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From America Online to America, Online: Reassessing Section 230 Immunity in a New Internet Landscape

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From America Online to America, Online: Reassessing Section 230 Immunity in a New Internet Landscape

Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law. Sincere thanks to all the friends, family and mentors who offered their support while writing this Note.

***FROM AMERICA ONLINE TO AMERICA,
ONLINE: REASSESSING SECTION 230
IMMUNITY IN A NEW INTERNET LANDSCAPE***

*Madeleine Blair**

* J.D. Candidate, 2024, University of Georgia School of Law. Sincere thanks to all the friends, family and mentors who offered their support while writing this Note.

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I. INTRODUCTION

Congress enacted the Communications Decency Act in 1996 to regulate the new world of internet activities and internet providers.¹ Section 230 of the Act has garnered recent scrutiny due to a provision that immunizes website providers and tech companies from liability for their users' conduct.² Because of Section 230, holding online providers directly accountable for online harms has been beyond the reach of private plaintiffs for the better part of the internet's history.³

The first part of this Note discusses Section 230 and the debate surrounding its application. Many parties have attempted to circumvent Section 230's immunity provisions, and two recent successes in that endeavor provide useful insight into the nature of Section 230's drawbacks—and potential solutions.

The second part of this Note examines those two cases, *Lemmon v. Snap, Inc.*⁴ and *A.M. v. Omegle.com, LLC*,⁵ and diagnoses the shortcomings inherent in Section 230's immunity provisions—namely that the statute's conception of the internet is obsolete and must be discarded.

The final part of this Note identifies in the cases a parallel to intellectual property principles that may prove useful in solving the problems Section 230 creates.

¹ 47 U.S.C. § 230.

² *Id.*; Danielle Draper, *Summarizing the Section 230 Debate: Pro-Content Moderation vs Anti-Censorship*, BIPARTISAN POLICY CENTER (Jul. 5, 2022), <https://bipartisanpolicy.org/blog/summarizing-the-section-230-debate-pro-content-moderation-vs-anti-censorship/>.

³ Barbara Ortutay, *What you should know about Section 230, the rule that shaped today's Internet*, PBS (Feb. 21, 2023), <https://www.pbs.org/newshour/politics/what-you-should-know-about-section-230-the-rule-that-shaped-todays-internet>.

⁴ *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

⁵ *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814 (D. Or. 2022).

II. BACKGROUND

A. AN OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENTY ACT

An understanding of Section 230's function begins with its language. Section 230(a) couches the legal provisions of the statute within a set of sociocultural findings, noting the "extraordinary advance" in information availability provided by "interactive computer services" and the internet.⁶ Also among these findings is the observation that the internet up until enactment of the statute had "flourished, to the benefit of all Americans, with a minimum of government regulation,"⁷ and a note about the increasing dependence on "interactive media" for information and entertainment services.⁸

Section 230(b) further contextualizes the statute by explicitly providing its policy reasoning.⁹ Taken together, these policy bases lay out a thematic framework based on balancing free speech against consumer and free market protection. Among the notable policy reasons enumerated are the "continued development of the internet and other interactive computer services,"¹⁰ "[preservation of] the vibrant and competitive free market . . . for the internet and other interactive computer services,"¹¹ and "[removal of] disincentives" for and "[encouraging] the development of" mechanisms which maximize user control over what they see and interact with online.¹² In short, Section 230 looks to foster technological development towards maximum user control over content exposure and consumption in a competitive free market of products and progressive ideas.

Section 230's substantive provisions begin with its most problematic, and most hotly debated, statutory language. Section 230(c)(1) provides 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."¹³ Courts have interpreted this broadly, essentially providing blanket civil immunity to any website or online service housing user-generated

⁶ 47 U.S.C. § 230(a).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* § 230(b).

¹⁰ *Id.* § 230(b)(1).

¹¹ *Id.* § 230(b)(2).

¹² *Id.* § 230(b)(4), (b)(3).

¹³ *Id.* § 230(c)(1).

content against any action stemming from that content or its effects.¹⁴ Under this broader interpretation, online providers' immunity has stood fast against direct attacks no matter how openly or on what scale the online platform has played venue to harassment or predatory behavior.¹⁵

B. RESPONSES TO SECTION 230'S IMMUNITY PROVISIONS

Resistance to Section 230 has come from both sides of the political aisle, although for different reasons.¹⁶ On the right, much of the push for Section 230 reform stems from concerns that the statute does not adequately preserve free political speech online.¹⁷ House Republicans, for example, have taken aim at large tech companies' Section 230 immunity, citing undue user censorship.¹⁸ Figures such as Florida governor Ron DeSantis and Texas attorney general Ken Paxton made similar bids for reform at the state level.¹⁹

Across these efforts runs a specific concern from right-wing figures that "Big Tech" is censoring and de-platforming users based on political affiliations.²⁰ These censored views typically dovetail into right-wing ideologies,

¹⁴ 1 RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, & PRINT § 4.6 (2d ed. 2022); *see also* *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that Section 230 barred negligence action against AOL for failure to moderate its user postings); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (holding that Section 230 immunized MySpace against negligence action brought by parent of child victimized on the platform by an adult user.)

¹⁵ Smolla, *supra* note 14.

¹⁶ Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M L. REV. 451, 465 (2021).

¹⁷ *Id.*

¹⁸ Lauren Feiner, *Republican bill seeks to limit social media liability protections without getting rid of them*, CNBC, <https://www.cnn.com/2020/09/10/republican-bill-seeks-to-limit-section-230-protection-for-tech-platforms.html> (last updated Sept. 10, 2020, 11:41 AM).

¹⁹ Lauren Feiner, *Supreme Court blocks Texas social media law that tech companies warned would allow hateful content to run rampant*, CNBC, <https://www.cnn.com/2022/05/31/supreme-court-blocks-texas-social-media-law-tech-companies-warned-would-allow-hateful-content-to-run-rampant.html> (last updated May 31, 2022, 8:19 PM); Cat Zakrzewski, *Florida governor signs bill barring social media companies from blocking potential candidates*, WASH. POST (May 24, 2022), <https://www.washingtonpost.com/technology/2021/05/24/florida-gov-social-media-230/>.

²⁰ Feiner, *supra* note 19 ("[There is] a common charge on the right that major California-based social media platforms like Facebook and Twitter are biased in their moderation strategies and disproportionately quiet conservative voices.").

one example being the “conservative activist group Project Veritas,” whose accounts Twitter suspended in 2021.²¹

A secondary concern for Section 230’s conservative critics lies in the safety and security of children online, as well as the statute’s failure to combat sex trafficking.²² The two-prong approach often uses this failure as a contrast point against the censorship of political affiliation. According to Republican Study Chairman and Indiana congressional representative Jim Banks, for example, Donald Trump’s social media suspension was as much a symptom of Section 230’s flaws as the “blind eye” those same sites supposedly turned to child pornography.²³ In a similar vein, Trump himself issued an executive order aiming to block certain operations of Section 230.²⁴

Where the political right believes Section 230 is so restrictive as to enable undue censorship, the political left sees the statute as excessively permissive. Liberal politicians have construed the statute as lacking a meaningful preventive mechanism against hate speech and disinformation.²⁵ The left has also pointed to recurrent incidents of cyberbullying, violent extremism, and online harassment as evidence of Section 230 immunity’s overbreadth.²⁶

Like their conservative counterparts, liberal members of Congress have attempted to pass bills that address their concerns by limiting Section 230

²¹ Jon Porter, *Twitter permanently suspends conservative activist group Project Veritas*, THE VERGE (Feb. 12, 2021, 5:12 AM), <https://www.theverge.com/2021/2/12/22279707/twitter-project-veritas-suspension-privacy-violations>.

²² Mark MacCarthy, *Back to the future for Section 230 reform*, BROOKINGS (Mar. 17, 2021), <https://www.brookings.edu/blog/techtank/2021/03/17/back-to-the-future-for-section-230-reform/>.

²³ Press Release, Jim Banks, Republican Study Chairman, House of Representatives, RSC Introduces Bill to Reform Section 230 (Mar. 22, 2021), <https://rsc-banks.house.gov/news/press-releases/rsc-introduces-bill-reform-section-230>.

²⁴ VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., LSB10484, SECTION 230 AND THE EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP 1 (2020), <https://crsreports.congress.gov/product/pdf/lsb/lsb10484>.

²⁵ Jessica Guynn, *Trump vs. Big Tech: Everything you need to know about Section 230 and why everyone hates it*, USA TODAY, <https://www.usatoday.com/story/tech/2020/10/15/trump-section-230-facebook-twitter-google-conservative-bias/3670858001/> (last updated Oct. 16, 2020, 5:43 PM) (“Democrats including presidential nominee Joe Biden have urged Congress to revise Section 230 to make tech companies more accountable for hate speech and extremism, election interference, misinformation and disinformation.”)

²⁶ Press Release, Mark R. Warner, Select Committee on Intelligence Chairman, Senate, Legislation to Reform Section 230 Reintroduced in the Senate, House (Feb. 28, 2023), <https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house>.

immunity.²⁷ Partisan parallels also extend to the executive branch: President Joe Biden has expressed his strong dislike for the statute based on its allowances for the widespread distribution of falsehoods,²⁸ though he has yet to officially issue an executive order on the subject.

As for tech companies themselves, Silicon Valley's biggest players have generally aligned with the left's view of Section 230 when expressing any discontent with the statute.²⁹ Particularly, Meta CEO Mark Zuckerberg has expressed an openness to altering the immunity provision.³⁰ Outside of the heaviest hitters, however, many online service providers including Pinterest and Reddit are actively lobbying to prevent Section 230 reform.³¹

Congress has made some bipartisan efforts in recent years to alter Section 230's immunity provisions. One such effort was the Fight Online Sex Trafficking Act ("FOSTA"),³² which aimed to combat online sex trafficking by limiting immunity for sites where such trafficking occurred.³³ Two years after FOSTA's 2018 enactment, a bipartisan congressional group introduced the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act ("EARN IT"),³⁴ which sought to reduce child exploitation online through a similar methodology to FOSTA.³⁵ These efforts, however, have not generated widespread

²⁷ *Id.*

²⁸ Rebecca Kern, *White House renews call to 'remove' Section 230 liability shield*, POLITICO, <https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771> (last updated Sept. 9, 2022, 12:39 PM).

²⁹ David McCabe, *Tech Companies Shift Their Posture on a Legal Shield, Wary of Being Left Behind*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/technology/tech-section-230-congress.html>.

³⁰ Dylan Byers, *Zuckerberg calls for changes to tech's Section 230 protections*, NBC News, <https://www.nbcnews.com/tech/tech-news/zuckerberg-calls-changes-techs-section-230-protections-rcna486> (last updated Mar. 24, 2021, 10:11 AM).

³¹ See Internet.works, <https://www.theinternet.works/issue/> (providing the issue statement for Internetworks, a lobbying group of smaller online entities opposing Section 230 reform.)

³² Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Congress § 2 (2018).

³³ Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 284-85 (2018).

³⁴ Eliminating Abusive and Rampant Neglect of Interactive Technologies Act, S.3538, 117th Congress (2022).

³⁵ Brown, *supra* note 16, at 472-73.

improvement by either party's measures,³⁶ and Section 230's immunity clause remains an incredibly broad shield mechanism for all kinds of online entities.

C. A NEW WAY AROUND SECTION 230: THE *SNAP* AND *OMEGLE* DECISIONS

While Section 230 significantly hinders individuals' private rights of action against online service providers, it does not entirely foreclose the possibility of provider liability. Demonstrating this fact, recent cases have found a new way to circumvent Section 230 immunity: products liability. Two cases in particular, *Lemmon v. Snap, Inc.* and *A.M. v. Omegle.com, LLC* ("*Snap*" and "*Omegle*", respectively), exemplify the direction Section 230 is pushing plaintiffs.

Snap, the earlier of the two decisions, concerned the death of two teenage boys involved in a high-speed driving accident.³⁷ In a wrongful death action on behalf of their children, the boys' parents alleged a design defect in the Snapchat app.³⁸ They argued that the speedometer feature of the app, which showed the speed the user was traveling, encouraged reckless driving via an in-app reward for those who clocked in at a speed of over 100 miles per hour.³⁹

The district court granted Snap's 12(b)(6) motion to dismiss the claim with leave to amend, noting it was "unclear" whether the claim was permissible under Section 230.⁴⁰ The court subsequently dismissed the amended complaint once plaintiffs refiled it because Section 230 indeed barred the action.⁴¹

On appeal, the Ninth Circuit reversed, holding that the plaintiffs' claims against Snap lacked any Section 230 limitation.⁴² To answer the question of whether § 230(c)(1) immunity barred the claim, the court employed a three-prong test originating from an earlier 9th Circuit case, *Barnes v. Yahoo!, Inc.*⁴³ Under the *Barnes* test, immunity from suit vests only if the provider is "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided

³⁶ Quinta Jurecic, *The politics of Section 230 reform: Learning from FOSTA's mistakes*, BROOKINGS (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/>.

³⁷ *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1088 (9th Cir. 2021).

³⁸ *Id.* at 1090.

³⁹ *Id.* at 1089.

⁴⁰ *Id.* at 1090.

⁴¹ *Id.*

⁴² *Id.* at 1087.

⁴³ *Id.* at 1091 (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009)).

by another information content provider.”⁴⁴ The court found that the second prong was unsatisfied by a products liability theory because such a theory treats the online provider as not a publisher but as a product manufacturer.⁴⁵ Under this interpretation of Snap’s role, § 230(c) immunity did not reach plaintiffs’ action.⁴⁶

Interestingly, the Ninth Circuit’s distinction relies on the idea that the action against Snap, Inc. “seek[s] to hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter.”⁴⁷ The implication that an entity should be held responsible “for its own conduct” hints at a conception of online service providers as autonomous entities deserving of accountability. This Note will later elaborate on the problematic differences between this conception and the conception contemplated in Section 230’s statutory language.⁴⁸

Alongside *Snap* stands *A.M. v. Omegle*, which cites *Snap* in its reasoning for permitting products liability claims to go forward without Section 230 limits.⁴⁹ In *Omegle*, plaintiff A.M. was eleven years old when she first accessed Omegle.com in 2014.⁵⁰ The site has one function, which is to pair users with a stranger in a one-on-one video and text chatroom.⁵¹ It paired A.M. with Ryan Fordyce, a man in his late thirties at the time of their meeting.⁵² For three years following the Omegle encounter with A.M., Fordyce engaged in regular harassment and abuse of A.M.⁵³ This abuse included forcing A.M. to send him pornographic content of herself, forcing A.M. to perform for him and his friends, and forcing A.M. to recruit more minors for Fordyce’s abuse.⁵⁴ Fordyce

⁴⁴ *Id.* (quoting *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019)).

⁴⁵ *Id.* at 1091-93.

⁴⁶ *Id.* at 1093.

⁴⁷ *Id.* (quoting *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018)).

⁴⁸ Section 230’s (Mis)conception of Online Spaces, *infra* § 3(b).

⁴⁹ *A.M. v Omegle.com, LLC*, 614 F. Supp. 3d 814, 819 (D. Or. 2022).

⁵⁰ *Id.* at 817.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

also used A.M.'s photos and videos as blackmail material, threatening to distribute them if A.M. came forward to others about Fordyce's actions.⁵⁵

While Fordyce, residing in Canada, faced separate Canadian criminal charges for the abuse, A.M. brought a civil action against Omegle in an American federal court.⁵⁶ Her claim alleged, in part, "(1) product liability arising out of defects in design, (2) product liability arising out of defects in warning, (3) negligence in design, [and] (4) negligence in warning and instruction"⁵⁷ On Omegle's 12(b)(6) motion to dismiss on all counts, the United States District Court for the District of Oregon dismissed only the claims unrelated to products liability.⁵⁸ Citing *Snap*, the court reasoned that the four products liability claims fell outside the scope of Section 230 immunity.⁵⁹ The court centered its analysis on the application of Section 230 to published material, distinguishing that published material from the inherent build of the site for which the plaintiff looked to hold the defendant liable.⁶⁰

III. ANALYSIS

A. ASSESSING SECTION 230 IN LIGHT OF THE *SNAP* AND *OMEGLE* DECISIONS

Ultimately, *Snap* and *Omegle* reveal a wide disparity between Section 230's stated goals and its actual effects in practice. As discussed previously in this Note, Section 230 looks to protect free speech while similarly protecting both consumers of online services and the market within which consumers and online providers operate.⁶¹ The policy underpinnings further extend to limiting obscenity and related harms on online platforms, as well as empowering online providers to censor and moderate their platforms to further that end.⁶²

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 820-21 ("Here, Omegle has attempted to make this a case about Fordyce's communications to the Plaintiff, but as discussed above, Plaintiff's case does not rest on third party content. Plaintiff's contention is that the product is designed [in] a way that connects individuals who should not be connected (minor children and adult men) and that it does so before any content is exchanged between them.")

⁶¹ 47 U.S.C. § 230; An Overview of Section 230 of the Communications Decency Act, *supra* § 2(a).

⁶² *Id.*

Snap and *Omegle* are merely two examples in a line of claims that attempt to circumvent Section 230's protections. Unlike others, however, these claims have found unusual success.⁶³ This highlights two things. First, the success of a products liability claim against an online platform provider makes clear that those platforms are products unto themselves. As it stands, Section 230 fails to acknowledge this reality, instead treating online service providers uniformly as providing neutral, empty vessels, rather than individualized and complex commodities.⁶⁴

Second, *Snap* and *Omegle* are symptomatic of Section 230's failure to recognize the array of harms online service providers can cause. These cases demonstrate that Section 230 has created, not eliminated, legal hurdles which hamper its stated policy aims. The chilling effect of these hurdles harms both individuals the statute looks to protect and, more broadly, free speech and the free market. By universally immunizing online content providers from the activities of their users, Section 230 functionally licenses a kind of default anarchy in online spaces. Online providers are thereby permitted to turn a blind eye to the environments on their platforms while users build out cultures that not only cause direct injury but also deter a truly free exchange of ideas and technological progress.

B. SECTION 230'S (MIS)CONCEPTION OF ONLINE SPACES

Section 230's issues largely stems from how it conceives online services and platforms. These issues exist because the statute is, perhaps even more than most statutes, a product of its time. Passed in 1996, Section 230 addresses a nascent internet that, by today's standards, was incredibly limited in size and scope. *Slate* magazine provides a time capsule narrative of the internet in the year Congress passed Section 230:

It's 1996, and you're bored. What do you do? If you're one of the

⁶³ Compare *Omegle*, 614 F. Supp. 3d 814 (finding that Section 230 did not bar an action against a social media site base for harassment sustained on that site) *with* *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (finding that Section 230 did bar an action for similar harassment).

⁶⁴ 47 U.S.C. § 230(a)(3).

lucky people with an AOL account, you probably do the same thing you'd do in 2009: Go online. Crank up your modem, wait 20 seconds as you log in, and there you are—"Welcome." You check your mail, then spend a few minutes chatting with your AOL buddies about which of you has the funniest screen name (you win, pimpodayear94).

Then you load up Internet Explorer, AOL's default Web browser. Now what? There's no YouTube, Digg, Huffington Post, or Gawker. There's no Google, Twitter, Facebook, or Wikipedia. A few newspapers and magazines have begun to put their articles online—you can visit the *New York Times* or *Time*—and there are a handful of new Web-only publications, including Feed, HotWired, *Salon*, Suck, Urban Desires, Word, and, launched in June, *Slate*. But these sites aren't very big, and they don't hold your interest for long. People still refer to the new medium by its full name—the *World Wide Web*—and although you sometimes find interesting stuff here, you're constantly struck by how little there is to do. You rarely linger on the Web; your computer takes about 30 seconds to load each page, and, hey, you're paying for the internet by the hour. Plus, you're tying up the phone line. Ten minutes after you log in, you shut down your modem. You've got other things to do—after all, a new episode of *Seinfeld* is on.⁶⁵

Besides providing an amusing insight into ye olde World Wide Web for an audience of Gen Z internauts, this vignette highlights several characteristics that separate today's internet from its Section 230-contemporary counterpart. Many are purely quantitative observations: the minimal number of sites,⁶⁶ the limited content available on those sites,⁶⁷ and the pay-by-hour model of dial-up

⁶⁵ Farhad Manjoo, *Jurassic Web*, SLATE (Feb.24, 2009, 5:33 PM), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html>.

⁶⁶ The internet of January 1996 had only 100,000 websites; 13 years later, in 2008, that number had increased to over 160 million. *The Web back in 1996-1997*, SOLARWINDS (Sept. 16, 2008), <https://www.pingdom.com/blog/the-web-in-1996-1997/>.

⁶⁷ *Id.*

internet⁶⁸ are hallmarks of the early internet experience. Some characteristics, however, are more cultural. Interpersonal interactions did not occur on social media, because social media simply did not yet exist as we know it.⁶⁹ Instead, most user-generated content on the 1996 internet came either in the form of chatroom forums, blogs, or personal websites.⁷⁰ Additionally, information accessibility via a true search engine was a novelty. Google did not exist until 1998,⁷¹ and Web search engines with Boolean string capacities had only just begun to operate in 1994 and 1995.⁷² Up to that point, web indexing was done by human moderators working for sites that published the compilations.⁷³

Perhaps the biggest change to the internet has simply been the enormous uptick in users and internet literacy. The number of internet users from the year of Section 230's enactment to today has increased from 36 million to over 5 billion.⁷⁴ Further, the knowledge gap between today's internet users and the typical user of 1996 is vast. A Morgan Stanley report from 1996 characterizes an

⁶⁸ See James Coates, A MAP FOR 'NEWBIES,' A GAS PEDAL FOR OLD HANDS, CHI. TRIB. (Nov. 3, 1996, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1996-11-03-9611060083-story.html> (summarizing both the standard model and mid-90s developments for online interfaces).

⁶⁹ See Chenda Ngak, *Then and now: a history of social networking sites*, CBS NEWS (July 6, 2011, 4:55 PM), <https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/> (discussing Classmates.com, a high school class directory, and social media predecessor).

⁷⁰ See Caitlin Dewey, *A complete history of the rise and fall — and reincarnation! — of the beloved '90s chatroom*, WASH. POST (Oct. 30, 2014, 2:01 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/30/a-complete-history-of-the-rise-and-fall-and-reincarnation-of-the-beloved-90s-chatroom/> (summarizing chatrooms' development up to and through the mid-'90s).

⁷¹ Dan Price, *8 Search Engines That Rocked Before Google Even Existed*, MAKE USE OF, <https://www.makeuseof.com/tag/7-search-engines-that-rocked-before-google-even-existed/> (last updated Apr. 22, 2021).

⁷² *Short History of Early Search Engines*, THE HISTORY OF SEO (Mar. 24, 2017), https://www.thehistoryofseo.com/The-Industry/Short_History_of_Early_Search_Engines.aspx (last visited April 18, 2023).

⁷³ *Id.*

⁷⁴ *Internet Users*, GLOBAL POLICY FORUM, <https://archive.globalpolicy.org/component/content/article/109-tables-and-charts/27519-internet-users.html> (last visited Oct. 30, 2022); *World Internet Users Statistics and 2022 World Population Stats*, INTERNET WORLD STATS, <https://www.internetworldstats.com/stats.htm> (last visited Oct. 30, 2022).

“intermediate” online user as one who merely knows their email.⁷⁵ A “novice” user, on the other hand, has “never heard of Motley Fool, CNET, or Yahoo.”⁷⁶ In contrast, today’s average internet user must possess competencies that far surpass their predecessors merely to navigate the most basic online spaces. A 2022 Forbes primer on computer usage, almost entirely implicating internet spaces, illuminates just how far the internet has evolved past its 1990s state.⁷⁷ First, under the “common digital tasks” heading is sending emails (thereby immediately surpassing the “intermediate” 1996 standard of simply knowing one’s email address).⁷⁸ The rest of the list is well beyond 1996 internet understanding.⁷⁹ By setting the bar for digital competency at messaging platforms like Slack and video-conferencing tools like Zoom, the article makes clear that today’s online spaces overtake their predecessors in both capability and complexity.⁸⁰ This progress implies a need for new technological competencies.

Such developments have also created blind spots for the average internet user. A 2019 Pew research study found that out of a ten-question digital knowledge assessment, only 2 percent of the American adults surveyed could answer all questions correctly.⁸¹ The questions assessed participants’ knowledge of baseline online security and protection measures for the internet of today.⁸² While some knowledge was relatively commonplace, other questions were consistently answered incorrectly.⁸³ Interestingly, despite the widespread use of social media, participants had difficulty answering questions on social media’s back-end operations.⁸⁴ 29 percent of participants correctly identified Instagram and WhatsApp as Facebook (now Meta) subsidiaries, and only 15 percent

⁷⁵ Sarah Jackson, *From clip art to Comic Sans: These screenshots from 25 years ago show just how much the internet has changed*, BUSINESS INSIDER (July 24, 2021, 8:10 AM), <https://www.businessinsider.com/web-from-1996-internet-25-years-ago-screenshots-2021-7>.

⁷⁶ *Id.*

⁷⁷ Nabanita De Foundation, *Forbes EQ BrandVoice: Taking the First Steps Towards Digital Literacy In 2022*, FORBES (Jan. 31, 2022, 3:19 PM), <https://www.forbes.com/sites/forbeseq/2022/01/31/taking-the-first-steps-towards-digital-literacy-in-2022/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Emily A Vogels & Monica Anderson, *Americans and Digital Knowledge*, PEW RSCH. CTR. (Oct. 9, 2019), <https://www.pewresearch.org/internet/2019/10/09/americans-and-digital-knowledge/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

correctly identified a photo as former Twitter CEO Jack Dorsey.⁸⁵ 77 percent responded that they were “unsure” whom the photo depicted.⁸⁶

Such blind spots are the exact kind that leaves the public vulnerable to exploitative environments protected under Section 230. Because while the American public is well-acquainted with the user end of modern internet platforms, the data shows that those platforms’ machinations remain opaque.⁸⁷

Section 230 views private, individual self-regulation as sufficient to avoid online service abuses.⁸⁸ Inherent in this view is the assumption that online platforms are mere vessels for user conduct and that victims of online exploitation are thus free to just log off.⁸⁹

But as the gap between usage and understanding shows, the ground is not so even. Instead, online platforms have become the user-level appendages of large corporate entities which use their platforms to corporate ends.⁹⁰ Unlike the smaller-scale internet contemporary during Section 230’s enactment, today’s online sphere is a marketplace of products, properties, and commodities produced by service providers.⁹¹ Private individuals’ online engagement is consequently a form of consumption and a source of revenue. The service provider, looking to maximize revenue, looks to keep users online as much as possible, and tech companies use various tools to achieve that end.⁹² The details of these methodologies are beyond the scope of this paper, but the fact that they exist at all demonstrates that online service providers create spaces that are far

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 47 U.S.C. § 230(b).

⁸⁹ *Id.*

⁹⁰ The Meta family of apps generated 114,450 million dollars of revenue in 2022 alone. S. Dixon, *Meta: annual revenue, 2009-2022, by segment*, STATISTA (Feb. 2, 2023)

<https://www.statista.com/statistics/267031/facebooks-annual-revenue-by-segment/>.

⁹¹ See Jasper Jolly, *Is big tech now just too big to stomach?*, THE GUARDIAN (Feb. 6, 2021, 3:00 PM), <https://www.theguardian.com/business/2021/feb/06/is-big-tech-now-just-too-big-to-stomach> (detailing the “relentless rise” in profits at the largest six tech firms: Meta, Amazon, Netflix, Alphabet, Apple, and Microsoft).

⁹² See Chris Christoff, *How to Keep Customers on Your Site and Boost Sales*, BUSINESS (Mar. 6, 2023), <https://www.business.com/articles/keep-customers-on-your-website/> (detailing a selection of user retention strategies).

from neutral. The users of these services lack the requisite knowledge to discern that fact every time they log on.⁹³

Beyond demonstrating a mere statutory anachronism, this relationship undermines Section 230 within the sphere of its policy aims. If the goal is to encourage the free and open exchange of ideas and technological progress, the commodification of internet spaces has created a significant obstacle to that aim. At the user level, it is in the corporate best interest to engineer environments that keep individuals online, because a larger userbase attracts advertising revenue.⁹⁴ The profit motivation of perpetually increasing user engagement outstrips any ideal of social progress or intellectual development.⁹⁵ Similarly, at the corporate level, the dream of capitalistic online innovation via a competitive market has collapsed into monopolistic userbase retention strategies, which have generated consumer backlash.⁹⁶

Social media platforms do little to educate or inform, but they keep people online for record times,⁹⁷ farming revenue for the corporations that operate them.⁹⁸ Quantity has outstripped quality, and Section 230's immunity provision has enabled this devolution. Online services and the companies that run them are free to commodify the internet and disregard the consequences, as no one harmed by the resulting environment may bring suit for it directly.⁹⁹

The above discussion demonstrates a serious divide between the internet Section 230 addresses and the internet that exists today. It also shows that this

⁹³ Vogels & Anderson, *supra* note 81.

⁹⁴ *How Do Internet Companies Profit With Free Services?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-give-away-their-services-free.asp> (last updated Dec. 22, 2022).

⁹⁵ See Janet Abbate, *How the Internet lost its soul*, THE WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/outlook/2019/11/01/how-internet-lost-its-soul/> (asserting that internet “commercial interests have eclipsed the public good.”)

⁹⁶ K. C. Ifeanyi, *Inside the good, bad, and very ugly of social media algorithms*, FAST CO. (June 24, 2022), <https://www.fastcompany.com/90761087/inside-the-good-bad-and-very-ugly-of-social-media-algorithms>; Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html>.

⁹⁷ Peter Suci, *Americans Spent on Average More Than 1,300 Hours on Social Media Last Year*, FORBES (June 24, 2021, 3:47 PM), <https://www.forbes.com/sites/petersuci/2021/06/24/americans-spent-more-than-1300-hours-on-social-media/>.

⁹⁸ A majority of the over half a trillion dollars generated by online ad revenue in 2022 went to the “Big Four” tech corporations: Apple, Alphabet, Amazon, and Meta. Zia Muhammad, *Big Tech Received 68% of Ad Revenue in 2022*, DIGITAL INFORMATION WORLD (Nov. 28, 2022), <https://www.digitalinformationworld.com/2022/11/big-tech-received-68-of-ad-revenue-in.html>.

⁹⁹ 47 U.S.C. § 230(c).

divide has left vulnerable much of the population and continues to do so as long as the statute continues to operate as it has.

C. A WAY FORWARD: SYNTHESIZING *SNAP*, *OMEGLE*, AND INTELLECTUAL PROPERTY PRINCIPLES TO REASSESS SECTION 230

So, what is the solution to this history of free online exploitation? This Note does not aim to comprehensively answer that question, as such a solution has been the subject of extensive debate that will likely only grow in the coming years. But *Snap* and *OmeGLE*, discussed above, may point us in a promising new direction for conceptualizing Section 230 reform.

Snap and *OmeGLE* not only reveal a deep-seated problem with Section 230 immunity but also highlight the commodified nature of internet spaces. They validate products liability as a cause of action against online service providers. In that case, it naturally follows that a conception of online space as a product is an effective legal approach to today's internet.

The cases also reinforce the problems stemming from platforms-as-products being free to operate unregulated. Section 230 itself even seems to have some inkling of the internet as a marketplace of commodities, with its focus on market powers.¹⁰⁰ Still, its understanding bakes in an idealization that the market for internet services does not need any consumer self-protection measures outside what the producers themselves decide to provide. For today's uber-commodified online sphere, that belief is simply unrealistic.

So we may view online spaces as products. Closely related is the possibility that we may view online spaces as properties. This connection ties into one of the closest links between the internet and the law: intellectual property law governing user-generated content. Copyright's online implications have become a point of extensive discussion relating to user-generated content protections and online copyright infringement.¹⁰¹

¹⁰⁰ 47 U.S.C. § 230(b)(2).

¹⁰¹ Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841 (2009); Ramon Lobato, Julian Thomas & Dan Hunter, *Histories of User-Generated Content: Between Formal and Informal Media Economies*, 5 U. S. CAL. INT'L J. COMM'N 899 (2011).

Copyright law's application to content posted online is undisputed. But under a conception of online platforms as property, there may be further value in applying copyright principles to internet spaces themselves. Copyright and intellectual property ("IP") law mirrors the policy aims Section 230 espouses. Particularly, IP and Section 230 both emphasize progress and market participant protection in service of economic and intellectual exchange. The divergence between the two comes in the means to the ends. IP (especially copyright) takes a tack of freedom by restraint, affording rights that encourage individuals to interact. Section 230, meanwhile, throws up its hands and announces a free-for-all, then bars individual redress for the consequences of the chaos. While this open-endedness may encourage "progress" through tech company profit-mongering, it runs the risk of inhibiting any other type of progress or free exchange.

IV. CONCLUSION

If online service providers offer products and properties for use, IP law shows us that Section 230's anarchical approach is not the only answer for encouraging market benefits and progress. Affording individuals some kind of private right of action to protect themselves and to hold service providers accountable could open more doors than it closes. This approach would liberate online users to freely engage with online services without doing so purely at the provider's whims. Such restraints could also encourage providers to take a more discerning look at their approach. With an IP inspiration, Section 230 reform might just create the kinds of safe, open online spaces the statute's policy aspirations envision.