

## Deputy Attorney General Jeffrey A. Rosen Speaks at the Free State Foundation's 12th Annual Telecom Policy Conference

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### *Remarks as Prepared for Delivery*

Thank you, Randy May, for that kind introduction. I am pleased to be a part of the Free State Foundation's Twelfth Annual Telecom Policy Conference.

At the Department of Justice, we have been carefully considering many of the same issues that are on today's program agenda. As many of you know, last summer we announced a review of market-leading online platforms as a department priority. Antitrust and competition policy are a core focus our review. But the issues presented by the market-leading online platforms reach more broadly. This is why we are also assessing areas like user privacy, data protection, and public safety as they relate to online platforms. We are also looking at Section 230 of the Communications Decency Act, a topic which I will discuss later in my remarks.

So I want to start today by talking a little about innovation and antitrust. One of the several reasons that we are focused on market-leading platforms is that innovation is such an important aspect of our economy and, therefore, of our future. Innovation has long been a focus of antitrust law, both in the merger review context and when assessing potentially anticompetitive conduct.

As an example, the department's Horizontal Merger Guidelines provide a framework for analyzing when a merger or acquisition is "likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail absent the merger." Those Guidelines counsel us to consider not only reduced incentives to innovate in existing products, but also new lines of business.

Although the antitrust goal of protecting innovation is nothing new, it has gained more attention recently. Despite the wonders produced by the World Wide Web, some say that innovation in the United States has actually been on a decline in the last two decades, and that the tech giants that produced some of those wonders are in part to blame. Across the spectrum, there are calls for government to act quickly and boldly to help ensure there is room for another wave of innovation that can improve people's lives.

In particular, some economists are concerned that innovation is waning. Among those is Professor Robert Gordon at Northwestern University, who in 2016 published a much discussed book called *The Rise and Fall of American Growth: The U.S. Standard of Living Since the Civil War*. It is useful to consider some of the questions and concerns that he raised. Gordon painted a grim picture of economic growth and innovation since 1970, finding that they had declined significantly through the year 2014. In stark contrast, Gordon found that the hundred years between 1870 and 1970 was, what he called, a "special century" where unprecedented economic growth was driven by transformative innovations. Think electricity, cars, airplanes, washers, radios, televisions, and movies, all of which came about in their modern form during this period.

Obviously, one of the most disruptive innovations of that “special century” was the development of the telephone in the United States around the turn of the 20<sup>th</sup> century. Alexander Graham Bell’s 1876 patent application for a speaking telephone was arguably the most valuable patent ever filed. A transformation in human connectedness quickly followed this great innovation – but so did the Bell System monopoly in the years after that.

As a dominant firm with vast resources and the technological expertise of Bell Labs, the old AT&T Bell System made a number of important innovations in the telecommunications realm and beyond. But with its dominance cemented, the old Bell System sometimes showed itself resistant to change, in part due to monopolistic incentives and protective regulation, and there were claims that innovation was less than it might have been.

The government’s antitrust case against AT&T was filed in 1974, and it has been suggested that the competition and ensuing innovation that followed would not have flourished in that way without the resulting divestiture of AT&T’s local exchanges from its long-distance network and manufacturing businesses around 1984.

That is significant, because Professor Gordon says that telecommunications proved an exception to the productivity slowdown that occurred around 1970. He is among those who say that the breakup of the AT&T monopoly helped set the stage for a “third industrial revolution” of innovation in communications, followed by the entry of new players into telephony and broadband, and the dramatic developments in mobile wireless with widespread use of smartphones. So, if Gordon is right, antitrust policy rightly deserves a degree of credit.

Professor Gordon’s book also credits today’s tech platform giants – for example, Amazon, Google, Facebook – as illustration for their part, in what he calls, the “third industrial revolution.” But he also poses a provocative question potentially relevant to our antitrust review: Is this third industrial revolution over? And, if so, why?

Gordon suggests that “the revolutions in everyday life made possible by e-commerce and search engines were well established by 2004.” For the decade after that, Gordon claims, innovation and growth were far more disappointing.

Gordon also reminds us that today’s tech giants that helped drive this revolution are no longer new. Amazon dates back to 1994 and Google to 1998. Even Facebook is now 16 years old. So this might lead us to ask: Where is the next big innovation? And why are we not seeing the same type of fundamental technological change today?

One of the questions that is inevitably present in our antitrust review is whether innovation has declined, as some say, because of monopoly positions held by some of today’s tech platform giants. As the Seventh Circuit wrote in a monopolization case only two weeks ago, “the harms that typically flow from a competitive market shifting to total control by a monopolist include... *reduced innovation.*”

Or, as the economist Kenneth Arrow once put it, an incumbent’s incentive to innovate is lessened because the resulting innovation replaces existing profitable sales. According to this theory, innovations are more likely to come not from a monopolist, but from an outsider without existing sales to replace.

By contrast, an incumbent monopolist has every incentive to thwart those innovative outsiders. And some say that is what we are seeing today. Numerous articles have been written about the tech giants' so-called "kill zones," that is, the strategy of buying upstart challengers to remove them as a competitive threat. Others claim there is no incentive to innovate when a dominant company can simply replicate any new idea itself and, with existing network effects, reap the commercial reward. Still others claim that sharp business practices by entrenched firms have prevented innovators from gaining traction.

So the department's review of online platforms is ongoing, so I am not yet able today to answer the questions that I have just posed.

But we do now have some answers regarding another recent antitrust matter that, at least in part, concerned innovation. Just last month, a district court in the Southern District of New York rejected the effort by a minority of state attorneys general to try to block the proposed merger of Sprint and T-Mobile notwithstanding the actions taken by the federal antitrust and telecommunications agencies to address the competitive concerns.

Regarding the topic of innovation, Judge Marrero in that decision said that AT&T and Verizon, the longtime market-share leaders in mobile wireless services, had typically not been innovators in consumer services, despite having high-quality networks. Instead, he said they have responded to the innovation of others in the market. Now, if the Tunney Act proceeding also enables this merger, T-Mobile and Sprint could have the opportunity together to become a stronger competitor and help to push forward the more rapid introduction of 5G technology, which is expected to be a cornerstone of future innovation across many economic sectors.

In thinking more broadly about innovation and antitrust, it can be helpful to look back at some of the technology companies that dominated past eras. For example, IBM dominated the computer hardware era and Microsoft dominated the software era. As with the evolution of the Bell System and the telecommunications sector that I talked about earlier, antitrust played a role in all of these transitions as well. The Department of Justice brought antitrust enforcement actions against IBM in 1969 and Microsoft in 1998. One lawsuit was eventually dismissed, and one ultimately prevailed. Both those enforcement actions coincided with one technology era ending and the next beginning. I just want to say that the Antitrust Division and all of us at DOJ who are responsible for antitrust enforcement are very much aware of this history, and pay close attention to the role of antitrust with regard to technological innovation.

Shifting gears just a little, as we focus on market-leading online platforms, there is another major issue that has come to the forefront: Section 230 of the Communications Decency Act of 1996. Section 230 has played a role in both the good and the bad of the online world. It has no doubt contributed to new offerings and growth online. At the same time, as DOJ is the agency tasked with protecting the American public through enforcing the law, we are concerned that Section 230 is also enabling some harm.

As background for anyone who is less familiar with Section 230, here is what one of its key provisions says: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1)). The typical example involves alleged defamation by a user of social

media. Under Section 230, the social media site is not liable for what the user says, although the user themselves may still be liable. Section 230 also immunizes a website from some liability for “in good faith” removing illicit user-generated content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” (47 U.S.C. § 230(c)(2)). The name of this section says a lot: “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”

We have been carefully looking at the benefits and costs of Section 230 as part of our broader review of market-leading online platforms. We recently convened a conference with thought leaders from a wide variety of perspectives in academia, victims’ rights groups, civil society, and technology experts, among others. With nearly 500 attendees and thousands more streaming online, we heard the benefits and the problems with Section 230. Additionally, the department held a private roundtable with thought leaders on all sides of the Section 230 debate to discuss problems and solutions in more detail. Numerous companies impacted by Section 230 also have provided us a greater understanding of how it impacts their everyday businesses and commercial choices.

There are some obvious benefits of Section 230. It has been dubbed the “26 words that created the internet,” and it is not hard to see why. When Section 230 was enacted in 1996, it enabled the growth of platforms that hosted user-generated content without fear that doing so would expose the platform to massive civil liability as publishers or speakers of that content. Without Section 230, some say, the potential civil liability and cost of litigation could have forced companies to significantly curtail their user-generated content – or even to cease to exist altogether.

But there is a dark side, too. To say the least, the online world has changed a lot in the 25 years since the original drafting of Section 230. The Internet is no longer made up of the rudimentary bulletin boards and chat rooms of AOL, CompuServe, and Prodigy, but instead, it is now a vital and ever-present aspect of both personal and professional modern lives. Indeed, it is now quaint to think of the likes of CompuServe hosting online comments. Instead, major online platforms now actively match us with news stories and friends and, whether by algorithm or otherwise, effectively choose much of what our children see, and enable a seemingly limitless number of people to connect with us or with our children. And platforms are often themselves speakers and publishers of their own content, and not mere forums for others to communicate.

Now, a quarter century after its enactment, there also is recognition that Section 230 immunity has not always been a force for good, particularly in light of some of the extraordinarily broad interpretation given to it by some courts. For example, platforms have been used to connect predators with vulnerable children, to facilitate terrorist activity, and as a tool for extreme online harassment.

The drafters of Section 230 might be surprised by this development. Remember, Section 230 was but one provision in the much larger Communications Decency Act of 1996. As its name suggests, the primary aim of the Communications Decency Act was to promote decency on the Internet and to create a safe environment for children online.

As it turned out, the Supreme Court rejected most of the Communications Decency Act on First Amendment grounds. The most significant piece that survived was Section 230. But rather than furthering the purposes of its underlying bill, some scholars have argued that Section 230 has instead immunized platforms “where they (1) knew about users’ illegal activity, deliberately refused to remove it, and ensured that those responsible could not be identified; (2) solicited users to engage in tortious and illegal activity; and (3) designed their sites to enhance the visibility of illegal activity and to ensure that the perpetrators could not be identified and caught.”

To address these concerns and the others that have been raised, we see at least four areas that are potentially ripe for engagement. First, as a threshold matter, it would seem relatively uncontroversial that there should be no special statutory immunity for websites that purposefully enable illegality and harm to children. Nor does someone appear to be a “Good Samaritan” if they set up their services in a way that makes it impossible for law enforcement to enforce criminal laws. In these particular situations, why should not the website or platform have to defend and justify the reasonableness of their conduct on the merits just like businesses operating outside the virtual world?

Second, the Department of Justice is also concerned about Section 230’s impacts on our law enforcement function, and the law enforcement efforts of our partners throughout the executive branch. In our discussions with scholars and members of the public on this topic, many are surprised to learn that Section 230 is increasingly being claimed as a defense against the federal government in civil actions. To be clear, Section 230 has a carve-out for certain federal criminal enforcement. But not all problems can be solved by federal criminal law. Federal civil actions play a very important role in their own right. The increasing invocation of Section 230 in federal civil enforcement actions often goes beyond the purpose of the Communications Decency Act, and can undermine the goals of 230 itself.

Third, we are concerned about expansions of Section 230 into areas that have little connection to the statute’s original purpose. As I mentioned earlier, the core of Section 230 concerns defamation and other speech-related torts. And for good reason: The restaurant review platform, for example, has no idea whether the user is right when he says the soup was cold or when she says the service was poor. Nor does the social media site have any idea whether the nosy neighbor’s online comments about the new person down the block are true or not. Civil immunity from tort litigation for online platforms in these instances makes some sense. The alternative would be a quasi-heckler’s veto, where the restaurant or neighbor could complain about the comments, and the platform would be forced to take them down for fear of civil liability.

But some websites have tried to transform Section 230 into an all-purpose immunity for claims that are far removed from speech. For example, some platforms have argued that Section 230 permits them to circumvent or ignore city ordinances on licensing of rental properties. While these types of arguments have not always succeeded, they demonstrate the potentially overbroad scope that some advocates have given the immunity.

Fourth, we are concerned about the extent to which platforms have expanded the use of Section 230 to immunize taking down content beyond the types listed in the statute. Under the Good

Samaritan provision, platforms have the ability to remove content that they have a “good faith” belief is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” We are told that some platforms treat this provision as a blank check, ignoring the “good faith” requirement and relying on the broad term “otherwise objectionable” as carte blanche to selectively remove anything from websites for other reasons and still claim immunity.

Perhaps there needs to be a more clear definition of “good faith,” and the vague term “otherwise objectionable” should be reconsidered. Of course, platforms can choose whether or not to remove any content on their websites. But should they automatically be granted full statutory immunity for removing lawful speech and given carte blanche as a censor if the content that is not “obscene, lewd, lascivious, filthy, excessively violent, or harassing” under the statute?

After 25 years, it seems that the time has come for Congress to assess what changes to Section 230 are now needed, and whether there are ways to realign some of its incentives in a better way. The Justice Department continues to welcome further input on this important topic as we prepare to address proposed changes. We would like to see the benefits maintained and enhanced, while the harms are mitigated.

So, having had my say today, let me thank you again for the opportunity to share these thoughts. I appreciate the Free State Foundation’s role in enhancing the public discourse on important issues like those being addressed today. I will look forward to a continued public dialogue. Thanks again.