

What would SESTA (Stop Enabling Sex Traffickers Act of 2017) do?

- 18 U.S.C. § 1591(a)(1) makes it a crime to “benefit” “from participation in a venture which has engaged in [sex trafficking of children or non-consenting adults].” SESTA would define “participation in a venture” (currently undefined) to mean “**knowingly** assisting, supporting, or facilitating a violation of subsection (a)(1).”
- Section 230 does not affect federal criminal prosecution of websites. But sites may be held civilly liable or be prosecuted under state law only if they can be shown to be responsible, at least in part, for the “**development**” of user content. SESTA would amend Section 230 to allow civil liability under 18 U.S.C. § 1595 for conduct that violates 18 U.S.C. § 1591.

What would FOSTA (Allow States and Victims to Fight Online Sex Trafficking Act of 2017) do?

- It is already a crime to “knowingly **transport**[] any individual in interstate or foreign commerce ... with **intent** that such individual engage in **prostitution**...” 18 U.S.C. § 2421 (“the Travel Act” of 1961).
- FOSTA creates a **new crime** (punishable by up to 10 years in prison) modeled on the Travel Act: the “use[] or operation of a facility or means of interstate or foreign commerce [i.e., the Internet] ... with the intent to promote or facilitate the prostitution of another person....”
 - This crime is tied to local law, leaving states and their subdivisions responsible for regulating (or legalizing) prostitution of consenting adults within their borders.
- To this new § 2421A, FOSTA adds two **aggravated violations** (punishable by up to 25 years in prison) for such intent combined with:
 - “promot[ion] or facilitat[ion] of the prostitution of **5 or more persons**” and
 - “act[ing] in **reckless disregard** of the fact that such conduct contributed to sex trafficking” of minors or adults by force (in violation of 1591(a)).
 - ◆ This applies even where prostitution is legal (i.e., in two Nevada counties), so such websites must take measures to assure minors or unwilling adults are not being trafficked through their sites.
- FOSTA provides victims two avenues for monetary restitution:
 - Mandatory restitution once criminal convictions occur; and
 - Establishing a violation of the criminal law in a civil suit under the lower civil burden of proof.

Could SESTA or FOSTA backfire, and actually hurt trafficking victims?

SESTA could discourage self-policing by websites, while FOSTA is far better crafted not to encourage websites to turn a blind eye to illegal activity.

- “Knowledge” is a difficult concept when applied at the scale of the Internet. What does a company “know” of the millions or billions of pieces of user content it may carry?
- Even in 1996, lawmakers recognized the “**Moderator’s Dilemma**”: holding websites responsible for user content based on allegations that a website knew about it could, perversely, discourage them from taking actions to monitor and filter user content — lest they be accused of having “knowledge” of it. Congress created Section 230’s “Good Samaritan” immunity “to remove disincentives for the development and utilization of blocking and filtering technologies” (§ 230(a)(4)).
- SESTA’s sponsors seem to implicitly recognize this. The bill preserves the immunity in Section 230(c)(2)(A), even while ending the law’s primary immunity: Section 230(c)(1). But this will not avoid the Moderator’s Dilemma for two reasons:

- Section 230(c)(2)(A) protects filtering (“any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be ... objectionable”). But it does not protect the **monitoring** of user content necessary for filtering, and it is in the course of monitoring user content that websites risk gaining “knowledge” of illegal activity.
- Section 230 has no explicit reference to monitoring, but its current immunity protects the full range of what websites do — implicitly including monitoring. Ending the heart of that immunity (§ 230(c)(1)) necessarily means ending the implicit immunity for monitoring.
- Rewriting 230(c)(2)(A) to explicitly include monitoring would be difficult and would not even solve the problem, because websites would still have to establish that their monitoring was conducted “**in good faith**.” Section 230 would no longer be an effective bar to being sued, and would instead require websites to demonstrate, in court, that they had acted “in good faith.” One appeals court decision has called this kind of litigation “death by ten thousand duck bites.”
- FOSTA avoids this problem altogether by preserving Section 230 immunity against civil suits.
- Furthermore, because FOSTA’s criminal standard is tied to intent rather than knowledge, websites should not fear that merely acquiring some knowledge of criminal activity in the course of monitoring content will, by itself, increase their criminal liability.
- FOSTA’s criminal standard applies to “the prostitution of another person,” meaning no trafficking victim could be charged (or sued) simply for engaging in prostitution themselves.

Which bill will work better for prosecutors?

Proving knowledge may sound easier than proving intent. But FOSTA will actually be far easier for prosecutors to use for three reasons:

- SESTA will require prosecutors to **prove that websites knew the ages** of trafficking victims (or that they are being coerced), which is extremely hard, given the way sex trafficking ads are worded and given that there is no reliable method for proving that the victim is a minor based on an image (at least, above a certain age).
 - For example, prosecutors alleged that MyRedBook.com advertised minors for prostitution, but had to settle for an illegal prostitution charge.
 - FOSTA’s baseline offense, by contrast, requires only proof of intent to facilitate or promote prostitution, regardless of age (or coercion). To obtain aggravated penalties, prosecutors need prove only that a website (also) acted with “reckless disregard” of the age (or coercion) of the victim.
- SESTA doubles down on the existing approach to online sex trafficking by trying to clarify the term “participation in a venture” in existing law. No prosecutions have been brought under this law, even after Congress added advertising as an element of the offense through the SAVE Act of 2015. There is little reason to think that SESTA will suddenly unlock federal prosecutions, and good reason to fear that prosecutors may continue to struggle to satisfy the convoluted approach of Section 1591.
 - FOSTA builds on the long-standing, commonly used standard of the Travel Act, expanding that approach to include use of the Internet as well as interstate transportation.
- SESTA will effectively require states to update their laws to mirror the new federal crime, while FOSTA will not.
 - Both bills allow enforcement of state laws if the conduct underlying the charge would constitute a violation of federal law, but FOSTA adds this key differentiating language: “... if the conduct involved interstate or foreign commerce.”

How would each bill address civil recovery for victims?

Both bills authorize civil suits for conduct that constitutes a violation of the underlying criminal standard. In either case, plaintiffs could establish a criminal violation via preponderance of the evidence, a lower bar than proving a crime “beyond a reasonable doubt.”

- In one respect, FOSTA is more difficult for plaintiffs to use than SESTA: as under Section 230 today, plaintiffs must show that a website was responsible at least in part for the development of user content or conduct.
 - Again, this is necessary to avoid the Moderator’s Dilemma — i.e., to avoid harming victims.
 - Over the last decade, courts have been working to apply the “development” standard to decide when websites lose Section 230’s immunity from civil suits and state prosecution. In 2015, the Washington Supreme Court allowed a civil suit against Backpage to proceed because plaintiffs had made an initial showing that Backpage had “helped develop the content of those advertisements.” That suit settled just before it was set to go to trial in late 2017. A Senate investigative report and Washington Post expose have since brought to light additional evidence that could be used in suits against Backpage. A federal district judge in Boston recently allowed plaintiffs to conduct additional discovery to satisfy their “development” arguments against Backpage.
- But in three other respects, FOSTA is more likely to compensate victims:
 - SESTA allows civil suits against websites solely for “knowingly participating in a venture” to encourage or promote sex trafficking of minors (or unwilling adults). As in criminal prosecutions, this requires establishing that websites knew of the victims’ age (or coercion). But FOSTA allows civil suits for either aggravated violation: (i) reckless disregard for the age of minors involved in sex trafficking or (ii) promoting prostitution of 5 or more persons.
 - FOSTA is far more likely than SESTA to result in criminal convictions, and thus in criminal investigations, which will supply the strongest factual basis for civil suits.
 - Again, FOSTA mandates restitution when criminal convictions are obtained. 100% of these awards will go to victims, while in civil suits, trial lawyers will claim much of the damages.

FURTHER READING

- Top Ten Myths about SESTA’s impact on startups by Engine Advocacy
- Professor Eric Goldman’s Senate Testimony on SESTA and links to his publications on the issue
- Submission from Hon. Chris Cox on behalf of Net Choice to the House Subcommittee on Communications and Technology
- Testimony of Hon. Chris Cox before the U.S. House Committee of the Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
- FAQ on Section 230 by Center for Democracy and Technology and the R Street Institute
- TechFreedom’s infographic on Section 230
- Learn more about Section 230