

A Path Forward for Section 230 Reform

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tl;dr

Background: The liability protections granted to intermediaries under Section 230(c)(1) of the Communications Decency Act of 1996 can and [should be conditioned](#) on platforms taking reasonable steps to curb harmful conduct. Online platforms should operate under a [duty of care](#) obligating them to adopt reasonable content-moderation practices regarding illegal or tortious third-party content.

But... Platforms should not bear excessive costs for conduct that does not and should not give rise to liability, while they should internalize the costs of responding to actual harms and meritorious litigation. This will require reforms to civil procedure, a regulatory agency to oversee creation of a duty of care, and implementation of a “safe harbor” or presumption of reasonableness.

KEY TAKEAWAYS

PROPOSED BASIC LIABILITY RULES

Section 230 holds that an online service provider is not to be treated as the speaker or publisher of third-party content and that liability is not triggered when providers act to moderate the content they host. This regime likely maximizes the benefits of widespread user-generated content, but it may come at the expense of insufficiently deterring harmful and illegal content.

Online intermediaries should operate under a duty of care to take appropriate measures to prevent or mitigate foreseeable harms caused by their users’ conduct. Some of those harms include activity that isn’t truly “speech.” When an online service provider fails to take reasonable care to prevent such “non-speech” tortious or illegal conduct, Section 230(c)(1) should not preclude it from being held liable.

Section 230(c)(1) should, however, preclude intermediary liability for *communication* torts that arise out of user-generated content. The exception would be where a platform failed to remove content that it knew or should have known was defamatory.

When a platform takes reasonable steps to moderate unlawful conduct, it would enjoy a safe harbor from liability. A platform that makes reasonable efforts to moderate would not be held liable simply for having inadvertently let some harmful content slip through. And while taking down content may indicate a platform knows the content is illegal, the provider would not necessarily be liable for failing to remove similar content anywhere it arises.

If a platform knows or should have known that a piece of content is illegal or tortious, however, failing to remove it should not be deemed reasonable. Harmful content can spread rapidly over the Internet, so platforms may be required, once given proper notice, to remove harmful content that was reasonably permitted when it was initially posted.

PROPOSED PROCEDURAL REFORMS

In order to create safe harbors for reasonable moderation practices, we propose the establishment of “certified” moderation practices. Such standards would be adopted pursuant to industry-specific guidelines established by a standard-setting organization authorized by the FTC (or other agency).

A platform could provide its certified moderation practices as a “certified answer” to lawsuits arising out of user-generated content. This would, in most circumstances, be sufficient to foreclose litigation against the platform at an early stage.

The burden would then shift to the plaintiff to show that the certified standards were not actually followed, that the platform should have been aware of a harm or potential harm, and that it failed to cure or prevent it. Such claims would need to meet a heightened pleading requirement.

Finally, we believe any agency oversight of this process should be explicitly scheduled to sunset. Once the basic system of intermediary liability has had some time to mature, it should be left to courts to further manage and develop the relevant common law.

TRADEOFFS OF REFORM

The reforms proposed here create no new causes of action; they do, however, require that online intermediaries seeking to avail themselves of Section 230 immunity must make reasonable efforts to deal with illegal activity on their platforms.

There are tradeoffs inherent in any regulatory regime, including the current Section 230 immunity regime. Reform can be beneficial if the marginal benefits exceed costs. The changes proposed here are designed to [preserve the benefits of Section 230](#) immunity while allowing the law to hold online

platforms accountable when they are in the best position to handle illegal conduct.

If properly implemented, there should be only modest immediate effects on intermediaries. As the duty of reasonable care is progressively interpreted by courts and regulators, we should expect experiments in new forms of content moderation, set against this backdrop of procedural safeguards. The result should be a progressive evolution toward more optimal practices.

Allowing courts to apply the flexible common law duty of reasonable care would also enable the jurisprudence to evolve with the changing nature of online platforms, the problems they pose, and the moderating technologies that become available.

For more on this issue, see the ICLE white paper [“Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet”](#) by Geoffrey A. Manne, Kristian Stout, & Ben Sperry.

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