

Section 230 Reform Summaries

September 2020

tl;dr

Section 230 of the Communications Decency Act has come under close scrutiny. Section 230 provides important immunity to online platforms for the content of third-party users. Section 230 also guarantees legal immunity when platforms moderate objectionable content on their services: so-called “good samaritan” immunity.

Reform efforts are aimed at creating more carve-outs to Section 230 immunities, and limiting the scope of content platforms can moderate.

Many of these proposals would make bad policy by creating disincentives to moderate content in order to avoid a flood of litigation.

KEY REFORM EFFORTS

THE EARN IT ACT

The [EARN IT Act](#), aimed at reducing online child sexual exploitation materials (“CSAM”), creates a 19 member commission to develop a set of best practices for preventing the proliferation of CSAM. The Act also creates an exemption from Section 230 for CSAM-related state law violations and related civil actions while guaranteeing services’ ability to use encryption.

Analysis: Platforms already have natural incentives to reduce the presence of CSAM on their platforms. Whereas services intent on distributing or facilitating CSAM have many ways to either stay off of law enforcement’s radar, or distribute their services so they are hard to track down. This will lead to an enforcement mismatch problem with the law. Also, allowing state law based prosecutions could create a currently unknown set of conditions

on important legal immunities in the CSAM context, as states set their own standards.

PACT ACT

The [PACT Act](#) establishes a notice and take-down system for large online platforms. The Act requires these platforms to publish a policy that delineates what constitutes “acceptable use” of its service, details how it ensures compliance with that policy, and provides a means for users to report violations of the policy. As part of the notification requirement, platforms must have a complaint system, including an email mechanism, a web form, as well as a human-staffed call center.

Pursuant to violations of the acceptable use policy, the Act prescribes a takedown and appeal system. The Act also requires the publication of a detailed “transparency report” describing the operation of the complaint system.

Section 230 immunity is removed if a platform becomes aware of illicit activity, either criminal or civil, by court or agency order, and fails to remove that content within 24 hours. The bill also empowers state attorneys general to enforce federal civil law pursuant to this provision.

Analysis: Large platforms already comply with court orders, so it is unclear what problem is being solved by this proposal. Adding in an exemption for federal civil law could have large, unknown consequences. Further, empowering state AG’s to enforce federal civil law in this manner could lead to an explosion of politicized litigation.

ONLINE FREEDOM AND VIEWPOINT DIVERSITY ACT

The [Online Freedom and Viewpoint Diversity Act](#) amends Section 230 by limiting the reasons

platforms may moderate while retaining civil immunity. A heightened “objectively reasonable belief” standard is introduced when a provider removes content that fits into a narrowed set of permissible moderation categories. Additionally, the bill contains a provision that platforms will be treated as the providers of third-party speech when they “editorialize” on that material.

Analysis: The seemingly small changes proposed mask potentially enormous expense. The bill is designed to restrict the categories of permissible moderation, while also elevating the standard by which moderation decisions are judged. As with most of the 230 reform bills, litigation over whether any particular moderation meets these new standards will chill moderation by threatening expensive litigation. Further, by including “editorialization” as a category that makes a platform potentially responsible for third-party speech, the bill goes farther than even traditional common law. An editorial is a separate speech act—yet under this bill, platforms would become liable as publishers for third-party speech when they merely opine on that speech (e.g. by “fact checking” messages). This appears to be a Congressional assault on free expression, and would likely receive close scrutiny by courts on First Amendment grounds.

DOJ'S SECTION 230 BILL

The DOJ's [proposed Section 230 reform bill](#) is very similar to the NTIA petition to the FCC in certain key respects (see our [explainer](#) on that). It would impose a number of changes, with a few being particularly worth noting. First, it overcomes perceived obstacles to law enforcement by creating multiple carve outs for federal civil and criminal law, and permitting enforcement by states attorneys general. Second, the immunity from traditional publisher liability is permitted only when a platform allows or disallows content in “good faith” compliance— as defined by the statute— with its terms of service. Third, it removes the ability of platforms to remove “otherwise objectionable” content from their services while also retaining immunity from publisher liability. Moreover, removing third-party content can only be undertaken because of an “objectively reasonable” belief that the content fits a permissible moderation

category. Fourth, the definition of “information content provider” is modified to include, among other things, entities that “fund...information provided by another person or entity.”

Analysis: The DOJ's bill effectively guts Section 230, creating a litigation bomb. Restricting platforms to moderate only when they have an “objectively reasonable belief” that content is highly offensive or dangerous, while removing the platform's ability to remove content it finds merely objectionable creates a large disincentive to moderate services. Yet, the bill is inconsistent. Platforms can theoretically add to their terms of service that they remove content they find objectionable, which *could* evade the limitations the bill introduces.

Nonetheless, platforms will face an explosion of expensive litigation in order to determine when moderation decisions are “objectively reasonable” and in “good faith compliance” with their terms of service. Finally, the addition of a provision that creates publisher liability for entities that “fund” the information of third-parties introduces a potential backdoor to argue that providing advertising revenue to third-parties is “funding.” This would be destructive to a large amount of socially beneficial commercial activity.

CONTACT US



Kristian Stout
Associate Director
kstout@laweconcenter.org



Ben Sperry
Associate Director
Legal Research
bsperry@laweconcenter.org



International Center
for Law & Economics