

GOVERNMENT

White House, with FCC petition, takes next steps to strip content immunity from social media networks

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A view of the North Portico of the White House, Wednesday, June 14, 2017 in Washington, DC. Official White House photo by Joyce N. Boghosian

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Two months ago, U.S. President Trump unleashed his ire against social media after Twitter added a fact-checking caveat to his tweet by issuing an executive order on preventing online censorship.

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Now there is an official follow-up.

As a corollary to the executive order, the National Telecommunications and Information Administration (NTIA) this week filed a petition for rulemaking with the Federal Communications Commission (FCC).

Should the FCC act, social media networks such as Facebook, Instagram, Twitter and the like will be treated the same way that news publishers are, responsible for the content that appears on their platforms.

So far, under a 1996 Communications Decency Act, social networks are exempt from being held liable for content posted on their platforms by users. But Twitter's decision to add a footnote to Mr. Trump's tweets injected an element of editorial involvement just as news publishers would intervene in cases of inaccurate reporting.

That action, Mr. Trump justified in his executive order ([see story](#)), means social networks should not have protections any different from publishers. Of course, his line of thinking exposes social networks to enormous legal liability, holding them to account for their users' views and postings.



President Trump announcing executive order removing legal shield for social media companies. Image credit: Fox

Alan G. Fishel and Adam G. Bowser, both attorneys at law firm [Arent Fox](#)'s communications and technology practice, have outlined the consequences of removing social media provider immunity. Here is what they had to say:

The NTIA asked the FCC to begin a rulemaking proceeding to reduce the circumstances in which social media providers would be protected from liability.

Under the Communications Decency Act, social media companies and other online service providers currently have broad immunity from claims that could otherwise arise from the content posted by others, as well as their own decisions to restrict or block content.

Through its petition, NTIA ostensibly seeks to "promote Internet diversity and a free flow of ideas, [while] holding dominant platforms accountable for their editorial decisions."

Specifically, NTIA is asking the FCC to begin a proceeding to adopt the following rulings:

1) The broad exclusion of liability for social media providers under Section 230(c)(1) does not apply to actions of social media providers, but only applies to inactions of social media providers (*e.g.*, where they refuse to delete or place restrictions on, or notifications relating to, third-party content)

2) The exclusion of liability for social media providers under Section 230(c)(2) for "good faith" actions to restrict access to or availability of material that the provider "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" is limited as follows:

- "Otherwise objectionable" material refers only to material that is similar in type to obscene, lewd, lascivious, filthy, excessively violent, or harassing material.
- "Good Faith" actions would require that all of the following conditions are met:
 - The restrictions are consistent with publicly available terms of service or use that clearly state the criteria the provider uses in its content-moderation practices;
 - The social media provider has an objectively reasonable belief that the material falls within one of the listed categories set forth in Section 230(c)(2);
 - The social media provider does not restrict access to or availability of material on deceptive or pretextual grounds, and does not restrict access in a discriminatory manner; and
 - The social media provider supplies the provider of the restricted material with timely notice and a reasonable factual basis for the restriction and a meaningful opportunity to respond, unless the social media provider has an objectively reasonable belief that the content is related to criminal activity or such notice would risk imminent physical harm to others.
- A social media provider is an Internet content provider and loses its liability protection under Section 230(c)(1) when it, among other things, substantively contributes to content provided by another information content provider by "modifying, altering, presenting or prioritizing with a reasonably discernible viewpoint, commenting upon, or editorializing" about such content.
- A social media provider is a publisher and does not have the protections of Section 230(c)(1) when:
 - It affirmatively solicits or selects to display information or content in accordance with a reasonably

discernible viewpoint or message, without having been requested to do so by the user; or

- It reviews third-party content displayed on the Internet and vouches for, editorializes, recommends, or promotes such content to other Internet users on the basis of the content's substance or messages.
- A social media provider is not a publisher with respect to third-party content merely by:
 - Providing such content in a form or manner that the user chooses or because a default setting of the provider supplies it, as long as the provider informs the user of this default and allows its disabling; or
 - Transmitting, displaying, or otherwise distributing such content, or moderating third-party content with a good faith application of its terms of service in force at the time the content is first posted.

FCC has 4 primary options

1. Effectively ignore the petition and do nothing, as the FCC is not required to act in response to a petition for rulemaking (very unlikely);
2. Reject the Petition outright on grounds that, *g.*, the FCC lacks authority, **much like it did in response to a recent Free Press petition** (unlikely);
3. Seek preliminary public comment on the petition that would address issues such as, does the FCC have the authority to issue regulations affecting the scope of Section 230 immunity and, if so, should it do so? (the most likely scenario);
4. Grant the petition for rulemaking and commence a rulemaking as framed by NTIA (the second-most likely scenario).

IF THE FCC acts on the petition, it has the potential to affect the Internet ecosystem in ways not seen in a generation.

Given the variety of legal issues involved, the petition's political nature, its First Amendment implications, and the extraordinary stakes involved in the outcome, this will be an incredibly important proceeding for information service providers and media companies to follow and be heard.

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