Twitter Thread by Jeff Kosseff



Jeff Kosseff
@jkosseff



Lots of talk over the past year about repealing Section 230. I though that it might be helpful to have a thread about what might happen if Congress entirely scraps 230.

We don't know for sure, because 230 has been on the books since 1996. Very few court opinions have examined platforms' liability for 3d-party content in a world without 230. So we have to look at pre-Internet cases involving bookstores and other distributors of content

and examine the protections for these distributors under the common law and 1st Amendment. The bottom line is that without 230, the platforms at minimum would face substantial litigation risks for 3d-party content.

For instance, under the common law, defamation plaintiffs can only succeed in suits against distributors such as bookstores if they can prove that the bookstore knew or had reason to know of the defamatory content.

Under this standard, there is a strong argument that a platform knows of allegedly defamatory content if it gets a complaint, and that the "reason to know" provision even exposes platforms to liability if they are aware of the defamatory character of some posts.

We don't know for sure what it means to know or have reason to know because these standards were tested in only a handful of pre-Internet cases.

Even if the plaintiff met the know/reason to know standard, the plaintiff also would have to meet the high bar for defamation claims in the U.S. (including actual malice if P is a public figure/official, falsity, etc.).

But those defamation questions could require far more extensive litigation than a case that is dismissed on 230 grounds. And platforms may simply not want to take that risk.

For instance, if a doctor complains to Yelp about a review that claimed he was late to patient appointments, will Yelp want to litigate the issue of whether the statement was false? Or will it delete the review upon complaint?

There of course is even the more restrictive reading of the common law, from the Stratton Oakmont v. Prodigy case that prompted Section 230: that if a platform does any moderation at all, it becomes liable for all of the user content because it no

longer is a "distributor."

As I explain in my book, I think that this case was wrongly decided and probably would not have survived an appeal. But there is at least a chance that other courts would adopt that reasoning.

So this is a very long way of saying that I think the most likely outcome of repealing 230 tomorrow would be fewer outlets for user content. Platforms would be far more risk averse about remotely controversial content.

I think that account suspensions, post removals, and other forms of blocking content would increase. Complaints about user content would carry far more weight, because that might be seen as putting the platform on notice and eliminating any common-law distributor protections.

Smaller sites, and those that offer a mix of both site-generated and user-generated content, would be more likely to focus more on the content that they create (and control) and less likely to allow users to post comments.

If courts were to adopt the Stratton Oakmont reasoning, and hold sites liable for all user content merely because they engage in some moderation, I think you'd also see fewer sites allowing user content.

There is a chance that under a Stratton Oakmont regime, sites would not moderate at all, but I think that in 2020, that could render sites unusable (another reason that I don't think that judges today would adopt that reasoning).

Many people who are angry at tech platforms for moderating too much or moderating too little seem to think that getting rid of Section 230 will address their concerns. I think that we need to do much better at analyzing what happens on the day after 230 is repealed.

This is, indeed, a very likely outcome. https://t.co/JonKHoJOfU

> what\u2019s funny is this would probably kill off the alternatives (gab parler etc) faster than the main platforms (twtr/fb) https://t.co/9cUChYU98z
>
> — fintech_idiot (Faisal) (@Faktastic11) November 28, 2020