WHOSE INTERPRETATION IS IT ANYWAY? AN ANALYSIS OF CURRENT JUDICIAL INTERPRETATION OF §230'S GOOD FAITH CLAUSE AND A PATH FORWARD

MATT FEDDER†

INTRODUCTION

In 1996, Congress enacted 47 U.S.C §230 ("Section 230") without much objection or debate regarding its provisions.[1]

† J.D. Candidate, 2022, University of Colorado Law School. I give my most heartfelt thanks to all the individuals that assisted in the making of this Note. I also thank each member and editor of the Colorado Technology Law Journal that have helped me edit and refine this Note.

1. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 3 (2019).

Simply put, Section 230 "protects online services from liability for third party content."[2] This broad liability shield is currently under bipartisan criticism and scrutiny from lawmakers and consumer advocates alike.[3] Section 230 was created during the internet's infancy and was seen as a catalyst that would enable rapid growth; without it, many believe companies wouldn't have the requisite freedom to innovate.[4]

There are two controversial subsections in Section 230, only one of which will be the subject of this paper. Some of the debate around Section 230 has been over §230(c)(1), the subsection that provides the broad liability shield mentioned above.[5] The main question surrounding §230(c)(1) is whether social network providers ("SNPs") or Interactive Computer Services ("ICSs"), because of their content moderation practices, should be treated as publishers rather than their Section 230 designation as platforms.[6] Less debate or precedent, however, can be found regarding the interpretation of Section 230's "Good Faith" provision, §230(c)(2)(A), which provides the boundaries that SNPs must operate within during their content moderation behavior.[7] Specifically, §230(c)(2)(A) provides that SNPs may voluntarily "in good faith … restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[8] This note's focus is primarily the Good Faith provision.

The enforcement of Section 230's Good Faith provision may be called into question by conservatives who claim that SNPs like Facebook, Twitter, and YouTube are using Section 230 as a license to silence speech based on political association.[9] Further,

2. Eric Goldman, *The Complicated Story of Fosta And Section 230*, 17 FIRST AMEND. L. REV. 279, 279 (2019).

3. *See* Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curations*, 72 OKLA. L. REV. 635, 636 (2020).

4. KOSSEFF, *supra* note 1, at 2–4.

5. 47 U.S.C. §230(c)(1) (2018).

6. *See* KOSSEFF, *supra* note 1, at 64–65.

7. KOSSEFF, *supra* note 1, at 65.

8. 47 U.S.C. §230(c)(2)(A) (2018).

9. *See, e.g.*, Press Release, Ted Cruz, U.S. Senator for Texas, Sen. Cruz: Latest Twitter Bias Underscores Need for Big Tech Transparency (Aug. 16, 2019),

conservatives argue that the alleged biases are examples of inconsistencies in these SNP's enforcement of their own policies, and thus are actions not taken in good faith.[10] In response to numerous Trump administration officials being removed from SNPs, former Customs and Border Protection Commissioner Mark Morgan's statement is likely indicative of many conservatives' sentiments on the issue: "[t]his is about individuals in positions of power that have a different political and ideological viewpoint and opinion than others and when that happens they try to shut us down."[11] Given the abundance of politically charged third party content found on SNP websites and the opaque nature of their content moderation practices, the Good Faith provision is ripe for its time in the spotlight.

This paper explores the current judicial understanding of "good faith" and "otherwise objectionable," and offers a potential interpretation using the available tools of statutory interpretation. This paper argues that the "good faith" requirement should be an objective test determining whether an SNP consistently applied its policies across its platform, and that courts should interpret "otherwise objectionable" narrowly to only include content substantially similar to the list of terms preceding it.

Part I of this paper explores the uncertainties that plagued the early years prior to Section 230's enactment and some of the critical cases that helped resolve them. Part II will provide a background on the current judicially understood scope of Section 230's less challenged clause, the Good Faith provision. Finally, Part III offers a path forward for future courts' interpretation of the now intensely contested provision and how they should interpret it in challenges against SNPs.

https://www.cruz.senate.gov/?p=press_release&id=4630 [https://perma.cc/4X9J-H32A] (alleging Twitter has a "pattern of arbitrarily silencing conservative voices").

10. *See* Tony Romm, *Trump Eye's 'Concrete Legal Steps' Against Social Media Sites for Alleged Bias Against Conservatives*, WASH. POST (Sept. 23, 2020, 3:26 PM), https://www.washingtonpost.com/technology/2020/09/23/trump-doj-censorship-section-230/ [https://perma.cc/HJ22-4GRS]

11. Adam Shaw, *After Trump Twitter ban, CBP chief says conservatives are 'constantly being censored' by Big Tech*, FOX NEWS (Jan. 9, 2021, 11:55 AM), https://www.foxnews.com/politics/trump-twitter-ban-cbp-chief-tech [https://perma.cc/XE5X-PK4Z].

I. THE CREATION OF SECTION 230'S BROAD LIABILITY PROTECTION

"Under the traditional view of publisher liability, publishers are presumed to know the content of the materials that they publish, and they can therefore be held strictly liable for tort violations such as libel and defamation or copyright violations."[12] The debate surrounding whether internet intermediaries should be treated as publishers, akin to a newspaper, arrived at a inflection point in the 1990s when two court decisions on the matter were in direct opposition to each other.[13] Legislation is often introduced and passed by the United States Congress to settle a dispute between different States' or courts' interpretation of a given controversy. The desire to provide "legal certainty to young internet companies and the broader World Wide Web" was the impetus for Section 230's drafters.[14]

A. An Unclear Standard for Publisher Liability

"In the 1990s, two New York courts – one federal and one state – encountered similar questions: are online intermediaries liable for defamatory content posted by their users?"[15] The courts arrived at conflicting conclusions, thus creating an ideal opportunity for Congress to settle the matter once and for all.[16]

In 1991, *Cubby v. CompuServe* addressed whether CompuServe could be held liable for the publication of defamatory statements by one of its users.[17] CompuServe acts as a host of many internet forums where users can access third-party content.[18] In one of those forums, the alleged defamatory statements denigrating the plaintiff's business practices were posted by the creator of a daily journalism newsletter.[19] CompuServe argued it was a distributor of content rather than

12. Skorup & Huddleston, *supra* note 3, at 649.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 138 (S.D.N.Y. 1991).
18. *Id.* at 137.
19. *Id.* at 137–38.

a publisher and moved for summary judgement.[20] "The court agreed that CompuServe was a distributor and granted summary judgement in its favor because CompuServe 'neither knew nor had reason to know of the allegedly defamatory . . . statements.'"[21]

A few years later, in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, a New York state court addressed a similar fact pattern to *Cubby* but reached a different conclusion.[22] There, the court considered whether an online operator of bulletin boards and forums, Prodigy Services Co., should be considered the publisher and be held responsible for a third-party-user's libelous statements because it allowed the statements on its website.[23] The court distinguished the case from *Cubby* on the grounds that *Cubby* contracted an independent agency to manage, review, create, delete, edit, and otherwise control the forum to which the defamatory content was posted.[24] Therefore, according to the state court, whereas *Cubby* had "little or no editorial control" over user content, Prodigy "held itself out to the public and its members as controlling the content of its computer bulletin boards."[25] "The court held that Prodigy was liable for users' content because the Prodigy operators engaged in moderation of user content, which equated the company to exercising editorial control."[26]

Congress resolved the court split in 1996 when it passed the Communications Decency Act ("CDA"). Although the CDA was originally designed to protect children from accessing pornographic and other obscene material online,[27] a bipartisan duo of representatives proposed an amendment to the CDA as a "direct and swift response to . . . [the] 1995 ruling against Prodigy."[28] The amendment "flew under the radar . . . [and]

20. Skorup & Huddleston, *supra* note 3, at 649.

21. *Id.* at 649–50.

22. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (ruling that "[Prodigy] is a publisher," unlike the *Cubby* court who ruled CompuServe was a distributor).

23. *Id.* at *1.

24. *Id.* at *4.

25. *Id.*

26. Skorup & Huddleston, *supra* note 3, at 650.

27. KOSSEFF, *supra* note 1, at 61–62.

28. *Id.* at 2.

received virtually no opposition or media coverage."[29] The amendment was pitched as the most effective way to protect children from pornographic or obscene content because it "empowered users and companies—rather than government—to protect children."[30] The second stated purpose of the bill was to allow young internet companies room to grow without regulation restricting such growth.[31]

Section 230 is often described as "distinct from the anti-indecency regulatory framework underlying the rest of the CDA," in that its main purposes were 1) to create a minimally regulated environment for the internet to grow, and 2) to provide online service providers the power to "develop and enforce their own standards while allowing consumers to select the appropriate standards for their needs."[32] "Critically, the law expressly established that internet intermediaries should not 'be treated as the publisher or speaker of any information provided by' a third party; generally, only content creators are exposed to liability."[33] However, the current debate focuses not on whether internet intermediaries or SNPs should always be treated as publishers of all third-party content; rather, as this paper argues, that the protection afforded to SNPs has exceeded the original scope of Section 230's original intent.

B. The Scope and Limits of Section 230's Broad Liability Protection

Although the Supreme Court found that certain provisions of the CDA constituted an unconstitutional restriction on speech in *Reno v. ACLU*, it left Section 230 liability protection untouched.[34] Despite Section 230's survival, the challenges to its scope were only just beginning.

In the years after *Reno*, courts have upheld Section 230's broad liability protections, including on the issue of defamation. In *Zeran v. American Online, Inc.*, the Fourth Circuit held that American Online, Inc. ("AOL") was not only immunized from

29. *Id.* at 3.
30. *Id.* at 69.
31. *Id.* at 69–70.
32. *See* Skorup & Huddleston, *supra* note 3, at 651.
33. *Id.*
34. *Id.*; *see also* Reno v. ACLU, 521 U.S. 844, 882 (1997).

publisher liability but also from distributor liability.[35] The court reasoned that AOL received protection from liability because Section 230's purpose was to "create[] 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," and that "lawsuits seeking to hold a service prover liable for its exercise of a publisher's traditional editorial functions . . . are barred."[36] "The court [stated] that distributor liability is 'merely a subset, or a species, of publisher liability, and is therefore also foreclosed by §230.'"[37] Over the years, courts have continued to expand Section 230's scope to prevent ICS, SNP, and other intermediary liability to the areas of copyright, products liability, negligence, and a minor's circumvention of a site's age restriction protocol.[38]

Courts have allowed a few notable exceptions to liability protection under Section 230. The first exception arises for Copyright infringements. "In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to address two concerns: (1) that intermediaries were not adequately addressing copyright violations and (2) that §230 liability protections removed the incentives for them to address those violations."[39] The DMCA included the Online Copyright Infringement Liability Limitation Act (OCILLA), which imposed liability on intermediaries who failed to remove offending copyrighted content after receiving notice of the violating content.[40]

Additionally, courts have recognized that in some instances, intermediaries can cross the boundary from being a "service provider" to a "content provider." The court in *Fair Housing Council of San Fernando Valley v. Roommates.com* found that Roommates.com had exercised enough control over content to qualify as the publisher of such content by providing a form with

35. Zeran v. Am. Online, Inc., 129 F.3d 327, 332–33 (4th Cir. 1997).

36. *Id.* at 330.

37. Skorup & Huddleston, *supra* note 3, at 652 (citing *Zeran*, 129 F.3d at 332).

38. *See* Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 716 (Cal. Ct. App. 2002); *see also* Doe v. MySpace, Inc., 528 F.3d 413, 416 (5th Cir. 2008).

39. Skorup & Huddleston, *supra* note 3, at 653–54.

40. *See* U.S. COPYRIGHT OFFICE, THE DIGITAL MIILLENIUM COPYRIGHT ACT OF 1998 1, 8 (Dec. 1998), https://www.copyright.gov/legislation/dmca.pdf [https://perma.cc/FS96-WYZQ]; *see also* 17 U.S.C. § 512(c)(1) (2010).

options for standardized answers.[41] "The court reasoned that an intermediary that 'contributes materially to the alleged illegality of the conduct' is not entitled to liability protection under §230."[42]

While the scope of liability protection has been expanded to cover the various examples above, companies must still carry out their content moderation behaviors – decisions regarding whether to tag, remove, or otherwise take action on a user's post – in accordance with Section 230's Good Faith provision, §230(c)(2)(A). Courts have offered scarce analysis of this provision and failed to present a widely accepted understanding of its meaning; thus, the provision would benefit from judicial interpretation.

II. THE COURTS' INTERPRETATION OF §230'S GOOD FAITH PROVISION

Compared to the vast literature and court decisions discussing §230(c)(1)'s publisher or platform debate, relatively few courts have addressed the question of what actions constitute "good faith," or what the catchall phrase "otherwise objectionable" was intended to capture. This paper will look to various judicial opinions addressing the Good Faith provision of Section 230, discuss the pitfalls and gaps in each, and suggest how those might be rectified to form a new standard for the future.

A. The Current Scope of Good Faith

Good faith is a term of art in the legal community with various definitions and interpretations in both legal dictionaries and common law. Many descriptions have a common theme, however, including using one's best efforts to deal fairly and honestly with another.[43] "[W]hat qualifies as 'good faith' is a

41. Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162–67 (9th Cir. 2008).

42. Skorup & Huddleston, *supra* note 3, at 655 (citing *Roommates.Com*, 521 F.3d at 1168).

43. *See* Catherine Pastrikos Kelly, *What You Should Know about the Implied Duty of Good Faith and Fair Dealing*, AM. BAR ASS'N (July 26, 2016), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-

contested area in § 230(c)(2) jurisprudence."[44] However, contract law has long contended with this interpretation and application.[45] We find some clarity in the Restatement (Second) of Contracts, "which provides that every contract imposes an obligation of good faith in its performance and enforcement."[46]

While the Uniform Commercial Code ("UCC") and the Restatement provide concrete definitions of good faith, the phrase is used in a variety of contexts, all of which can import different meanings to it.[47] Judge Richard Posner, in striking a balance between the two possible extreme readings of good faith – one creating a fiduciary duty to your counterpart and the other finding fraud with an emphasis on intentionally harming the other party – has offered a general approach. [48] He adopts that "[t]he concept of the duty of good faith . . . is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute."[49] Applied to the question at issue in this paper, both the SNPs and its users have agreed to a terms of service (TOS) and each has assumed a duty of good faith in meeting his end of the bargain.

Based on this paper's review of the current but scant Section 230 jurisprudence on good faith, courts have rarely found that a company's actions were taken in bad faith. Nevertheless, one example of such a ruling is found in *Smith v. Trusted Universal Standards In Elec. Transactions, Inc*. There, the court ruled that although Smith's e-mail spam could correctly be considered objectionable material, Smith's e-mails were being blocked in bad faith.[50] Smith alleged that his e-mails were being blocked

competition/practice/2016/duty-of-good-faith-fair-dealing/ [https://perma.cc/VT4Q-52HQ].

44. Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 661 (2012).

45. *See* Stephen L. Sepinuck, *The Various Standards for the "Good Faith" of A Purchaser*, 73 Bus. Law. 581, 581 (2018).

46. *Id.* at 582.

47. RESTATEMENT (SECOND) OF CONTRACTS § 205(a) (AM. L. INST. 1981).

48. Todd D. Rakoff, *Good Faith in Contract Performance: Market Street Associates LTD. Partnership v. Frey*, 120 HARV. L. REV. 1187, 1190 (2007).

49. *Id.* at 1191 (quoting Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 595 (7th Cir. 1991)).

50. Smith v. Trusted Universal Standards in Elec. Transactions, Inc., No. CIV09-4567RBKKMW, 2010 WL 1799456, at *7 (D.N.J. May 4, 2010).

because he didn't subscribe to a higher level of service with Comcast, his internet service provider.[51] The court concluded that if Smith's allegations were accepted as true, Comcast's action to block his e-mails was not a result of the objectionable content and would therefore constitute bad faith.[52] Notably, the court suggested that Comcast acted in bad faith because it failed to provide a legitimate basis for its actions when questioned.[53] Claims that SNPs fail to provide legitimate bases for their actions are frequent in current debates around political censorship online.[54]

Another example where a court discusses good faith is found in the Ninth Circuit's Zango *Inc. v. Kapersky Lab, Inc.* Judge Fisher's concurrence addressed the possibility that anticompetitive purposes may disqualify an online provider from § 230(c)(2) protection.[55] Judge Fisher wrote the following in his concurring opinion:

> [U]nder the generous coverage of § 230(c)(2)(B)'s immunity language, a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material "otherwise objectionable.". . . Unless § 230(c)(2)(B) imposes some good faith limitation on what a blocking software provider can consider "otherwise objectionable," or some requirement that blocking be consistent with user choice, immunity might stretch to cover conduct Congress very likely did not intend to immunize.[56]

As is clear from the limited precedent addressing the question of good faith in the context of Section 230, its correct application is unsettled and subject to individual judges' normative values.[57] If the test for good faith lacks any level of

51. *Id.*

52. *Id.*

53. *See id.*

54. *See, e.g.*, Katie Yoder, *Twitter Blocks Pro-Life Congresswoman's 'Inflammatory' Abortion Ad*, NEWSBUSTERS (Oct. 9, 2017, 5:26 PM), https://www.newsbusters.org/blogs/culture/katie-yoder/2017/10/09/twitter-blocks-pro-life-congresswomans-inflammatory-abortion [https://perma.cc/7XBX-TCSV].

55. Zango, Inc. v. Kapersky Lab, Inc., 568 F.3d 1169, 1178–79 (9th Cir. 2009) (Fisher, J., concurring); *see also* Goldman, *supra* note 44, at 665.

56. *Zango*, 568 F.3d at 1178–79.

57. Goldman, *supra* note 44, at 665.

certainty in its application to Section 230, as is the current case, a judge's determination of good faith may fall victim to his or her own political beliefs and should therefore draw upon the phrase's established application found in contract law. While there isn't any evidence of a judge inserting his own political beliefs in this area of law, worries of a judge's personal political beliefs entering the judiciary are of constant concern in all areas of law. Part III proposes a potential application of good faith in Section 230 challenges.

One key argument judges will likely contend with will be an SNP's defense that it often has imperfect algorithms which implement the content moderation decisions on its platform.[58] SNPs will likely further argue that the algorithm is neutral and cannot be or isn't biased in its decision making. However, an algorithm is only as unbiased as its creator, and civil rights activists and conservatives both have recently argued that those algorithms are created by individuals biased against their positions.[59]

Even though the current precedent offers little aid in resolving these issues, each issue may have its day in court in the future.

B. The Current Scope of "Otherwise Objectionable"

The catchall phrase "otherwise objectionable" has come under scrutiny more recently as claims of biased censorship have increased, specifically those that impact voters' opinions during elections.[60] Again, as is the case with the good faith prong of the

58. *See generally* Copia Institute, *Content Moderation Case Study: Twitter's Algorithm Misidentifies Harmless Tweet As 'Sensitive Content' (April 2018)*, TECH DIRT (Sept. 25, 2020, 3:30 PM), https://www.techdirt.com/articles/20200925/14414345379/content-moderation-case-study-twitters-algorithm-misidentifies-harmless-tweet-as-sensitive-content-april-2018.shtml [https://perma.cc/4U6V-XH7D].

59. *See, e.g.*, Kalev Leetaru, *Facebook Audit Exposes Algorithm Biases in Policing Speech*, REAL CLEAR POLITICS (July 12, 2020), https://www.realclearpolitics.com/articles/2020/07/12/facebook_audit_exposes_algorithm_biases_in_policing_speech.html [https://perma.cc/2XKR-84YW]; *see also* Dominique Harrison, *Civil Rights Violations in the Face of Technological Change*, ASPEN INST. (Oct. 22, 2020), https://www.aspeninstitute.org/blog-posts/civil-rights-violations-in-the-face-of-technological-change/ [https://perma.cc/2MZE-ZC7Y].

60. *See, e.g.*, Mark Moore & Aaron Feis, *Ted Cruz rips Jack Dorsey over censorship of Post's Hunter Biden bombshell*, N.Y. POST (Oct. 28, 2020, 12:00 PM),

Good Faith provision, judicial consideration and guidance here is limited.

One of the few cases that addresses this question is *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, where the court considered allegations that Malwarebytes configured its software to block users from accessing Enigma's software in order to divert Enigma's customers to its own service.[61] The court stated that it was "clear . . . from the statutory language, history, and case law . . . that providers do not have unfettered discretion to declare online content 'objectionable.'"[62] The court cited the concurring opinion in *Zango* to further buttress its position: "[A]n 'unbounded' reading of the phrase 'otherwise objectionable' would allow a content provider to 'block content for anticompetitive purposes or merely at its malicious whim.'"[63]

The *Malwarebytes* court warned that if judges interpreted the term "otherwise objectionable" to provide SNPs or ICSs "unbridled discretion to block online content," that could enable or motivate them to "act for their own, and not the public benefit."[64] Despite the court's dicta on the potential dangers of an overly broad reading of the catchall, the court in *Malwarebytes* confined the application of its ruling to those cases involving arguments of anticompetitive censorship.[65]

Other courts were likewise persuaded by arguments that favored reading "otherwise objectionable" more narrowly, or at least not applying a purely subjective test.[66] One such court adopting this view is *Song Fi Inc. v. Google, Inc.*, where the court considered whether YouTube's removal of a video because YouTube claimed it violated its terms of service was proper under an "otherwise objectionable" analysis.[67] YouTube claimed Song Fi artificially inflated the view count of the video in question, a violation of its terms of service, and was therefore

https://nypost.com/2020/10/28/ted-cruz-rips-jack-dorsey-over-censorship-of-posts-bombshell/ [https://perma.cc/N443-ADR3].

61. Enigma Software Group USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1044 (9th Cir. 2019).

62. *Id.* at 1047.

63. *Id.* (quoting Zango, Inc. v. Kapersky Lab, Inc., 568 F.3d 1169, 1178 (9th Cir. 2009)).

64. *Id.* at 1051 (citing *Zango*, 568 F.3d at 1178).

65. *Id.* at 1052.

66. *E.g.*, Song Fi Inc. v. Google, Inc., 108 F. Supp. 3d 876 (N.D. Cal. 2015).

67. *Id.* at 882.

within the meaning of "otherwise objectionable."[68] In its analysis of the catchall phrase, the court attempted to apply its ordinary meaning, relying on how the terms were used at the time of enactment and their meaning in the dictionary.[69] The court found that the phrase was defined as "undesirable [or] offensive" in Webster's Dictionary from 1984, the dictionary in use at the time Congress enacted the Communications Decency Act.[70] The court reasoned that the "ordinary meaning of 'otherwise objectionable' . . . counsel[s] against reading 'otherwise objectionable' to mean anything to which a content provider objects regardless of why it is objectionable."[71]

The *Song Fi* court, however, didn't end its analysis with the dictionary definition; it acknowledged that "meaning is not determined in the abstract."[72] The court noted that "when a statute provides a list of examples followed by a catchall term (or 'residual clause') like 'otherwise objectionable,' the preceding list provides a clue as to what the drafters intended the catchall provision to mean."[73] That general rule is embodied in the canon of statutory construction known as *ejusdem generis*, which is Latin for "of the same kind," [74] discussed at length in Part III. Further, the court reviewed the Act's history and purpose to support its narrow interpretation: "Congress was focused on potentially offensive materials, not simply any materials undesirable to a content provider or user."[75] The court's decision against YouTube's content moderation behavior is a win for advocates of a narrow reading of "otherwise objectionable." The court made clear that it did not believe the removal of the video was malicious because artificial view count inflation "is not objectionable" and "was the kind of self-regulatory editing and screening that Congress intended,"[76] and declined to adopt

68. *Id.*
69. *Id.*
70. *Id.*
71. Song Fi Inc. v. Google, Inc., 108 F. Supp. 3d 876, 884 (N.D. Cal. 2015).
72. *Id.* at 882.
73. *Id.* at 883.
74. *See id.*; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 199–213 (2012) (discussing the canon at length).
75. *Song Fi Inc.*, 108 F. Supp. 3d at 883.
76. Song Fi Inc. v. Google, Inc., 108 F. Supp. 3d 876, 884 (N.D. Cal. 2015).

YouTube's "completely subjective (and entirely unbounded) reading of these provisions."[77]

While many courts have similarly adopted a narrow reading of "otherwise objectionable,"[78] others have embraced a moderator favorable approach. One such case is *e360Insight, LLC. V. Comcast Corp.*, where the court considered whether Comcast's actions fell within the permissible bounds of the "otherwise objectionable" catchall when it blocked e360Insight's unsolicited and bulk e-mails.[79] There, the court followed the standard set forth in *Zango*, which noted that "section 230(c)(2) only requires that the provider subjectively deems the blocked material objectionable."[80] The *e360Insight* court reasoned that this broad standard furthered one of Section 230's stated purposes; "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services."[81] Part III argues that the court's reasoning in *e360Insight* contradicts the same purpose on which its decision rested.

III. A PATH FORWARD FOR GOOD FAITH AND OTHERWISE OBJECTIONABLE

This section explores the various statutory interpretive tools judges have at their disposal to determine the meaning of a given statute, phrase, or word. Section A will analyze the phrase "good faith" through the common law lens to determine its proper application within Section 230 and will provide a recent example where an SNP's performance of its TOS is claimed to fall short of the good faith requirement in Section 230(c)(2)(A). Section B interprets the catchall "otherwise objectionable" using the *ejusdem generis* statutory canon and the

77. *Id.*

78. *See, e.g.*, Holomaxx Techs. v. Microsoft Corp., 783 F. Supp. 2d 1097, 1104 (N.D. Cal. Mar. 11, 2011); *see also* Nat'l Numismatic Certification, LLC. v. eBay, Inc., No. 6:08-CV-42-ORL-19GJK, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008).

79. e360Insight, LLC. v. Comcast Corp., 546 F.Supp.2d 605, 607 (N.D. Ill. 2008).

80. *Id.* at 608.

81. *Id.* (citing 47 U.S.C. § 230(b)(3)).

Act's stated purposes to argue that a narrow reading of the phrase is most reasonable.

A. Good Faith and Social Network Providers

The application of good faith finds its natural home in contract law. As noted in Part II, Judge Posner set forth a general method for interpreting good faith where the court attempts to approximate what the parties would likely have agreed to in a negotiation.[82] This duty between two parties is analogous to the duty caused by the relationship between an SNP and its user where the user agrees to follow the SNP's TOS and other stipulated rules and policies.[83]

The duty of good faith requires adherence by each party throughout two phases of the contractual relationship: precontractual and postcontractual.[84] Precontractual obligations arise during the formation or negotiation stage of a contract.[85] While this paper doesn't focus on the precontractual duties, when a user agrees to – "checks the box" – on an SNP's TOS or agrees to an SNP's conditions simply by accessing its website, the precontractual duty has been satisfied.[86]

Most relevant to my analysis is the postcontractual (post contract signing) duty of good faith, which requires each party to *perform* and *enforce* its obligations under the contract in good faith.[87] Importantly, a party's duty to act in good faith is greater during the postcontractual stage.[88]

In the world of SNPs, in exchange for access to and use of the SNP's platform, the user agrees to confine his interactions

82. Rakoff, *supra* note 48, at 1191 (quoting Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 595 (7th Cir. 1991)).

83. Tim Peterson, *Know Your Rights When Social Media Companies Change Their Terms of Service*, LEGAL ZOOM (Nov. 8, 2019), https://www.legalzoom.com/articles/know-your-rights-when-social-media-companies-change-their-terms-of-service [https://perma.cc/QCV4-NNS4].

84. Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 595 (7th Cir. 1991).

85. *Id.*

86. *See generally Why You Need a Website Terms of Use Agreement*, LEGALNATURE, https://www.legalnature.com/guides/why-your-website-needs-a-strong-terms-of-use-agreement-and-what-to-include [https://perma.cc/4BQN-KF9E] (last visited May 4, 2022).

87. *See Frey*, 941 F.2d at 595.

88. *Id.*

on the site to the limits stipulated in the contract.[89] Correspondingly, the SNP agrees to permit the user access to and use of its site while that user remains within the TOS boundaries.[90] One question remains: what actions taken during the SNP's future performance satisfy or violate its duty? The difficulty in answering this question sometimes arises from the failure of SNPs to specifically define enforcement terms in the contract. Where such a gap exists, courts determine what, if any, implied conditions must have been present at the time of formation that were necessary for each party's assent.[91] A court's finding that implied conditions exist within a contract serve "the overriding purpose of contract law, which is to give the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero."[92]

I believe an implied condition exists within an SNP's TOS and will explore which actions taken by the SNP during its postcontractual enforcement of the TOS satisfy its duty of good faith.

i. The Implied Condition of Neutrality and Consistent Enforcement

Twitter provides a useful example of a typical SNP TOS which illustrates an application of the duty of good faith in Section 230(c)(2)(A). In Twitter's TOS, a user is informed that he may be removed from Twitter if he violates Twitter's User Agreement (UA).[93] Contained within Twitter's UA are "[t]he Twitter Rules."[94] In its preamble, the Twitter Rules state that "[its] rules are to ensure all people can participate in the public

89. *Why You Need a Website Terms of Use Agreement*, LEGALNATURE, https://www.legalnature.com/guides/why-your-website-needs-a-strong-terms-of-use-agreement-and-what-to-include [https://perma.cc/4BQN-KF9E] (last visited May 4, 2022).

90. *Id.*

91. Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 596 (7th Cir. 1991).

92. *Id.*

93. *Twitter Terms of Service*, TWITTER (Aug. 19, 2021), https://twitter.com/en/tos#update [https://perma.cc/NN5D-C6JJ].

94. *Id.*

conversation freely and safely."[95] Further, Twitter expresses that its mission "is to give everyone the power to create and share ideas and information, and to express their opinions and beliefs without barriers."[96] Both are valid and laudable goals. Those statements, however, set the stage of the contractual agreement between Twitter and its users from which a user can aptly infer that Twitter intends to enforce those rules neutrally and consistently across its users' interactions—the implied condition—to "ensure all people can participate in the public conversation freely."[97] That inference is a necessary addition for the concept of good faith to carry any weight.

"The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."[98] In the famous case *Wood v. Lucy, Lady Duff-Gordon*, Lady Duff-Gordon's name (i.e., her brand) maintained high status in "the public mind."[99] She gave Wood the exclusive right to market and use her name on other designers' clothing, but Wood did not expressly promise to use reasonable efforts to accomplish that goal.[100] The court held that "such a promise is fairly to be implied."[101] Moreover, the court reasoned that "a promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."[102] As applied here, although the Twitter Rules or UA do not expressly state that Twitter will impartially enforce its rules against all claimed violations using consistent standards of decision making, such a promise can be fairly implied.

A drawing of this implied condition is obvious and necessary because its absence would be contrary to common sense and the purpose of the contract. Where an explicit term of a contract is not expressed in the document, courts should determine which

95. *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/R5X5-NQHM] (last visited May 3, 2022).

96. *Investor Relations FAQ*, TWITTER, https://investor.twitterinc.com/contact/faq/default.aspx [https://perma.cc/MQ58-MFH2] (last visited May 4, 2022).

97. *The Twitter Rules*, *supra* note 95.

98. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91 (1917).

99. *Id.* at 90.

100. *Id.*

101. *Id.* at 90–91.

102. *Id.* at 91 (citing Moran v. Standard Oil Co., 211 N. Y. 187, 198, 105 N. E. 217, 221 (1914)).

conditions must have been present at the time of signing so as not to frustrate the purpose of the contract.[103] It exceeds the boundary of reasonableness to believe that a user would sign up for a service, containing a specific set of rules to be enforced, if he believes those rules would not be neutrally and consistently enforced upon him and the other users. The purpose of the contract between Twitter and its users is, as stated by Twitter, to "ensure all people can participate in the public conversation freely and safely."[104] In part, through various content moderation practices, Twitter attempts to fulfill that purpose by removing certain types of content. Inconsistent application of those moderation behaviors frustrates that purpose.

One recent content moderation decision by Twitter propelled it into the spotlight during the 2020 United States presidential election campaign and can provide a helpful example of how a claim might be decided.

In October 2019, Twitter's content moderators prevented the distribution of a New York Post article alleging that Hunter Biden was selling access to his father, then Vice President, Joe Biden.[105] Twitter stated that it removed the Post article because it violated Twitter's hacked materials policies.[106] Opponents of Twitter's moderation behavior claimed that it inconsistently applied that policy to its users based on political leanings.[107]

The specific claim was that Twitter's failure to take similar action on a New York Times article that published the details of President Donald Trump's tax returns is evidence of bias, or at least an inconsistent application of its policies.[108] After significant backlash, Twitter took to its own platform to clarify the policy. It stated that "commentary on or discussion about

103. Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 595–96 (7th Cir. 1991).

104. *The Twitter Rules*, *supra* note 95.

105. Shannon Bond, *Facebook and Twitter Limit Sharing 'New York Post' Story About Joe Biden*, NPR (Oct. 14, 2020, 6:49 PM), https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden [https://perma.cc/E4MM-SLDW].

106. *Id.*

107. *See* Editorial, *Twitter and Facebook's Shameful Repression of the New York Post's Hunter Biden Story*, NAT'L REV. (Oct. 14, 2020, 9:06 PM), https://www.nationalreview.com/2020/10/twitter-and-facebooks-shameful-repression-of-the-new-york-posts-hunter-biden-story/ [https://perma.cc/PE5A-HW4W].

108. *See id.*

hacked materials, such as articles that cover them but do not include or link to the materials themselves, aren't a violation of [the hacked materials policy]. Our policy only covers links to or images of hacked materials themselves."[109] This clarification was meant to distinguish between the two newspapers' articles. Unlike the New York Post article, the New York Times article didn't post a link to or an image of the hacked document itself. Although Twitter clarified its position on the hacked materials policy, the above statement appears to be in conflict with the text of the policy.

The policy defines hacked materials as "the information obtained through a hack," and that the "[i]nformation need not be personally-identifiable private information in order to qualify as hacked materials under this policy."[110] This definition would seem to include any information within a hacked document, not only the document itself. Later in its policy, Twitter states that "[t]weets referring to a hack or discussing hacked materials would not be considered a violation of this policy unless materials associated with the hack are directly distributed in the . . . links to hacked content hosted on other websites."[111] It is unclear here whether Twitter is using the term "materials" and "information" interchangeably. Nevertheless, because Twitter defines hacked materials as the information obtained from a hack, posting the information found in a hacked document should also be a violation of Twitter's policy. If that reasoning is as straightforward as some may be convinced it is, Twitter's failure to remove the New York Times article and its later decision to remove the New York Post article imposed two different enforcement standards on its users and was therefore a violation of its duty of good faith.

However, despite Twitter's real or perceived inconsistent enforcement of that policy, it appears that there is enough ambiguity, vagueness, and contradiction within Twitter's

109. Twitter Safety (@TwitterSafety), TWITTER (Oct. 14, 2020, 5:44 PM), https://twitter.com/TwitterSafety/status/1316525306656718848?ref_src=twsrc%5Etfw [https://perma.cc/WRU2-UEJL].

110. *Distribution of Hacked Materials Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/hacked-materials [https://perma.cc/4G47-LF6N] (last visited May 2, 2022).

111. *Id.*

hacked materials policy to conclude that a failure to remove the New York Times article may not have been done in bad faith.

Therefore, the operative test in applying the good faith standard to Section 230(c)(2)(A) challenges should be to determine if the company has implemented the contested policy or decision neutrally and consistently across the posts at issue. Context, of course, will need to play a role in a court's analysis. Twitter has some 340 million users[112] and reported violations of its policies can be expected to carry different weight. A good place to start may be for courts to review prominent or widely covered violations, like the one discussed above, as a benchmark for consistent treatment, and then use those benchmarks in allegations of bad faith or biased and inconsistent application of its policy.

B. Statutory Interpretation of "Otherwise Objectionable"

Judges have a plethora of tools available at their disposal to aid the interpretation of a statute. Whether a judge subscribes to a particular interpretive camp, purposivism or originalism, among others, each judge can turn to the numerous semantic and contextual canons to buttress or focus his analysis. This section will focus on the *ejusdem generis* canon to discover a possible interpretation of "otherwise objectionable." Finally, it will draw upon the history of Section 230 to help buttress the arguments made using the ejusdem generis canon.

i. *Ejusdem Generis* Canon

The *ejusdem generis* canon is properly limited to an application which states that "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."[113] For example, a California court held that "trays, glasses, dishes, or other tableware" did not include paper

112. Katie Sehl, *Top Twitter Demographics That Matter to Social Media Marketers*, HOOTSUITE (May 28, 2020), https://blog.hootsuite.com/twitter-demographics/ [https://perma.cc/4ED5-MVYE].

113. SCALIA & GARNER, *supra* note 74, at 199.

napkins.[114] The court reasoned that the catchall term "other tableware" limited the interpretation of items to those of "the same degree of permanency as that possessed by the other objects enumerated immediately before it in the statute."[115]

Debate about the beneficial effect the *ejusdem generis* canon has on the interpretation of statutes is common; some call for its abolition while others hold it up as "a gem of common sense" [116] that "expresses a valid insight about ordinary language usage."[117] Certainly, the canon should not and does not apply in all instances where a list of terms is followed by a catchall phrase. For example, "*ejusdem generis* generally requires at least two words to establish a genus – before the *other*-phrase."[118]

Another question that arises in regards to the canon's application is how broadly or narrowly to define the class delineated by the specific terms.[119] For example, a statute that applies to owners of "lions, tigers, or other animals" might only apply to owners of wildcats or to owners of all dangerous wild animals.[120] Determining the breadth of the class should generally be found by considering the specific terms, the broad term at the end, and what category might come into a reasonable person's mind.[121]

Finally, the canon should not be applied when the specific terms are so heterogeneous that they do not fit into any other definable category.[122] For example, the catchall phrase *all manner of merchandise* was once held not to be limited (meaning it received a broad reading) by the preceding list of fruit, fodder,

114. *Id.* at 200 (citing Treasure Island Catering Co. v. State Bd. of Equalization, 120 P.2d 1, 5 (Cal. 1941)).

115. *Treasure Island Catering Co.*, 120 P.2d at 5.

116. SCALIA & GARNER, *supra* note 74, at 211 (citing Joel R. Cornwell, *Smoking Canons: A Guide to Some Favorite Rule of Construction*, CBA Record, May 1996, at 43, 45).

117. *Id.* (citing 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:18, at 291 (6th ed. 2000)).

118. *Id.* at 207.

119. *Id.* at 208.

120. *Id.* at 209.

121. *See id.* at 206–07.

122. *Id.* at 209.

farm produce, insecticides pumps, nails, tools, and wagons.[123] One can imagine putting himself in the judge's position and being hard-pressed to find commonality among the specific terms and therefore difficult to limit his interpretation to include only mentioned items. No such difficulty arises where the words, in their context, are part of a clear genus of terms.

As discussed in Part II, when applying the canon and its limiting principles to the phrase "otherwise objectionable," some courts have concluded that a narrow reading is appropriate. Further, and contrary to the court's conclusion in *e360Insight*, a broad reading will conflict with the Act's stated purpose.

In holding that a broad reading of the catchall was proper, the *e360Insight* court highlighted one of the Act's five stated purposes: "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services."[124] This purpose is targeted at user, not SNP, control over the type of information received by users of the SNP's service. In fact, each numbered purpose mentioning control over content is directed at control by the user rather than an SNP or ICS.[125] Of course, this does not mean that SNPs are permitted zero control over content; this paper would serve no purpose if that was true.

As discussed above in Part I, at the time of Sections 230's enactment, the emerging nature of interactive services online resulted in a legal backdrop which painted a picture of uncertainty for the types of behavior for which companies could be held liable.[126] The concerns that won the day in the discussions surrounding the passing of Section 230 were about shielding companies from their users' defamatory or libelous content if that company failed to remove the content.[127] The issue presented in this paper revolves around the action companies decide to take, not the actions they don't.

123. *Id.* at 209–10 (citing Heatherton Coop. v. Grant, [1930] 1 D.L.R. 975 (N.S.)).

124. e360Insight, LLC. v. Comcast Corp., 546 F.Supp.2d 605, 608 (N.D. Ill. 2008) (citing 47 U.S.C. § 230(b)(3)).

125. *See generally* 47 U.S.C. § 230(b).

126. *See* KOSSEFF, *supra* note 1, at 89.

127. *See id.* at 95.

As mentioned above in Part I, SNP and ICS moderation behaviors are limited to removing or restricting content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[128] Applying the *ejusdem generis* canon here, a narrow reading is appropriate and furthers the Act's stated purposes.

Initially, considering the specific terms, one could classify them as words which describe the type of material often listed in age-restricted material. Reference to these categories is found in the Classification and Rating Administration's rating rules for motion pictures in the United States. Children under the age of 17 are not permitted to view a Restricted ("R") rated movie without an accompanying guardian because those movies often include adult activity, intense violence, or sexually oriented nudity.[129] Similarly, violent or graphic content, videos inviting sexual activity, vulgar language, and nudity are listed as age-restricted content on YouTube's Community Guidelines enforcement page.[130] However, this does not mean that only content unsuitable for children is the type of content that can be removed. The above examples are presented to illustrate the type of material that the list of items generally refers to.

Next, a reasonable person could assume only content that is nearly identical, or at the very least similar in nature, to the listed terms would be included. The list of terms would become unnecessary if the catchall were meant to expand its delineated list to anything an SNP subjectively considers to be objectionable. That conclusion is drawn from the idea that a list of terms followed by a catchall, rather than a catchall followed by a list of terms, is critical to a correct application of the *ejusdem generis* canon to the present issue.[131] Courts often confuse this sequential requirement with the more general rule *noscitur a sociis*, which states that associated words in a list bear

128. 47 U.S.C. § 230(c)(2)(A).

129. MOTION PICTURE ASSOCIATION, CLASSIFICATION AND RATING RULES 7 (2020), https://www.filmratings.com/Content/Downloads/rating_rules.pdf [https://perma.cc/8L45-33XQ].

130. YOUTUBE, *Age-restricted content*, https://support.google.com/youtube/answer/2802167?hl=en&ref_topic=9387060 [https://perma.cc/E9U6-MCBU] (last visited Feb. 27, 2022).

131. SCALIA & GARNER, *supra* note 74, at 205.

each other's meaning – words are given meaning by their context.[132]

As such, using the *ejusdem generis* canon, courts should confine their interpretations of "otherwise objectionable" to prevent an overbroad reading of the statutorily delineated types of content SNPs and ICSs can voluntarily remove from their websites. A narrow reading would not prevent SNPs from enabling age-restrictions or adding content warnings to specific posts that contain such material. It would prevent SNPs from removing content that is not of the type that is generally related to well understood and accepted types of obscene, violent, or harassing material. However, applying a narrow interpretation would not and has not prevented SNPs from expanding those categories in its terms of service to be agreed upon by its users. The problem, as discussed above, only comes when enforcement of the agreed-upon rules is undertaken in an unbalanced or inconsistent way. The effects of a narrow reading, without other agreed-upon limitations on content by both parties, would only permit SNPs to remove—among other substantially similar types of speech—vulgar language, nudity, incitement towards sexual acts, sexually explicit material, or excessively violent material.

Rather than frustrating the Act's purpose, as some may argue a narrow reading would, it will further the purpose to preserve a vibrant and competitive marketplace.[133] A narrow reading would prevent SNPs from removing political speech, conspiratorial speech, or the commonly contested "hate speech." If SNPs seek to prevent the publication of those categories of speech, as is their prerogative, they should still be required to specifically draw the boundaries for when those lines are crossed in its TOS. An SNP's users would be able to see upfront the type of speech that a given platform allows. At that moment, the user can make an informed decision whether the platform will meet his needs. An overbroad reading will prevent that type of user choice because the standards for what the SNP subjectively believes to be objectionable is an oft undefined and ever-moving concept.

132. *See id.*
133. 47 U.S.C. § 230(b)(2).

An amorphous labeling that speech which a given user subjectively believes is hateful cannot, under a narrow reading, be removed by the SNP without first properly setting those boundaries in its TOS or UA. Instead, controls should be provided to a user that enable him to block similar speech from coming across his personal "air-waves." Critically, this does not prevent Congress from clarifying its position on what the catchall protects under its umbrella or adding to the types of content Section 230 allows SNPs to remove or restrict.

CONCLUSION

As debate about what type of speech social media platforms like Twitter, Facebook, YouTube should allow on their sites marches ahead, a consensus should first be found on the kind of content that those sites are currently permitted to remove or restrict. This paper has offered a framework for how courts should approach and interpret that question by applying commonly used canons of statutory interpretation. Courts should remain faithful to the text of a statute and interpret it so as not to frustrate its purpose.