

NTIA § 230 FCC Petition: A Poor Solution to an Ill-Defined Problem

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tl;dr

The Debate:

President Trump recently demanded the National Telecommunications and Information Administration (NTIA) request that the FCC undertake [a major reinterpretation of CDA Section 230](#) to make it more difficult for digital platforms to receive liability immunity for the content of third parties and for their own content moderation decisions. The FCC has [granted the petition](#) and is seeking public comment.

But... the petition is driven by a political dispute between the Administration and the platforms. What's more, the Administration is evading constitutional restrictions in order to cajole the FCC into serving its ends.

While there are possible useful reforms to be made to Section 230, forcing major changes to an important law on the basis of a political quarrel would let petty politics reshape one of the most important laws that governs the Internet.

KEY TAKEAWAYS

THE WHITE HOUSE IS TRYING TO END-RUN THE CONSTITUTION

The White House is attempting to use NTIA as an intermediary to force the FCC to reinterpreting Section 230.

But... as an independent agency, the FCC is insulated from direct political control by the

Administration. The White House is no more entitled to directly command the FCC to reinterpret Section 230 than it is to use NTIA as a “straw purchaser” to achieve its ends. Moreover, the interpretation of Section 230 has never been considered within the FCC's purview, and reform of Section 230 is something for Congress to undertake.

NTIA'S PETITION IS INADEQUATE AS A MATTER OF LAW AND LOGIC

Further, the NTIA's approach is legally infirm. NTIA starts with a presumption that a key problem with Internet liability is that conservatives are being censored, and works backwards from there. The result is a set of requests that are legally unsupportable, and, even if not, would damage a vibrant industry without creating any social gains.

But... there is no “but” here. The petition is hard to take seriously on its legal merits. What follows is a high-level overview of the petition's substantive shortcomings.

NTIA WANTS THE FCC TO NARROW THE CIRCUMSTANCES WHEN PLATFORMS CAN MODERATE CONTENT

NTIA asks the FCC to create a new distinction between the overlapping liability protections contained in Section 230. In essence, the administration wants to make it more challenging for platforms to moderate content by aggressively circumscribing the conditions under which they can remain immune from liability for user-generated content. It would do this by

removing one of Section 230's key immunities by directing courts to treat platforms as "publishers" when they remove or alter third-party content.

But... The changes that NTIA asks for are flatly contradicted by the language of Section 230. Section 230 prohibits claims that would treat a platform as the "publisher or speaker" of the content of a third-party (known as "publisher liability"). A long-standing function of publishers is to edit the content they offer through their service—including by completely withdrawing it.

Thus, if a platform withdraws or modifies content in a way that a traditional publisher would do, it receives Section 230's protections. Despite NTIA's assertions, both major provisions of Section 230 permit or encourage platforms to moderate the content on their service.

Further, it's worth noting that the use of NTIA to attempt to modify Section 230 amounts to an unconstitutional end-run around both Congress as well as the strictures imposed on the Administration with respect to directing independent agencies.

NTIA WANTS THE FCC TO IMPOSE OPEN ENDED "GOOD FAITH" OBLIGATIONS ON PLATFORMS' MODERATION DECISIONS

Section 230 permits platforms to moderate their users' content when it is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." The "otherwise objectionable" allowance is permits platforms to moderate on nearly any basis. For instance, platforms validly remove SPAM from their services as "otherwise objectionable" content.

NTIA seeks to change this by restricting what is considered "otherwise objectionable" to be "similar in type" to the enumerated items.

Additionally, NTIA asks the FCC to interpret "good faith" moderation as requiring a form of due process owed to platform users. As part of this change, NTIA would impose an "objective belief" standard on platforms' moderation decisions. This would mean that even moderation decisions made without particular bias would be subject to review

by a third-party to determine whether they meet a more rigorous legal standard of "good faith."

But... the language of the statute clearly permits a wide degree of latitude for platforms to remove "otherwise objectionable." As noted, SPAM content can be removed as "objectionable" content under Section 230 and it does not easily fit into the categories of "lewd, lascivious, filthy, excessively violent, [or] harassing." If the NTIA has its way, a large amount of content that falls below the rather high threshold of these categories will become immune from moderation.

And to guarantee that platforms' moderation comports with some larger standard of "good faith" would require some official body to review moderation decisions. Whether this is a court or the FCC, the constitutionality of such a body and its role in reviewing the content of speech is suspect. This is particularly true when such moderated speech contains political content.

Moreover, the proposed changes to the law will nearly always require litigation in order to resolve whether a particular moderation decision comports with due process and was objectively in "good faith." Whereas platforms currently are relatively well protected against frivolous suits from disgruntled users, the changes NTIA proposes would open the floodgates of litigation. This would immediately raise costs on platforms without adequately balancing countervailing considerations, such as flexibility to tailor services to users or the ability to create different sorts of content communities.

While there may be beneficial changes to make to Section 230, the changes proposed by NTIA are little more than legal window dressing in an otherwise political dispute.

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