



October 15, 2019

Berin Szóka  
President, TechFreedom  
110 Maryland Ave, NE, #205  
Washington D.C. 20002

Hon. Frank Pallone  
Chairman  
House Energy & Commerce Committee  
House of Representative  
2107 Rayburn House Office Building  
Washington, DC 20515

Hon. Greg Walden  
Ranking Member  
House Energy & Commerce Committee  
House of Representative  
2185 Rayburn House Office Building  
Washington, DC 20515

**Re: Fostering Healthier Internet to Protect Consumers**

Dear Chairman Pallone and Ranking Member Walden:

If one law has made today's Internet possible, it is Section 230 of the Communications Decency Act of 1996 ("Section 230").<sup>1</sup> Drafted by Rep. Chris Cox (R-CA) and Sen. Ron Wyden (D-OR), that law ensured that websites would not be held liable for content created by their users except in very limited circumstances. Without that law, social media sites that allow users to post content of their own creation would never have gotten off the ground, given the impossibility of monitoring user content at the scale at which such sites operate today. I write to correct several critical misconceptions that have plagued this debate.

**I. There Was No "Quid Pro Quo" behind Section 230**

The Republican Staff Memo claims that Section 230 reflects an implicit *quid pro quo*:

Congress included Section 230 to balance the need for creating a safe harbor for small Internet companies to innovate and flourish without fear of insurmountable legal fees, while also keeping the Internet clear of offensive and violent content by

---

<sup>1</sup> 47 U.S.C. § 230.

empowering Internet platforms to take action to clean up their own site. This has often been referred to as the “shield and sword,” where platforms receive a “shield” from liability for using the ability to self-regulate, or the “sword” that CDA 230 provides them.<sup>2</sup>

The memo then claims that “platforms” have failed to meet their end of the bargain: “Internet platforms have, in many instances, benefitted from the ‘shield’ without using the ‘sword’ as intended.”<sup>3</sup> Both claims are false: the first misrepresents the legislative history of Section 230 and the second fails to acknowledge how much interactive computer service providers, both large and small, wield the “sword” of content moderation — and *why* they do so, without a legal mandate to.

#### **A. Congress Intended Section 230 to Protect Operators from Having to Do the Impossible.**

Nothing in the text of Section 230 suggests Congress intended to create “shield” for hosting or removing content in exchange for companies using a “sword” in removing content. Instead, the floor discussions of the bill make clear the Congress was focused on two things (1) protecting websites from having to do the impossible — and thus ensuring that the Internet would not be strangled in its crib the thread of legal liability and (2) removing legal disincentives that discouraged websites from using their “sword.” Consider the remarks of Rep. Bob Goodlatte (R-VA):

Mr. Chairman, I thank the gentleman from Oregon [Mr. WYDEN] for yielding this time to me, and I rise in strong support of the Cox-Wyden amendment. This will help to solve a very serious problem as we enter into the Internet age. We have the opportunity for every household in America, every family in America, soon to be able to have access to places like the Library of Congress, to have access to other major libraries of the world, universities, major publishers of information, news sources. ***There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.*** This will cure that problem, and I urge the Members to support the amendment.<sup>4</sup>

---

<sup>2</sup> Memorandum from the Republican Staff Committee to the Republican Members of the Committee on Energy and Commerce at 2 (Oct. 11, 2019). [hereinafter Republican Staff Committee Memo].

<sup>3</sup> *Id.* at 4.

<sup>4</sup> Congressional Record, *House Debate on Section 230* at H8471 (Aug. 4, 1995) (emphasis added).

Rep. Chris Cox, who drafted the law personally, made clear that he aimed to remove the perverse disincentives created by the legal system. His discussion of the then-recent court decisions that drove him to draft Section 230 is worth reprinting in its entirety:

Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, *the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.*

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it. But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a \$200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks. Prodigy said, "No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us." The court said, "No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricter liability because you tried to exercise some control over offensive material.

Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. That is where we should be headed, and that is what the gentleman from Oregon [Mr. WYDEN] and I are doing.

Mr. Chairman, our amendment will do two basic things: First, it will **protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem.** Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.<sup>5</sup>

So while the Republican Staff memo links the “sword” and “shield” as part of a quid pro quo, the legislative history of Section 230 makes clear that the law intended to protect **both** those that did no content moderation (then protected under the legal rule announced in *Cubby, Inc. v. CompuServe, Inc.*<sup>6</sup>), as well as those that *did* engage in content removal (left exposed under the theory espoused in *Stratton Oakmont v. Prodigy Services Co.*<sup>7</sup>). Congress never intended a link, or a *quid pro quo*, between content moderation and immunization from liability for third-party content.

## **B. Website Operators Do Engage In Active Content Moderation**

Internet services rely heavily on the sword just as much as the shield to manage their reputation and maintain their competitive edge in the market. The memo appears to suggest that the shift towards an “advertising-centric business models built upon user-generated content” has made websites less willing to wield the sword of content moderation.<sup>8</sup> In fact, just the opposite is true: relying on advertising generally gives platforms *more* of an incentive to monitor and remove objectionable user content.

There are, of course, exceptions — but they prove our point. Backpage derived the bulk of its revenues from sex trafficking ads. As discussed below, we have always believed the company

---

<sup>5</sup> Cong. Rec. at H8470 (1995) (statement of Rep. Chris Cox).

<sup>6</sup> *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>7</sup> *Stratton Oakmont v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

<sup>8</sup> Republican Staff Committee Memo, *supra* note 2, at 3-4.

could have, and should have, been prosecuted even without new federal legislation because (a) Section 230 does not shield any site from criminal liability and (b) the company lost the protections of Section 230 by helping to create sex trafficking ads. More generally, we believe the primary response to sites like Backpage should be the enforcement of existing criminal laws and, if necessary, the creation of new laws carefully targeted to address that conduct *without* burdening lawful speech. That can be done *without* amending Section 230.

## II. The Republican Staff Memo Misunderstands Three Other Key Aspects of Section 230

The Republican Staff Memo claims that Section 230 has been interpreted more broadly than Congress intended: “While the authors intended this liability protection to incentivize ‘interactive computer services’ to patrol their platforms, it was not intended to be interpreted as an unlimited, broad liability protection absent any good faith action to maintain accountability.”<sup>9</sup> This sentence is misleading in three respects — both essential to properly understanding Section 230. The Republican memo overstates the scope of Section 230’s immunity by failing to mention two kinds of limitations upon that immunity: explicit carve-outs and liability for content that operators help to create. Finally, the memo makes the unsupported claim that Congress expected more “good faith action to maintain accountability” as a condition of Section 230’s protections.

### A. Section 230 Explicitly Preserves Four Sources of Liability

As the Democratic Staff Memo notes, “CDA 230 does provide some exceptions to this immunity. Websites may still be held liable for third-party content that violates: (1) federal criminal law; (2) intellectual property law; (3) the Electronic Communications Privacy Act; and (4) certain laws prohibiting sex trafficking.” The Republican Staff memo mentions only the last of these — a recent amendment — failing to mention that the first three exceptions are written directly into the statute.<sup>10</sup> These exceptions, particularly those for federal criminal and intellectual property claims, are major and longstanding sources of potential liability for online service operators.

---

<sup>9</sup> Republican Staff Committee Memo, *supra* note 2, at 2.

<sup>10</sup> The Republican Memo does mention that “Section 230(c)(2) of the Communications Act provides a *civil* liability safe harbor for ‘interactive computer services’ that voluntarily, in good faith, take actions to restrict access to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content,” Republican Staff Committee Memo, *supra* note 2, at 1 (emphasis added). This oblique reference is simply inadequate to convey the inverse: that Section 230 has never immunized websites from *criminal* liability.

That Section 230 does not affect liability for intellectual property violations — and, in particular, copyright violations, which are covered by the Digital Millennium Copyright Act<sup>11</sup> — is a source of perpetual confusion in coverage of these debates. This point merits special emphasis because much of the attack on Section 230 seems to be coming from copyright interests who, presumably, know better but seem to benefit politically from confusing Section 230 with liability for copyright violations.

But the most important explicit limitation of the Section’s protections is that for liability under federal criminal law. On the one hand, there are already a host of federal laws under which service operators can be charged, including broad liability for conspiracy and racketeering, with ample monetary remedies available upon conviction, including asset forfeiture. On the other hand, this exception means that Congress has always had the ability to combat online ills by creating new federal criminal laws — *without* the need to amend Section 230. The House version of the Allow States and Victims to Fight Online Sex-Trafficking Act (FOSTA) would have done precisely this;<sup>12</sup> we supported that piece of legislation as a targeted solution for the scourge of online sex trafficking, but opposed combining that bill with the Senate’s Stop Enabling Sex Trafficking Act (SESTA), which created broad new *civil* liability as a new exception to Section 230.<sup>13</sup>

## **B. Section 230 Does not Protect Service Operators from Liability for Content They Help to Create.**

Importantly, as the Democratic Staff Memo also notes, “CDA 230 does not protect a website from liability for its own content.”<sup>14</sup> The Republican Staff Memo mentions that Section 230 “provides a liability shield to ‘interactive computer services’ from being treated as a publisher or speaker of any information provided by another information content provider.”<sup>15</sup> The Democratic Staff Memo says essentially the same thing.<sup>16</sup> Both paraphrase the wording

---

<sup>11</sup> 17 U.S.C. § 512.

<sup>12</sup> H.R. Rep. No. 115-572 on H.R. 8165 Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (Feb. 20, 2018), available at <https://www.congress.gov/congressional-report/115th-congress/house-report/572>

<sup>13</sup> Letter from TechFreedom joined by policy organizations to lawmakers (Feb. 23, 2018), available at [http://docs.techfreedom.org/Letter\\_SESTA-FOSTA\\_Hybrid\\_2-23-18.pdf](http://docs.techfreedom.org/Letter_SESTA-FOSTA_Hybrid_2-23-18.pdf)

<sup>14</sup> Memorandum from Committee on Energy and Commerce Staff to Subcommittee on Communications and Technology and Subcommittee on Consumer Protection and Commerce Members and Staff at 3 (Oct. 11, 2019). [hereinafter Democratic Staff Committee Memo].

<sup>15</sup> Republican Staff Committee Memo, *supra* note 2, at 1 citing 47 U.S.C. §230.

<sup>16</sup> The Democratic Memo mentions “First, CDA 230 prohibits courts from treating “an interactive computer service”—a web-based platform— “as the publisher or speaker” of material posted on the site by third-parties,” Democratic Staff Committee Memo, *supra* note 14, at 3.

of Section 230(c)(1) and, in so doing, omit what former Rep. Christopher Cox (R-CA) has called the “two most important words” in Section 230.<sup>17</sup> Information *content* providers (ICPs) are *not* shielded from immunity by the statute. An ICP is defined as “any person or entity that is responsible, in whole or *in part*, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>18</sup> The importance of the words “in part” is easy to miss because these words are found not in the functional provisions of the statute but in the definition of an information content provider.

These two words have allowed the courts to delineate when websites cross the line from merely hosting (or otherwise making available) user content to actually helping to create or develop it. For example:

- Roommates.com was held to have lost the protection of Section 230 and be liable under federal fair housing laws for helping to create racially discriminatory ads because the site solicited racial preferences of its users.<sup>19</sup>
- Backpage.com hired a company based in the Philippines to scour other websites for ads that could run on Backpage, create accounts on Backpage for those users, copy their ads onto Backpage, contact those users, and encourage them to switch to Backpage — as revealed in a June 2017 expose in *The Washington Post*.<sup>20</sup> On April 6, 2018 before FOSTA was signed into law, the DOJ and state AGs shut down Backpage and obtained a guilty plea from its CEO using *existing* federal criminal law.<sup>21</sup>
- Accusearch created a service that collected confidential phone numbers, weaponizing private data for commercial gain. Because Accusearch “developed” the offending content, they were responsible at least *in part* and thus could be sued by the Federal Trade Commission.<sup>22</sup>

---

<sup>17</sup> Armchair discussion with Former Congressman Cox, Back to the Future of Tech Policy, YouTube (August 10, 2017), available at [https://www.youtube.com/watch?time\\_continue=248&v=iBEWXIn0JUY](https://www.youtube.com/watch?time_continue=248&v=iBEWXIn0JUY)

<sup>18</sup> 47 U.S.C. § 230(f)(3) (emphasis added).

<sup>19</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008).

<sup>20</sup> Tom Jackman and Jonathan O’Connell, *Backpage has always claimed it doesn’t control sex-related ads. New documents show otherwise* (2017), available at [https://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7-b38e-35fd8e0c288f\\_story.html](https://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7-b38e-35fd8e0c288f_story.html)

<sup>21</sup> Christine Biederman, *Inside Backpage.com’s Vicious Battle with the Feds* (2019), available at <https://www.wired.com/story/inside-backpage-vicious-battle-feds/>

<sup>22</sup> *FTC v. Accusearch*, 570 F.3d 1189 (2009). For more information see Michael Erdman, *Website (search engine?) not entitled to Section 230 protection for FTC Act violation* (2007), available at <https://onlineliabilityblog.com/2007/10/27/website-search-engine-not-entitled-to-section-230-protection-for-ftc-act-violation/>

### **C. Congress Wisely Required “Good Faith” for Content Removal, but not Publishing.**

Again, the Republican Staff Memo claims that Section 230 “was not intended to be interpreted as an unlimited, broad liability protection absent any good faith action to maintain accountability.” As demonstrated above, Section 230’s immunity is neither “unlimited” nor as “broad” as the Republican Staff Memo claims.

That memo’s claim about “good faith” is also misleading. In fact, Congress’s intention is unmistakable from the plain text of the statute. Section 230(c)(2)(A)’s immunity for removal of content (to paraphrase that subsection) explicitly requires good faith while Section 230(c)(1)’s immunity for publishing content does not. As discussed below, Congress clearly knew what it was doing in writing a good faith requirement into one provision but not the other. One could hardly find a clearer case of the statutory canon of *expressio unius est exclusio alterius*: “the express mention of one thing of a type may excludes others of that type.”<sup>23</sup>

### **D. Section 230(c)(2)(A)’s Good Faith Requirement Has Properly Been Interpreted Narrowly.**

Because most cases are resolved on 230(c)(1) grounds, there is relatively little case law on the meaning of “good faith.” In 2011, Santa Clara Law Prof. Eric Goldman, having done an exhaustive survey of Section 230 case law, concluded that “no online provider has lost § 230(c)(2) immunity because it did not make a good faith filtering decision.”<sup>24</sup> “Nevertheless, even the relatively few judicial decisions have provided examples of some provider actions that may not be in good faith. For example, anticompetitive motivations might disqualify an online provider from § 230(c)(2).”<sup>25</sup> In another case, “the judge found that an online provider’s failure to articulate a reason for its blocking decision could be bad faith.”<sup>26</sup> Prof. Goldman concluded:

As these examples illustrate, the statute’s “good faith” reference invites judges to introduce their own normative values into the consideration. Fortunately, most judges do not introduce their own normative values into the statutory inquiry.

---

<sup>23</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016).

<sup>24</sup> Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 UC Irvine Law Rev. 659, 665 (2012), available at <https://ssrn.com/abstract=1934310>

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* citing *Smith v. Trusted Universal Standards in Elec. Transactions*, No. 09-4567 (RBK/KMW), 2011 WL 900096, at \*25–26 (D.N.J. Mar. 15, 2011).

Several § 230(c)(2) cases have held that good faith is determined subjectively, not objectively.<sup>27</sup>

Some may see this narrow application as a defect in the law, but it probably reflects the underlying constitutional issue: The First Amendment protects private actors in their exercise of editorial discretion, which is precisely what both Section 230(c)(2)(A) and 230(c)(1) protect.<sup>28</sup> The First Amendment does not, of course, protect anti-competitive conduct, even by media companies, and thus is it not surprising that anti-competitive conduct should be considered not in good faith.<sup>29</sup> Likewise, the First Amendment may allow for some degree of mandatory transparency as to *how* editorial discretion is exercised.

Congress should tread very, very carefully here, as we have previously urged the House Judiciary Committee in testimony, lest it create a system of legal mandates even more intrusive than the Fairness doctrine was. Any attempt to extend regulations from the broadcasting world would be obviously unconstitutional, since those regulations depend on the specific limitations the Supreme Court has placed upon the First Amendment rights of broadcasters.<sup>30</sup> Those limitations may not stand up to First Amendment review if challenged today, but even if they are still valid, they are specific to broadcasting, and do *not* apply to Internet media, which the Court has made clear enjoy the full protection of the First Amendment.<sup>31</sup>

If lawmakers want to better understand how Section 230 has been applied, a more detailed study of the case law on the “good faith” standard would be an excellent place to start.

### **III. Congress Struck the Right Balance in Crafting Section 230**

Congress had good reasons for not making Section 230(c)(1) contingent upon “good faith;” doing so would have completely changed the dynamics of how Section 230 works, largely defeating the purpose of Section 230: protecting service operators from having to litigate every lawsuit brought against them. There is a world of difference between being able to dismiss a lawsuit with a standard motion to dismiss on a pure question of law (arguing that

---

<sup>27</sup> *Id.* citing (on the subjectivity of good faith) *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008). *But see* Nat’l Numismatic Certification, LLC. v. eBay, Inc., No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008).

<sup>28</sup> Berin Szóka, *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the House Committee on the Judiciary*, (April 2018), available at <http://docs.techfreedom.org/Szoka-Testimony-Platform-Responsibility-&-Neutrality-4-25-18.pdf>

<sup>29</sup> Letter from TechFreedom joined by policy organizations and experts to Jeff Sessions (Sept. 21, 2018), available at <https://techfreedom.org/wp-content/uploads/2018/09/Letter-to-Jeff-Sessions-re-Social-Media-Bias-v2.pdf>

<sup>30</sup> *Id.*

<sup>31</sup> *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down federal law governing online child protection).

the plaintiff had failed to show that the site had lost its Section 230 immunity, principally by becoming responsible, at least in part, for developing content) and having to endure discovery by the plaintiff, having to draft a motion for summary judgment specific to the facts of the case, and having to litigate that motion. Multiply the increased cost and hassle of the latter by the enormous number of lawsuits a website might face if Section 230(c)(1) included a good faith requirement, given the staggering scale of Internet services, and Section 230 would be a fundamentally different statute. Under such a statute, nothing like the Internet as we know it could have developed. Digital services would look much more like Netflix, Spotify, or cable, focused on content created by digital publishers, rather than users.

Judge Alex Kozinski summarized the problem best in his *Roommates.com* decision. Even as he ruled that the website was, in fact, responsible, at least “in part,” for creating racially discriminatory housing ads, he cautioned that plaintiffs (and state prosecutors) must bear the burden of establishing that a website had lost the protection of Section 230:

We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such *close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged — or at least tacitly assented to — the illegality of third parties.*<sup>32</sup>

Any proposed amendment to Section 230 should be assessed on this basis: will it force websites to “face death by ten thousand duck-bites?”

One proposal that clearly fails that test is the amendment to Section 230(c)(1) proposed by Prof. Danielle Citron, one of the witnesses at this hearing, and Ben Wittes:

No provider or user of an interactive computer service that *takes reasonable steps to prevent or address unlawful uses of its services* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider.*<sup>33</sup>

---

<sup>32</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (emphasis added).

<sup>33</sup> Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 *FORDHAM L. REV.* 401, 419 (2017).

While this proposal may sound moderate, it would make Section 230’s principal protection dependent upon a triable question of fact. Plaintiffs would be able to insist upon extensive discovery into how operators run their services to assess the reasonableness of their practices. What is “reasonable” is literally the most litigated question in the English language.<sup>34</sup>

#### **IV. Congress Wisely Did Not Include a Size Threshold in Section 230**

The Republican Staff Memo includes another unsubstantiated claim about legislative intent: “Congress included Section 230 to balance the need for creating a safe harbor for *small* Internet companies to innovate and flourish without fear of insurmountable legal fees.”<sup>35</sup> The memo goes on to identify size as one of the “issues” that “Congress has been reviewing” in determining “what constitutes an ‘interactive computer service.’”<sup>36</sup> The memo reads as follows:

##### **1. The Size of the Platform is Relevant.**

The size, scale, sophistication, and influence of Internet platforms during the time CDA 230 was written is drastically different than today’s Internet. While the liability protection for small, nascent Internet platforms in 1996 may have created the Internet we know today, the reality is that many Internet platforms today are much larger, some having market valuations nearing \$1 trillion dollars. With such available resources, Internet platforms have come under greater scrutiny to use their “sword” and create accountability on their platform.<sup>37</sup>

The White House is reportedly drafting an Executive Order that would ask the Federal Communications Commission to issue a declaratory ruling that would narrow the definition of “interactive computer service” to exclude leading social networks.

These proposals fundamentally misunderstand what Section 230 was intended to do. The law was not simply a shield for nascent industry. In 1996, AOL already had 5 million users,

---

<sup>34</sup> “...such amorphous eligibility standards would negate or completely eliminate Section 230’s procedural benefits. It would make Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of defendant’s behavior,” Eric Goldman, *Why Section 230 Than the First Amendment*, Notre Dame Law Review Online, Forthcoming (March 12, 2019), available at <https://ssrn.com/abstract=3351323>

<sup>35</sup> Republican Staff Committee Memo, *supra* note 2, at 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

and was adding subscribers rapidly.<sup>38</sup> Congress certainly could not have imagined what today's Internet would look like, but certainly did understand that the "small, nascent Internet platforms" were growing explosively. Congress could have built size thresholds into the statute but did not do so — because size was essentially irrelevant.

What mattered to Congress then, and what matters now, is not how deep a company's pockets are, but what the effect of making them liable for user content will be *on the margins*. Even the best-resourced company in the world may decide that facing "death by ten thousand duck bites" simply is not worth it. Even the world's largest social media platforms cannot possibly replicate the kind of fact-checking that traditional media do for the third party content they host (like letters to the editor and obituaries). In any event, what matters is not "whether a company can afford it" but what the effect of increased liability would be *on users themselves*. Section 230 was intended both to enable websites to host user speech (Section 230(c)(1)) and also to remove objectionable content ((Section 230(c)(2)(A)). The law was carefully crafted to achieve both goals simultaneously. Congress should be exceedingly careful about disrupting that balance.

## V. How Section 230 Applies to Other Digital Intermediaries

The Republican Staff Memo correctly notes that the world has become ever more complicated since Section 230 was enacted:

In addition to the increasing size and sophistication of Internet platforms, the Internet's architecture has become more complex since CDA 230 was enacted. Whereas the 1996 law envisioned a simple world of "interactive computer services," today's Internet requires a more complex web of edge providers, content delivery networks (CDNs), ISPs, and others that have a distinct role in creating today's Internet experience. In some instances, CDNs have played a very explicit and public role in moderating speech.

But this is hardly an argument for amending Section 230. And it is in this arena that Congress could do the most damage in amending Section 230, given the complexity of this space. As we noted in a statement of principles we helped to draft in July, signed by 53 leading experts in intermediary liability and Internet law, and 27 other organizations:

Principle #7: Section 230 should apply equally across a broad spectrum of online services. Section 230 applies to services that users never interact with directly. The further removed an Internet service—such as a DDOS protection provider or

---

<sup>38</sup> CNBC, *Timeline: AOL through the Years* (2015), available at <https://www.cnbc.com/2015/05/12/timeline-aol-through-the-years.html>

domain name registrar—is from an offending user’s content or actions, the more blunt its tools to combat objectionable content become. Unlike social media companies or other user-facing services, infrastructure providers cannot take measures like removing individual posts or comments. Instead, they can only shutter entire sites or services, thus risking significant collateral damage to inoffensive or harmless content. Requirements drafted with user-facing services in mind will likely not work for these non-user-facing services.<sup>39</sup>

It is in this area that Congress risks doing the most fundamental damage to the Internet itself.

## VI. The False Argument for Regulatory Asymmetry

The Republican Staff Memo identifies, as one of the “issues” to be discussed, “Regulatory Asymmetry”:

Internet platforms make editorial judgements regarding: what content is and is not permissible, what content users do and do not see, and whether certain users are or are not allowed to exercise online speech, which can be viewed inconsistent with their status as third-party intermediaries. By contrast, ***traditional media companies are held accountable for the news content they publish online***. This inconsistent treatment of Internet platforms and traditional media companies may impact both industry competition and consumer protection.

This completely misstates the law and reveals a profound misunderstanding of how Section 230 works. In fact, traditional media companies enjoy precisely the same protections of Section 230 for their online operations as “new media” because Section 230 applies equally to *all* “interactive computer service providers.” That is, neither kind of company can be held civilly liable for content created by third parties unless it can be shown that they shared in creating it. Thus, for example, the user comments on a *New York Times* story posted on the Internet are treated exactly like the comments posted on Facebook or a community knitting discussion board. Likewise, Fox News is responsible for the content it creates and posts to the Internet, just as Facebook is responsible for its own posts. What matters is not the identity of the company, but who is responsible for developing the content.

There is no regulatory or legal “asymmetry” about a newspaper being held responsible for “publishing” its own content online simply because creating its own content is the bulk of what the site does, while Facebook primarily hosts content created by users. This simply

---

<sup>39</sup> *Liability for User-Generated Content Online Principles for Lawmakers* (2019), available at <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical>

reflects the fact that these media companies work very differently. There is no reason to expect that such different companies should be subject to the same legal regimes. The crucial difference lies in the problem of scale: traditional media companies can screen the third party content they host, such as letters to the editor, advertisements, classifieds, obituaries, and the like. Internet services cannot, because they handle exponentially greater volumes of content. It is no response to say, as some conservatives now do, that such companies simply should not exist — but it is at least an honest recognition of the reality highlighted back in 1996 by Rep. Goodlatte: content moderation at scale is so inherently difficult that exposing companies to civil liability for the decisions they make will either (a) simply eliminate such services or (b) have the perverse effect of disincentivizing them from *trying* to remove harmful or objectionable content.

## VII. The Underlying Constitutional Constraints Facing Congress

Websites are private media companies that enjoy the full protection of the First Amendment — unlike broadcasters, whose First Amendment rights have been limited because they use the public airwaves.<sup>40</sup>

It is true that “Internet platforms have come under greater scrutiny to use their ‘sword’ and create accountability on their platform,”<sup>41</sup> but that is a question of politics, not of what the law — or even what it *should* be. In assessing what the law should be, lawmakers must realize that what we are talking about is essentially regulation of speech. There is very little (if anything) the government can lawfully do to directly require website operators to clean up lawful speech. The Supreme Court made that clear in striking down every other provision of the Communications Decency Act of 1996 *besides* Section 230,<sup>42</sup> as did the lower courts in striking down the Child Online Protection Act of 1998.<sup>43</sup> Fundamentally, Section 230 can best be understood as a way to ensure that private actors will not be deterred by fear of civil liability from attempting to police online content *as they see fit* — thus protecting their editorial discretion and avoiding a First Amendment challenge.

---

<sup>40</sup> Szóka Testimony at 13.

<sup>41</sup> Republican Staff Committee Memo, *supra* note 2, at 5.

<sup>42</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>43</sup> Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736, § 1403 (codified at 47 U.S.C. § 231), enjoined from enforcement in alternative part by *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d. Cir. 2008) (prohibiting enforcement of COPA’s civil and criminal penalties contained in 47 U.S.C. § 231(a)(1)), cert. denied 555 U.S. 1137.

Any attempt to rework Section 230 to force digital media companies to police or host content in ways they would not otherwise have done faces the same sort of First Amendment problems, even if they are one step removed. We discussed these issues in our House Judiciary Committee testimony.<sup>44</sup> Professor Larry Tribe summarized the case law thusly: “government may not condition the receipt of its benefits upon the nonassertion of constitutional rights even if receipt of such benefits is in all other respects a 'mere privilege.’”<sup>45</sup>

## VIII. Conclusion

Congress made a complete mess of SESTA, the first amendment to Section 230 since the law was enacted in 1996. The list of procedural fouls is long, but among others, the Senate bill (amending Section 230) never went through the Senate Judiciary Committee, the bill was married to a completely different House bill (that did not amend Section 230) on the House floor, and at the end of the day, the specific website it was targeting was prosecuted under existing law anyway. Congress never developed a clear grasp of the issues at stake, leaving fundamental questions unanswered, including what prosecutions and civil actions were actually possible under Section 230 and existing law. Congress must not make the same mistakes again. If lawmakers feel they must act, the best next step would be to order a study of these issues by a blue ribbon commission of experts.

Republicans, in particular, should remember that Section 230 was drafted by a Republican Congressman (who went on to serve a long and distinguished career as a Republican), supported by leading Republicans, and enacted with overwhelming Republican support. It is also the most successful Republican tort reform measure in history, ensuring that the threat of litigation did not stifle a potentially thriving industry. Section 230 is one of the greatest bipartisan success stories of all time. Any discussion of amending Section 230 should be addressed in the same thorough and bipartisan manner.

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Berin Szóka

President, TechFreedom

[bszoka@techfreedom.org](mailto:bszoka@techfreedom.org)

---

<sup>44</sup> Szóka Testimony at 22.

<sup>45</sup> L. TRIBE, AMERICAN CONSTITUTIONAL LAW 510 (1st. ed. 1978).