

Twitter Thread by Jeff Kosseff



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A repeal of Section 230 likely would lead to more content moderation and fewer opportunities for user-generated content. To understand why, it's helpful to look at a dispute that Eddie Haskell had with an adult bookstore 40 years ago.

After *Leave it to Beaver* went off the air, Ken Osmond, the actor who played Eddie Haskell, became an LAPD officer who had a small family and led a pretty quiet life. Until the early 80s, when he found out that a chain of LA porn stores was selling a film starring John Holmes.

The cover of the film's carton said that it starred "John Holmes, who played 'Little Eddie Haskell on the *Leave it to Beaver* show.'" Ken Osmond was the only one who played Eddie Haskell, and he never was in porn.

The chain of porn stores sold more than 10,000 different films, and the men who ran the stores said they had not reviewed the movie's cover, nor did they know who played Eddie Haskell.

Haskell sold the bookstore chain for libel, and the key issue for the court was whether the company could be held liable for the cover of a film that it distributed, even though it was unaware of that cover and that it might be defamatory.

The case made its way to the California Court of Appeal, which held that the bookstore could not be liable. Looking to the common law and the First Amendment, the court held that the plaintiff must show that a distributor knew the content may be defamatory.

This "distributor" category receives more protection than the author who merely repeats a defamatory statement.

But "distributors" receive protection unless they know or have reason to know of the defamatory nature of the statements.

Applying this standard, the court concluded that Osmond's claim failed because there was no evidence that the bookstore chain knew or had reason to know of the defamatory nature of the film carton.

OK, you're wondering - this is a case from 1984, involving a film carton how does it apply to the Section 230 debate? It helps us understand the potential liability of platforms in a world without 230, where the common law and First Amendment set the standard of liability.

We don't know for sure how courts would categorize platforms. Some suggested that platforms would receive the sweeping common-law protections of phone companies, but I don't think that quite gets the caselaw right. We won't know without a test case, but that is too optimistic.

As I have written, the most likely *best* case scenario for them is that they receive common-law distributor protections like bookstores. And in that case, there is substantially more risk.

Take Haskell's case. Imagine if Haskell had complained to the store about the film carton, the store continued to sell it, and Haskell sued for those continued sales. It would be hard for the store to continue to claim it did not "know" of the statement.

So the bookstore would suddenly be in the position of defending a defamation case on the merits (i.e., litigating Osmond's public figure status, falsity, and other issues).

Now imagine a social media platform in a 230-free world. Does it want to defend defamation cases on the merits for billions of user posts? Of course not. So let's assume that it receives distributor protections.

There is a strong argument (though not absolute) that if the social media platform receives a complaint about user content, it will no longer be able to claim those distributor protections. So the platform either has to take it down or defend a defamation suit.

And what does it mean to have "reason to know?" We also don't know because there are so few distributor liability cases. But there's at least a reasonable chance that a platform could be liable even without receiving a complaint.

So this is why we could expect to see platforms remove more content without Section 230. Individuals who are the subject of objectionable content would have a greater chance of being able to pressure a platform to take down the content.

You might think that is a good result, in light of the harmful content online. Or you might think that it results in suppression of speech. Regardless of whether it is your desired outcome, it would indeed be the outcome of 230 repeal.

I also should add: RIP Ken Osmond, who lived a good life. <https://t.co/gr2mb3xMNI>