U.S. Supreme Court decisions boost 'Section 230' foundation for online publishers

The U.S. Supreme Court issued two opinions, related in their subject, in mid-May that have generated a lot of discussion among the legal community. It seems prudent to share a few of the thoughts that have crossed my desk with all of you, because these are based on an issue that you struggle with on occasion.

All of you confront comments posted to stories and in other social media forums online. Since 1996, the law we know informally as "Section 230" has provided some protection for us, as publishers, in regard to comments others post on our online sites. Back when that law was passed, Congress sought to provide immunity for online interactive computer services as part of the Communications Decency Act. The goal was to treat online service providers as distributors of content, like bookstores, rather than as print publishers who are responsible for the printed content.

Section 230 not only is a defense to you against those who might post on your site, but it also functions as a sword for your use, when your content shows up on third party sites. Sometimes it works well, and other times not so well. In the last year or two, I've had cases where I've assisted a publisher in sending a "take down" notice to the host of a website advising that there is copyrighted material posted on that site. Section 230 creates a process that, upon receipt of such a notice, the website manager makes inquiry and if certain defense protections are not given to the website manager, that manager then may take down the infringing content.

But that "take down" aspect was not the focus of the recent Supreme Court analysis. The two cases before the U.S. Supreme Court decided in mid-May which addressed the Section 230 protection dealt with responsibility for the content third parties post on your site.

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One, known as the Gonzalez v Google case, involved an American student killed in 2015 in Paris in the course of an Islamic State terrorist attack. His family alleged that Google was used by these terror advocates to target an attack on a Turkish nightclub in Paris, and therefore it had some liability, as its actions were in concert with the terrorists and therefore were in support of their acts.

The U.S. Supreme Court, in its decision, concluded that the plaintiffs' allegations against Google were identical to those in a companion case also decided the same day, Twitter v Taamneh, involving a terrorist attack in Istanbul that killed a member of the defendant's family. That family sued Facebook, Twitter and Google (owner of YouTube, the social media entity targeted here).

The parties agreed in the underlying lawsuit that they did profit off the content on their social media apps, and also that they did not attempt to significantly monitor or censor the content that was posted. But the key for the court was whether there was evidence that the social media entity "aided and abetted" in the attack and therefore had some potential joint liability for the outcome.

The Supreme Court held that the act of providing this online social media forum was not sufficient "assistance" to create guilt or liability on the part of the publisher. This lack of screening done by the social media entity as to the content posted on its site by the terrorists was a critical factor in this decision – there was no evidence of any active effort by the social media entities to further the terrorists' causes. Most important: Transmitting information was not knowingly giving assistance to anyone.

This group of decisions from the Supreme Court strengthens the foundation on which Section 230's defense rests.

Some of our newspapers do actively moderate content and perhaps even attempt to control what is posted on social media, but to be honest, it is to your benefit to do moderation with a very light hand, if any.

The more you attempt to police your social media content, the more you potentially could be found to have "knowingly given assistance" to anyone advocating a position on your website.

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