

Litigation in the Attention Economy: Developing Defenses to Social Media Addiction Claims

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By Litigation against social media platforms for using allegedly addictive features has been on the rise, with 28 federal lawsuits filed in 2022.¹ In an attempt to circumvent Section 230 of the Communications Decency Act (CDA), plaintiffs claim that social media platforms knowingly designed defective algorithms, causing minors to become addicted to social media, resulting in disordered eating, depression, body dysmorphic disorder, suicidal ideation, and severe anxiety.² As courts begin to rule on these claims, not only will plaintiffs be unable to prove causation, but defendants' social media platforms will be shielded by Section 230 of the CDA for their tailored algorithms and user engagement features.

Understanding the Attention Economy: How Social Media Platforms Make Money

The advent of the information age has brought increased social media usage, with users' daily time on social networking sites increasing dramatically over the last 10 years. In 2012, users spent 90 minutes per day on social networking sites; the number increased to 147 minutes per day in 2022.³ As of 2022, the vast majority of teens aged 13 to 17 used social media, with usage as follows: 95 percent used YouTube, 67 percent used TikTok, 62 percent used Instagram, 59 percent used Snapchat, and 32 percent used Facebook.⁴ Increased social media use has coincided with broader access to smartphones. In 2014, 24 percent of teens reported being "almost constantly" on the internet, with 73 percent owning a smartphone. By 2022, 46 percent of teens were "almost constantly" on the internet, and 95 percent reportedly owned a smartphone.⁵

Social media platforms make money primarily through their marketing partners. The more users pay attention to a platform, the more appealing the site becomes to advertisers. Social media companies use two marks to judge attention: (1) time spent on the platform and (2) user engagement. Generally, top social media platforms allow advertisers to choose to pay based on cost-per-click or cost-per-impression.⁶

Under a cost-per-click program, an advertiser only pays the social media platform when a user clicks on an ad, whereas under a cost-per-impression program an advertiser pays whenever their ad appears on the user's screen, regardless of whether the platform user interacts with the ad. Consequently, platforms are incentivized to keep users on the site, clicking and scrolling for as long as possible to make the sites profitable. Some major social media platforms also provide the option to pay only when a targeted user takes a particular action. For example, advertisers can send out direct messages to users on LinkedIn and are only charged when users click on the message.

Social media platforms use algorithms to study individual user behavior to maximize engagement. These algorithms aim to create the perfect newsfeed for each user by (1) analyzing accumulated unstructured data, (2) predicting the types of content a user will find interesting, and (3) populating the user's feed with content it believes the user will find interesting.⁷ The more a user engages with content through liking, sharing, messaging, or searching the content, the more likely similar content will populate their feed. Additionally, the more "likes" a post receives, the more likely the algorithm will share it with a broader audience.

Platforms use personalized algorithms to make it easier for users to discover new products and services that are right for them. Social media is how 28 percent of customers find out about new brands and services, making it the fourth most popular brand discovery channel behind search engines (36 percent), TV ads (35 percent), and word-of-mouth (31 percent).⁸ Similarly, businesses that adopt personalized marketing also benefit as they see an average 19 percent increase in sales.⁹

Designed to Engage: How Social Media Platforms Keep Users Interested

Social media platforms are a form of entertainment; consequently, they have incorporated elements to

increase user engagement and enhance the overall user experience. Features adopted by social media platforms to prolong use include (1) infinite scrolling, (2) read receipts, (3) tailored content, and (4) social rewards.

Endless scrolling/streaming or infinite scrolling allows users to discover new content endlessly without leaving the page. The user becomes increasingly immersed in the platform without coming to a natural stop. A natural stop would encourage the user to leave the platform. Endless scrolling is particularly effective on smartphones. The simple finger swipe requires less effort than scrolling using a mouse, making it even more immersive.¹⁰ Infinite scrolling utilizes the brain's release of dopamine, the chemical responsible for reward-seeking behavior; looking through social media releases dopamine, encouraging users to continue viewing new content. Facebook's Feed utilizes infinite scrolling to keep users engaged, it is a constantly updating list of stories in the center of the user's home page. The stories include status updates, photos, videos, links, app activity, and "likes" from people, pages, and groups the user follows on Facebook.¹¹

Read receipts on Snapchat, Facebook, and WhatsApp encourage both parties to expect a fast answer after opening the message, thereby encouraging users to remain on the app once they open a message and to continue communicating. Snapchat, which does not allow users to opt out of read receipts, has a very high user engagement rate. The average active Snapchat user opens the app's camera more than 20 times daily.¹² Social reward features include the "like" or "thumbs up." A "like" or thumbs up indicates positive social feedback, creating a feeling of validation among users receiving them. These design features make social media platforms engaging and therefore play a crucial role in their utility and entertainment value.

Plaintiffs Will Struggle to Prove Causation

Social media addiction is currently unrecognized as a mental health disorder, and we should remain skeptical of the necessity to regulate it until it is proven to exist.¹³ The health consequences of excessive social media usage are largely unknown; therefore, plaintiffs will struggle to establish causation. A literature review by the National Institutes of Health revealed that many studies indicate that social media may cause psychological harm to users; however, the level of the suspected harm has yet to be determined.¹⁴

Research on the effect of social media on adolescent development has yielded mixed results. When studying the impact of excessive social media use among adolescents, a correlation between social media use and depression was observed by some researchers, yet significant benefits to adolescent well-being were also observed.¹⁵ Other studies concluded that social media use in teens did not have a strong association with physiological health and may even improve teen well-being, as adolescents were found to establish a better diversity of friends and increased access to emotional support.¹⁶ One UK study of 10,000 teens and pre-teens found that social media is "not, in and of itself, a strong predictor of life satisfaction across the adolescent population."¹⁷ One study even suggested that social media usage has benefited children because it has allowed them to fulfill their need to socialize without their peers being physically present. The ability to sustain friendships online is valuable, especially during periods such as the COVID-19 global pandemic, where opportunities to socialize were limited. One study suggested that online friendships among youths are as strong as offline relationships. The study measured the

strength of these relationships based on self-disclosure, validation, companionship, instrumental support, conflict, and conflict resolution.¹⁸ Thus, while the spaces in which these relationships are being established and maintained are novel, the core qualities of these online relationships remain the same.¹⁹ Such a finding could indicate that social media is not crowding out healthy social behaviors but rather being utilized to help amplify them.

The effectiveness of social media breaks and their relationship to higher levels of well-being has not been established, further suggesting that social media use does not significantly impact users' mental health. A study involving multiple social media platforms (i.e., Facebook, Twitter, Instagram, and Snapchat) over four weeks found no correlation between well-being and social media abstinence. Participants maintained the same levels of well-being and quality of life throughout every week of the experiment, although a decrease in loneliness was reported.²⁰ Unlike previous studies that openly hold themselves out as studying the effect of social media usage, the study framed itself primarily as a study on how people use their time rather than on the influence of social media use on psychosocial outcomes.²¹ Given that the impact of excessive social media use on mental health remains unknown, plaintiffs claiming social media addiction will struggle to establish a causal link between excessive social media usage and a negative impact on mental health.

Section 230 of the Communications Decency Act Shields Platforms From Liability

Section 230 of the Communications Decency Act (CDA) serves as the strongest defense for social media platforms in lawsuits with teen social media addiction claims. Section 230(c)(1) reads in part, "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." Courts have interpreted Section 230(c)(1) immunity to apply broadly, providing social media platforms immunity for good faith editing and filtering decisions.²²

Plaintiffs can overcome the CDA only by proving that either (1) social media platforms do not act in a publishing capacity when employing personalized algorithms to recommend content to users or (2) these platforms act as information content providers when they design their systems to addict users. Under a strict product liability theory, users must prove the defect, causation, and injury. Plaintiffs allege that the liability does not arise from the posting, editing, or withdrawing of specific content. Instead, plaintiffs, attempting to circumvent CDA 230, allege that the harm stems from the use of artificial intelligence and reinforcement learning to personalize user content²³ or, alternatively, argue that defendant social media sites are content developers through features to prolong site usage, such as badges, "likes," or mechanisms such as infinite scrolling.

While courts have found that social media platforms can be liable for encouraging illegal behavior via platform features available to end-users, courts have consistently struck down any attempts to hold platforms liable for any alleged harm caused by tailoring users' feeds. In *Maynard v. Snapchat*, a plaintiff driver alleged that Snapchat could reasonably foresee that its product design created a risk of harm based on, among other things, the fact that Snapchat knew that other drivers were using the platform's speed filter while driving at 100 miles per hour or more as part of "a game," purposefully designed its products to encourage such behavior, and knew of at least one other instance in which a driver who was using Snapchat while speeding

caused a car crash.²⁴ The Georgia Supreme Court reversed the appellate court's decision to dismiss the case, finding that the lower court erred in dismissing the case based on a lack of proximate cause.

The Ninth Circuit expanded upon *Maynard* in *Lemmon v. Snap, Inc.* In *Lemmon*, the Ninth Circuit reversed the district court, finding that CDA did not protect Snapchat under a negligent design claim and that it could be held liable for manipulating user behavior to the user's detriment through in-app reward systems. Like *Maynard*, Snapchat's speed filter was the alleged source of the harm, but it expanded *Maynard* to include the app's general reward system. In *Lemmon*, a speeding driver was using Snapchat's speed filter, hoping that he would receive a badge from the app. The parents of the deceased son argued that Snapchat encourages certain behavior by rewarding users with "trophies, streaks, and social recognitions" based on the types of snaps they send out.²⁵ Snapchat does not, however, tell users how to earn these badges.²⁶ Thus, the court found that it was reasonable for users to believe that by using the Snapchat speed filter, a reward in the form of a badge could be achieved by driving at speeds exceeding 100 miles per hour, even if there was no badge for reaching the speed.²⁷ In denying summary judgment, the court found that the case could proceed because "Snap is being sued for the predictable consequences of designing Snapchat in such a way that it allegedly encourages dangerous behavior." The court also rejected Snapchat's argument that the harm was caused by the third-party content or the publishing of the Snap and, thus, Snapchat was not shielded by Section 230 immunity. The court stated that the platform's own acts caused harm through their defective content-neutral tools. Therefore, by trying to manipulate user behavior, platforms can be liable for unintentional harm resulting from the behavioral changes encouraging potentially dangerous illegal actions as long as they are reasonably foreseeable.

Much like in *Maynard* and *Lemmon*, plaintiffs have argued that liability should attach to the hyper-personalized recommendation algorithms and user engagement features.²⁸ Plaintiffs allege that the tailoring of the content is defectively designed since the third party content on its own would not cause the suspected mental health harm. According to plaintiffs it is the way in which the third-party content is aggregated and presented to users that demands users attention at allegedly extreme levels. Thus, plaintiffs argue that, unlike *Backpage*, *Herrick*, and *Barnes*, these actions do not arise solely from third-party content posted on the site; instead, plaintiffs allege it stems from the act of hyper-personalizing the content caused by the defendant's social media platforms, which they argue manipulates user behavior.²⁹ However, user engagement features such as "likes," read receipts, and tailored personalized user feeds via the platform's algorithm are all subject to immunity under Section 230 of the CDA. Unlike in *Maynard* and *Lemmon*, the user engagement features allegedly causing mental health issues are not encouraging any dangerous illegal activity. The user engagement features are designed merely to keep users entertained.

Plaintiff's allegations that social media platforms are liable due to their allegedly addictive algorithm are likely to fail. The Second Circuit's ruling in *Force v. Facebook* undermines the plaintiffs' likelihood of succeeding on their defectively designed algorithms theory. In *Force v. Facebook*, plaintiffs were victims, estates, and family members of terrorist attacks in Israel, suing under the Antiterrorist Act, alleging that Facebook provided material support to Hamas, a terrorist group. Specifically, plaintiffs argued that Facebook de-

veloped the content of the terrorist postings through its algorithms that were designed to utilize users' information to match them with others, allowing the group to grow and spread its message.³⁰ The Second Circuit rejected this argument, however, stating that using these automatic algorithms does not subject Facebook to liability under Section 230, as it is merely the site "vigorously fulfilling its role as a publisher."³¹ Applying *Force* to plaintiffs' social media addiction claims suggests that the defendant social media platforms will not be found liable for their use of algorithms that are designed to make their platforms more engaging.

Conclusion

While plaintiffs continue to file claims alleging that social media platforms are addictive, the alleged harm caused by purported excessive social media usage has yet to be conclusively proven. Even if plaintiffs could establish that excessive social media usage causes mental illness, courts will likely find that Section 230 of the CDA will prevent plaintiffs from prevailing on such claims. ☉

Endnotes

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