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PERSPECTIVE

## Did Twitter cross the line by commenting on Trump's tweets?

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Twitter is in the limelight after it flagged and commented on President Donald Trump's tweets on three different occasions in the past few weeks. While Twitter, like other interactive computer service providers, enjoys protection under the Communications Decency Act from an array of civil claims including defamation, such protection is not unlimited. As a result, Twitter should be mindful that its responses to the president may fall outside the scope of the CDA's protection, thus exposing it to civil liability. To further complicate matters, the president has issued an executive order that may impact the scope of the CDA and therefore impact Twitter's response to further presidential tweets.

Congress initially enacted the CDA to prevent minors from accessing sexually explicit materials on the internet. Though the U.S. Supreme Court subsequently struck down portions of the CDA pertaining to indecency on the grounds that such portions violated First Amendment rights of free speech (*Reno v. ACLU*, 521 U.S. 844 (1997)), Section 230 of the CDA remains. 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 provider." The statute "bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw,

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postpone or alter content." *Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 174-75 (2d Cir. 2016) (internal citation omitted). Stated otherwise, online service providers that host or republish speech are protected from various laws that would otherwise hold them accountable for the conduct or words of third parties. Section 230 therefore serves to promote free speech by allowing online service providers to publish content without the fear of liability. If not for Section 230, interactive computer service providers such as Amazon or Yelp may not allow customers to post online reviews and social media platforms such as Facebook or Twitter may not allow users to post videos and commentary, given the time and cost involved with prescreening material to be posted.

Last month, Trump published two tweets about mail-in ballots claiming, "There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent" and "This will be a Rigged Election." Even if Twitter believed that Trump's tweets were false,

it would face no liability for publishing such tweets given the immunity provided by Section 230. Nevertheless, Twitter responded to the president's tweets by flagging them with a link stating, "Get the facts about mail-in ballots." The link is to a new Twitter "thread" with commentary from Twitter. Specifically, Twitter noted that it flagged the tweets as part of its "efforts to enforce [its] civic integrity policy" and published its opinion that Trump's tweets "could confuse voters about what they need to do to receive a ballot and participate in the election process." Twitter also provided viewers further content about mailing ballots and links to various news articles.

Two days later, Trump issued an executive order in response to Twitter's conduct. Specifically, Trump stated that

"Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias." By his executive order, Trump directed Secretary of Commerce Wilbur Ross, along with Attorney General William Barr and the National Telecommunications and Information Administration, to file a petition for rule making with the Federal Communications Commission for the agency to "expeditiously propose regulations to clarify" certain provisions of Section 230. Specifically, Trump wants the FCC to clarify "(i) 'the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c) (2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and *does not address the provider's responsibility for its own editorial decisions*' and (ii) 'the conditions under which an action restricting access to or availability of material is not 'taken in good faith' within the meaning of subparagraph (c)(2)(A) of section 230."

Was it necessary, however, for Trump to issue an executive order to challenge Twitter's response?

With respect to Twitter’s decision to flag Trump’s tweets as part of its “efforts to enforce [its] civic integrity policy,” such conduct would almost certainly be protected under Section 230. Section 230 provides immunity for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” Twitter, however, did not restrict access to Trump’s tweets. Rather, it flagged them. By flagging them, Trump could argue at most that Twitter’s conduct served to alter his tweets. Section 230, however, “bars lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content.” *Fed. Trade Comm’n*, 838 F.3d at 174-75 (internal citation omitted). The CDA further allows service providers to, in good faith, engage in blocking and screening of third-party content. *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015). Here, even if flagging the tweets could be

interpreted as altering the tweets, such conduct likely would be considered a traditional editorial function.

Twitter did not, however, solely flag the tweets. It also provided a link to a new thread that contained commentary about Twitter’s decision to flag the tweets. By providing this additional commentary, Twitter created additional content. Section 230 expressly provides that an “entity that is responsible, in whole or in part, for the creation or development of information” is not immune under Section 230 for liability related to the publication of that information.

Here, Twitter created and published a thread that contains Twitter’s independently drafted and published content about mail-in ballots for the 2020 election. Specifically, in the new thread, Twitter stated that “Trump makes unsubstantiated claim that mail-in ballots will lead to voter fraud” and provided cites to CNN and Washington Post in support of its comments. Twitter also explained its reasoning for flagging the tweets as an effort “to enforce [its] civic integrity policy” because it believes the tweets “could confuse voters about what they need to do to receive a ballot and participate in the

election process.” Twitter’s responses are original content and posted on its behalf. Thus, it appears that Twitter would not be protected under Section 230 for any liability stemming from these publications.

Twitter should be mindful of its potential liability as it decides to create content by commenting on its decisions to flag certain tweets by Trump. This is especially true here, where Trump’s Twitter-feud with Twitter is likely to continue. For example, on June 3, Trump tweeted a video that included a montage to George Floyd and support for the Black Lives Matter protest, and Trump speaking in the background. Twitter disabled the video and wrote the following in its place, “This media has been disabled in response to a report by the copyright owner.” Trump did not take kindly to Twitter’s response, tweeting an article about its response and stating: “They are fighting hard for the Radical Left Democrats. A one sided battle. Illegal. Section 230!” Twitter CEO Jack Dorsey replied, stating, “Not true and not illegal. This was pulled because we got a DMCA [Digital Millennium Copyright Act] complaint from copyright holder.” Thus Twitter, through its CEO’s tweets, has once again

created content in response to its decisions to act upon Trump’s tweets. Most recently, on June 18, Trump tweeted a doctored video edited to appear as though CNN ran a story about a ‘racist baby.’ Twitter promptly flagged the video as “manipulated media” and provided a link which informed readers that “the president shared a version of the video which many journalists confirmed was edited and doctored with a fake CNN chron.”

Though Twitter may lose the protection of Section 230 by creating content in response to Trump’s tweets, it still will not face liability unless the created content violates any law. In other words, if Twitter’s created content does not contain defamatory or otherwise actionable statements, then Twitter does not need the protection of Section 230 in any event. Accordingly, pending any clarification by the FCC of Section 230, so long as Twitter does not post its own unlawful content, its feud with Trump can remain on Twitter, and not a courtroom. ■

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