

## Beyond Section 230 Liability for Facebook

Nancy S. Kim

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>



Part of the [Consumer Protection Law Commons](#), [Contracts Commons](#), and the [Internet Law Commons](#)

---

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# BEYOND SECTION 230 LIABILITY FOR FACEBOOK

NANCY S. KIM<sup>†</sup>

## INTRODUCTION

In October 2021, a former Facebook employee, Frances Haugen, publicly revealed that the company's internal research documented harms that its products caused some of its users.<sup>1</sup> The company's response was sadly predictable. It questioned the reliability of Haugen's testimony, asserted its commitment to doing the right thing, and then diverted the public's attention by changing its name to Meta. The company's deny-and-distract tactics were, by now, all too familiar and provided few answers.

More than any other platform company, Facebook has found itself at the center of controversy. Its advertisement-supported business model relies upon user engagement which means that its algorithms often, even if unintentionally, promote content that is false, divisive, and harmful to its users.<sup>2</sup> The company profits handsomely from scams that proliferate on its site.<sup>3</sup> Its

---

<sup>†</sup> Michael Paul Galvin Chair in Entrepreneurship and Applied Legal Technology, Chicago-Kent College of Law, Illinois Institute of Technology. Thanks to my colleagues who provided excellent comments and suggestions at a faculty workshop at the Chicago-Kent College of Law and at the 2022 Conference on Governance of Emerging Technologies and Science at the Sandra Day O'Connor College of Law, Arizona State University. Thanks also to the editors of the St. John's Law Review for their skill and careful editing.

<sup>1</sup> Facebook has changed its corporate name to Meta Platforms, Inc. and this Article will use either name to refer to the company. The Wall Street Journal reported on Frances Haugen's allegations in a podcast. See *The Journal, The Facebook Files, Part 6: The Whistleblower*, WALL ST. J. (Oct. 3, 2021, 7:32 PM), <https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-6-the-whistleblower/b311b3d8-b50a-425f-9eb7-12a9c4278acd> [<https://perma.cc/5QF5-V89R>].

<sup>2</sup> *The Journal, The Facebook Files, Part 4: The Outrage Algorithm*, WALL ST. J. (Sept. 18, 2021, 11:30 AM), <https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-4-the-outrage-algorithm/e619fbb7-43b0-485b-877f-18a98ffa773f> [<https://perma.cc/752F-5YZB>].

<sup>3</sup> See *BBB Study: Online Shopping Scams Flourish on Social Media During Pandemic*, BETTER BUS. BUREAU (Dec. 2, 2021), <https://www.bbb.org/article/news-releases/26193-bbb-study-online-shopping-scams-flourish-on-social-media-during-pandemic> [<https://perma.cc/4D5E-CUWX>]; BETTER BUS. BUREAU, THEFT ON A MASSIVE SCALE: ONLINE SHOPPING FRAUD AND THE ROLE OF SOCIAL MEDIA 1, 2, 5,

practices governing data collection and online tracking activities are dubious at best.

Yet, despite all the hand wringing and negative commentary about the legality and ethicality of its business, Facebook continues to engage in practices with harmful social consequences. According to a Wall Street Journal investigation referred to as the “Facebook Files,” the company’s own research documented the harms that its products inflict upon its users and society.<sup>4</sup> How then has Facebook managed to get away with it for so long?

In the absence of regulation, the public depends upon private citizens to claim their rights and redress their wrongs in a court of law. When companies deploy new technology and new business models, legislators and regulators are often slow to react. Consequently, the legality of these new practices is often litigated in court, typically in a class action lawsuit brought against the company. The imposition of civil liability is especially critical in Facebook’s case because the company has been famously evasive about its internal research and what it knows about its products. A lawsuit could be an important way to compel Facebook to disclose some of that information.

However, platform companies such as Facebook typically escape liability for content on their websites because of the immunity provided by section 230 of the Communications Decency Act.<sup>5</sup> They claim that they are not publishers of content. Instead, they argue, they merely provide a platform for the distribution of content created by others. As mere platforms, courts have held that they are not responsible for defamatory or harmful content on their websites, even if they occasionally exercise removal or moderation power.<sup>6</sup>

---

7–10 (2021); Bob Sullivan, *Facebook Earns Billions From Scam Ads, Lawsuit Alleges*, BOBSULLIVAN.NET (Sept. 7, 2021), <https://bobsullivan.net/cybercrime/facebook-earns-billions-from-scam-ads-lawsuit-alleges/> [<https://perma.cc/G2J2-ZNJH>].

<sup>4</sup> See The Journal, *supra* note 1.

<sup>5</sup> Communications Decency Act of 1996, 47 U.S.C. § 230.

<sup>6</sup> See Jeff Kosseff, *A User’s Guide to Section 230, and a Legislator’s Guide to Amending it (or Not)*, 37 BERKELEY TECH. L.J. 757, 769, 776–77 (2022); Joel R. Reidenberg, Jamela Debelak, Jordan Kovnot & Tiffany Miao, *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals*, FORDHAM CTR. L. & POL’Y, 1, 9–10 (2012). Many commentators have criticized this broad reading of section 230. See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 402–03 (2017); Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 BYU L. REV. 1435, 1437 (2022); Nancy S. Kim,

But platform companies such as Facebook generate harms that aren't limited to merely hosting content posted by others. They actively control, promote, and arrange content to generate greater profits, and they design their products in ways that cause their users to engage in detrimental behaviors. In Facebook's case, when confronted with evidence of the harm caused by its products, it crouches into a defensive posture, and denies and deflects instead of responding to concerns in a proactive and productive manner.

For example, Senator Richard Blumenthal's staff created a fake 13-year-old girl's account on Instagram and indicated that she was interested in extreme dieting. Her account was soon "exclusively" shown recommendations to follow more extreme dieting and eating disorder accounts.<sup>7</sup> When a CNN news reporter contacted Instagram for comment, the company removed the recommendations and issued a statement that, "We do not allow content that promotes or encourages eating disorders and we removed the accounts shared with us for breaking these rules."<sup>8</sup> Yet when CNN news set up a similar account for another fake 13-year-old girl interested in extreme dieting content, Instagram's algorithm again promoted accounts like "Prettily Skinny," and "Wanna Be Skinny."<sup>9</sup> Senator Blumenthal responded that the company's claims to protect children or take down dangerous accounts was "absolute hogwash."<sup>10</sup>

This Article discusses how social media companies may be civilly liable, using Facebook as an example.<sup>11</sup> As the Facebook Files and other research reveal, the harms from Facebook's

---

*Imposing Tort Liability on Websites for Cyberharassment*, 118 YALE L.J. POCKET PART 115, 116 (2008); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, WASH. L. REV. 335, 335, 339 (2005).

<sup>7</sup> Donie O'Sullivan et al., *Instagram Promoted Pages Glorifying Eating Disorders to Teen Accounts*, CNN (Oct. 4, 2021), <https://www.cnn.com/2021/10/04/tech/instagram-facebook-eating-disorders/index.html> [<https://perma.cc/GZ9P-G9GL>].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Other social media companies likely face the same challenges and raise the same concerns as Facebook because their business models depend upon sustained use of their products. See generally GAIA BERNSTEIN, UNWIRED: GAINING CONTROL OVER ADDICTIVE TECHNOLOGIES (2022). TikTok, for example, has recently been criticized in the media for sending users algorithmically-generated extreme content, such as eating disorder videos. See Tawnell D. Hobbs et al., *'The Corpse Bride Diet': How TikTok Inundates Teens with Eating-Disorder Videos*, WALL ST. J. (Dec. 17, 2021, 10:45 AM), <https://www.wsj.com/articles/how-tiktok-inundates-teens-with-eating-disorder-videos-11639754848> [<https://perma.cc/QY28-2X5Q>].

proprietary products and the company's own actions reverberate throughout society, harming even children.<sup>12</sup> Facebook has profited from the dissemination of misinformation. It has been used for criminal activity, including drug and human trafficking.<sup>13</sup> Its products allow the proliferation and distribution of images that erode the self-esteem of girls to the point that many of them want to commit suicide.<sup>14</sup> These harms are ones that Facebook itself has purportedly documented and acknowledged internally, yet it denies or dismisses them in public.<sup>15</sup>

Facebook's sins are not solely derivative, and the arguments I make in this Article aren't based on the harmful content being posted on Facebook by third parties. Rather, I contend that Facebook *itself* has contributed to harms in specific and concrete ways. The design of its website and its business decisions affect the way users interact with the platform. Its algorithms actively arrange, select and promote certain content and then push out this content to those who are most vulnerable to it.

For example, studies have indicated that people who are shown alcohol-related posts and advertisements increase their drinking habits.<sup>16</sup> Instagram allows underaged users to receive promotional materials from alcohol brands.<sup>17</sup> By contrast,

---

<sup>12</sup> See Charlotte Chang, *Internet Safety Survey: Who Will Protect the Children?*, 25 BERKELEY TECH. L.J. 501, 503–04 (2010).

<sup>13</sup> Graison Dangor, *Ruling Against Facebook in Sex Trafficking Case Threatens Key Legal Shield for Social Media Platforms*, FORBES (June 25, 2021), <https://www.forbes.com/sites/graisondangor/2021/06/25/ruling-against-facebook-in-sex-trafficking-case-threatens-key-legal-shield-for-social-media-platforms/?sh=6416b0743acc>. In December 2021, a class action lawsuit was filed against Facebook claiming that its failure to police content and its design of its platform contributed to violence against the Rohingya community. Michelle Toh, *Facebook Sued for \$150 Billion Over Violence Against Rohingya in Myanmar*, CNN (Dec. 7, 2021, 10:44 AM), <https://www.cnn.com/2021/12/07/tech/facebook-myanmar-rohingya-muslims-intl-hnk/index.html> [<https://perma.cc/32GH-YEC6>].

<sup>14</sup> The Journal, *The Facebook Files, Part 2: 'We Make Body Image Issues Worse'*, WALL ST. J. (Sept. 18, 2021, 12:00 PM), <https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-2-we-make-body-image-issues-worse/c2c4d7ba-f261-4343-8d18-d4de177cf973> [<https://perma.cc/T78S-EAC6>].

<sup>15</sup> *Id.*

<sup>16</sup> Henneke Hendriks et al., *Picture Me Drinking: Alcohol-Related Posts by Instagram Influencers Popular Among Adolescents and Young Adults*, 10 FRONTIERS PSYCHOLOGY 1, 2 (2019); Adam E. Barry et al., *Alcohol Marketing on Twitter and Instagram: Evidence of Directly Advertising to Youth/Adolescents*, 51 ALCOHOL & ALCOHOLISM 487, 488 (2016); see also Amy Keller, *Social Media and Alcohol*, DRUGREHAB.COM (Feb. 28, 2020), <https://www.drugrehab.com/addiction/alcohol/influence-of-social-media/> [<https://perma.cc/2MHJ-XAXN>].

<sup>17</sup> Barry et al., *supra* note 16, at 490.

Twitter prevents underaged profiles from receiving alcohol-related promotional materials.<sup>18</sup>

The Internet has evolved, and so has the role of platform companies. AOL's message board, the prototype of the Internet platform from the 1990s, is no longer the dominant online intermediary. Today's platform company is not limited to the singular function of passively hosting content. The actions and *inactions*, practices, features, and services of modern platform companies are many and varied. In the past, the primary danger they posed was from content posted by third parties. Section 230 provided an effective shield in that context, and one that may have made sense. But no longer are the harms suffered by victims limited to the harms from content posted by others. In many cases, the harms are generated by acts or omissions of the company itself. Accordingly, the company should be responsible for those harms.<sup>19</sup>

The victims, too, are not a monolith and they suffer different types of harms. There is no one-size-fits-all model of civil liability for platform companies. Corporations can commit a panoply of harms and may be liable under a variety of theories. The same is true for online intermediaries, which have changed from the early days of the Internet when they were mere hosts of online forums and message boards.

This Article proceeds as follows. Part I explores potential tort liability claims. Social media platforms shape user behavior and online discourse through the design of their websites. Section 230 should not shield platforms from liability when their calculated business decisions regarding website design cause injury to their users. Part II discusses potential warranty and contract related claims. The Article concludes that the law should modernize by acknowledging and accommodating the fluidity between *products* and *services* supplied by platform companies. It should also recognize that in an increasingly interconnected world reliant upon technology and social media, platform companies should not escape liability for their products simply because they *also* host content posted by their users.

---

<sup>18</sup> *Id.* at 489. This study is discussed in more detail *infra* Section I.B.1.

<sup>19</sup> Sometimes they are despite Section 230 defenses, at least in the Ninth Circuit. *See, e.g.,* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1175–76 (9th Cir. 2016); Doe v. Internet Brands, Inc., 824 F.3d 846, 854 (9th Cir. 2016); Lemmon v. Snap, Inc., 995 F.3d 1085, 1094 (9th Cir. 2021).

The stakes are high as companies jostle for dominance in the metaverse. Facebook recently unveiled its new artificial intelligence supercomputer, which it is building for the metaverse.<sup>20</sup> The care that the corporation takes in using this supercomputer to build and structure the metaverse and its norms will depend, in large part, upon its potential liability.

### I. TORT-BASED CLAIMS

The shield that platform companies like Facebook use to protect themselves from tort liability is Section 230 of the Communications Decency Act (“CDA”), and specifically (c)(1) which provides: “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.”<sup>21</sup>

In a variety of contexts, courts have repeatedly allowed platform companies to shield themselves from liability under Section 230 of the CDA, even where the claims have been based on the companies’ algorithms, and not on the content *per se*.<sup>22</sup>

Subsection (c)(1) protects websites from liability as a “publisher or speaker of any information” meaning that they cannot be held liable for the content of the information posted by third parties on their websites.<sup>23</sup> It does not, however, mean that a website has *no* civil liability at all.<sup>24</sup> If it did, the other subsections would be superfluous.

While Subsection (c)(1) gets much of the attention, there are other provisions of Section 230 that are worth noting as they clarify what is *not* affected by (c)(1). While (c)(1) protects

---

<sup>20</sup> Suman Bhattacharyya, *Meta Unveils New AI Supercomputer*, WALL ST. J. (Jan. 24, 2022, 12:00 PM), [https://www.wsj.com/articles/meta-unveils-new-ai-supercomputer-11643043601?mod=tech\\_featst\\_pos1](https://www.wsj.com/articles/meta-unveils-new-ai-supercomputer-11643043601?mod=tech_featst_pos1) [<https://perma.cc/AYC9-T258>]. According to the Wall Street Journal article, the objective of the supercomputer is to develop “AI models that can think like a human brain, with multiple inputs—such as voice and visual recognition—and can deliver contextual understanding of situations.” *Id.* Jerome Pesenti, vice president of AI at Meta, stated, “In the metaverse, its one hundred percent of the time, a 3-D multi-sensorial experience, and you need to create artificial-intelligence agents in that environment that are relevant to you.” *Id.*

<sup>21</sup> 47 U.S.C. § 230(c)(1).

<sup>22</sup> See *Gonzalez v. Google, Inc.*, 2 F.4th 871, 912–13 (9th Cir. 2021) (finding that Google’s algorithms do not deprive it of section 230 immunity); *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (finding that Facebook’s algorithms that suggest content did not make it a publisher under section 230).

<sup>23</sup> 47 U.S.C. § 230(c)(1).

<sup>24</sup> See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009); *Doe*, 824 F.3d at 854.

websites from liability as a publisher or speaker, it is (c)(2) which provides *civil liability* protection. This protection, however, is available only when these companies take actions to *restrict* “obscene”, “excessively violent” and “otherwise objectionable” material—even if constitutionally protected—*or* when they take action to “enable or make available . . . the technical means to restrict” content.<sup>25</sup> In other words, Section 230 only protects websites from civil liability in three situations: (1) where the claim is based upon the *content* of the material (such as defamation claims); (2) where the website acts to restrict objectionable content including if the content is constitutionally protected; and (3) when the website enables its users to restrict content.

Furthermore, Subsection (c)(1)’s protection is not absolute as the other provisions make clear. In particular, as discussed below, subsections (d) and (e) may provide a basis for civil liability.

A. *Negligence Per Se and Section 230(d)*.

Section 230(d) states that:

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.<sup>26</sup>

Many platform companies overlook this obligation although it is a mandatory one as the word “shall” indicates. For example,

---

<sup>25</sup> 47 U.S.C. § 230(c)(2).

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to 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; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

*Id.*

<sup>26</sup> 47 U.S.C. § 230(d).



Facebook does not provide any notice of the availability of such parental controls or filtering services with respect to offensive content. It does explain how a user might manage ads and how to opt-out of interest-based ads; however, a user may not opt-out of seeing ads altogether. The website also contains information on its Help page about how to proactively moderate content that visitors publish on their Facebook page.<sup>27</sup> However, Facebook's efforts fall short of the obligation under Section 230(d) because they require the user to actively search for the information regarding content control. This may be because Facebook does not actually want parents to have the ability to block or restrict their children's access to content as it would limit the user's engagement, and consequently, Facebook's opportunities to collect data and generate revenue.<sup>28</sup>

Furthermore, Facebook only explains how a user may use Facebook's own features to block certain content; it does not provide the user with information about other commercially available products as it is required to do under 230(d). Finally, Facebook does not provide this information at the time of entering into an agreement. In fact, it does not actually *notify* the user but rather requires the user to take the initiative of actively ferreting out that information by wading through the confusing links and voluminous terms on its different pages.

The failure of Facebook to comply with this requirement could constitute *negligence per se*. Negligence per se applies where the defendant has, without excuse, failed to comply with a statute that establishes specific requirements intended to prevent harm, the plaintiff suffers that harm, and the plaintiff is a member of the group that the statute was intended to protect.<sup>29</sup> Section 230 balances the objectives of free speech and fostering the growth of the Internet with protecting children from obscene

---

<sup>27</sup> *How Do I Block Certain Words from Appearing in Comments on my Facebook Page?*, FACEBOOK HELP CTR, <https://www.facebook.com/help/131671940241729> [https://perma.cc/2LFJ-C9PE] (last visited Feb. 14, 2023).

<sup>28</sup> As most people now know, Facebook makes money by selling advertisements. NBC News, *Senator Asks How Facebook Remains Free, Zuckerberg smirks: 'We Run Ads,'* YOUTUBE (Apr. 10, 2018), <https://www.youtube.com/watch?v=n2H8wx1aBiQ> [https://perma.cc/5XL7-NQTA].

<sup>29</sup> RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 14 (AM. L. INST. 2022) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

and pornographic content.<sup>30</sup> Legislators believed that one of the primary ways to do this was by encouraging parents to take measures to screen out inappropriate content themselves, so that the content would not be accessible to their children.<sup>31</sup> The purpose of subsection (d) is to ensure that parents are aware of steps they can take to monitor and screen content by imposing an obligation upon “interactive service providers” to actively inform parents of these options. A minor who suffers emotional or physical harm from obscene, extremely violent, pornographic or otherwise harmful content may be able to argue that Facebook is negligent *per se* for failing to inform the minor’s parents of ways to screen out inappropriate content. The plaintiff would still need to prove causation and damages. Direct testimony from the plaintiff and witnesses, medical records, and other types of evidence, such as the content itself, may allow the factfinder to make causal inferences.

*B. Tort Liability Under State Laws Consistent with Section 230.*

Subsection (e) clarifies that Section 230 has no effect on certain other laws, including federal criminal law, intellectual property law, any state or federal communications privacy law, or “any State law that is consistent with this section.”<sup>32</sup> It further states that no liability may be imposed under any *inconsistent* state or local law.<sup>33</sup> The changing nature of businesses and the products they offer requires rethinking how

---

<sup>30</sup> 47 U.S.C. § 230(b) states:

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) 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;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

<sup>31</sup> VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 5 (2021).

<sup>32</sup> 47 U.S.C. § 230(e).

<sup>33</sup> *Id.* (subsection (e)(5) also carves out claims of sex trafficking).

existing laws should apply. Tort law's flexibility and its emphasis on policy and evolving social norms has the potential to redress many of the harms caused by platform companies notwithstanding Section 230.

1. Premises/Proprietorship liability and Negligent Failure to Warn.

One basis of liability for Facebook could be premises or, more aptly, proprietorship liability.<sup>34</sup> Generally, a land possessor owes a duty to entrants to keep premises in a reasonably safe condition.<sup>35</sup> Furthermore, "a business or other possessor of land that holds its premises open to the public" has by virtue of that "special relationship" a duty of reasonable care to those who are lawfully on the premises.<sup>36</sup> Thus, a businesses has both the duty to keep business premises safe as well as a duty of reasonable care to customers who, through no fault of the business, may fall ill or be injured by third parties.

Facebook's business is virtual, but its website is a defined space with a defined web address. It is considered to be a place where others can connect and can be described as a virtual meeting place or marketplace. Even though its users don't walk into a physical location, they visit Facebook's virtual one, which has defined perimeters and boundaries so that one knows when one enters and exits the premises. Furthermore, the relationship that Facebook has to its registered users is the same type of relationship that a business has to its customers—they are in a mutually beneficial relationship.<sup>37</sup> Facebook would not have a business at all if it were not for its users, and it generates more profit if its users visit the website more often and stay longer. Although Facebook's users may not pay to use its products, Facebook's business depends entirely upon attracting and retaining users, collecting data on its users and their activity, and then selling that information to marketers who pay to advertise to those users.

---

<sup>34</sup> See Nancy S. Kim, *Website Proprietorship and Cyber Harassment*, 2009 UTAH L. REV. 993, 1034–37 (2009).

<sup>35</sup> See RESTATEMENT (THIRD) OF TORTS, LIAB. FOR PHYS. & EMOT. HARM, § 51 (2022) ("[A] land possessor owes a duty of reasonable care to entrants on the land" with respect to artificial and naturally-occurring conditions on the land).

<sup>36</sup> *Id.* § 40.

<sup>37</sup> See *id.* § 40(a) ("An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.").

Given the special relationship that Facebook has with its users, which it uses for its financial benefit, the company has a duty to exercise reasonable care with respect to risks that arise within that relationship.<sup>38</sup> That duty means that it should take reasonable measures to make sure the place where the relationship activity occurs—its virtual premises—are safe. At a minimum, Facebook should provide effective reporting and blocking mechanisms so that users are not forced to see content that is harmful to them. Instead, it seems that in order to generate more revenue, Facebook’s algorithms suggest content without regard to whether it is psychologically harmful to its users.<sup>39</sup> The example mentioned earlier regarding Senator Blumenthal’s Instagram experiment illustrates this problem. The fictitious 13-year-old girl’s Instagram account was bombarded with recommendations to follow more and more extreme dieting accounts, which could encourage self-harming inclinations and lead to eating disorders in a vulnerable young teenager.<sup>40</sup>

Facebook use may also result in financial harm to users. Scams and other fraudulent activity are prevalent on Facebook and Instagram. A recent lawsuit claims that Facebook earns billions from fraudulent ads.<sup>41</sup> A study conducted by the Better Business Bureau found that online fraud is rampant on Facebook. According to the study, customers report that Facebook does little to prevent false advertisements and fraudulent activity, responds slowly and ineffectively to complaints in violation of its own stated policies, and even

---

<sup>38</sup> *Id.*

<sup>39</sup> See Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:49 AM), [https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp\\_lead\\_pos7](https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7) [<https://perma.cc/4YW6-NXLK>].

<sup>40</sup> See O’Sullivan et al., *supra* note 7.

<sup>41</sup> See Bob Sullivan, *Facebook Earns Billions from Scam Ads, Lawsuit Alleges*, BOBSULLIVAN.NET (Sept. 7, 2021), <https://bobsullivan.net/cybercrime/facebook-earns-billions-from-scam-ads-lawsuit-alleges/> [<https://perma.cc/D25V-DEWE>]; *Facebook Scam Ads Class Action Lawsuit 2021 – FB Alleged Of Working With Scammers To Dupe Users...*, CONSIDER THE CONSUMER (Aug. 26, 2021), <https://considertheconsumer.com/consumer-class-actions/facebook-scam-ads-class-action-lawsuit-2021-fb-alleged-of-working-with-scammers-to-dupe-users> [<https://perma.cc/7SW2-JTCT>]; Craig Silverman & Ryan Mac, “Facebook Gets Paid”, BUZZFEED NEWS (Dec. 10, 2020, 5:44 PM), <https://www.buzzfeednews.com/article/craigsilverman/facebook-ad-scams-revenue-china-tiktok-vietnam> [<https://perma.cc/9LNK-Y7MA>].

intentionally ignores the problem of scams, presumably because it wants the revenue generated by these false advertisements.<sup>42</sup> Facebook should have a duty to warn its users of fraudulent activity on its sites and to take immediate action to eradicate it.

The 9th Circuit in *Doe v. Internet Brands, Inc.*, recognized a claim of “negligent failure to warn” despite the defendant website’s claim of Section 230 immunity.<sup>43</sup> The plaintiff had been lured and raped by individuals using a fake website hosted by defendant. The court stated that the plaintiff did not seek to hold the defendant liable as a “publisher or speaker” of content because her claim was based on the defendant’s failure to warn her about information it obtained from an outside source about how third parties targeted and lured victims through a website.<sup>44</sup> Accordingly, Section 230 did not bar her claim. Facebook, too, should be liable if it fails to warn users of dangers that it knows lurk on its website.

Facebook should also be liable for the condition of its own premises. If a customer is attacked in a store’s dimly lit parking garage, the store is not liable for committing the attack. It may, however, be liable for not taking reasonable measures to prevent foreseeable harm. If there had been prior attacks in the parking lot, then the store should have installed better lighting.

Similarly, Facebook should take reasonable measures to prevent foreseeable harm. If it knows of a crime occurring on its site, it should notify its users and implement design features to stop the occurrence of future criminal acts. Instead, it seems to subordinate its users’ safety and well-being in order to maximize opportunities for data collection and revenue generation. Facebook’s default settings favor more disclosure, less privacy, and more dependence on Facebook, even though defaults that do the opposite would be better for its users.<sup>45</sup>

For example, Facebook could enhance safety on its site by implementing reporting features to reduce fraud and harmful

---

<sup>42</sup> *Theft on a Massive Scale: Online Shopping Fraud and the Role of Social Media*, BETTER BUS. BUREAU, [https://www.bbb.org/all/scamstudies/fake\\_online\\_retailers\\_study/online\\_shopping\\_fraud\\_study](https://www.bbb.org/all/scamstudies/fake_online_retailers_study/online_shopping_fraud_study) [https://perma.cc/A9VS-3FZR] (last visited Sept. 14, 2022).

<sup>43</sup> *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016).

<sup>44</sup> *Id.* at 851.

<sup>45</sup> Joanna Stern, *How to Fix Facebook, Instagram and Social Media? Change the Defaults*, WALL ST. J. (Oct. 17, 2021, 9:00 AM), <https://www.wsj.com/articles/how-to-fix-facebook-instagram-and-social-media-change-the-defaults-11634475600> [https://perma.cc/K2FC-S8ZZ].

content. It could hire more employees to monitor fake accounts, do a better job of screening for suspicious activity, flag new accounts, and install features that mediate or allow the user to easily block or delete harmful content. Some of Facebook's features that purportedly protect users from harmful content are difficult to find. The company also fails to do an adequate job of verifying the age of users, endangering children who are often the most vulnerable to harmful activities and may be more affected by advertisements for alcohol or eating disorders.<sup>46</sup>

Facebook could also identify newly created accounts so that users can better assess their reliability. An account that has been active for a long period of time has a reputation associated with it and is considered more reliable. Fraudsters setting up new accounts may deceive others by using proxies for reputation. Scam artists on Instagram, for example, may buy followers for a new account, which may mislead users into thinking the account is a reliable one as it appears to be established and without a history of complaints. On the other hand, an icon indicating that the account is only a couple of days old despite its many followers may act as a red flag to users and prompt them to conduct more due diligence before further engaging with the account holder.

There are many other steps Facebook *could* be taking, but isn't, to better protect its users on its site. Section 230 should not be a bar to a negligent failure to warn or to a proprietorship liability claim because the basis of the claim is not on the content itself, but on the failure to act reasonably to keep its users safe from foreseeable harm.

## 2. Product Liability.

Several courts have considered whether social media companies are liable for their algorithms and have generally found that section 230 provides immunity.<sup>47</sup> Yet, these decisions have been divisive and accompanied by incisive concurring and dissenting opinions. Perhaps the most notable was Chief Judge Katzmann's concurring opinion in *Force v. Facebook*, which

---

<sup>46</sup> Barry et al., *supra* note 16. One study showed that while Twitter successfully prevented underage profiles from following promotional materials from alcohol brands, Instagram did not and allowed all the underaged profiles to follow all alcohol brands. *Id.*

<sup>47</sup> *Gonzalez v. Google LLC*, 2 F.4th 871, 897 (9th Cir. 2021) (“[A] website’s use of content-neutral algorithms, without more, does not expose it to liability for content posted by a third-party. Under our existing case law, § 230 requires this result.”); *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019).

stated “[w]hen a plaintiff brings a claim that is based not on the content of the information shown but rather on the connections Facebook’s algorithms make between individuals, the CDA does not and should not bar relief.”<sup>48</sup> Similarly, in a concurring opinion in *Gonzalez v. Google LLC*, Judge Berzon, citing to Katzmann’s concurrence, expressed concern about the sweeping immunity of Section 230 and urged the court to reconsider whether it should “extend[] to the use of machine-learning algorithms to recommend content and connections to users.”<sup>49</sup> In the same case, in a separate opinion concurring and dissenting in part, Judge Gould wrote that Section 230 should not immunize “social media companies’ use of their own algorithms, procedures, users, friends, or other means [used] to deliver content . . . to the users of the social media.”<sup>50</sup>

In *Bolger v. Amazon.com, LLC*, a California appellate court found that Section 230 did not provide immunity from strict products liability.<sup>51</sup> The plaintiff, Angela Bolger, bought a laptop computer battery from Amazon, the online marketplace. Amazon argued that it did not distribute or sell the product and so was not subject to strict products liability. The court disagreed, finding that “Amazon placed itself between” the buyer and the seller “in the chain of distribution” by “accept[ing] possession of the product from [the seller] and shipp[ing] the product in Amazon packaging.”<sup>52</sup> The court explained that strict products liability was “created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies.”<sup>53</sup> The court further noted, “The scope of strict liability has been expanded, where necessary, to account for ‘market realities’ and to cover new transactions in ‘widespread use . . . in today’s business world.’”<sup>54</sup>

The court found that Amazon’s relationship with the buyer and seller presented “just such a new transaction now in widespread use” and concluded that “Amazon should be held liable if a product sold through its website turns out to be

---

<sup>48</sup> *Force*, 934 F.3d at 77 (Katzmann, J., concurring in part and dissenting in part).

<sup>49</sup> *Gonzalez*, 2 F.4th at 913 (Berzon, J., concurring).

<sup>50</sup> *Id.* at 925 (Gould, J., concurring in part and dissenting in part).

<sup>51</sup> 267 Cal. Rptr. 3d 601, 605 (Cal. Ct. App. 2020).

<sup>52</sup> *Id.* at 604.

<sup>53</sup> *Id.* at 605.

<sup>54</sup> *Id.*

defective.”<sup>55</sup> The court stated that Section 230 did not apply because Bolger’s strict liability claims “depend on Amazon’s own activities, not its status as a speaker or publisher of content provided” by the seller for its product listing.<sup>56</sup>

Section 230 poses challenges when a product liability claim is brought against a social media platform as opposed to one where goods are sold. In *Herrick v. Grindr, LLC*, the plaintiff, whose former boyfriend was impersonating him on Grindr, sued the dating app claiming that it was a “defectively designed and manufactured product” because it lacked safety features.<sup>57</sup> The court found that Section 230 barred the products liability claims because the plaintiff’s claims depended on holding Grindr responsible for the content posted by another user.<sup>58</sup>

Similarly, in *In re Facebook*,<sup>59</sup> the Texas Supreme Court took an expansive approach to Section 230’s protections and found that it shielded Facebook because any product liability would be premised on “second-guessing of Facebook’s ‘decisions’” relating to its handling of third party content, even though “couched as failure to warn” or “some other tort.”<sup>60</sup>

However, the 9th Circuit recognized a “negligent design” claim brought against the social media platform, Snap.<sup>61</sup> In that case, the parents of two boys who died in a high-speed car accident sued Snap, alleging that the negligent design of its smartphone application encouraged the boys to drive at dangerous speeds, which led to their deaths.<sup>62</sup> The app allowed users to superimpose a filter to record their “real-life” speed. The plaintiffs alleged the company knew it incentivized young drivers to drive at dangerous speeds to capture high speed snaps.<sup>63</sup> The defendant argued that it was protected under Section 230, but the court disagreed: “Snap . . . enjoys CDA immunity only if it is (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).

<sup>58</sup> *Id.*

<sup>59</sup> *In re Facebook*, 625 S.W.3d 80 (Tex. 2021).

<sup>60</sup> *Id.* at 93.

<sup>61</sup> *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1087 (9th Cir. 2021).

<sup>62</sup> *Id.* at 1087.

<sup>63</sup> *Id.* at 1089.



action, as a publisher or speaker (3) of information provided by another information content provider.’”<sup>64</sup>

The court found that although Snap was a provider of an interactive computer service, the plaintiffs alleged a cause of action based upon negligent design—“a common products liability tort”—and that the duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA.<sup>65</sup> It concluded that because the claim “does not seek to hold Snap responsible as a publisher or speaker, but merely ‘seek[s] to hold Snapchat liable for its own conduct,’” Section 230 immunity was not available.<sup>66</sup>

In addition to Section 230, there are other potential hurdles with imposing product liability on companies for the algorithms they create.<sup>67</sup> First, it is unclear whether algorithms constitute products.<sup>68</sup> Second, the plaintiff must establish that the platform’s products are defective.<sup>69</sup> Furthermore, product liability claims must involve bodily injury, and causation may be difficult to prove.<sup>70</sup> As the rest of this Section explains, none of these hurdles are insurmountable.

---

<sup>64</sup> *Id.* at 1091.

<sup>65</sup> *Id.* at 1092.

<sup>66</sup> *Id.* at 1093 (alteration in original).

<sup>67</sup> Other commentators have wrangled with the issue of imposing product liability on algorithms. See Allison Zakon, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1107, 1107 (2020); Karni A. Chagal-Feferkorn, *Am I an Algorithm or a Product? When Product Liability Should Apply to Algorithmic Decision-Makers*, 30 STAN. L. & POL’Y REV. 61, 69 (2019); Kira M. Geary, Comment, *Section 230 of the Communications Decency Act, Product Liability, and a Proposal for Preventing Dating App Harassment*, 125 PA. ST. L. REV. 501, 505 (2021).

<sup>68</sup> RESTATEMENT (THIRD) PROD. LIAB. § 1 (1998) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”); see also Zakon, *supra* note 67, at 1121 (noting that a successful product liability claim requires first, establishing that “software qualifies as a product for the purpose of product liability” and second, that the design was defective under the risk-utility approach.); Chagal-Feferkorn, *supra* note 67, at 84 (concluding that it is “very likely, at least prima facie, that thinking algorithms” might be classified as “products, even if their entire essence is information, and even if their function replaces human services.”).

<sup>69</sup> DAN B. DOBBS ET AL., HORNBOOK ON TORTS 804 (2d ed. 2016) (“Whether a product is in some way defective remains the most central issue in products liability litigation.”).

<sup>70</sup> *Bolger v. Amazon*, 267 Cal. Rptr. 3d 601, 613 (Ct. App. 2020) (“[R]ecovery under the doctrine of strict liability is limited solely to ‘physical harm to person or property.’” (alteration in original)); see also DOBBS ET AL., *supra* note 69, at 803. (“In all but a few states, when a product’s defect causes commercial or economic harm

a. *Does Facebook provide a “product”?*

A potential hurdle to applying product liability to Facebook’s site is that it is not a “good” as defined by the Uniform Commercial Code (“UCC”).<sup>71</sup> Yet, the definition of “product” is not and should not be limited to the UCC definition of goods.<sup>72</sup> The Restatement defines “product” as “tangible personal property” and “[o]ther items . . . when the context of their distribution and use is sufficiently analogous” to tangible personal property to warrant application of product liability rules; it also expressly excludes services.<sup>73</sup>

Although Facebook is a platform for the exchange of ideas and information, it is *also* a product that offers certain standard features to the public. Simply because it is a publisher and distributor of content does not mean that it has no liability for anything it does or for its product offerings. As the Ninth Circuit noted in a case involving a different social media company, “our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools.”<sup>74</sup>

The intangibility of Facebook’s products should not preclude product liability.<sup>75</sup> Courts have often considered the applicability

---

without causing physical harms to persons or to property that is not part of the product itself, courts generally exclude tort claims for strict liability and negligence, and perhaps even for fraud.” (footnotes omitted); Geary, *supra* note 67, at 526–27 (“One major obstacle for bringing product liability claims against apps . . . is that most courts require that the plaintiff suffer a physical injury or damage to property,” but dating apps may pose a risk of physical harm if, for example, bad actors harass an individual in person).

<sup>71</sup> U.C.C. § 2-105(1) (AM. L. INST. & UNIF. L. COMM’N 2021) (“‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . .”).

<sup>72</sup> For a general discussion of the limitations of the UCC definition of goods as applied to modern networked products and the Internet of Things, see Stacy-Ann Elvy, *Hybrid Transactions and the Internet of Things: Goods, Services, or Software?*, 74 WASH. & LEE L. REV. 77, 89 (2017) (arguing that existing approaches to whether the UCC applies to networked goods are inadequate and proposing an approach that focuses on functionality).

<sup>73</sup> RESTATEMENT (THIRD) TORTS: PROD. LIABILITY § 19 (AM. L. INST. 1998).

<sup>74</sup> *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021).

<sup>75</sup> In a prescient article, David Lannetti, then an attorney and now a judge on the Norfolk Circuit court, wrote about the need for a “predictable” interpretation of product:

Current interpretations of the term found in products liability jurisprudence likely will be inadequate in the near future based on evolving technologies—and the products that these technologies will produce. A revised definition of “product” is necessary to ensure that products liability law recognizes new items that may not qualify as products under current

of products liability to the rendering of services in hybrid transactions which involve both a sale of a product and the provision of a service.<sup>76</sup> Courts typically distinguish between two types of services: those where the service provider is part of a profession, such as a doctor or dentist, and the essence of their function is to render an opinion; and those where the service provider, such as a beautician, is rendering services as part of a commercial enterprise.<sup>77</sup> The nature of Facebook's business is more akin to a commercial enterprise than to professional services. Facebook's business is even less service-like than a beautician's business. Most consumers refer to *using* Facebook or Instagram, and Facebook does not provide professional advice or opinions.

Cases where courts have rejected intangibles as products involved media communications, such as video games or television shows. In other words, the product was *content* which implicated First Amendment principles because content involves "intangible thoughts, ideas, and messages contained within games, movies, and website materials."<sup>78</sup> Facebook's products, by contrast, are not the content on its site, but the delivery mechanisms for the content, including the site itself, its design features, and its functionality.

The law should recognize that the nature of consumer products has evolved. Increasingly, more consumers are interacting with intangible products or with goods that incorporate software, digital content, and other intangible features. In an increasingly digital world, to require tangibility as a prerequisite to products liability would essentially immunize the world's biggest companies simply because they and their products exist primarily online. As other scholars have noted,

---

guidance but nevertheless should be governed by existing products liability law, based on the policy objectives undergirding this field of law.

David W. Lannetti, *Toward a Revised Definition of "Product" Under the Restatement (Third) of Torts: Products Liability*, 35 TORT & INS. L.J. 845, 848 (2000).

<sup>76</sup> See, e.g., *Newmark v. Gimbel's Inc.*, 258 A.2d 697, 700–02 (N.J. 1969) (finding that implied warranty of fitness of products existed to transaction where hairdresser used product in giving a permanent wave).

<sup>77</sup> *Id.* at 702–03.

<sup>78</sup> See *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 810–11 (W.D. Ky. 2000) ("[I]ntangible thoughts, ideas, and expressive content are not 'products' within the realm of the strict liability doctrine.").

definitions intended for yesterday's marketplace should not allow today's companies to escape liability for defective products.<sup>79</sup>

Expanding the definition of product to include intangibles is consistent with the objective of products liability law to ensure that the costs of injuries from defective products are borne by manufacturers.<sup>80</sup> As Justice Traynor noted, "It is to the public interest to discourage the marketing of products having defects that are a menace to the public."<sup>81</sup>

Definitional challenges were addressed by the *Bolger* court when Amazon argued that it did not fall under the conventional definition of "seller" or "distributor." Amazon characterized its business as a "service, i.e., a forum for others to sell their products, and therefore outside the rule of strict liability."<sup>82</sup> The court, however, rejected Amazon's arguments stating that "[d]ictionary definitions of seller and distributor do not define the scope of strict liability in California" nor did the commercial code section "defining a 'sale' for purposes of the law of sales."<sup>83</sup>

---

<sup>79</sup> Several scholars have discussed the challenges and limitations of limiting products liability to the traditional definition of tangible products in the modern economy. Stacy-Ann Elvy, for example, has noted that narrow definitions of "product" and "goods" pose significant challenges for consumers who seek to hold companies liable" for networked goods. STACY-ANN ELVY, *A COMMERCIAL LAW OF PRIVACY AND SECURITY FOR THE INTERNET OF THINGS* 165 (2021). Elvy also argues, "Products liability law's and the UCC's patchwork and sectoral coverage based on the severability of services and software from physical objects must come to an end. In short, the law in this area must evolve to recognize and incorporate the convergence of physical objects, services, software, and online systems." *Id.* at 316. Similarly, Susan Block-Lieb and Edward Janger note that "many consumer products are entirely intangible, consisting solely of services, such as internet services, intellectual property, or financial services." Susan Block-Lieb & Edward J. Janger, *Fit for Its Ordinary Purpose: Implied Warranties and Common Law Duties for Consumer Finance Contracts*, 59 HOUS. L. REV. 101, 105 (2021); see also Joseph L. Reutiman, *Defective Information: Should Information Be a 'Product' Subject to Products Liability Claims?*, 22 CORNELL J.L. & PUB. POL'Y 181, 182, 196 (2012) (noting that courts have not been consistent in applying the "tangible-intangible distinction" with respect to products and that the approach should be abandoned as it is "not conducive to consistent or intellectually coherent results."); David Berke, *Products Liability in the Sharing Economy*, 33 YALE J. ON REG. 603, 647-48 (2016) (discussing the difficulties of apply products liability to the sharing economy and proposing a new doctrinal framework); Nora Freeman Engstrom, *3-D Printing and Product Liability: Identifying the Obstacles*, 162 U. PA. L. REV. ONLINE 35, 36-37 (2013) (analyzing the issues arising with applying product liability law to 3-D printing).

<sup>80</sup> See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

<sup>81</sup> *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462 (1944).

<sup>82</sup> *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 618-19 (2020).

<sup>83</sup> *Id.* at 619.

The way that a company describes its business offerings reflects how it conceptualizes them which, in turn, affects how consumers perceive them. The vocabulary used to refer to products, services, and content differs. Patients visit their doctors, viewers watch shows, gamers play video games, and consumers use their toasters, hair dryers, and Facebook. Facebook itself refers to its websites and apps as “products.”<sup>84</sup> Its website states that the “Meta Products” include “Facebook (including the Facebook mobile app and in-app browser)” and “Instagram” and “[a]ny other features, apps, technologies, software, or services offered by Meta Platforms, Inc.”<sup>85</sup> Accordingly, Facebook should be liable for its own products just as other companies are for theirs.

*b. Are Facebook’s products defective?*

There are generally three types of product defects: manufacturing defects, design defects, and information or marketing defects.<sup>86</sup> For Facebook and other social media sites, design and information defects are relevant; manufacturing defects typically would not be.<sup>87</sup>

*i. Design defects.*

A products liability claim based upon a design defect involves a reasonableness or “risk-utility balancing” test.<sup>88</sup> This test considers whether there are reasonable design alternatives that would have reduced the risk of foreseeable harm to the plaintiff taking into consideration factors such as the potential and seriousness of injury, the cost of adopting the alternative

---

<sup>84</sup> *What are the Meta Products?*, FACEBOOK, [www.facebook.com/help/1561485474074139/?helpref=uf\\_share](https://www.facebook.com/help/1561485474074139/?helpref=uf_share) [https://perma.cc/92DZ-YPMX] (last visited Feb. 14, 2023).

<sup>85</sup> *Id.*; see also *The Meta Company Products?*, FACEBOOK, [www.facebook.com/help/195227921252400/?helpref=uf\\_share](https://www.facebook.com/help/195227921252400/?helpref=uf_share) [https://perma.cc/JAF4-UQ2U] (last visited Feb. 14, 2023).

<sup>86</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (2022); DOBBS ET AL., *supra* note 69, at 805.

<sup>87</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (2022) (“Questions of design defects and defects based on inadequate instructions or warnings arise when the specific product unit conforms to the intended design but the intended design itself, or its sale without adequate instructions or warnings, renders the product not reasonably safe.”).

<sup>88</sup> *Id.* at § 2, cmt. d.

design, and the likelihood of reducing injury by doing so.<sup>89</sup> Thus, “a design is defective if the product could have been made safer by the adoption of a reasonable alternative design.”<sup>90</sup> The “open and obvious” nature of the design defect does not preclude a product liability claim although it may be relevant to the issue of whether there were reasonable alternative designs.<sup>91</sup>

There are several major types of design defects with Facebook. First, there are those features that encourage impulsive behaviors, such as the “Like” button. Then, there are features that encourage unhealthy and addictive behavior like the “eternal scroll,” which allows users to continuously read content without clicking to another page, thus gluing users to the site. Finally, there are “dark patterns”<sup>92</sup> and default settings that trick users, facilitate privacy intrusions, and make it more difficult for users to control their content and personal information. Many of the design features are defective in more than one way. For example, Facebook allows users to post pictures and personal information of others without their express consent. Twitter, by contrast, has recently implemented a policy that limits users’ ability to do so, thus providing an alternative reasonable design for a social media site that may reduce the likelihood of injury to those whose images are posted without their consent.<sup>93</sup>

Facebook’s use of deceptive website interfaces to trick users into privacy disclosures is not new or accidental. In fact, the company’s use of dark patterns is so notorious and widespread that there is even a term—“Privacy zuckering”—to refer to the practice of tricking users into publicly sharing more information

---

<sup>89</sup> *Id.* (“[W]hether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design . . . rendered the product not reasonably safe.”).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (noting that the Restatement “does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness”).

<sup>92</sup> “Dark patterns” are website and app designs to trick users or manipulate them into doing things they didn’t intend to do. See *What is Deceptive Design?*, DECEPTIVE DESIGN, <https://www.deceptive.design> [<https://perma.cc/5DKS-QEJ3>] (last visited Sept. 14, 2022) (defining dark patterns as “tricks used in websites and apps that make you do things that you didn’t mean to, like buying or signing up for something”); see also BERNSTEIN, *supra* note 11 Chapter 3 (discussing website design that hooks users).

<sup>93</sup> Twitter Safety, *Expanding Our Private Information Policy to Include Media*, TWITTER (Nov. 20, 2021), [https://blog.twitter.com/en\\_us/topics/company/2021/private-information-policy-update#](https://blog.twitter.com/en_us/topics/company/2021/private-information-policy-update#) [<https://perma.cc/5JCZ-Q9ZR>].

that they intended.<sup>94</sup> The site's default settings also make it difficult to remove information that a user might have accidentally disclosed or posted.<sup>95</sup> For example, setting up an account is quick and easy but deleting an unpublished or deactivated account takes several days.<sup>96</sup> Other design decisions make it difficult or impossible to remove content. For example, photos posted of a user by others cannot be removed by the user.<sup>97</sup>

With social media sites, it may be difficult to distinguish the harms caused by the content from the harms caused by the algorithms pushing out that content. One way to draw more tightly the causal connection between the product and the harm it causes is to focus on the physical and mental effects of using Facebook. Facebook has conducted much research in-house concerning the effects of its products on its users. Even if Facebook refuses to voluntarily release much of its internal research to the public regarding what it knows about how its products affect users, it will have to do so if compelled by a court as part of a product liability lawsuit.

Facebook's harms are not limited to emotional harms caused by viewing content on its website; the company intentionally designs its products to be addictive. Because its very business model depends on user engagement and attracting the most users for the longest period of time on its website,<sup>98</sup> Facebook's

---

<sup>94</sup> Tim Jones, *Facebook's "Evil Interfaces"*, ELEC. FRONTIER FOUND. (Apr. 29, 2010), <https://www.eff.org/deeplinks/2010/04/facebooks-evil-interfaces> [https://perma.cc/3TCA-YE37]; see also *Privacy Zuckering*, DECEPTIVE DESIGN, <https://www.deceptive.design/types/privacy-zuckering> [https://perma.cc/YX24-WGMX] (last visited Sept. 12, 2022).

<sup>95</sup> Gorjan Jovanovski, *Dark Patterns Facebook Uses to Stop You From Deleting Data*, UX COLLECTIVE (Mar. 24, 2018), <https://uxdesign.cc/6-dark-patterns-facebook-uses-to-stop-you-from-deleting-data-c0e3634be1bf> [https://perma.cc/GD5E-2APX].

<sup>96</sup> *Id.*; see also *Delete Account Permanently*, FACEBOOK HELP CTR., <https://www.facebook.com/help/search?helpref=search&query=delete%20account%20permanently> [https://perma.cc/5PY6-FPTQ] (last visited Sept. 12, 2022).

<sup>97</sup> *How Do I Remove a Tag from a Photo or Post I'm Tagged in on Facebook?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/140906109319589?helpref=related> [https://perma.cc/FH89-SKMH] (last visited Sept. 12, 2022).

<sup>98</sup> Henry Farrell, *It's No Accident That Facebook is So Addictive*, WASH. POST (Aug. 6, 2018, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/06/its-no-accident-that-facebook-is-so-addictive/> [https://perma.cc/9A9J-NHDP] (noting that Facebook is in the "social engineering business" and tries to maximize user engagement); The Journal, *The Facebook Files, Part 4: The Outrage Algorithm*, WALL ST. J. (Sept. 18, 2021, 11:30 AM), <https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-4-the-outrage->

products are deliberately configured so users remain on the site as long as possible.<sup>99</sup> Several of Facebook’s former investors and employees have revealed that Facebook intentionally designed its website’s features to be addictive and to encourage engagement in a way that harms its users.<sup>100</sup> Sean Parker, an early investor in Facebook and its founding President, caused a stir when he publicly stated that the company was “exploiting a vulnerability in human psychology,” which its inventors consciously knew:<sup>101</sup>

The thought process that went into building these applications, Facebook being the first of them, . . . was all about: “How do we consume as much of your time and conscious attention as possible?” And that means that we need to sort of give you a little dopamine hit every once in a while, because someone liked or commented on a photo or a post or whatever. And that’s going to get you to contribute more content, and that’s going to get you . . . more likes and comments. . . . The inventors, creators—it’s me, it’s Mark [Zuckerberg], it’s Kevin Systrom on Instagram, it’s all of these people—understood this consciously. And we did it anyway.<sup>102</sup>

Users get a dopamine rush with each new notification in a way that one former Facebook engineer compared to a gambler at a slot machine.<sup>103</sup> One study concluded that there was “some evidence to support the argument that uses and gratifications of Facebook are linked with Facebook addiction,” but that further

---

algorithm/e619fbb7-43b0-485b-877f-18a98ffa773f [https://perma.cc/96KX-TLHB] (explaining how Facebook changed its algorithms to maximize user engagement).

<sup>99</sup> Jon Brooks, *Tech Insiders Call Out Facebook for Literally Manipulating Your Brain*, KQED (May 25, 2017), <https://www.kqed.org/futureofyou/379828/tech-insiders-call-out-facebook-for-literally-manipulating-your-brain> [https://perma.cc/52W9-BPLF].

<sup>100</sup> See Hilary Andersson, *Social Media Apps Are ‘Deliberately’ Addictive to Users*, BBC NEWS (July 4, 2018), <https://www.bbc.com/news/technology-44640959> [https://perma.cc/TV2Z-TWDU]; Farrell, *supra* note 98; James Vincent, *Former Facebook Exec Says Social Media is Ripping Apart Society*, VERGE (Dec. 11, 2017), <https://www.theverge.com/2017/12/11/16761016/former-facebook-exec-ripping-apart-society> [https://perma.cc/Q35N-CN9T].

<sup>101</sup> Andersson, *supra* note 100.

<sup>102</sup> Mike Allen, *Sean Parker Unloads on Facebook: “God Only Knows What It’s Doing to Our Children’s Brains”*, AXIOS (Nov. 9, 2017), <https://www.axios.com/2017/12/15/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-1513306792> [https://perma.cc/XN46-HUDM].

<sup>103</sup> See Andersson, *supra* note 100 (citing Sandy Parakilas, a former Facebook platform manager, who commented that “Social media is very similar to a slot machine.”).



research was needed before these arguments could be conclusive.<sup>104</sup>

It is foreseeable that designing a website that is intended to hold users captive to a screen will lead to physical and mental harms associated with Internet addiction.<sup>105</sup> Prolonged use of Facebook's products harms the physical and mental well-being of its users because they are sitting in front of a computer or scrolling on their phone for long periods of time, and Facebook intentionally designed its products so they would do just that.<sup>106</sup>

The addictive properties of their products may be especially harmful to children and adolescents whose brains and bodies are still developing, and who may be more vulnerable to social isolation and depression.<sup>107</sup> Facebook claims that "many teens" feel better, not worse, after using its services.<sup>108</sup> One study, however, indicated that the "lift in mood" that comes from Facebook use led to "deficient self-regulation, possibly due to

---

<sup>104</sup> Tracii Ryan et al., *The Uses and Abuses of Facebook: A Review of Facebook Addiction*, 3 J. BEHAV. ADDICTIONS 133, 133 (2014).

<sup>105</sup> For example, studies have shown that sitting raises risks for obesity, diabetes, metabolic syndrome, and a host of other harmful health consequences. *The Dangers of Sitting*, HARV. HEALTH PUBL'G (May 23, 2019), <https://www.health.harvard.edu/pain/the-dangers-of-sitting> [<https://perma.cc/49HG-E76P>]; Kathy Katella, *Why Is Sitting So Bad for Us?*, YALE MED. (Aug. 28, 2019), <https://www.yalemedicine.org/news/sitting-health-risks> [<https://perma.cc/Q7NS-GN65>]; Edward R. Laskowski, *What Are the Risks of Sitting Too Much?*, MAYO CLINIC (Aug. 21, 2020), <https://www.mayoclinic.org/healthy-lifestyle/adult-health/expert-answers/sitting/faq-20058005> [<https://perma.cc/FSK2-HZ62>].

<sup>106</sup> Gary W. Small et al., *Brain Health Consequences of Digital Technology Use*, 22 DIALOGUES CLINICAL NEUROSCIENCE 179, 180–81 (2020); *Electronic Screen Alert: Avoid This Vision Risk*, HARV. HEALTH PUBL'G (Aug. 1, 2017), <https://www.health.harvard.edu/diseases-and-conditions/electronic-screen-alert-avoid-this-vision-risk> [<https://perma.cc/LX43-ELKY>]; *Computer-Related Injuries*, BETTER HEALTH CHANNEL (May 31, 2015), <https://www.betterhealth.vic.gov.au/health/healthyliving/computer-related-injuries#bhc-content> [<https://perma.cc/W738-JZ2M>].

<sup>107</sup> One study, for example, found changes in the gray matter density of internet addicted adolescents. Yan Zhou et al., *Gray Matter Abnormalities in Internet Addiction: A Voxel-Based Morphometry Study*, 79 EUR. J. RADIOLOGY 92, 93 (2011); see also Brian A. Primack et al., *Social Media Use and Perceived Social Isolation Among Young Adults in the U.S.*, 53 AM. J. PREVENTATIVE MED. 1, 6 (2017); James E. Boone et al., *Screen Time and Physical Activity During Adolescence: Longitudinal Effects on Obesity in Young Adulthood*, 4 INT. J. BEHAV. NUTRITION & PHYSICAL ACTIVITY (2007).

<sup>108</sup> Pratiti Raychoudhury, *What Our Research Really Says About Teen Well-Being and Instagram*, META: NEWSROOM (Sept. 29, 2021, 4:43 PM), <https://about.fb.com/news/2021/09/research-teen-well-being-and-instagram/> [<https://perma.cc/9WBU-V6DN>].

negative reinforcement.”<sup>109</sup> It concluded that this could, in severe cases, lead to “negative life consequences.”<sup>110</sup>

Features such as the “Like” button and the “endless” or “infinite scroll,” where the next page loads as the user scrolls down the page, are widely known to encourage addictive behavior. The combination of engagement algorithms and addictive features, such as the endless scroll and the Like button, harms the user in concrete and specific ways. Dr. Robert Lustig, a professor of pediatrics at the University of California, San Francisco, wrote:

The ‘Like’ button made Facebook the most accessed website on the entire internet. That ‘Like’ button wields more power than virtually any fist, but new data suggests it damages both the Liker and the Likee. . . . One recent study demonstrated association between the use of Facebook and the development of depression, but only in those teen girls who used Facebook as a surveillance tool to compare themselves to others, which, realistically, is most of the adolescent population.<sup>111</sup>

In another study, participants underwent MRI scanning while being shown a fake item for a “thumbs-up or thumbs-down.” Dr. Lustig reported: “The nucleus accumbens (NA) lit up only when the subjects Liked something that they thought that others Liked as well— in other words, they exhibited the herd mentality. If they Liked something that wasn’t popular, no dopamine rush was noted.”<sup>112</sup>

It is important to note that it wasn’t the *content* that created the dopamine rush, but the rush of being part of a mob—a mob that could be organized and joined with the Like button. The authors of another study showed that Facebook use predicted “negative shifts” in well-being in young adults and undermined well-being.<sup>113</sup> Facebook use has raised so much concern among researchers that one referred to the study of “Facebook addiction” as an “emerging field.”<sup>114</sup>

The use of sophisticated technology and the engineering of its products creates a harm that is separate and distinct from

---

<sup>109</sup> Ryan et al., *supra* note 104, at 145.

<sup>110</sup> *Id.*

<sup>111</sup> ROBERT H. LUSTIG, *THE HACKING OF THE AMERICAN MIND* 196 (2017).

<sup>112</sup> *Id.* at 197.

<sup>113</sup> Ethan Kross et al., *Facebook Use Predicts Declines in Subjective Well-Being in Young Adults*, 8 PLOS ONE 1 (2013).

<sup>114</sup> Ryan et al., *supra* note 104, at 141; *see also* Anindita Chakraborty, *Facebook Addiction: An Emerging Problem*, 11 AMER. J. PSYCHIATRY RESIDENTS’ J. 7 (2016).

any harm that the content itself might inflict. A user who watches cat videos and news articles about cats is harmed not because the content itself is harmful—they are only cat videos after all—but because Facebook's algorithms feed the user's interest, and its design features encourage obsessions, physical inactivity, and other unhealthy and harmful behavior.

Facebook could give the user more control over its content. For example, it could make it easier to select words or hashtags users *don't* want to see, rather than the limited and hard-to-find controls that it currently offers.<sup>115</sup> It could also provide a reasonable alternative to algorithms that personalize and promote content based upon user data by creating algorithms that instead show content in user's feeds in chronological order.<sup>116</sup>

In addition, Facebook could offer the *same* content but deliver it in a more moderate or measured fashion. It could stop using the “endless” scroll and “Like” features. It could include pop-up timers, cooling periods, and delaying features so that user's posts do not appear immediately. It could change its default settings to show posts in chronological order. All these changes would curb impulsivity, slow the frequency of dopamine rushes, and encourage healthier use of its products. Instead, its algorithms push out content in a form intended to glue the user to the screen like a zombie, increasing the chances of computer-related physical and mental injuries. The addictive features are especially concerning for children and young adults whose brains are malleable and thus, more vulnerable. Prolonged attachment to its website may cause mental and emotional harm not only because the substance of the content may be false or harmful, but

---

<sup>115</sup> Guy Rosen & Tessa Lyons, *Remove, Reduce, Inform: New Steps to Manage Problematic Content*, META (Apr. 10, 2019), <https://about.fb.com/news/2019/04/remove-reduce-inform-new-steps/> [<https://perma.cc/N2XK-TSNS>].

<sup>116</sup> This is something that Facebook used to do. Stern, *supra* note 45.

Years ago, Facebook and others moved away from chronological—newest to oldest—feeds. Now what we see is ordered by computer systems that use our personal data and habits to determine which content would be most alluring to us. . . . [T]hose same systems can spread incendiary content, misinformation and more. They can also drive you into rabbit holes of similar content.

*Id.*

also because staring at *any* content for long periods of time is mentally and emotionally harmful.<sup>117</sup>

A bipartisan bill introduced by Senators Edward Markey and Bill Cassidy would update the Children’s Online Privacy Protection Act and proposes, among other things, creating an online “Eraser Button,” which would permit eliminating personal information for a child or teen.<sup>118</sup> An Eraser Button is a reasonable alternative to the cumbersome and hard-to-find privacy settings currently required on many social media websites. Another bill introduced by Senator Markey and Senator Richard Blumenthal, the Kids Internet Design and Safety Act, would ban “auto-play” settings, push alerts, badges and certain recommendations.<sup>119</sup> It would also ban badges that reward kids for increasing time on the app or website; ban features that quantify popularity, such as “like” buttons and follower counts; and require websites to implement easier mechanisms for reporting harmful content.<sup>120</sup> All these proposals are reasonable alternatives to the current design of Facebook’s products and should apply to *all* users, not just children and teenagers.

Facebook could easily implement all the proposed features in the two aforementioned bills without too much cost, but doing so

---

<sup>117</sup> Beth Ann Mayer, *The Mental Health Effects of Being Constantly Online*, HEALTHLINE (Aug. 21, 2020), <https://www.healthline.com/health/the-mental-health-effects-of-being-constantly-online> [<https://perma.cc/A9T5-SFKF>].

<sup>118</sup> Press Release, Edward Markey, Sen., U.S. Cong., Senators Markey and Cassidy Propose Bipartisan Bill to Update Children’s Online Privacy Rules (June 24, 2021), <https://www.markey.senate.gov/news/press-releases/senators-markey-and-cassidy-propose-bipartisan-bill-to-update-childrens-online-privacy-rules> [<https://perma.cc/3B-KL-HH9A>]. Similar legislation has already been enacted in California. Marc Sollinger, *California “Eraser Law” Lets Minors Remove Embarrassing Online Content*, PBS NEWS HOUR (Sept. 25, 2013, 5:21 PM), <https://www.pbs.org/newshour/nation/california-eraser-law-lets-minors-remove-embarrassing-online-content> [<https://perma.cc/5JPR-P4W9>].

<sup>119</sup> Press Release, Edward Markey, Sen., U.S. Cong., Senators Markey and Blumenthal Introduce First-Of-Its-Kind Legislation to Protect Children Online From Harmful Content, Design Features (Mar. 5, 2020), [https://www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-introduce-first-of-its-kind-legislation-to-protect-children-online-from-harmful-content-design-features\\_](https://www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-introduce-first-of-its-kind-legislation-to-protect-children-online-from-harmful-content-design-features_) [<https://perma.cc/8CLT-VQWQ>]; see also Press Release, Edward Markey, Sen., U.S. Cong., Senators Markey and Blumenthal, Rep. Castor Reintroduce Legislation to Protect Children and Teens From Online Manipulation and Harm (Sept. 30, 2021) [hereinafter Manipulation and Harm], <https://www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-rep-castor-reintroduce-legislation-to-protect-children-and-teens-from-online-manipulation-and-harm> [<https://perma.cc/WKN6-WSG3>].

<sup>120</sup> Manipulation and Harm, *supra* note 119.

would reduce user engagement. Rather than implementing default settings that promote healthy use, the company sets defaults to those that generate more user activity and more ad revenue—and encourage addiction, privacy disclosures, and the erosion of mental health.<sup>121</sup>

The previously mentioned study involving alcohol promotions assigned ten fictitious Twitter and Instagram profiles ages of 13, 15, 17, 19, and 21.<sup>122</sup> All the profiles were able to view and like, comment, and forward the official pages of twenty-five selected alcohol brands. Twitter's age gate prevented underage profiles from following the official company pages and from receiving promotional advertising and updates from alcohol brands.<sup>123</sup> Only the two legal drinking age profiles received direct-to-consumer promotional material via their Twitter account. Instagram, by contrast, did not employ an age screening mechanism and, thus, all the profiles on Instagram, including the underage ones, received alcohol industry advertisement directly to their smartphones.<sup>124</sup> The Instagram profiles "received 12–13 updates from alcohol companies each day (approximately 91 per week), regardless of age."<sup>125</sup> Furthermore, the frequency of the alcohol advertising updates increased as the weekend approached, "reaching its peak on Thursday and Friday."<sup>126</sup> Facebook's business decision to omit effective age screening controls permits the harm and constitutes the defect in its product.

ii. Information defects.

Generally, companies should provide reasonable instructions or warnings about foreseeable risks posed by a product, including how to use it safely.<sup>127</sup> An adequate warning alerts the user to

---

<sup>121</sup> One commentator noted that the "out-of-the-box social-media experience keeps you hooked on your feeds and sharing your personal data" and that switching the defaults could "mean the difference between a healthy social-media environment and a toxic one with negative mental-health impact, especially for kids." Stern, *supra* note 45.

<sup>122</sup> See Barry, *supra* note 16, at 487.

<sup>123</sup> *Id.* at 489.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (AM. L. INST. 1998) (a product is defective when there are "inadequate instructions or warnings" that pose "foreseeable risks of harm" that could have been avoided or reduced by the "provision of reasonable instructions or warnings by the seller or other distributor,

potential dangers and informs the user of ways to reduce the risk of harm from using the product.<sup>128</sup> There is no duty to warn of obvious risks.<sup>129</sup>

Facebook should warn its users about the addictive nature of its products, the misinformation on its site, and the problems related to inadvertent privacy disclosures. Instead, it does the opposite by proclaiming its products are safe to use, even for adolescents. It persists in making public statements about its efforts to protect user privacy, including on its website where its self-proclaimed efforts to protect privacy are prominently displayed, but the specifics of *how* users can protect their privacy are difficult to find.<sup>130</sup> For example, Facebook has a section on “Privacy Basics” where the user can click through pages with large images that state “How You’re Protected” and “We have top-rate security measures in place to help protect you and your data when you use Facebook.”<sup>131</sup> However, if a user tries to find out *what* specifically those “top rate” security measures are and how to implement them, the user is led to two separate hyperlinks that lead to pages with fine print, no images, and generic information on online security measures such as “Protect your password” and “Never share your login information,”<sup>132</sup> which hardly seem like “top rate” security measures. Facebook touts certain content control features on its platform, but information on how to actually use them is difficult to find as they are buried within other pages.<sup>133</sup> By contrast, TikTok, another social media site, makes it much easier to find specific

---

or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.”).

<sup>128</sup> *Liriano v. Hobart Corp.*, 170 F.3d 264, 270 (2d Cir. 1999) (noting the “complex functions of warnings” which not only “exhort its audience to be careful” but “also affect what activities the people warned choose to engage in.”).

<sup>129</sup> See *Dempsey v. Va. Dare Stores*, 186 S.W.2d 217, 220 (Mo. Ct. App. 1945); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995) (noting that there is “no duty to warn of obvious” risks).

<sup>130</sup> *How You’re Protected*, FACEBOOK PRIV. BASICS, facebook.com/about/basics/stay-safe-and-secure/how-youre-protected#1 [https://perma.cc/GAG7-KSRF] (last visited Sept. 13, 2022).

<sup>131</sup> *Id.*

<sup>132</sup> See generally *Meta Privacy Policy - How Meta Collects and Uses User Data*, PRIV. CTR., www.facebook.com/privacy/policy/?entry\_point=data\_policy\_redirect&entry=0 (last visited Sept. 13, 2022); *What Can I Do to Keep My Facebook Account Secure?*, FACEBOOK HELP CTR., www.facebook.com/help/213481848684090 [https://perma.cc/Z8VR-TURU] (last visited Sept. 13, 2022).

<sup>133</sup> Rosen & Lyons, *supra* note 115.

steps to take to control unwanted content.<sup>134</sup> The manner in which information is presented is an essential part of effective notice. Facebook's presentation of the dangers of using its products is unhelpful and uninformative, and its feeble efforts fail as reasonable notice.

Some may argue that the addictive qualities of Facebook, the misinformation and bullying on the site, and the harms to privacy are generally known and so a warning would be superfluous. But the potential harms of Facebook are not open and obvious to the ordinary consumer the way that operating a product such as an electric saw is obviously dangerous.<sup>135</sup>

Facebook's lack of transparency, its public statements, and its website design further obscure the dangers of using its products. Even those who have heard of the dangers of using Facebook may be assuaged or convinced by the company's public statements, including those on its website, which deny, discount, or distract from potential harms.<sup>136</sup> As the Facebook former employee and whistleblower Frances Haugen warned in her Senate testimony, due to the company's lack of transparency, the public must take Facebook's marketing message on "blind faith."<sup>137</sup> She stated, "when Facebook is directly asked questions as important as, how do you impact the health and safety of our children, they choose to mislead and misdirect."<sup>138</sup> As a result, she stated, the public has "no visibility" into how the platform operates.<sup>139</sup>

---

<sup>134</sup> *Limiting Unwanted Content*, TIKTOK, <https://newsroom.tiktok.com/en-us/limiting-unwanted-content> [<https://perma.cc/94KW-UBBB>] (last visited Sept. 13, 2022).

<sup>135</sup> *See Hood v. Ryobi Am. Corp.*, 181 F.3d 608, 611 (4th Cir. 1999).

<sup>136</sup> Facebook has stated that "Facebook builds its products to create value, not to be addictive." *What 'The Social Dilemma' Gets Wrong*, FACEBOOK, <https://about.fb.com/wp-content/uploads/2020/10/What-The-Social-Dilemma-Gets-Wrong.pdf> [<https://perma.cc/QG3K-PN64>] (last visited Sept. 13, 2022). It also claims that it takes steps to protect people's privacy, reduce polarization, and fight misinformation. *Id.* In response to the Senate testimony from Frances Haugen, Facebook's CEO Mark Zuckerberg wrote a post that the company cares "deeply about issues like safety, well-being and mental health." Mark Zuckerberg, FACEBOOK (Oct. 5, 2021), <https://www.facebook.com/zuck/posts/10113961365418581> [<https://perma.cc/9FT9-S29D>].

<sup>137</sup> PBS NewsHour, *Facebook Whistleblower Testifies to Senate on Children and Social Media*, YOUTUBE, at 17:10 (Oct. 5, 2021), <https://youtu.be/h/HGIwcJ7THU> [<https://perma.cc/5HGW-DYK9>].

<sup>138</sup> *Id.* at 17:18.

<sup>139</sup> *Id.* at 18:10.

Furthermore, to argue that warnings are unnecessary because the harms of Facebook are obvious misstates the purpose of warnings. As Judge Guido Calabresi noted, a warning has different functions and, “where the function of a warning is to assist the reader in making choices, the value of the warning can lie as much in making known the existence of alternatives as in communicating the fact that a particular choice is dangerous. It follows that the duty to warn is not necessarily obviated merely because a danger is clear.”<sup>140</sup>

Some users may have heard about the issues with using Facebook’s products but may not understand how to use them in a safe manner. This is particularly troublesome as Facebook does not provide parents with the requisite information required to screen content, as mandated under section 230 (d). Finally, given the ubiquity of Facebook use, and the compulsory nature of joining it to participate in certain organizations or activities, abstaining from Facebook use altogether may not be a viable option.

## II. CONTRACT-BASED LIABILITY

A product that does not conform to the company’s own public representations and express warranties is arguably a defective product. In some jurisdictions, a breach of an express warranty makes a product unreasonably dangerous.<sup>141</sup> Claims based upon contract or breach of warranty do not implicate section 230 because they are not based upon content posted by others. Instead, the claims are based upon the company’s own statements about its products and services. Broken promises made by a company might provide the basis for contract damages. Even if the promise is not specific enough to constitute a warranty or contract, it may be specific enough to establish a claim for reliance damages or unjust enrichment, which could include disgorgement of gains from improper conduct.<sup>142</sup>

Facebook has repeatedly made public statements about its efforts to protect children, enhance security measures on its

---

<sup>140</sup> *Liriano v. Hobart Corp.*, 170 F.3d 264, 270 (2d Cir. 1999).

<sup>141</sup> *See, e.g.*, LA. STAT. ANN. § 9:2800.58 (1988).

<sup>142</sup> *See, e.g., In re Facebook, Inc.*, 402 F.Supp.3d 767, 803 (2019) (“[E]ven if the plaintiffs suffered no economic loss from the disclosure of their information, they may proceed at this stage on a claim for unjust enrichment to recover the gains that Facebook realized from its allegedly improper conduct.”).



website, and monitor offensive, harmful, and false information.<sup>143</sup> It also makes the following affirmative statements in its Terms of Service: “We employ dedicated teams around the world . . . and develop advanced technical systems to detect potential misuse of our Products, harmful conduct towards others, and situations where we may be able to help support or protect our community . . . .”<sup>144</sup>

In addition, Facebook’s Community Standards outline “what is and isn’t allowed” and state: “We’re committed to making Facebook a safe place. . . . Content that threatens people has the potential to intimidate, exclude or silence others and isn’t allowed on Facebook.”<sup>145</sup>

The statement is specific enough—“isn’t allowed”—that it could constitute an express warranty, and a promise that Facebook will take action to remove and reduce threatening content.

Although Facebook’s products are not goods as defined under the UCC, courts have often cited the UCC by analogy where goods are not involved.<sup>146</sup> Under the UCC, a seller may make express warranties by affirmatively making a factual statement or promise about a product or by sending a sample or model, which becomes part of the basis of the bargain.<sup>147</sup> Many courts do not require reliance as an element in a claim for breach of an

---

<sup>143</sup> Antigone Davis, *Preventing Child Exploitation on Our Apps*, META (Feb. 23, 2021), <https://about.fb.com/news/2021/02/preventing-child-exploitation-on-our-apps/> [https://perma.cc/77KA-ZMM2].

<sup>144</sup> *Terms of Service*, META (July 26, 2022), [https://www.facebook.com/legal/terms/plain\\_text\\_terms](https://www.facebook.com/legal/terms/plain_text_terms) [https://perma.cc/Q5WM-W4CZ].

<sup>145</sup> *Facebook Community Standards*, META, <https://transparency.fb.com/policies/community-standards/> [https://perma.cc/B8U5-BLJS] (last visited Sept. 15, 2022).

<sup>146</sup> *See, e.g.*, JUDY L. WOODS, 7 IND. PRAC., UCC FORMS ANNOTATED § 26-1-2-102 (3d ed. 2021) (“The application of the UCC is limited to those transactions covered by the statute, but Indiana Courts regularly apply the UCC by analogy in a number of contexts.”); *see also* Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Says About the Scope of Contract Law in the Information Age*, 38 DUQ. L. REV. 255, 264 (2000) (noting the pervasive influence of Article 2 and how it “affects transactions where courts treat the transaction as if it were a transaction in goods when it is not, where courts apply the law of sales by analogy to a transaction admittedly not a transaction in goods, and by shaping views of what is appropriate common law for transactions other than transactions in goods” (emphases in original)).

<sup>147</sup> U.C.C. § 2-313(1)(b) (“Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.”).

express written warranty,<sup>148</sup> although some do. UCC § 2-313(2) states that formal words such as “warrant” or “guarantee” or a “specific intention to make a warranty” are not necessary to create an express warranty.<sup>149</sup> An express warranty may be contained in a contract, but a company’s public statements in advertisements and marketing materials may also constitute an express warranty.<sup>150</sup>

Facebook’s Terms of Service limit their liability, disclaim warranties, and contain an “as-is” clause.<sup>151</sup> However, they cannot protect Facebook from its *express warranties and representations*. “[A] disclaimer is inoperative if it is inconsistent with an express warranty or if it is unreasonable.”<sup>152</sup> Furthermore, a limitation of liability clause must not be

<sup>148</sup> *Norcold, Inc. v. Gateway Supply Co.*, 798 N.E.2d 618, 623–24 (2003); *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 849 (N.D. Cal. 2012) (“Proof of reliance on specific promises” is not required to prevail on a breach of express warranty claim in California).

<sup>149</sup> U.C.C. § 2-313(2) (AM. L. INST. & UNIF. L. COMM’N 1951).

<sup>150</sup> *Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012) (“Product advertisements, brochures, or packaging can serve to create part of an express warranty.”); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467 (S.D.N.Y. 2014) (“[A]n express warranty ‘may include specific representations made by a manufacturer in its sales brochures or advertisements regarding a product upon which a purchaser relies.’”).

<sup>151</sup> *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php/> [<https://perma.cc/2BLF-2HPH>] (last visited Aug. 23, 2022).

[W]e also DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT. We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct (whether online or offline) or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content).

*Id.*

<sup>152</sup> See CAL. COM. CODE § 2313 cmt. 6 (West 2002); *Soc’y Nat’l Bank v. Pemberton*, 409 N.E.2d 1073, 1076 (Ohio Mun. 1979) (explaining that where warranty disclaimers “cannot reasonably be construed as consistent with the seller’s oral express warranty, the express warranty will predominate and the inconsistent provisions are inoperative to the extent they are unreasonable.”); *Viking Yacht Co. v. Composites One LLC*, 496 F. Supp. 2d 462, 470 (D.N.J. 2007) (“[A] clear and conspicuous” disclaimer “may nevertheless be deemed inoperable if ‘unreasonably inconsistent’ with the express warranties given.” (citation omitted)); *Miller v. Hubbard-Wray Co., Inc.*, 630 P.2d 880, 883 (Or. Ct. App. 1981) (finding that where there is a conflict between an oral express warranty and a written disclaimer, the “disclaimer . . . must yield to the express warranty.”).

unconscionable.<sup>153</sup> Excluding damages for personal injury is prima facie unconscionable.<sup>154</sup>

Facebook's Terms of Service and other terms on its website may provide the basis for a breach of contract claim. The plaintiffs in the case, *In re Facebook, Inc.*,<sup>155</sup> adequately alleged that Facebook breached its contract when it disclosed user information to apps and business partners without permission. The court found that Facebook's Statement of Rights and Responsibilities promised that users "own all of the content and information" that they post and that they "can control how it is shared" through privacy and application settings.<sup>156</sup> Furthermore, the Data Use Policy stated that apps would be allowed to use information "only in connection with" a user's friends.<sup>157</sup>

The *In re Facebook, Inc.* plaintiffs also brought a claim of breach of the implied covenant of good faith and fair dealing which "protects the parties' 'reasonable expectations'" under the contract.<sup>158</sup> The federal district court stated that the plaintiffs' claim for breach of the implied covenant of good faith and fair dealing was even stronger than that for breach of contract because

even if Facebook were, at a later stage in the litigation, able to identify a technical argument for why it did not *quite* violate the literal terms of its contract with its users, it would be difficult to conclude (if the factual allegations in the complaint are true) that Facebook did not frustrate the purposes of the contract, and intentionally so.<sup>159</sup>

In addition to its promise that users can control how their content is shared, Facebook makes several other promises to its users. For example, its Terms of Service provide:

We employ dedicated teams around the world and develop advanced technical systems to detect misuse of our Products, harmful conduct towards others, and situations where we may be able to help support or protect our community. If we learn of content or conduct like this, we will take appropriate action—for example, offering help, removing content, removing or

---

<sup>153</sup> U.C.C. § 2-719(3).

<sup>154</sup> *Id.*

<sup>155</sup> *In re Facebook, Inc.*, 402 F. Supp. 3d 767, 777 (N.D. Cal. 2019).

<sup>156</sup> *Id.* at 792.

<sup>157</sup> *Id.* at 801.

<sup>158</sup> *Id.* at 802.

<sup>159</sup> *Id.*

restricting access to certain features, disabling an account, or contacting law enforcement.<sup>160</sup>

The company also states that it does its “best” to keep Facebook safe, although it can’t guarantee it.<sup>161</sup> These promises create a reasonable expectation on the part of the user that Facebook will be receptive and responsive to customer complaints about fraudulent or harmful content on the website. The basis for the complaint would not be that Facebook is the publisher or distributor of the content, but that it has made a promise to its users that it will do its best to eliminate or reduce harmful content and activity on its site. A “reasonable” response would include a timely, personalized one, and not simply an automated reply followed by inaction.

Because Facebook does not charge money for the use of its products, one might argue that pursuing a breach of contract claim may be pointless in many cases given that expectation damages may not be available. Yet reliance damages and mental distress damages may be appropriate.<sup>162</sup> There may, for example, be some situations where Facebook’s failure to perform as promised in its contract may result in particularly foreseeable mental distress. If, say, Facebook were to fail to block the account of a user who made repeated death threats to another, that inaction could constitute breach of its promise to keep Facebook a “safe place,” which could constitute predictable and severe mental distress.

In some cases, equitable remedies may be appropriate where monetary damages would be uncertain, difficult to ascertain, or otherwise inappropriate. Equitable relief may be especially useful in a case involving harassment. Facebook may leave harmful content online after receiving a take-down request. Often, it does so while it conducts an internal investigation into whether the content breaches its Community Standards.<sup>163</sup> During this time, the harmful content gets shared and

---

<sup>160</sup> *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/Q3CB-BPLV>] (last visited June 27, 2022).

<sup>161</sup> *Statement of Rights and Responsibilities*, FACEBOOK (Jan. 30, 2015), [www.facebook.com/legal/terms/previous](https://www.facebook.com/legal/terms/previous) [<https://perma.cc/97PE-RHZR>].

<sup>162</sup> *See Menorah Chapels at Milburn v. Needle*, 899 A.2d 316, 325 (N.J. Super. Ct. App. Div. 2006) (recognizing that emotional harm damages available for breach of funeral services contract).

<sup>163</sup> *What Happens When I Report Something to Facebook? Does the Person I Report Get Notified?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/103796063044734> [<https://perma.cc/U4GJ-95RS>] (last visited June 27, 2022).

redistributed so that the victim of the post suffers severe consequences that could have been prevented or minimized if the content had been immediately removed.

A Facebook user could seek to specifically enforce the contract and require a court to order Facebook to immediately remove the content. The basis of the Plaintiff's claim would be Facebook's contractual promises to remove that content, and not that Facebook was liable as a publisher for that content. In other words, the cause of action would be based in contract, and not tort. A plaintiff could also seek to enjoin the release of an announced feature that would diminish safety on the site as it could plausibly result in a breach of Facebook's promise to keep users safe.

In some cases, representations and warranties made by Facebook involve content posted by others. Rather than saying nothing or acknowledging the harmfulness of certain content, the company issues statements that it invests "heavily in people and technology to keep our platform safe," has made fighting misinformation a "priority," and that it has "invested so heavily in safety and security."<sup>164</sup> Facebook CEO Mark Zuckerberg has publicly stated that the company's research has shown that social apps "can have positive mental-health benefits" for young people without also mentioning the harms caused by its products—harms that its own research has uncovered.<sup>165</sup>

A Wall Street Journal investigation found that Facebook's internal research showed a "significant teen mental-health issue" correlated to Instagram use, especially for girls.<sup>166</sup> An internal company presentation contained a slide stating, "We make body image issues worse for one in three teen girls," and "Teens blame

---

<sup>164</sup> 60 Minutes Overtime, *Facebook's Response to 60 Minutes' Report, "The Facebook Whistleblower"*, CBS NEWS (Oct. 3, 2021, 7:41 PM), <https://www.cbsnews.com/news/facebook-statement-60-minutes-whistleblower-2021-10-03/> [https://perma.cc/4PET-DHNNH].

<sup>165</sup> Tara Subramaniam, *Fact Check: 3 Times Internal Docs Contradicted Facebook's Public Stance*, CNN (Sept. 28, 2021, 8:13 AM), <https://www.cnn.com/2021/09/28/politics/facebook-public-internal-contradict-wsj/index.html> [https://perma.cc/44KR-F9DR]; Jeet Heer, *Mark Zuckerberg Knows Exactly How Bad Facebook Is*, NATION (Oct. 18, 2021), <https://www.thenation.com/article/society/facebook-whistleblower-mental-health/> [https://perma.cc/8UK3-ZREC]; Damien Gayle, *Facebook Aware of Instagram's Harmful Effect on Teenage Girls, Leak Reveals*, GUARDIAN (Sept. 14, 2021, 2:40 PM), <https://www.theguardian.com/technology/2021/sep/14/facebook-aware-instagram-harmful-effect-teenage-girls-leak-reveals> [https://perma.cc/FW4P-SDZM].

<sup>166</sup> Wells et al., *supra* note 39.

Instagram for increases in the rate of anxiety and depression.”<sup>167</sup> During a Senate hearing, lawmakers accused the company of “[e]xploiting the peer pressure of popularity and ultimately endangering” the health of teenage girls.<sup>168</sup> During a Senate hearing prompted by the investigation, Senator Blumenthal stated that documents showed that Facebook “chooses the growth of its products over the well-being of our children”<sup>169</sup> and that it was “indefensibly delinquent in acting to protect them.”<sup>170</sup> Facebook’s global head of safety, Antigone Davis, denied the accusations stating that Facebook takes the “privacy, safety and well-being of all those who use [the] platform very seriously, especially the youngest people on our services.”<sup>171</sup> The company also cast doubt on the reliability of its own research into Instagram’s effect on teen health.<sup>172</sup>

Another potential misrepresentation involves the company’s claims about the accuracy of its artificial intelligence to identify hate speech. For example, Facebook previously stated that its artificial intelligence systems detected “98%” of hate speech, but some reports indicate that figure is actually in the single digits.<sup>173</sup> If these reports are true, then Facebook is making express warranties and representations about the nature of its products and services that are false.

Unfortunately, it is difficult to know with certainty whether these reports and accusations are in fact true or false without further delving into the company’s documents and research. Facebook, however, has declined to make more internal research

---

<sup>167</sup> *Id.*

<sup>168</sup> Ryan Tracy & John D. McKinnon, *Senators Accuse Facebook of Disregarding Research Showing Harm to Teens*, WALL ST. J. (Sept. 30, 2021, 4:34 PM), [https://www.wsj.com/articles/facebooks-efforts-to-attract-youths-come-under-senate-scrutiny-11632994201?mod=livecoverage\\_web](https://www.wsj.com/articles/facebooks-efforts-to-attract-youths-come-under-senate-scrutiny-11632994201?mod=livecoverage_web) [<https://perma.cc/4Q3A-NQWY>].

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Abram Brown, *Facebook Publishes Criticized Instagram Research into Teen Health Ahead of Congressional Testimony*, FORBES (Sept. 29, 2021), <https://www.forbes.com/sites/abrambrown/2021/09/29/facebook-publishes-criticized-instagram-research-into-teen-health-ahead-of-congressional-testimony/?sh=79f72868310e> [<https://perma.cc/4AB3-KDSU>].

<sup>173</sup> Deepa Seetharaman et al., *Facebook Says AI Will Clean up the Platform. It’s Own Engineers Have Doubts*, WALL ST. J. (Oct. 17, 2021), [https://www.wsj.com/articles/facebook-ai-enforce-rules-engineers-doubtful-artificial-intelligence-11634338184?mod=article\\_inline](https://www.wsj.com/articles/facebook-ai-enforce-rules-engineers-doubtful-artificial-intelligence-11634338184?mod=article_inline) [<https://perma.cc/VDR9-9EQE>].

public.<sup>174</sup> Presumably it would be required to produce that research if compelled by a court.<sup>175</sup>

Facebook should not be permitted to avoid responsibility for its products and services simply by denying that it engages in wrongdoing; rather, it should defend accusations the way other public companies must, in a court of law, during a public hearing. Even if a breach of warranty claim yields little in the way of monetary damages, nominal damages may provide satisfaction to those who have relied upon the company's representations. More importantly, the litigation process itself may yield important information about the company's internal research and business practices which the public may not learn about otherwise.

### CONCLUSION

The law should recognize the ways in which commercial products have evolved.<sup>176</sup> The line between goods and services is increasingly blurred, as is the one between the virtual and physical worlds. Businesses that operate primarily online, like Facebook, affect those who live in the physical world, and their products inflict harms on real, not virtual, victims.

Facebook recognizes the social problems that its products create and yet seems incapable or unwilling to solve them. It may be that Facebook has made a business decision not to allocate adequate resources to solving its problems, or it may be that its problems are unresolvable given its business model. In

---

<sup>174</sup> *Id.*; see also Wells et al., *supra* note 39. In response to requests to release Facebook's internal research on the impact of its platforms on youth mental health, Facebook stated that its internal research was "kept confidential" to promote internal brainstorming. An external researcher at the Oxford Institute, noted that "data exists within the tech industry" to study the effects of social media on mental health but that companies have not been open about allowing scientists to access it. *Id.*

<sup>175</sup> Facebook's most recent Terms of Service does not contain a mandatory arbitration clause. *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/6U8P-2TQW>] (last visited Dec. 17, 2021).

<sup>176</sup> As one commentator noted over twenty years ago:

[A]s new technologies emerge in response to the needs of society, it only makes sense that any losses incurred as a result of technological defects should be spread among all who benefit from the advances. Just as Justice Traynor justified the introduction of strict products liability on evolving industrial technology and its relationship to consumers, the current technological revolution demands similar treatment.

Lannetti, *supra* note 75, at 880 (footnote omitted); see also Zakon, *supra* note 67, at 1145 (noting that "current legal frameworks are sufficiently developed" to maintain a successful products liability claim to algorithms).

either case, the company is causing social harm that it has a duty to remedy.

Would the social benefit of shutting down Facebook outweigh the harm in doing so?<sup>177</sup> No company should be considered “too big to fail” if its harm to society is greater than its benefit. If a company is incapable of remedying its widely acknowledged and serious problems, its business model is flawed, and rather than providing it with a legal subsidy in the form of section 230, it should face liability for the harms it generates or it should cease to exist.

Lawsuits by private parties may be far from ideal.<sup>178</sup> The results may be inconsistent depending upon the jurisdiction, and compensation may be inadequate or unfairly distributed.<sup>179</sup> Lawsuits are also costly. Class action lawsuits often result in large pay-outs to attorneys with minimal compensation to plaintiffs. Nonetheless, they play an important role in the shaping of corporate behavior and may be the only recourse in cases of regulatory failure. Members of the public cannot depend upon well-intentioned lawmakers to protect them from corporate wrongdoing in every instance. For years, lawmakers have tried to pass legislation imposing restrictions on powerful tech companies, but industry lobbyists, skillful private sector attorneys, political stalemates, and the stalling tactics of these well-funded companies have resulted in few successes.<sup>180</sup>

---

<sup>177</sup> Some think it would. See Preston M. Torbert, “*Because It Is Wrong*”: An Essay on the Immorality and Illegality of the Online Service Contracts of Google and Facebook, 12 J.L. TECH. & INTERNET, 1, 16, 171 (2021) (arguing that the behavioral advertising business model is immoral and illegal).

<sup>178</sup> See Joe Nocera, *On Opioids, Why Are Lawyers Doing the Work of Lawmakers?*, N.Y. TIMES (Dec. 12, 2021), <https://www.nytimes.com/2021/12/11/business/dealbook/opioid-epidemic-lawsuits.html> [<https://perma.cc/G8JG-4VS9>].

<sup>179</sup> *Id.* (discussing examples of successful legal theories in one jurisdiction that failed in another).

<sup>180</sup> See Cecilia Kang, *Lawmakers Urge the Head of Instagram to Better Protect Children*, N.Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/2021/12/08/technology/adam-mosseri-instagram-senate.html> [<https://perma.cc/F77N-JCTT>] (“Though lawmakers often show bipartisan unity in the hearings, dozens of data privacy bills have been stymied by intense lobbying and partisan disagreement over how stringent laws should be.”). Senator Richard Blumenthal remarked that Facebook and other Big Tech companies claim to favor government regulations “but they have opposed specific measures with armies of lawyers and lobbyists and tons of money.” *Id.* In California, tech companies lobbied state legislators from passing a bill that would have allowed prosecutors to sue social media companies for knowingly using features addictive to children. Adam Beam, *Social Media Addiction Bill Fails in California Legislature*, AP NEWS (Aug. 11, 2022), <https://apnews.com/article/social-media-california-legislature-f5fd4c8ac90546c506bc3>



The imposition of civil liability is especially critical given Facebook's notoriously evasive nature and its diversionary tactics. For example, in an attempt to downplay the significance of the reported harmful effect of Instagram use on teenagers, the company tried to refute the accuracy of its own internal research, criticizing its small sample size and its *own* employees' analysis.<sup>181</sup> Given the company's lack of transparency, a lawsuit may be one of the best ways to compel the company to disclose more of what it knows about the effects of its products on users, and to motivate it to design with safety in mind.

Imposing civil liability on Facebook is consistent with the goals of tort law, to compensate injured victims, impose liability on wrongdoers, and deter harmful conduct.<sup>182</sup> The prospect of product liability may incentivize *all* platform companies to consider incorporating safety features into their products to avoid being compelled to do so by the government. For example, Instagram announced that it was rolling out new safety features for minors only *after* a bipartisan group of state attorneys general announced that it was investigating child safety on the platform, and lawmakers held hearings on Instagram's risks to children.<sup>183</sup> The announcement also came a day before Adam Mosseri, the Head of Instagram, was scheduled to testify about child safety issues on the platform.<sup>184</sup> The timing of the announcement of these safety features prompted the question—why only now? The answer may be that the company previously

---

a685ab58b2b [https://perma.cc/Q8NR-RDYC] (“California’s influential tech industry worked for months to defeat the bill”). However, a companion bill, the California Age-Appropriate Design Code Act, was recently signed by Gov. Newsom despite opposition from the tech industry. Natasha Singer, *California Governor Signs Sweeping Children’s Online Safety Bill*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/business/newsom-california-children-online-safety.html> [https://perma.cc/4GB7-9AGX].

<sup>181</sup> Abram Brown, *Instagram Chief Mosseri Defends Meta in Senate, Urges Congress To Pass New Tech Rules*, FORBES (Dec. 8, 2021, 3:16 PM), <https://www.forbes.com/sites/abrambrown/2021/12/08/instagram-adam-mosseri-senate-congress-testimony/?sh=4ad896b368ea> [https://perma.cc/7C9S-HU9S]; Abram Brown, *Facebook Publishes Criticized Instagram Research into Teen Health Ahead of Congressional Testimony*, FORBES (Sep. 29, 2021, 8:21 PM), <https://www.forbes.com/sites/abrambrown/2021/09/29/facebook-publishes-criticized-instagram-research-into-teen-health-ahead-of-congressional-testimony/?sh=6728ce95310e> [https://perma.cc/65GU-4SLC].

<sup>182</sup> See DOBBS ET AL., *supra* note 69, at 19, 21, 23.

<sup>183</sup> Shannon Bond, *Instagram Unveils New Teen Safety Tools Ahead of Senate Hearing*, NPR (Dec. 7, 2021, 3:00 AM), <https://www.npr.org/2021/12/07/1061808098/instagram-teens-safety-tools> [https://perma.cc/WAQ8-GXER].

<sup>184</sup> *Id.*

had little incentive to consider the well-being of its users at the expense of profits given the immunity it enjoys under section 230.

Facebook’s divert-and-distract strategy failed to impress Senator Marsha Blackburn of Tennessee, who observed, “Meta is attempting to shift attention from their mistakes by rolling out parental guides, use timers, and content control features that consumers should have had all along.”<sup>185</sup> After the hearing, Josh Golin, the executive director of Fairplay, a children’s advocacy non-profit, observed that Mosseri’s testimony “was just more of the same: evasions, empty promises, and too-little, too-late gestures aimed at forestalling congressional action instead of meaningfully addressing Instagram’s harmful business model and design choices.”<sup>186</sup>

Section 230 immunity should only apply to publisher or speaker liability for content posted by third parties; it should *not* shield a company from liability for its own conduct. Certainly, Facebook should also be liable—at least, to some extent—for the content that it disseminates and promotes. But before this can happen, Congress must amend section 230 and abolish the legal subsidy that it provides to social media companies.<sup>187</sup> Until it does so, Facebook may have a “get out of jail free” card with respect to publisher or speaker liability for content posted by others. It should not, however, have one with respect to its own site features, its own business practices, and its own representations and warranties. Platform companies like Facebook are corporations, and while they function primarily in the digital sphere, their products and services affect people around the world. Corporations *should* be liable for the design of their intangible offerings in the same way that other companies have liability for their tangible product offerings.

Platform companies are now assessing how to build the infrastructure and norms that will govern the metaverse and Web 3.0. They will determine what it looks like, and how we will interact with it and with each other. Their choices will have long

---

<sup>185</sup> *Id.*

<sup>186</sup> See Kang, *supra* note 180.

<sup>187</sup> As Danielle Keats Citron and Mary Anne Franks have noted, the public discourse around section 230 is unfortunately filled with misconceptions that hinder much needed policy reform. See Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 47–48; see also Kosseff, *supra* note 6, at 40.

term consequences. The law should incentivize companies to act in socially beneficial ways or, at least, deter them from ignoring social costs in their pursuit of profit. The failure to hold platform companies accountable for their business decisions will have harmful repercussions for the future of the Internet and for the world that depends upon it.