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RESEARCH SUMMARY

Liability Protection for Online Content Distributors: The Common-Law Roots of Section 230 of the Communications Decency Act

As internet businesses began to emerge in the 1990s, online content distributors were taken to court for allegedly defamatory or otherwise objectionable material they published or republished. While one court found that an internet-based company was not liable, a second arrived at the opposite conclusion. Congress resolved the ambiguity by enacting the Communications Decency Act of 1996, whose Section 230 established a broad liability shield for online content distributors.

Critics argue that Section 230 is a deviation from standard liability law that should be corrected. Brent Skorup and Jennifer Huddleston explain why they disagree in "The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation." They argue that Section 230 accelerated a common-law shift away from liability for media distributors both online and offline over the past 50 years.

WHY SECTION 230 RESEMBLES COMMON LAW

The authors document a legal trend beginning in the 1930s that ushered in judicial protection of media distributors from publisher liability. In particular, courts throughout the country recognized a "wire service defense" and Section 230–like "conduit liability" as broadcast and mass media developed. Two considerations drove the legal trend toward the reduction of liability for distributors and publishers: a desire for practical legal rules and free speech norms. Unsurprisingly, these considerations also drove the creation of Section 230.

- Section 230 was codified just when it was needed—at the time internet firms had started to reach audiences of tens of millions. It does not protect only the large firms such as Facebook and Google, but rather continues to provide liability protection for large and small distributors alike.
- Section 230, like conduit liability, provides certainty for online content distributors to conduct their business without the risk of protracted litigation.
- Congress recognized, as the courts had in several First Amendment cases for traditional media, that publisher and republisher liability chills the free exchange of controversial ideas and criticism.

THE POTENTIAL LEGAL EVOLUTIONS OF LIABILITY IN THE FACE OF CURRENT CHALLENGES

There are limited circumstances in which departures from current broad liability protections (under Section 230 and existing legal precedent) might be practicable while preserving free expression and innovation:

- In cases where egregiously offensive or patently harmful material can be reliably identified by nonexpert moderators or basic software, and where the risk of false positives can be minimized, a notice of liability could be sent to the online distributor requiring removal of the content.
- Any such amendments to Section 230 should be enacted thoughtfully—in ways that codify the free speech and pragmatic concerns that courts have recognized in decades of publisher liability cases.