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Weakening The CDA Would Have Unintended Consequences

By **Charles Harris II**

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Law360, New York (August 18, 2017, 3:04 PM EDT) -- The majority view among courts is that section 230 of the Federal Communications Decency Act (the "CDA")[1] broadly immunizes websites from liability for user content. Legislators in both the U.S. House and Senate recently introduced bipartisan bills that would amend the CDA and federal criminal code to expressly carve out websites that facilitate sex trafficking from section 230's immunity. While this legislative effort is no doubt commendable, the vague amendatory language in the proposed legislation could open the door for the plaintiffs bar to file vexatious lawsuits against even law-abiding websites, and lead to uneven enforcement of sex trafficking crimes by state authorities. Websites that allow users to post content should be aware of this proposed legislation as it works its way through Congress.

Section 230 of the CDA

Section 230 of the CDA was passed in 1996 primarily in reaction to an unpopular New York trial court decision in Stratton Oakmont Inc. v. Prodigy Services Co.[2] It's black letter law that a defendant must "publish" material to be held liable for defamation.[3] In Stratton, the court held that website operator, Prodigy, could be liable for defamation as a "publisher" of remarks posted on its online message board because it held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards.[4]

Section 230 thus limited a website's liability for regulating user content. Particularly, section 23(c)(1) provides that courts may not treat a website operator as the "publisher or speaker" of user content.[5] Also, section 23(c)(2) provides that courts should not hold an operator liable for its good-faith efforts to block or screen user content that it deems objectionable.[6] Most courts have broadly construed section 230 to provide near complete civil and criminal immunity for websites from causes of action based on user content, including claims for defamation, housing discrimination, negligence, securities fraud and cyber stalking. As illustrated below, however, the courts' adherence to this broad construction of section 230 has sometimes led to allegedly abhorrent websites wholly avoiding liability.

The Senate Subcommittee Report and Proposed Senate and House Bills

In January of this year, the Senate Permanent Subcommittee on Investigation issued a 50-page report after a 20-month investigation into online sex trafficking; the investigation focused on the online

advertising website, Backpage.com ("Backpage"), which the committee labeled as the leading online marketplace for commercial sex.[7] The committee found that Backpage knew its website facilitates child sex trafficking.[8] But even in the midst of this investigation, Backpage escaped liability in lawsuits alleging that its website aided sex trafficking by invoking section 230. The most renowned of those cases is Jane Doe No. 1 v. Backpage.com LLC,[9] in which the First Circuit held that section 230 shielded Backpage from liability under the Federal Trafficking Victims Protection Reauthorization Act of 2008 (the "TVPRA"), and called on Congress to pass legislation that would hold websites liable for promoting sex trafficking.[10]

It is against this background that Congress proposed the legislation at issue. First, on April 3, 2017, Congresswoman Ann Wager introduced the Allow States and Victims to Fight Online Sex Trafficking Act of 2017,[11] which would amend language in section 230 and the TVPRA to clarify that section 230's immunity doesn't extend to websites that foster sex trafficking. Then, on Aug. 1, 2017, Senator Rob Portman introduced the Stop Enabling Sex Traffickers Act of 2017,[12] which is nearly identical to the House bill. Both bills have received broad bipartisan support — the House bill has attracted 111 cosponsors, and the Senate bill has already attracted 27 cosponsors.

To the contrary, the technology industry quickly came out in objection to the Senate bill. In an Aug. 2, 2017, letter to Congress, which hasn't slowed the momentum of the proposed legislation, 10 major trade associations representing the industry aptly pointed out that the new section 230 "language will have the unintended consequence of allowing opportunistic trial lawyers to bring a deluge of frivolous litigation targeting law-abiding intermediaries and create the potential for unpredictable, inconsistent enforcement by state authorities for political or monetary gain."[13] But the brief letter did not discuss what language in the bills is problematic and why it is such an issue. This is the focus of the next two sections below.

The Amendments Proposed in the Senate and House Bills

Although the amendments proposed in the Senate and House bills are slightly different, both bills suffer from similar defects. At the outset, section 1591 of the TVPRA imposes a criminal penalty on anyone who benefits financially from "participation in a venture" connected to sex trafficking when the person either knows or recklessly disregards the fact that the victim is an adult under duress or a minor.[14] Section 1595 creates a civil remedy for the victim against the trafficker or person who benefits financially from taking part in known trafficking.[15]

The Senate bill includes these significant amendments:

- The TVPRA is revised to define "participation in a venture" as knowing conduct by an entity that "assists, supports, or facilities a violation" of section 1591.[16]
- Section 230 of the CDA is amended to affirm that it's a matter of public policy to "ensure the vigorous enforcement of federal criminal and civil law relating to sex trafficking."[17]
- Section 230 is revised to make clear that the CDA should not impair criminal or civil liability under the TVPRA.
    - Specifically, section 230 would include the TVPRA in the list of federal statutes that the CDA should not be construed to impair.[18]
    - Also, section 230 would state that the CDA does not diminish a state's criminal or civil enforcement of sex trafficking, and that the CDA does not "impair the enforcement" of the civil remedy under section 1595 of the TVPRA.[19]

The House bill includes these significant amendments:

- The TVPRA is revised to (i) include a provision that imposes criminal penalties on a website operator that publishes information provided by a user with reckless disregard that the information provided furthers actual or intended sex trafficking, and (ii) explicitly state that a plaintiff or the government need not prove intent on the part of the website operator in a criminal or civil proceeding against it.[20]
- The TVPRA is amended to define the phrase "participation in a venture" as knowing or reckless conduct by an entity that "aids or abets" a violation of the TVPRA.[21]
- Section 230 is revised to state that it's a matter of public policy to "ensure vigorous enforcement against providers and users of interactive computer services of federal and state criminal and civil law" relating to child sex trafficking.[22]
- Section 230 is amended to clarify that the CDA should not impair criminal or civil liability under the TVPRA.
    - Notably, section 230 would include the TVPRA in the list of federal statutes that the CDA should not be construed to impair.[23]
    - Also, section 230 would provide that the CDA does not impair state criminal or civil statutes that prohibit sex trafficking and that the CDA has no effect on the availability of civil remedies under section 1595 of the TVPRA or under any other federal or state statute that provides a civil remedy for sex trafficking. [24]

An Unintended Consequence of the Proposed Legislation

Congress is attempting to address a critical issue with this proposed legislation, but, in doing so, it is potentially creating another problem. Namely, when legislators use broad, undefined terms in a prohibitive statute that creates a private right action, like the TVPRA, the plaintiffs' bar will exploit the ambiguity in the statutory language to bring frivolous and vexatious litigation against even responsible companies.

To be sure, the Senate bill proposes to amend the TVPRA to impose liability on any website that benefits from "assisting," "supporting," or "facilitating" sex trafficking. Remarkably, none of these actions are defined. The House bill takes it a step further, imposing liability on websites that "aid" (also an undefined term) known sex trafficking, and adding a specific provision imposing liability on a website that recklessly permits a user to post content that promotes sex trafficking. Then, above all, each bill makes clear that section 230's immunity does not protect websites from lawsuits under the TVPRA and analogous state statutes.

It is easy to see how the proposed legislation could lead to abuse. If some version of the Senate or House bill is enacted, ironically, the plaintiffs in civil suits would probably bring arguments akin to those raised by the plaintiffs in Jane Doe: a website facilitated sex traffickers by instituting posting standards that permitted traffickers to create a marketplace for sex trafficking, and not effectively screening the website for offensive conduct.[25] The threat of this sort of litigation would make even allowing users to post content risky and, for sites that do allow user content, compel them to take costly steps to screen their websites for and block user content intended for sex trafficking. Besides, preventing users from posting any offensive content is obviously a tough task given the breadth of users posting internet content. While the present and proposed mens rea requirements for a violation of the TVPRA offer some protection to websites, courts frequently cannot address the question of whether or not a

defendant satisfies the required mental state at the pleading stage. Thus, a website operator might expend significant defense costs even where it ultimately succeeds on the merits of the lawsuit.

It's also problematic that the Senate and House Bills carve out state sex trafficking enforcement actions from the section 230's immunity, and, in effect, encourage states to bring lawsuits against website operators. State officials' decentralized prosecution of sex trafficking crimes would surely lead to disparate and uneven enforcement of the offenses across the country, as well as uncertainty among website operators as to what they should do to avoid prosecution.

What Should I Do if I'm A Website Operator?

Website operators that permit users to post content should consider doing two things: First, since the Senate and House bills remain in committee, there's still an opportunity for affected website operators to voice their concerns to lawmakers and recommend changes to the proposed legislation. Operators can speak to legislators directly or through organizations already engaged in opposing the bills, such as the Electronic Frontier Foundation or Interactive Advertising Bureau. Also, website operators might get a head start on reviewing their posting standards to make sure that their requirements are not encouraging sex trafficking, and to ensure that they are using appropriate measures to screen for and block user content that might be aimed at sex trafficking. Indeed, these actions are prudent, regardless of whether a form of the Senate or House bill actually becomes law.

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[1] 47 U.S.C. § 230.

[2] Trial IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[3] E.g., Madison v. Frazier, 539 F.3d 646, 652–53 (7th Cir. 2008).

[4] 1995 WL 323710 at *2. In contrast to Stratton, the majority view at that time was that a website operator was a "distributor," not a publisher, of user content. See, e.g., Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135, 137–38 (S.D.N.Y. 1991).

[5] 47 U.S.C. § 230(c)(1).

[6] 47 U.S.C. § 230(c)(2)(A).

[7] Backpage.com's Knowing Facilitation of Online Sex Trafficking, Sen. Rep., 115 Cong. (Jan. 1, 2017), available at www.hsgac.senate.gov/subcommittees/investigations/reports (last visited Aug. 12, 2017).

[8] Id. at 2–3.

[9] Jane Doe No. 1 v. Backpage.com LLC, 817 F.3d 12, 19, 22, 29 (1st Cir. 2016).

[10] 18 U.S.C.A. §§ 1591, 1595.

[11] H.R. 1865, 115th Cong., 1st Sess. (2017), available at www.congress.gov/115/bills/hr1865/BILLS-115hr1865ih.pdf (last visited Aug. 12, 2017).

[12] S. 1693, 115th Cong., 1st Sess. (2017), available at www.consumermediallc.files.wordpress.com/2017/08/sestatext.pdf (last visited Aug. 12, 2017).

[13] Letter of 8/2/17 from CompTIA, et al., to Sen. Portman, et al., available at www.ccianet.org/wp-content/uploads/2017/08/S1693-Association-Letter-08-02-2017.pdf (last visited Aug. 12, 2017).

[14] 18 U.S.C. § 1591(a).

[15] Id. at § 1595.

[16] S. 1693, supra at § 4.

[17] Id. at § 3.

[18] Id.

[19] Id.

[20] H.R. 1865, supra at § 4.

[21] Id. at § 3.

[22] Id.

[23] Id.

[24] Id.

[25] See Jane Doe, 817 F.3d at 16–17.
