

The Law & Economics of Online Intermediary Liability

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tl;dr

Background: The Communications Decency Act of 1996's Section 230 holds that the law will not treat online service providers as speakers or publishers of third-party content, and that actions the providers take to moderate content hosted by their services will not trigger liability. A quarter-century later, a [growing number of lawmakers](#) seek reforms to Section 230. In the 116th Congress alone, [26 bills](#) were introduced to modify the law's scope or to repeal it altogether.

But... While the current debate popularly centers on whether platforms should be forced to host certain content or when they should be forced to remove other content, such reforms are [virtually certain to harm](#), not improve, social welfare: As frustrating as imperfect content moderation may be, state-directed speech codes are much worse.

However... The real gains to social welfare will materialize from reforms that better align the incentives of online platforms with the social goal of deterring or mitigating illegal or tortious conduct. To the extent that the current legal regime permits social harms online that exceed concomitant benefits, it should be reformed to deter those harms if such reform can be accomplished at sufficiently low cost.

KEY TAKEAWAYS

SECTION 230 ENABLES SOME HARMFUL ACTS

Tort law aims to align incentives with social welfare, deterring costly behavior and encouraging optimal levels of precaution against risks of injury. Sometimes, this even means holding intermediaries liable for harms caused by third parties, which is appropriate when the intermediary is the party who could best reduce the probability of a costly interaction at the least cost.

The near-complete immunity Section 230 grants to online platforms for harms caused by their users is a departure from how tort law usually governs intermediary behavior. While this immunity has yielded benefits (more user-generated content and freedom to moderate), it also imposes costs, such as the law's failure to ensure that illegal and tortious online conduct are optimally deterred.

Just as there are in the real world, there are violations of civil law and civil rights, violations of criminal law, and tortious conduct that occurs on online platforms, all of which impose real costs on individuals and society at-large. In other words, there are very real, concrete benefits that would result from demanding greater accountability from online intermediaries, even if that also leads to "collateral censorship" of some lawful speech.

The debate must therefore acknowledge value judgments that must be made about, among other things, the quantity and type of speech that should exist online, how individuals threatened by tortious and illegal conduct online should be protected, how injured parties should be made whole, and what role online platforms should have in helping to negotiate these tradeoffs.

ONLINE INTERACTIONS AND SELF-RESTRAINT

There are various factors—beyond just the threat of liability—that may serve to deter both online and offline speech, including fear of reprisal, threat of social sanction, and people’s baseline sense of morality. Ideally, most deterred speech is of the harmful or, at least, low-value sort.

But the incentives for self-restraint may be weakened online. For example, because many online [interactions are anonymous](#), it may substantially weaken the fear of reprisal. Even users who are neither anonymous nor pseudonymous can sometimes prove challenging to reach with legal process. And, perhaps most importantly, online content is disseminated both faster and more broadly than offline media. It is often not the original speaker or actor, but others amplifying the original speech or conduct, that cause the greatest degree of harm.

A proper evaluation of the merits of any intermediary-liability regime must therefore consider whether user liability alone is insufficient to deter bad actors, either because it is too costly to pursue remedies against users directly, or because platforms act in ways that make it less likely that harmful speech or conduct is deterred. In other words, intermediaries may, intentionally or unintentionally, facilitate harmful speech that would otherwise be deterred (self-censored) were it not for the operation of the platform.

A FRAMEWORK TO EVALUATE REFORM

The proper framework to evaluate Section 230 reform must consider the degree to which shifting the legal rules governing platform liability would increase litigation costs, increase moderation costs, constrain products and services, increase “collateral censorship,” and impede startup formation and competition, all relative to the status quo.

Assessing any given reform requires identifying both the direction and magnitude of change that would result in all of these areas. It requires evaluating the corresponding benefits that legal change would bring in increasing accountability for tortious or criminal conduct online. And, finally, it means hazarding a best guess of the net effect. Few reform proposals brought forward to date have undertaken this analysis with any degree of rigor.

For more on this issue, see the ICLE white paper [“Polluting Words: Is There a Coasean Case to Regulate Offensive Speech?”](#) and Ben Sperry’s *Truth on the Market* post [“An L&E Defense of the First Amendment’s Protection of Private Ordering.”](#)

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