform is unlikely to change the results of those cases. The antitrust claims Parler, a social media platform, recently brought against Amazon but later decided to withdraw illustrate this point. On January 10, 2021, Amazon announced that it was suspending its web-hosting services for Parler because, in Amazon's view, Parler had failed to respond to an increase in violent content on its platform after the riot on Capitol Hill earlier this year.[37] Parler responded by filing a lawsuit against Amazon, alleging, among other things, that Amazon violated Section 1 of the Sherman Act by conspiring with Parler's competitor Twitter to favor Twitter, even though, according to Parler, Twitter's content can be just as violent and abusive as posts on Parler.[38] Amazon argued that Section 230 precludes Parler's claims because Amazon acted in good faith to block Parler, which contains violent and harassing content.[39] But as Amazon also argued — and many agree — Parler's claims under the Sherman Act would fail regardless of whether Section 230 applies because Parler did not even allege that Amazon and Twitter ever discussed Parler, let alone that they reached an agreement to block Parler.[40] In other words, Parler's claims likely would not fly even if there were no Section 230 immunities to antitrust law.

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31 *Id.* at 1266.

32 *Id.* at 1272.

33 2019 U.S. Dist. LEXIS 97132 (N.D. Cal. Jun. 10, 2019).

34 *Id.* at *10.

35 *Id.* at *9-11.

36 *Will Parler Prevail in Its Antitrust Case Against Amazon?*, Knowledge@Wharton, https://knowledge.wharton.upenn.edu/article/parler-antitrust-case-against-amazon/ (Herbert Hovenkamp stated that antitrust law typically does not cover "political terminations").

37 *The hollow core of Parler's antitrust case against Amazon*, Reuters (Jan. 14, 2021), https://www.reuters.com/article/legal-us-otc-parler/the-hollow-core-of-parlers-antitrust-case-against-amazon-idUSKBN29I309.

38 *Id.*

39 *Id.*

40 *Id.*; *Will Parler Prevail in Its Antitrust Case Against Amazon?*, Knowledge@Wharton, https://knowledge.wharton.upenn.edu/article/parler-antitrust-case-against-amazon/ (Herbert Hovenkamp commented on the Parler lawsuit: "You can't just kind of make an atmospheric claim that there is a conspiracy. You really have to put some facts into it, and there really aren't any facts here that would support that kind of conspiracy claim.").

IV. CONCLUSION

As the executive and legislative scrutiny of "Big Tech" continues, Section 230 will remain a hot topic on legislative agendas and in public discussions. But it remains to be seen whether any legislative proposals would be enacted. Litigants will likely continue to challenge the scope of Section 230 by filing lawsuits against "Big Tech," and it would be interesting to see whether some courts might start reevaluating precedents and reshaping the scope of Section 230 immunities. That said, in our opinion, any legislative or judicial action to redefine or curtail protections under Section 230 is unlikely to have a material impact on antitrust law or the ultimate results of cases against "Big Tech" brought under antitrust law.

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