Washington Journal of Law, Technology & Arts

Volume 17 | Issue 2 Article 2

7-1-2022

Cyber-Silencing the Community: YouTube, Divino Group, and Reimagining Section 230

Layla G. Maurer
Case Western Reserve University School of Law

Cyber-Silencing the Community: YouTube, Divino Group, and Reimagining Section 230

Cover Page Footnote

*Layla Maurer received her JD from Case Western Reserve University School of Law in May of 2022. She holds a Master's in Library and Information Science from Kent State University and has a career background in technology and digital media. She currently works for the legal department at Wizards of the Coast, and is broadly interested in technology law, gaming law, privacy, and digital citizenship. She has written on internet- and technology-based legal issues including artificial intelligence, Section 230, and trademark for gamertags in Esports.

WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 17, ISSUE 2 SPRING 2022

CYBER-SILENCING THE COMMUNITY: YOUTUBE, *DIVINO GROUP*, AND REIMAGINING SECTION 230

*Layla G. Maurer**

ABSTRACT

Social media platforms, once simple messaging boards, have grown to colossal size. They are now a vital source of communication and connection, particularly for marginalized groups such as the LGBTQ+ community. Social media holds incredible sway over the news, political discourse, and entertainment that we consume, and the platforms we use are now able to sculpt conversations simply by allowing or disallowing (i.e., moderating) specific types of speech or content.

One indirect form of moderation is demonetization, a means by which content creators are disallowed revenue from advertisements on their hosted media. The consequence of improper demonetization is not just financial: demonetized content is also deprioritized and, in a sea of competing media, often overlooked or in some cases entirely hidden. This process effectively removes demonetized voices from the broader conversation, which is precisely what happened to a list of LGBTQ+ creators on YouTube starting in 2017. Those creators' voices were—seemingly unintentionally—silenced, as an algorithm inadvertently flagged their content as "adult" or "sexually suggestive." The creators lost following and revenue, and YouTube as a host of online content faced no consequences for the error, thanks to the protections afforded it by Section 230 of the Communications Decency Act of 1996. Section 230 has been treated as a shield for online platforms, as well as a sword enabling those platforms to moderate content as they see fit (with several restrictions).

Moderation is necessary and important in the broadest sense. However, modern platforms, being a far cry from the messaging boards of the late 1990s in practically every sense, must be held to higher account for the means by which they undertake that moderation. This paper suggests a set of simple amendments to Section 230 that would allow for monetized content creators whose content had been inappropriately flagged and demonetized to a) have that content remonetized and b) to seek recourse in the form of fines levied against platforms that repeatedly mis-flag content that conforms with that platform's stated policies. While this solution is less than ideal, it is one which would place a higher onus on the platforms themselves while still protecting those platforms' rights to moderate as they see fit.

* Layla Maurer received her JD from Case Western Reserve University School of Law in May of 2022. She holds a Master's in Library and Information Science from Kent State University and has a career background in technology and digital media. She currently works for the legal department at Wizards of the Coast, and is broadly interested in technology law, gaming law, privacy, and digital citizenship. She has written on internet- and technology-based legal issues including artificial intelligence, Section 230, and trademark for gamertags in Esports.

TABLE OF CONTENTS

INTRODUCTION

In August of 2019, eight LGBTQ+ creators[1] filed a class action lawsuit against YouTube (via its parent company, Google)[2] in which they alleged that YouTube specifically and unfairly targeted their content for flagging, restricted viewing, and demonetization.[3] The term "demonetization" on an ad-sponsored platform, such as YouTube, means "the process wherein independent content creators are denied paid advertisements in their video, thus denying them revenue and reducing their income from the video-hosting platform."[4] A "creator" on YouTube is a power user or YouTube "partner" who a) has established themselves, and their YouTube channel, as a source of unique and follower-generating content and b) benefits from YouTube's monetization and internal recognition platforms, while not holding employment as a paid influencer for a third party.[5]

The creators' lawsuit, *Divino Group, LLC et al. v. Google LLC et al.*, considered whether the censorship of LGBTQ+ content merited either a First Amendment claim or a civil rights discrimination claim against the platform (or both).[6] One transgender creator, Chase Ross, provided evidence that his videos were restricted when he included the word "trans" in their titles.[7] Another creator, Sal Bardo, noticed in 2017 that his "benign" (non-sexually explicit or profane) LGBTQ-focused videos had been placed in restricted mode and demonetized without notice from YouTube.[8] Bardo spoke to other creators in the community who claimed that the same was happening to them: LGBTQ-focused videos (or those tagged with LGBTQ+ keywords) were being targeted by YouTube's blacklist algorithms.[9]

---

[1] *See* Taylor Lorenz, *The Real Difference Between Creators and Influencers*, THE ATLANTIC (May 31, 2019), https://www.theatlantic.com/technology/archive/2019/05/how-creators-became-influencers/590725/ for a discussion about the differences in terminology.

[2] Class Action Complaint for Damages, Injunctive Relief, Restitution, and Declaratory Judgment, Divino Group, LLC et al. v. Google LLC et al., No. 5:19CV04749 (N.D. Cal. Aug. 13, 2019).

[3] James Hale, *8 Creators File Suit Against YouTube, Claiming it Discriminates Against LGBTQ+ Content*, TUBEFILTER (Aug. 14, 2019), https://www.tubefilter.com/2019/08/14/8-creators-file-suit-against-youtube-claiming-it-discriminates-against-lgbtq-content/; *see also* Greg Bensinger & Reed Albergotti, *YouTube Discriminates Against LGBT Content by Unfairly Culling It, Suit Alleges*, WASH. POST (Aug. 14, 2019), https://www.washingtonpost.com/technology/2019/08/14/youtube-discriminates-against-lgbt-content-by-unfairly-culling-it-suit-alleges/.

[4] Piper Thompson, *Understanding YouTube Demonetization and the Adpocalypse*, G2 LEARN HUB (June 14, 2019), https://learn.g2.com/youtube-demonetization.

[5] *See* Lorenz, *supra* note 1.

[6] Class Action Complaint, *supra* note 2.

[7] Chase Ross (@ChaseRoss), TWITTER (Oct. 8, 2017, 4:22 pm), https://twitter.com/ChaseRoss/status/917122952176467969.

[8] E.J. Dickson, *Inside LGBTQ Vloggers' Class-Action 'Censorship' Suit Against YouTube*, ROLLING STONE (Nov. 14, 2019, 1:54 pm), https://www.rollingstone.com/culture/culture-features/lgbtq-youtube-lawsuit-censorship-877919/.

[9] *Id.*; *see also* Lindsay Dodgson, *YouTubers Have Identified a Long List of Words that Immediately get Videos Demonetized, and They Include 'Gay' and 'Lesbian' but not 'Straight' or 'Heterosexual'*, INSIDER.COM (Oct. 1, 2019, 8:49 am), https://www.insider.com/youtubers-identify-title-words-that-get-videos-demonetized-experiment-2019-10.

The company was apparently aware that the content had been flagged inappropriately and was working to remedy the issue.[10] However, even after Bardo's flags had been lifted in 2018, his content was re-flagged by late 2019.[11] At that time, Bardo received a message indicating his channel had been demonetized because it contained "content isolated for the sole purpose of sexual gratification."[12] Despite the evidence provided by the plaintiffs, Magistrate Judge for the Northern District of California Virginia K. DeMarchi indicated initial skepticism on the merits of the case[13] and, in January of 2021, granted Google et al.'s motion to dismiss for failure to state a claim upon which relief could be granted.[14]

YouTube itself has wavered on its own enforcement of policies regarding censorship. In mid-2019, the platform overtly refused to take down videos from or ban right-wing YouTuber Steven Crowder, who repeatedly targeted gay journalist Carlos Maza using homophobic and racist slurs.[15] Yet later that year (and likely in response to the backlash on its refusal to moderate such content), it claimed that it was instating and enforcing a new anti-harassment policy that would apply to content that negatively targeted people based on race, gender expression, or sexual orientation.[16] Today, its policies indicate that it prefers not to censor content, as it believes that "a broad range of perspectives ultimately makes us a stronger and more informed society."[17] However, YouTube provides community guidelines limiting spam, "sensitive" content (including sexual or adult content), violent content, regulated goods, and misinformation generally.[18] Its YouTube Partner Program ("YPP"), which provides monetization for approved content creators, dictates that creators must meet a specific list of requirements in order to retain monetization rights.[19] Those requirements,[20] introduced in 2016—prior to the current policies—specify that content creators must adhere to "advertiser-friendly

---

[10] Dickson, *supra* note 8.
[11] *Id.*
[12] *Id.*
[13] Dorothy Atkins, *LGBTQ Bias Suit Against YouTube Faces Skeptical Judge*, LAW360 (June 2, 2020, 6:59 pm), https://www.law360.com/articles/1279094/lgbtq-bias-suit-against-youtube-faces-skeptical-judge.
[14] Order Granting Motion to Dismiss, Divino Group LLC et al. v. Google LLC, et al., no. 19-cv-04749-VKD (N.D. Cal. 2021).
[15] Paolo Zialcita, *YouTube Announces New Anti-Harassment Policy to Fight Racial, Gender, LGBTQ Abuse*, NPR (Dec. 11, 2019), https://www.npr.org/2019/12/11/787165948/youtube-announces-new-anti-harassment-policy-to-fight-racial-gender-lgbtq-abuse; *see also* Sara Ashley O'Brian, *YouTube CEO Apologizes to LGBTQ Community but Stands by Crowder Decision*, CNN BUSINESS (June 10, 2019), https://www.cnn.com/2019/06/10/tech/youtube-susan-wojcicki-code-con/index.html.
[16] Zialcita, *supra* note 15.
[17] YOUTUBE.COM, POLICIES OVERVIEW, https://www.youtube.com/howyoutubeworks/policies/overview/ (last visited Oct. 16, 2021).
[18] YOUTUBE.COM, COMMUNITY GUIDELINES, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Oct. 16, 2021).
[19] GOOGLE SUPPORT, YOUTUBE CHANNEL MONETIZATION POLICIES, https://support.google.com/youtube/answer/1311392 (last visited Oct. 16, 2021).
[20] Tim Mulkerin, *A Bunch of Famous YouTubers are Furious at YouTube Right Now – Here's Why*, BUSINESS INSIDER (Sept. 1, 2016), https://www.businessinsider.com/youtube-stars-advertiser-friendly-content-guidelines-2016-9.

content guidelines.[21] Specifically, they must not contain sexually suggestive content, violence, "inappropriate language," promotion of drugs, or "controversial or sensitive subjects."[22]

YouTube is the United States' second-most visited website.[23] Its monthly hits in August of 2021 numbered 4.62 billion.[24] As of May 2020, YouTube accounted for 15 percent of all traffic on consumer broadband networks worldwide.[25] Despite being a video platform, YouTube is also classified as "social media"[26] due to its widespread and active community of users.[27] Additionally, the platform's monetization is based upon numbers of views, shares, clicks, and interactions with paid ads.[28] It "monetizes" videos via "pre-roll, display, and other advertising formats. Advertisers pay based on clicks and impressions,"[29] which necessitates social activity such as sharing and commenting. This weighs in favor of its being considered a social tool. However, the classification of a platform as being "social" does not automatically grant its users the right to free speech on that platform. In fact, social media platforms are, as private platforms, entitled to censor as they see fit. This is because they are not considered to be "public forums."[30]

"Public forums," elaborated upon in Part II below, are forums which provide a protected space for public debate and assembly.[31] Judge DeMarchi argued in *Divino Group* that, as private platforms, Google et al. would (a) not be subject to a civil rights claim and (b) be entitled to "Section 230" protections.[32] DeMarchi was referring to Section 230 of the Communications Decency Act of 1996 ("CDA").[33] Section 230 was intended to protect publishers of third-party content from liability for their users' posts and activities on their platforms; this protection is granted to any service that publishes third-party content, and has today been expanded to

---

[21] GOOGLE SUPPORT, ADVERTISER-FRIENDLY CONTENT GUIDELINES, https://support.google.com/youtube/answer/6162278 (last visited Oct. 16, 2021).
[22] Mulkerin, *supra* note 20.
[23] *Top 100: The Most Visited Websites in the US [2021 Top Websites Edition]*, SEMRUSH.COM, https://www.semrush.com/blog/most-visited-websites/ (last visited Oct. 16, 2021) [hereinafter *Top 100*].
[24] *Id.*
[25] Peter Suciu, *YouTube Remains the Most Dominant Social Media Platform*, FORBES (Apr. 7, 2021), https://www.forbes.com/sites/petersuciu/2021/04/07/youtube-remains-the-most-dominant-social-media-platform/.
[26] *See Top 100*, *supra* note 23 (depicting a chart of insights on the most popular sites in the US by industry, wherein YouTube is categorized as a "social network").
[27] *See* Stephen Tornetta, *The Case for YouTube as a Social Media Channel*, CHATTERBLAST (Sept. 20, 2019), https://chatterblast.com/the-case-for-youtube-as-a-social-media-channel/.
[28] Mary Hall, *How Do People Make Money on YouTube?*, INVESTOPEDIA (Aug. 6, 2021), https://www.investopedia.com/ask/answers/012015/how-do-people-make-money-videos-they-upload-youtube.asp.
[29] *Id.*
[30] *Public Forum*, *Merriam-Webster*, https://www.merriam-webster.com/legal/public%20forum (last visited Oct. 16, 2021).
[31] *Id.*
[32] Divino Group LLC et al. v. Google LLC et al., 2021 WL 51715 (N.D. Cal. 2021).
[33] 47 U.S.C. § 230 [hereinafter Section 230].

include social media platforms where "third parties" are the users of those platforms.[34]

This paper argues that Section 230, despite its role in fostering the exchange of information on the internet, has been misapplied due to its drafters' understandable lack of foresight into what the internet has become both as a source of communication and of income for content creators. Part I discusses the origins of the *Divino Group* lawsuit and the importance of YouTube content creation as a source of income for the LGBTQ+ community. Part II elaborates upon Section 230 and its legislative history. Part III suggests language for modifying Section 230 to provide recourse for monetized content creators whose content has been inappropriately flagged and demonetized—in other words, censored—irrespective of whether the censorship was intentional.

PART I: THE PATH TO *DIVINO GROUP* AND THE ROADBLOCKS FOLLOWING

The *Divino Group* case was motivated by the repeated flagging, removal, and demonetization of content created by LGBTQ+ identifying creators. In 2017, creators such as Chase Ross,[35] Rowan Ellis,[36] Tyler Oakley,[37] Stevie Boebi,[38] and NeonFiona[39] began vocally complaining that their content had been "hidden, demonetized, or age-gated."[40] Chase Ross and NeonFiona both provided screenshot evidence on their respective Twitter accounts showing that their channels' content had been restricted due to the inclusion of certain keywords in their videos' titles. Ross' videos including the word "trans*" were flagged and demonetized.[41] In NeonFiona's case, viewing her channel in "restricted mode,"[42] which limits accessible videos to non-adult content, caused videos including the words "gay,"

---

[34] *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Oct. 16, 2021).
[35] *See* Ross, *supra* note 7.
[36] Rowan Ellis is a "video essayist and creator" who creates content based on LGBTQ+ issues and pop culture. Rowan Ellis, *About*, ROWANELLIS.COM, https://www.rowanellis.com/ (last visited Oct. 31, 2021).
[37] Tyler Oakley is a gay advocate for LGBTQ+ youth who created YouTube content every week from October 2007 to December 2020. *See* Tyler Oakley, *About: Tyler Oakley*, TYLEROAKLEY.COM, https://tyleroakley.com/ (last accessed Oct. 31, 2021).
[38] Stevie Boebi is a lesbian creator who acts as an "advocate for the lesbian community, and the LGBTQ+ world at large." SHORTY AWARDS, STEVIE BOEBI, https://shortyawards.com/9th/stevieboebi (last accessed Oct. 31, 2021); *see also* Stevie Boebi (@stevieboebi), TUMBLR, https://stevieboebi.tumblr.com/ (last accessed Oct. 31, 2021).
[39] "NeonFiona" is a bisexual YouTube creator. *See* NeonFiona (@neonfiona), YOUTUBE, https://www.youtube.com/c/neonfiona/videos (last accessed Oct. 31, 2021).
[40] Megan Farokhmanesh, *YouTube is Still Restricting and Demonetizing LGBT Videos – and Adding Anti-LGBT Ads to Some*, THE VERGE (June 4, 2018, 2:46 pm), https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-demonetization-ads-algorithm.
[41] Ross, *supra* note 7.
[42] *See* Niraj Chokshi, *YouTube Filtering Draws Ire of Gay and Transgender Creators*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/technology/youtube-lgbt-videos.html.

"girlfriend," "lesbian," and "bisexual" to disappear from the list of available content.[43]

Authors Wayne Wilkinson and Stephen Berry consider these restrictions a consequence of the "YouTube Adpocalypse of 2017."[44] The "Adpocalypse"[45] began with a series of controversial videos posted on the channels of several popular YouTube creators in 2016-17: Felix Kjellberg ("PewDiePie"), whose video included anti-Semitic and alt-right propaganda;[46] Logan Paul, who traveled to Aokigahara Forest and posted a video depicting the body of someone who died from suicide;[47] and Steven Crowder, a prominent right-wing conservative who slandered gay journalist Carlos Maza.[48] Advertisers began boycotting the platform in response to their ads being placed on videos such as PewDiePie's, Paul's, and Crowder's.[49] YouTube took immediate steps to implement advertiser protections in response to the PewDiePie video,[50] resulting in the "Advertiser-Friendly Content Guidelines" of 2016.[51] Soon after, content creators began seeing "dips in revenue" as these policies allowed advertisers to selectively "pull their ads from videos they disagreed with or found [to be] distasteful."[52] Months later following the removal of the Logan Paul video,[53] YouTube further honed its new policies to create specific requirements for ad revenue.[54] In order to monetize, creators needed a) at least "4,000 hours of accrued watch time" in the last 12 months and b) over 1,000

---

[43] NeonFiona (@neonfiona), TWITTER (Mar. 16, 2017), https://twitter.com/neonfiona/status/842390135257874432.

[44] Wayne W. Wilkinson & Stephen D. Berry, *Together They Are Troy and Chase: Who Supports Demonetization of Gay Content on YouTube?*, 9(2) PSYCH. POPULAR MEDIA 224, 224 (2020).

[45] *See, e.g.*, Sangeet Kumar, *The Algorithmic Dance: YouTube's Adpocalypse and the Gatekeeping of Cultural Content on Digital Platforms*, 8(2) INTERNET POL'Y REV. 1 (2019); Rachel Dunphy, *Can YouTube Survive the Adpocalypse?*, N.Y. MAGAZINE (Dec. 28, 2017), https://nymag.com/intelligencer/2017/12/can-youtube-survive-the-adpocalypse.html; Piper Thomson, *Understanding YouTube Demonetization and the Adpocalypse*, G2.COM (June 14, 2019), https://learn.g2.com/youtube-demonetization.

[46] Thomson, *supra* note 4; *see also* Aja Romano, *The Controversy Over YouTube Star PewDiePie and His Anti-Semitic "Jokes," Explained*, VOX (Feb. 17, 2017), https://www.vox.com/culture/2017/2/17/14613234/pewdiepie-nazi-satire-alt-right.

[47] *See* Robinson Meyer, *The Social-Media Star and the Suicide*, THE ATLANTIC (Jan. 2, 2018), https://www.theatlantic.com/technology/archive/2018/01/a-social-media-stars-error/549479/; *see also* Thomson, *supra* note 4.

[48] O'Brian, *supra* note 15.

[49] *See, e.g.*, Steven Sanford, YouTube and the Adpocalypse: How Have the New YouTube Advertising Friendly Guidelines Shaped Creator Participation and Audience Engagement? (2018) (M.Sc. Thesis, Lund University) (on file with university) ("Across an 18 month period covering starting in 2016, YouTube was subjected to a major advertising boycott … During this period a large number of high profile brands began to quickly and quietly withdraw their adverts, en masse. This was done after it was discovered that a number of them had been placed, via the platforms automatic algorithm, in thousands of videos which broadcast messages of hate, violence and extremism").

[50] Thomson, *supra* note 4.

[51] *See* Mulkerin, *supra* note 20; *see also* ADVERTISER-FRIENDLY CONTENT GUIDELINES, *supra* note 21.

[52] Thomson, *supra* note 4.

[53] Meyer, *supra* note 47.

[54] Thomson, *supra* note 4.

subscribers.[55] One effect of these statistical requirements was that "[h]uge numbers of channels were purged from ad networks"[56] while the creators strove to meet the new standards—or waited to find out whether they would have sufficient numbers at the end of 12 months.[57]

While the second tweak to monetization may not have had a striking effect on LGBTQ+ creators, the third and final change certainly did. This change followed the widespread backlash from YouTube's decision not to censor or remove Steven Crowder's overtly homophobic videos attacking a gay Vox journalist.[58] YouTube initially stood by its decision in the Crowder controversy, though it later "flip-flopped" and suspended Crowder's monetization.[59] YouTube then chose to reassess how advertisers were being affected by controversial content.[60] In a seeming effort to shift responsibility for ad placements from YouTube to the ad companies themselves, this change allowed for advertisers to specifically exclude broad categories of content. Those categories are: 1) "tragedy and conflict"; 2) "sensitive social issues"; 3) "sexually suggestive content"; 4) "sensational and shocking"; and "profanity and rough language."[61] These categories were not visible to content creators, only to advertisers.[62] Thus, creators had no way to know whether their content fell under the aforementioned categories. As of today, advertisers can also choose a Standard Content option for their ad placement which broadly restricts "sexual" content.[63]

Even more importantly, YouTube took the step of updating its content-flagging algorithm to be "more stringent"—with the side effect of "the algorithm automatically demonetizing and de-platforming numerous channels that simply *covered* sensitive and controversial issues."[64] LGBTQ+ creators noticed that their videos, and revenue, were being affected by these changes soon after they were implemented. The *Divino Group* complaint alleged that the changes to the algorithm, as well as the categorizations offered to advertising companies, were automatically, discriminatorily, and unfairly causing ads to be removed from the named creators' videos.[65] The complaint also accused YouTube of discrimination on the basis that YouTube admitted to "hiding from view" content that included or referenced "same-sex relationships" and "pop culture from a feminist and queer perspective."[66]

---

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See* Danny Nett, *Is YouTube Doing Enough to Stop Harassment of LGBTQ Content Creators?*, NPR (June 8, 2019), https://www.npr.org/2019/06/08/730608664/is-youtube-doing-enough-to-stop-harassment-of-lgbtq-content-creators.
[59] Jennifer Elias, *YouTube Flip-Flops on Suspending Video Blogger Accused of Harassment*, CNBC (June 5, 2019), https://www.cnbc.com/2019/06/05/youtube-flip-flops-on-steven-crowder-suspension.html.
[60] *Id.*
[61] Kumar, *supra* note 45, at 4.
[62] *Id.*
[63] *Id.*
[64] Thomson, *supra* note 4.
[65] Class Action Complaint, *supra* note 2.
[66] *Id.* at para. 11.

YouTube is, in essence, a source of media and entertainment, and some might believe that simply removing advertisements or flagging content as "adult" does very little harm to those posting the content. However, YouTube is not strictly a "media repository" but rather provides "a substantial (or exclusive) source of income for many content creators through advertising revenue."[67] Demonetization is thus "censorship by proxy."[68]

Furthermore, many creators fund their channels and build their brands through advertising revenue alone.[69] Since YouTube has a massive presence on the internet, accounting for the majority of video consumption in the United States and boasting 2.6 billion users worldwide,[70] it is the preeminent option for creators who want to build a global brand presence via video. However, YouTube is not required to allow all content creators to host their videos on its platform or pay all users for their views. As a private company it can selectively choose the type and availability of its users' content, despite that content's role in providing income to the creator. Censorship, in this context, is permissible; but if the company's stance is to support and permit specific communities' content—as it claims with the LGBTQ+ community[71]—then mistaken censorship that punishes those communities ought to result in recourse and compensation for those affected. The issue as highlighted by the court in its reasoning for dismissing the *Divino Group* suit,[72] is that social media platforms like YouTube do not guarantee free speech.

PART II: SPEECH ON THE INTERNET AND SECTION 230

There exists, understandably, widespread confusion about what exactly is protected or protectable speech when it comes to online platforms. Articles and debates on the nature of free speech on the internet—and whether the internet should be regulated—have existed since the birth of the internet as a medium for communications.[73] As early as 1996, "cyberspace activist" John Perry Barlow poetically declared:

---

[67] Wilkinson & Berry, *supra* note 44, at 224.
[68] *Id.*
[69] *Id.* at 225.
[70] *See* Suciu, *supra* note 25; *see also YouTube User Statistics 2022*, GLOBALMEDIAINSIGHT (Apr. 18, 2022), https://www.globalmediainsight.com/blog/youtube-users-statistics/ (indicating that YouTube has 2.6 billion unique users generating "billions of views" on the platform, and that YouTube is the "second-most trafficked website after Google").
[71] *See* Abby Ohlheiser, *LGBT Creators Wonder Whether YouTube Really Supports Them or Just Pretends To During Pride Month*, WASH. POST (June 6, 2019), https://www.washingtonpost.com/technology/2019/06/06/lgbt-creators-wonder-whether-youtube-really-supports-them-or-just-pretends-during-pride-month/.
[72] *See generally* Divino Group LLC et al. v. Google LLC et al., 2021 WL 51715 (N.D. Cal. 2021).
[73] *See, e.g.*, James J. Black, *Free Speech & The Internet: The Inevitable Move Toward Government Regulation*, 4 RICHMOND J. L. & TECH. 1 (1997) (suggesting that activity on the "Net" would fall under regulations according to where the speech/activity originated and discussing differences in free speech regulations according to geographic location); *see also* Helen Roberts, *Research Paper 35 (1995-96): Can the Internet be Regulated?*, AUSTL. PARLIAMENT HOUSE, https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp9596/96rp35 (last visited Feb. 23, 2022).

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.[74]

Although Barlow—someone with "no technical expertise" but who held "a reputation as a prophet of new technology"[75]—and his sympathizers may have had sweeping ideals surrounding what they hoped was a cyberlibertarian future, those ideals have not truly come to pass. They have, however, been ingrained in the debate over whether speech on the internet is "free" and whether the internet is, or ought to be, considered separate from the "real world"[76] and thus regulated or deregulated in a unique manner.

A. The Necessity of, and Unintended Consequences from, Private Moderation

1. "Free Speech" as a Moving Target

Internet speech regulation and moderation entered the purview of the Supreme Court early on, and the Court has a history of selectively eschewing regulation of internet-based speech. In 1997 in *Reno v. ACLU*, the Court ruled that restrictions on the "display" and "transmission" of what was deemed "indecent" communications online violated the First Amendment, lending credence to the idea that internet speech is truly free.[77] However, five years later in 2002—as the internet, and access to it, was broadening exponentially—the Court grappled with definitions of protected expression and obscenity. In *Ashcroft v. Free Speech*

---

[74] John Perry Barlow, *A Declaration of the Independence of Cyberspace (Feb. 8, 1996)*, ELEC. FRONTIER FOUND.: JOHN PERRY BARLOW LIBR., https://www.eff.org/cyberspace-independence (last visited Apr. 28, 2022).

[75] Michael Buozis, *Making Common Sense of Cyberlibertarian Ideology: The Journalistic Consecration of John Perry Barlow*, TAYLOR & FRANCIS ONLINE (July 7, 2021), https://www.tandfonline.com/doi/abs/10.1080/24701475.2021.1943994.

[76] *See* Katharine Gelber & Susan J. Brison, *Digital Dualism and the "Speech as Thought" Paradox*, *in* FREE SPEECH IN THE DIGITAL AGE 12, 17 (Susan J. Brison & Katharine Gelber eds., 2019) (arguing that "[t]hose who claim a special sphere of speech online misconstrue the nature of speech itself and use unviable arguments for its protection" and that cyberspace should not be distinguished from the "real world").

[77] Reno v. ACLU, 521 U.S. 844 (1997); *see also* Robert Corn-Revere, *Internet & First Amendment Overview*, FREEDOM FORUM INST. (Nov. 20, 2002), https://www.freedomforum institute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/.

Coalition, the Court found that "virtual" child pornography not involving actual children was "protected expression" under the First Amendment.[78] Later that year in *Ashcroft v. ACLU*, the Court upheld the Child Online Protection Act (COPA)[79] as a means of regulating expression, but remanded to the lower court for a determination as to what constituted "obscenity law" in the modern age.[80] Since that time the landscape, and very nature, of the internet has evolved in such a manner that regulation has become increasingly necessary. The First Amendment question has shifted from a conversation around obscenity and protection of children to one of threatening (or, "true threat")[81] language and spread of misinformation.[82] As authors on Bloomberg put it in June of 2021, "the debate is over how, not whether, to filter what's said online."[83]

2. Shifting Sands and the Social Media Debate

In the twenty years since *Ashcroft v. ACLU*, the makeup and content of the internet has become virtually unrecognizable compared to that shared on earlier platforms. When *Ashcroft* was decided, accessing information online was a markedly slower task[84] and the percentage of people using the internet was far smaller. According to Pew Research Center, 82% of American adults were on the internet in 2015.[85] That percentage, in 2000, was 50%,[86] but with a significant portion of those users being between the ages of 18-29.[87] The draw for younger adults was not to locate information or even share news; the internet in the early 2000s was primarily a source of entertainment and of limited connectivity with a

---

[78] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); *see also* Corn-Revere, *supra* note 77.
[79] Child Online Protection Act, 47 U.S.C. § 231 (1998); *see also* ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007) (Enjoining enforcement of COPA on Fourth and Fifth Amendment grounds); Mukasey v. ACLU, 555 U.S. 1137 (2009) (refusing certiorari and in so doing affirming the *Gonzales* decision).
[80] Ashcroft v. ACLU, 535 U.S. 564 (2002); *see also* Corn-Revere, *supra* note 77.
[81] A "true threat" in First Amendment jurisprudence is "a statement that is meant to frighten or intimidate one or more specified persons into believing that they will be seriously harmed by the speaker or someone acting at the speaker's behest" and involve a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Kevin Francis O'Neill & David L. Hudson, Jr., *True Threats*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1025/true-threats (June 2017) (citing Virginia v. Black, 538 U.S. 343 (2003)).
[82] *See* Megan R. Murphy, Comment, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. PENN. L. REV. 733 (2020).
[83] Sarah Frier, Naomi Nix, & Sarah Kopit, *Why Free Speech on the Internet Isn't Free for All*, BLOOMBERG TECH: QUICK TAKE (June 19, 2021), https://www.bloomberg.com/news/articles/2021-06-19/why-free-speech-on-the-internet-isn-t-free-for-all-quicktake.
[84] In 2007, average internet access speed was 3.67 Mbps; in 2017 it was 18.75 Mbps. S. O'Dea, *Average Internet Connection Speed in the United States from 2007-2017 (in Mbps), by Quarter*, STATISTA (July 22, 2020).
[85] Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RESEARCH CTR. https://www.pewresearch.org/internet/2015/06/26/americans-internet-access-2000-2015/ (June 26, 2015).
[86] *Id.*
[87] *Id.*

pre-existing group of friends.[88] A staggering 92% of that same age bracket were active users in 2015.[89] Among senior citizens, a demographic most often targeted by misinformation and "fake news" efforts,[90] the percentage of internet users spiked from 14% in 2000 to 58% in 2015,[91] with the majority becoming active online after 2012.[92]

Why is this important? Simply put, the internet is being used less as a place of sporadic connectivity and more as an intrinsic part of people's everyday lives. Society relies on the internet for news, communication, creative content, audio and video streaming, and much, much more—including use of, and access to, the phenomenon of "social media."[93] Social media is a development that evolved from a mere profile-uploading service in 1997 to the platforms we think of today:[94] Facebook, Reddit, Twitter, Instagram, Pinterest, Snapchat, and TikTok, primarily.[95] Although they are privately-owned entities, the fact that they frequently host content which is available for widespread public consumption has led to broad confusion about the platforms' rights to censor that content.[96] YouTube is a privately-owned content provider that hosts user-created content and encourages content sharing. It is by definition "social media," and subject to the same confusion that plagues other hosts of user speech.

3. YouTube, Despite Its Publicly Shareable Content, is Not a Public Site

Most of the world would consider YouTube to be a "public" site; however, it, as a social media platform (and the most popular one as of 2021),[97] is anything but. Because social media platforms are *not* considered public forums,[98] they are largely free to censor user content, with the exception that government accounts on those

---

[88] For a description of early- to mid-2000s websites and their purposes, *see* Clinton Nguyen, *These Websites Defined the Early 2000s – Here's Where They Are Now*, BUSINESSINSIDER (Oct. 5, 2016), https://www.businessinsider.com/what-happened-to-early-2000s-websites-2016-10.
[89] Perrin & Duggan, *supra* note 85.
[90] *See, e.g.*, Nadia M. Brashier & Daniel L. Schacter, *Aging in an Era of Fake News*, 29(3) CURR. DIRECTIONS PSYCHOLOGICAL SCI. 316 (2020).
[91] Perrin & Duggan, *supra* note 85.
[92] *Id.*
[93] Social media is "web-based communication tools that enable people to interact with each other by sharing and consuming information." Daniel Nations, *What is Social Media?*, LIFEWIRE (Jan. 26, 2021), https://www.lifewire.com/what-is-social-media-explaining-the-big-trend-3486616.
[94] *The Evolution of Social Media: How Did it Begin, and Where Could it Go Next?*, ARTICLES: MARYVILLE UNIV., https://online.maryville.edu/blog/evolution-social-media/ (last visited Feb. 25, 2022) (referencing the site "Six Degrees").
[95] *Id.* (listing major social media platforms as of 2022).
[96] *See, e.g.*, Natalie Strossen, Transcript, *Does the First Amendment Apply to Social Media Companies?*, TALKSONLAW, https://www.talksonlaw.com/briefs/does-the-first-amendment-require-social-media-platforms-to-grant-access-to-all-users (last visited Feb. 25, 2022).
[97] *See* Salvador Rodriguez, *YouTube is Social Media's Big Winner During the Pandemic*, CNBC (Apr. 7, 2021), https://www.cnbc.com/2021/04/07/youtube-is-social-medias-big-winner-during-the-pandemic.html.
[98] *Public Forum*, *supra* note 30.

platforms may not silence users who are responding to the government's speech.[99] Despite this, the internet and "social media in particular"[100] have become critical for the expression of protected speech.[101] Jack Dorsey, the creator of Twitter, stated in 2018 that he believes Twitter *should* be a "public square" where "activists, marginalized communities, whistleblowers, journalists, governments and the most influential people in the world" have an "open and free exchange" of ideas.[102] Recently, in April of 2022, billionaire Elon Musk of Tesla and SpaceX offered to purchase Twitter for $44 billion, stating that "free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated."[103] Musk's offer was accepted,[104] but critics have already levied harsh opinions against Musk and his Barlow-esque dream of a cyberlibertarian platform.[105] Those critics point out that a lack of moderation leads not only to a free-for-all arena for hate speech and bigotry,[106] but also potential legal implications if Musk intends not to moderate Twitter's European users.[107]

Regardless of Dorsey and Musk's idealistic visions, only the government—not private platforms—can affirmatively create new public spaces.[108] The government has not done so in the context of social media generally; the exception lies in (correctly) labeling the official account pages of government officials as being truly public.[109]

This affirmative lack of government action in social media was the crux of the reason that Judge DeMarchi opted to dismiss the plaintiffs' complaint in *Divino Group*. The plaintiffs' first claim, for violation of their First Amendment rights under 42 U.S.C. § 1983,[110] failed because to state a claim under § 1983, plaintiffs "must plead facts showing that a person acting under color of state law proximately

---

[99] *See* CONG. RSCH. SERV., LSB10141, UPDATE: SIDEWALKS, STREETS, AND TWEETS: IS TWITTER A PUBLIC FORUM? (2019).
[100] *Id.*
[101] *Id.*
[102] Jack Dorsey (@jack), TWITTER (Sept. 5, 2018, 1:56 pm), https://twitter.com/jack/status/1037399119810232321.
[103] Bobby Allyn, *Elon Musk Bought Twitter. Here's What He Says He'll Do Next*, NPR (Apr. 25, 2022), https://www.npr.org/2022/04/25/1094671225/elon-musk-bought-twitter-plans.
[104] *Id.*
[105] *See, e.g.*, Marc Ginsberg, *Elon Musk's Twitter 'Free Speech' Mirage*, THE HILL (Apr. 29, 2022), https://thehill.com/opinion/technology/3471557-elon-musks-twitter-free-speech-mirage/; Mutale Nkonde, *Elon Musk Says He Wants Free Speech on Twitter. But for Whom?*, SLATE: FUTURETENSE (Apr. 27, 2022), https://slate.com/technology/2022/04/elon-musk-free-speech-twitter-for-whom.html; Natasha Lomas, *Will Elon Musk Put Twitter on a Collision Course with Global Speech Regulators?: 'Free Speech Absolutism' Versus Digital Regulation in Europe and Beyond…*, TECHCRUNCH (Apr. 26, 2022), https://techcrunch.com/2022/04/26/elon-musk-free-speech-regulation/.
[106] Ginsberg, *supra* note 105.
[107] Lomas, *supra* note 105.
[108] CONG. RSCH. SERV., *supra* note 99.
[109] *See, e.g.*, E.A. Gjelten, *Can Government Officials Block Critics on Social Media?*, LAWYERS.COM (Apr. 13, 2021), https://www.lawyers.com/legal-info/criminal/can-government-officials-block-critics-social-media.html.
[110] Civil Action for Deprivation of Rights, 42 U.S.C. § 1983.

caused a violation of their constitutional or other federal rights."[111] Here, the plaintiffs acknowledged that Google et al. were private entities, but attempted to argue that the defendants "should be considered state actors" because the defendants "designated" YouTube as a public forum for free expression.[112] Unfortunately for the plaintiffs, no person was acting under color of state law, nor did any government authority designate the platform a "public forum."

The "public forum" label is one that platforms and courts tend to eschew due to the substantial inferences associated with it. In 2018, Mark Zuckerberg of Facebook (now "Meta")[113] avoided answering Senator Ted Cruz's repeated questions relating to whether Facebook was a "neutral public forum."[114] Similarly, in *Prager University v. Google LLC* ("*Prager III*"), the Ninth Circuit overtly and directly stated that YouTube is not a public forum.[115] This seems counterintuitive considering the growing importance of the internet as a means of communication, notably among "digital natives" ("[c]hildren and young people born into and raised in a digital world (post-1980)"),[116] but the reality is that platforms can censor as they wish.[117]

The internet's role in public debate was particularly visible during both the 2020 United States election cycle and the COVID-19 pandemic.[118] Fake news media sources and "echo chambers"[119] proved extremely problematic,[120] leading to

---

[111] Order Granting Motion to Dismiss, Divino Group et al. v. Google LLC et al., no. 19-cv-04749-VKD, at *4.
[112] *Id.*
[113] *See* Mark Zuckerberg, *Founder's Letter, 2021*, META (Oct. 28, 2021), https://about.fb.com/news/2021/10/founders-letter/, for information on the change to "Meta;" *see also* Press Release, Facebook.com, Introducing Meta: A Social Technology Company (Oct. 28, 2021) (discussing Facebook's change in branding and vision for the future).
[114] *See* Stephen Loiaconi, *Zuckerberg Insists Facebook is 'Platform for All Ideas,' but Republicans Disagree*, WJLA: ABC NEWS (Apr. 12, 2018), https://wjla.com/news/nation-world/zuckerberg-insists-facebook-is-platform-for-all-ideas-but-republicans-disagree.
[115] Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020).
[116] *Digital Natives*, AM. LIBR. ASS'N: LIBRARY OF THE FUTURE, https://www.ala.org/tools/future/trends/digitalnatives (last visited Apr. 29, 2022).
[117] *See* CONG. RSCH. SERV., *supra* note 99.
[118] *See, e.g.*, Alessandro Gabbiadini et al., *Together Apart: The Mitigating Role of Digital Communication Technologies on Negative Affect During the COVID-19 Outbreak in Italy*, 11 FRONTIERS IN PSYCHOL. 1 (eCOLLECTION 2020) (2020); *see also* Adrian Wong et al., *The Use of Social Media and Online Communications in Times of Pandemic COVID-19*, 22(3) J. INTENSIVE CARE SOC'Y 255 (2020); Davey Alba & Sheera Frenkel, *From Voter Fraud to Vaccine Lies: Misinformation Peddlers Shift Gears*, N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/technology/from-voter-fraud-to-vaccine-lies-misinformation-peddlers-shift-gears.html (last updated Jan. 7, 2021) (discussing the spread of "false vaccine narratives" by right-wing figures in an attempt to "maintain attention and influence" after the 2020 election cycle).
[119] *See* Matteo Cinelli et al., *The Echo Chamber Effect on Social Media*, 118(9) PROCEEDINGS NAT'L ACAD. SCI. 1 (2021).
[120] *See, e.g.*, Ingrid Hsieh-Yee, *Can We Trust Social Media?*, 25(1-2) INTERNET REF. SERVS. Q. 9 (2021); Mollie A. Ruben, et al., *Is Technology Enhancing or Hindering Interpersonal Communication? A Framework and Preliminary Results to Examine the Relationship Between Technology Use and Nonverbal Decoding Sill*, 11 FRONTIERS IN PSYCHOL. (eCOLLECTION 2020) (2021).

politically-based arguments over whether platforms were unfairly favoring a particular viewpoint in the wake of profound tides of misinformation.[121]

But rather than treat platforms as truly public, many (successfully) called for the platforms to create and enact policies purporting to fight that misinformation.[122] Even Reddit—whose self-proclaimed policy is to allow "open and authentic" debate—now selectively bans and moderates content on its platform.[123] Similarly, many platforms only selectively censor content,[124] with the larger platforms opting to do so by algorithm.[125]

Without critical eyes on the datasets that such algorithms use for moderation, "benign" content—such as Sal Bardo's—is at risk for inappropriate or unintended moderation.[126] While a deeper discussion of the unintended and evidently biased results of algorithmic moderation is beyond the scope of this paper, it is notable that algorithmic bias is a topic of debate for both regulatory authorities and technology content providers.[127] Whether manual or algorithmic, any undue or

---

[121] *See, e.g.*, Jessica Guynn, *'You're the Ultimate Editor,' Twitter's Jack Dorsey and Facebook's Mark Zuckerberg Accused of Censoring Conservatives*, USA TODAY (Nov. 17, 2020), https://www.usatoday.com/story/tech/2020/11/17/facebook-twitter-dorsey-zuckerberg-donald-trump-conservative-bias-antitrust/6317585002/; Vera Bergengruen, *Under Scrutiny, Facebook and Twitter Face Their Biggest Test on Election Day*, TIME (Nov. 3, 2020), https://time.com/5906854/facebook-twitter-election-day/; Taberez Ahmed Neyazi et al., *Misinformation Concerns and Online News Participation Among Internet Users in India*, 7 SOC. MEDIA & SOC'Y 1 (2021); Sarah Kreps, *The Role of Technology in Online Misinformation*, BROOKINGS: FOREIGN POL'Y (June 2020); Denise-Marie Ordway, *Fake News and the Spread of Misinformation: A Research Roundup*, JOURNALIST'S RESOURCE (Sept. 1, 2017), https://journalistsresource.org/politics-and-government/fake-news-conspiracy-theories-journalism-research/.

[122] *See, e.g.*, COMMUNITY GUIDELINES, *supra* note 18; *COVID-19 Misleading Information Policy*, TWITTER.COM, https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy (last visited Oct. 16, 2021); Nick Clegg, *Combating COVID-19 Misinformation Across Our Apps*, FACEBOOK.COM (Mar. 25, 2020), https://about.fb.com/news/2020/03/combating-covid-19-misinformation/.

[123] *See* Steve Huffman (@spez), REDDIT (Aug. 25, 2021), https://www.reddit.com/r/announcements/comments/pbmy5y/debate_dissent_and_protest_on_reddit/ (stating that "Dissent is a part of Reddit and the foundation of democracy. Reddit is a place for open and authentic discussion and debate. This includes conversations that question or disagree with popular consensus. This includes conversations that criticize those that disagree with the majority opinion. This includes protests that criticize or object to our decisions on which communities to ban from the platform").

[124] *See* Ashwini Ashokkumar et al., *Censoring Political Opposition Online: Who Does It and Why*, 91 J. EXPERIMENTAL PSYCH. 104031 (2020); for a discussion on selective content moderation, *see also* Sanaz Talaifar et al., *Political Censorship in the Digital Age*, SOC'Y PERSONALITY & SOC. PSYCH.: CHARACTER & CONTEXT (Oct. 28, 2020), https://www.spsp.org/news-center/blog/talaifar-ashokkumar-swann-political-censorship.

[125] *See* James Vincent, *Facebook is Now Using AI to Sort Content for Quicker Moderation*, THE VERGE (Nov. 13, 2020, 9:00 am), https://www.theverge.com/2020/11/13/21562596/facebook-ai-moderation; Francesca Duchi, *Problematic Algorithms: YouTube's Censorship and Demonetization Problem*, MEDIUM.COM (Apr. 16, 2019), https://www.theverge.com/2020/11/13/21562596/facebook-ai-moderation.

[126] *See generally* Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHILOSOPHY & TECH. 739-66 (2021).

[127] *See, e.g.*, Alice Xiang, *Reconciling Legal and Technical Approaches to Algorithmic Bias*, 88(3) TENN. L. REV. 649 (2021).

discriminatory moderation currently goes without consequence, as evidenced by *Divino Group.* The social media platforms performing the moderation are heavily relying on the protections afforded to them by Section 230 of the CDA.

B. Section 230's Applicability in *Divino Group*

One part of the *Divino Group* dismissal was based on Judge DeMarchi's assessment of the plaintiffs' claim that, by leaning on Section 230 of the CDA, the defendants' "private conduct bec[ame] state action 'endorsed' by the federal government."[128] Judge DeMarchi relied on *Prager III* in determining that YouTube's "hosting of speech on a private platform is not a traditional and exclusive government function" and that the Supreme Court has "consistently declined to find that private entities engage in state action, except in limited circumstances."[129] Judge DeMarchi stated that the standard is to "start with the presumption that conduct by private actors is not state action. [Plaintiff] bears the burden of establishing that Defendants were state actors."[130]

However, Judge DeMarchi did not directly address the protections granted by Section 230, other than to say that Section 230 was designed "to keep government interference in [internet communication] to a minimum."[131] In so doing, Judge DeMarchi followed a long trend of selective application and misapplication of Section 230 protections.[132] Such misapplication is understandable given the law's tenuous relationship with technology, but no longer acceptable considering the current socially-focused state of the internet—and the fact that the CDA was enacted in 1996, twenty-five years earlier than the *Divino Group* (and other related) decisions.

---

[128] Order Granting Motion to Dismiss, Divino Group et al. v. Google LLC et al., no. 19-cv-04749-VKD, at *4.

[129] *Id.* at *4 (citing Prager Univ. v. Google LLC, 951 F.3d 991, 997-99 (9th Cir. 2020)).

[130] *Id.* at *15 (citing Florer v. Congregation Pidyon Shevuyim, *N.A.*, 639 F.3d 916, 922 (9th Cir. 2011)).

[131] *Id.* at *17 (citing Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003)).

[132] For a discussion of the history of Section 230 application/misapplication, *see, e.g.,* Neil Fried, *Why Section 230 Isn't Really a Good Samaritan Provision*, DIGITALFRONTIERS ADVOCACY: BLOGS & OPEDS (Mar. 24, 2021), https://digitalfrontiersadvocacy.com/blogs-and-op-eds/f/why-section-230-isnt-really-a-good-samaritan-provision ("Courts have concluded [the language of § 230(c)(1)] 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.' Consequently, judges have ruled that platforms cannot be held culpable for negligently, recklessly, or knowingly facilitating terrorism, harassment, sexual disparagement, non-consensual dissemination of intimate photos, housing discrimination, distribution of child sexual abuse materials, and other unlawful conduct by their users. Absent that potential liability, platforms are less likely to moderate content, not more."); s*ee also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1608 (2018) ("courts have grappled with [the paradox in applications of § 230] and occasionally broken with the expansive interpretation of the Good Samaritan provision to find a lack of § 230 immunity").

C. The Intent of Section 230 and What Needs to Change

Section 230 has an astonishing amount of deference afforded to it by courts and tech moguls alike, often due to their misunderstanding of the intent behind the legislation.[133] Just recently, the Supreme Court denied a request to "clarify the meaning" of the law, a request made because so often the people bringing complaints against it fail to ascertain the purpose of the writing.[134] Justice Thomas has opined that lower courts wrongly read more expansive protections than the Act was intended for,[135] while Presidents Trump and Biden have both espoused distrust of the law and argued for its removal or revision (each in different ways).[136]

Just what was the intent behind Section 230? Section 230 is part of the Communications Decency Act ("CDA"), a piece of legislation that stemmed from the general idea that Congress should protect internet users—particularly children—from accessing unwanted materials such as pornography on the newly-burgeoning World Wide Web.[137] The CDA was Senator James Exon's "battle" against pornographers, those he would refer to as "barbarians" at the digital gate, luring children in, causing the internet to become a "red light district."[138] The House thoroughly and hotly debated the CDA's constitutionality; Exon's language was so far overreaching that even Speaker of the House Newt Gingrich opposed it.[139] Gingrich stated that Exon's proposed limitations on access were "clearly a violation of free speech and … the right of adults to communicate with each other."[140]

Amidst the debate over the CDA, a 1995 case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* [hereinafter *Prodigy*] was brought to the courts.[141] In *Prodigy*, a New York state court found an internet platform, Prodigy, liable for defamation because a Prodigy user had claimed that a bank had committed securities fraud; that

---

[133] *See, e.g.*, Matt Schruers, *Myths and Facts about Section 230*, DISRUPTIVE COMPETITION PROJ. [PROJECT DISCO] (Oct. 16, 2019), https://www.project-disco.org/competition/101619-myths-and-facts-about-section-230/ (illustrating the widespread ideas and misconceptions about the law alongside judicial precedent involving the law).

[134] *See* Alan Z. Rozenshtein, *Section 230 and the Supreme Court: Is Too Late Worse Than Never?*, LAWFARE (Oct. 20, 2020), https://www.lawfareblog.com/section-230-and-supreme-court-is-too-late-worse-than-never.

[135] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 13 (2020); *see also* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

[136] See CONG. RSCH. SERV., UPDATE: SECTION 230 AND THE EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP, LSB10484 (Oct. 16, 2020), for then-President Trump's most recent Executive Order on § 230. See Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN (July 20, 2021), https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html, for information on President Biden's initial attempts to change the law

[137] 141 Cong. Rec. H8460 (1995), ARNOLD & PORTER LLP LEGISLATIVE HISTORY: P.L. 104-104 at *1.

[138] 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995).

[139] *Id.*

[140] *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L. J. 51 (1996).

[141] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Super. Ct. May 24, 1995).

is to say, the court decided that Prodigy had the same "publisher" liabilities as a traditional newspaper or other published source in acting as the "speaker" responsible for third-party content.[142] This holding differed from that of an earlier New York case, *Cubby, Inc. v. CompuServe, Inc.*, in which CompuServe was found *not* to be a "publisher" of online content.[143] The *Prodigy* court distinguished its case by stating that Prodigy, unlike CompuServe, had adopted content standards that likened it enough to a traditional publisher that similar liabilities should apply.[144]

In May of 1995, during the debate surrounding the CDA, *Prodigy* was decided. Immediately following that decision, two Congressmen who had some insight into technologies, Representatives Chris Cox and Ron Wyden, managed to realize what effect labeling online platforms as "publishers" would have on the growth of the internet and tied that into an amendment to the CDA.[145] The Cox-Wyden amendment, titled the "Internet Freedom and Family Empowerment Act,"[146] was introduced in June of 1995 as House Bill 1555 (104th Cong.).[147] Cox stated that their bill would "protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet … who takes steps to screen indecency;"[148] their bill would protect those entities from liability.[149] Cox and Wyden thus introduced the language that would become Section 230. It was this language that convinced the House to pass a version of the CDA.[150]

The language of Section 230(c)(1) reads: "No 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."[151] This language has been deemed "the twenty-six words that created the Internet."[152] It enabled the free exchange of information online while protecting the hosts of that information from liability for speech that they simply could not logistically or feasibly control; in short, "Section 230 allowed companies such as Prodigy to determine what moderation practices and policies best serve their users, without being exposed to massive potential liability."[153] Additionally, Section 230(c)(2) provides immunity for platforms that remove or restrict content that they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,

---

[142] *Id.* at *8-9.
[143] Cubby, Inc. v. CompuServe, Inc., 766 F. Supp. 135 (S.D.N.Y. 1991).
[144] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Super. Ct. May 24, 1995).
[145] Jeff Kosseff, *What's in a Name? Quite a Bit, if You're Talking About Section 230*, LAWFARE BLOG, https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230 (last visited Nov. 13, 2021).
[146] *Id.*
[147] H.R. 1555, 104th Cong. (1995).
[148] 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).
[149] *Id.*
[150] Cannon, *supra* note 140.
[151] 47 U.S.C. § 230(c)(1).
[152] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (1st ed. 2019).
[153] *See* Jeff Kosseff & Eric Goldman, *Correcting the Record on Section 230's Legislative History*, TECH. & MKTNG. L. BLOG (Aug. 1, 2019), https://blog.ericgoldman.org/archives/2019/08/correcting-the-record-on-section-230s-legislative-history-guest-blog-post.htm.

whether or not such material is constitutionally protected."[154] This is the language that platforms rely on in moderating, censoring, and demonetizing.

The House version of the CDA which contained Section 230, and the earlier Senate version, each became part of the Telecommunications Act of 1996 ("TCA").[155] A year later in *Reno v. ACLU*, the Supreme Court struck down the provisions of the TCA that made up the CDA—all except Section 230.[156] Thus Exon's battle against pornography generally disappeared from the TCA, and Section 230 now stands alone, with no context to clarify its meaning.

Section 230 was, and is, an incredibly important piece of legislation. In some ways it continues to serve its purpose admirably even after twenty-five years. However, our digital universe has changed. Social media like YouTube (not yet imagined in 1996) is a vital source of visibility, connectivity, and income for marginalized groups of creators such as those in the LGBTQ+ community. Allowing Section 230 to fully protect platforms from liability for inappropriate removal or flagging of income-bearing (and not otherwise violent, lewd, et cetera) content made by those creators, who rely on the platform for both exposure and income, is objectively a misapplication of the statute. The solution lies in a simple amendment.

PART III: REIMAGINING 230 AND RECOURSE FOR CREATORS

The ideal solution for the *Divino Group* issue of unwanted censorship by digital platforms (and platforms' algorithms) would be to enact a new piece of civil rights legislation designating the LGBTQ+ community as a fully protected class, making it a federal offense to discriminate against LGBTQ+ individuals and their content on any platform whether monetized or not. Such a change would enable Section 230 to be more appropriately amended to state that no platform or host of content may flag, remove, moderate, or demonetize content based solely upon keywords that indicate LGBTQ+ affiliation. However, such sweeping changes to civil rights legislation are unlikely in the foreseeable future.[157]

In the meantime, this paper proposes the following changes to Section 230 to help meet the needs of modern platforms as well as content creators.

First, amend Section 230(c)(2) to replace the words "otherwise objectionable" with "objectively denigrating," and add a clause indicating that the content creator has the right to review and contest any moderation that the creator in good faith believed to be in line with the published policies of the platform. This would be

---

[154] 47 U.S.C. § 230(c)(2).
[155] Kosseff, *supra* note 145.
[156] *Reno v. ACLU*, *supra* note 77.
[157] *See, e.g.*, Dallas Ducar, *Passing the Equality Act will Ensure LGBTQ Civil Rights*, BOS. GLOBE (Feb. 15, 2022), https://www.bostonglobe.com/2022/02/15/opinion/passing-equality-act-will-ensure-lgbtq-civil-rights/ (explaining that "[f]or over 50 years, bills have been introduced to guarantee nondiscrimination protections for LGBTQ Americans and yet have never passed" and that the Equality Act, legislation meant to prohibit discrimination against LGBTQ Americans in public spaces, had been awaiting a Senate vote for over a year as of February 2022).

similar to the language of the notice and takedown procedures of the Digital Millennium Copyright Act ("DMCA").[158]

Second, add a new clause, Section 230(c)(3), which would read: "A content creator ("Creator") whose content has been removed, moderated, demonetized, flagged, or otherwise restricted from any platform or internet service provider ("Platform") more than six (6) times in a period of six (6) months has the right to file a claim against that Platform for (1) reinstatement of their removed, moderated, demonetized, flagged, or otherwise restricted content, and (2) damages totaling the amount of calculated loss of advertising revenue and reasonably demonstrable loss of social media following if, in good faith, the Creator can (a) demonstrate that their content consistently fell within the policy parameters specified by that Platform and (b) demonstrate financial loss or hardship directly imposed or proximately caused by the demonetization of their content."

These slight changes would modernize Section 230 and cause platforms to seriously reevaluate their content-flagging mechanisms, procedures, and algorithms to ensure that content such as that in the *Divino Group* lawsuit was not inappropriately flagged and demonetized. The changes would provide some recourse to LGBTQ+ content creators, who could legally argue for the reinstatement of their monetized content within a brief, but reasonable, period post-demonetization in order to mitigate the financial losses caused by temporary demonetization. Further, these changes would allow for a fine to be levied against the platform for repeatedly mis-flagging the same creator's content. While this would not prohibit platforms from creating policies counter to the interests of the LGBTQ+ community, it would encourage platforms like YouTube (who purport to support the community)[159] to reevaluate their blacklisting and flagging protocols and algorithms. The changes would also incentivize platforms to fine-tune their policy language while motivating creators to seek out the platforms that are acting in their best interest both policy-wise and monetarily.

---

[158] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); *see also* Pub. L. No. 105-304, title II, § 203, 112 Stat. 2886 (1998) (codifying 17 U.S.C. § 512, where § 512(c)(3) creates the DMCA notice and takedown requirements).

[159] As far back as 2013, YouTube's Marketing department was encouraging creators to share LGBT content using the hashtag #ProudToLove, stating: "At YouTube, we're proud to stand with the LGBT community to support equal rights and marriage equality--we believe that everyone has the right to love and be loved. Pride Month may be coming to a close, but we hope YouTube is a place where you can feel proud and build a community all year long." Raymond Brian, *We're #ProudToLove the LGBT Community on YouTube*, YOUTUBE OFFICIAL BLOG (June 27, 2013), https://blog.youtube/creator-and-artist-stories/were-proudtolove-lgbt-community-on/; s*ee also* Sara Ashley O'Brien, *YouTube CEO Apologizes to LGBTQ Community but Stands by Crowder Decision*, CNN BUS. (June 10, 2019), https://www.cnn.com/2019/06/10/tech/youtube-susan-wojcicki-code-con/index.html (Susan Wojicki, CEO of YouTube, was quoted during the Crowder controversy as saying that YouTube "wants to support [the LGBTQ] community").

CONCLUSION

Internet speech is now more important than could have possibly been imagined when the World Wide Web was first unveiled in the mid-1990s. The internet itself is now a gathering place, and in some cases the sole source of camaraderie, for marginalized groups—especially the younger LGBTQ+ community. Digital natives utilize social media to connect and learn from each other. Some, like the content creators in the *Divino Group* lawsuit, earn an income solely or primarily from allowing ad placements on the video content they create for their social media channels. YouTube, as the far-and-away leader in providing hosted video content for these communities and users, should not be one hundred percent immune from liability for wrongly disallowing viewership of, or removing advertising revenue from, those users' videos simply because they contain LGBTQ+ keywords.

YouTube should enjoy Section 230 protections, as should any internet service provider or platform. Section 230 should not be repealed. However, our legislators need to bring Section 230 into modern times in order to allow creators adequate recourse for unintentional flagging or censorship of content that causes those creators to lose social media presence and revenue. This paper's proposed changes to Section 230 would do just that: enable creators to have content reinstated and provide damages for loss of advertising income and loss of follower count. The changes would not require that a platform allow *all* speech; rather, for those platforms that purport to allow a certain manner of speech, the changes would provide incentive for them to more intelligently author and manage their censorship keywords, algorithms, and blacklist datasets. These changes would go a long way towards providing a more reliable and non-discriminatory source of viewership, income, and community for marginalized creators, such as LGBTQ+ creators.