# Twitter Thread by Jeff Kosseff

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## Today's Section 230 thread examines what is probably the biggest misconception about the law (and that's saying a lot): whether there is a distinction between "publishers" and "platforms." The short answer is no. The longer answer is No, absolutely not! I explain:

The argument goes like this: websites only receive Section 230 protections if they are "neutral platforms." If they begin to moderate/block/curate user content, they become "publishers" and lose their Section 230 protections. Because 230 only applies to "neutral platforms."

Before deconstructing why this argument is incorrect, it is important to note that we don't know exactly where it has come from. It really only surfaced in the public debate 1-2 yrs ago.

But many lawyers for platforms have been making this mistake since 230 was passed, and have advised their clients to not moderate, lest they lose 230 protections. I think this terrible advice has led to a lot of the garbage we're dealing with online today.

Here's why the "publisher/platform" distinction just isn't a thing under Section 230. A main reason that Congress passed 230 was in response to a badly reasoned 1995 NY state court opinion that found that Prodigy was liable for all of its users' posts because it moderated.

In a subsequent thread, I'll explain why the Prodigy decision was badly decided. But it received enough attention that some members of Congress feared that it would create a disincentive to moderation.

Section 230 was a market-based alternative to the Communications Decency Act, which imposed criminal penalties for transmitting indecent content online to minors. 230's sponsors recognized that CDA was unconstitutional.

Both 230 and CDA were included in the 1996 telecom act (even though they didn't fit perfectly well together). Soon after, SCOTUS struck down the CDA as unconstitutional, but 230 survived.

230, at its core, recognizes that platforms are best positioned to decide their own moderation practices. While 230 is very much a free speech-protective law, it *never* was the case that Congress wanted to limit the protections to "neutral

platforms."

230 has two provisions, (c)(1) and (c)(2). (c)(1) contains the 26 words, which say that interactive computer service providers/users are not treated as publishers/speakers of 3d-party content.

(c)(2) says that ICS providers also are not liable for good-faith actions to restrict access/availability to material that they deem are objectionable.

In litigation, platforms have relied on (c)(1) far more frequently than (c)(2), both in cases arising from harmful material that was left on the site, as well as those arising from decisions to moderate content.

(c)(1) has absolutely no requirement of "neutral platforms." In fact, it doesn't even use the word "platform." It applies to providers/users of interactive computer services, which are defined as:

The most support that the publisher/platform crowd has for their distinction is this statement from 230's findings, but I don't think it helps them.

Even if we were to read the findings as a requirement (it is not), "true diversity of political discourse" does not mean that a platform must abstain from any moderation that might favor/disfavor a particular view.

Many of the controversial moderation decisions involve hate speech. If a platform were to allow hate speech to run rampant (and some do), that very likely silences the political discourse of others who do not feel welcome on the platform.

Under Section 230, all of that is the platform's decision, not the government's. That is crystal clear from the legislative history, including this statement in the 1995 floor debate from former Rep. Chris Cox, 230's co-author.

This is why I say that 230 is a market-based law. The platforms are supposed to develop moderation practices that they believe their users demand. If they moderate too much or too little, they likely will lose users.

I've been through every document related to 230's passage, interviewed its co-authors and others involved in its passage extensively, and I have not found one shred of evidence that anyone wanted to condition it on neutrality.

230 was the last line of defense against the CDA, which all of 230's supporters recognized was an unconstitutional disaster. People were freaked out about online porn, and 230 provided a way to allow platforms to moderate as they saw fit without involving the government.

There is also a practical issue: what is a "neutral platform?" Do they not moderate anything at all? Do they only moderate content that is illegal, like obscenity? In either case, many platforms would be filled with legal but harmful speech and could very be unusable.

So this is all a very long way of saying, no, Section 230 does not impose a publisher/platform distinction. It is not in the text of the law. It is not in the congressional intent of the law. And such a distinction would be unworkable.

To illustrate: let's say that five tweets in this thread were defamatory (I hope not, but let's go with it). I would receive no 230 protection, and could be sued (I'd still have the many other tools to defend against defamation claims, like actual malice for public figures).

If the subject of my tweets were to sue Twitter, Twitter likely could use 230 to get the case dismissed at a very early stage.

This would be true even if Twitter had received a complaint from the subject of the tweets and decided not to delete them.

This also would be true if Twitter received a complaint about the five tweets and only deleted one of them. It's deletion of some of the content does not make it a "publisher."

If a Twitter employee were to publicly post a reply to my tweets that in and of itself contained defamatory statements, then Twitter could not claim 230 for that reply because it was the "information content provider" of that reply.

But even in that case, Twitter still would not be liable for the statements in the tweets that I wrote.

I will continue to write Section 230 explainers until everyone on Twitter understands the law.

Definitely - important topic - coming later this week. https://t.co/0wN66NDYNb

> Could you devote a thread to the legal definition and application of \u201cgood faith\u201d here? I've seen more than a few people zero in on that to accuse Twitter et al. of operating in \u201cbad faith\u201d because their moderation rules end up disproportionately affecting right-wing accounts.
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> — Jeremy Parker (@astutepanther) November 29, 2020